

Republic of the Philippines
COURT OF APPEALS
Manila

SPECIAL ELEVENTH DIVISION

PEOPLE OF THE PHILIPPINES CA-G.R. CR. HC. No. 02587
Plaintiff-Appellee,

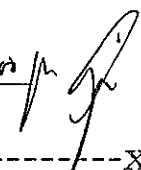
- versus -

Members:

***SALAZAR-FERNANDO, R.,**
Chairman
AREVALO-ZENAROSA, M., &
****DIMARANAN-VIDAL, M.,**
JJ.

L/CPL. DANIEL J. SMITH,
Accused-Appellant.

Promulgated:

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DECISION

AREVALO-ZENAROSA, M., J.:

This is an appeal raised by L/CPL. Daniel Smith from the Decision of the Regional Trial Court, Branch 139, Makati City in Criminal Case No.06-651 entitled, "People of the Philippines vs. L/CPL. Daniel J. Smith, S/SGT. Chad Brian Carpentier, L/CPL.

* Vice J. Enriquez, Jr. who inhibited himself from participating in this case

**Vice J. Baltazar-Padilla, per Office Order No. 532-09-CMV, dated April 21, 2009

Dominic Duplantis and L/CPL. Keith Silkwood for Rape,” finding only the said accused 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. No. 8353 sentencing him to suffer the penalty of Reclusion Perpetua together with the accessory penalties provided for under Article 41 of the same Code.

The three other accused were acquitted for failure of the prosecution to adduce sufficient evidence against them.

The antecedent facts:

An Information for Rape was filed against the above-named accused including Timoteo L. Soriano, Jr., which reads 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 (sic), 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 Nicole,” 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 “Nicole”, to her damage and prejudice.

CONTRARY TO LAW.”¹

¹ To respect dignity and protect privacy of women and their children pursuant to Sec. 29 RA 7610.

The complainant has been referred to as “Nicole” in the media, so she will be named as such herein.

¹ p.1, Record

After several pleadings, motions, manifestations, memoranda, etc., filed by both prosecution and defense, the case was raffled to the Regional Trial Court, Branch 73, Olongapo City presided by Judge Renato Dilag. Later, a Motion for his Inhibition was filed by the private complainant. In his Order dated March 28, 2006 Judge Dilag inhibited himself from hearing the case. In an earlier Order dated January 13, 2006 the trial court found no probable cause to indict Timoteo L Soriano as a co-conspirator in the rape case and ordered his name dropped from the Information.

Thereafter, the Supreme Court in its Resolution dated March 28, 2006 upon request for Transfer of Venue of the case from the Regional Trial Court, Olongapo City to the Regional Trial Court, Makati City resolved, upon recommendation from the Office of the Court Administrator to grant the transfer of the case to the Regional Trial Court, Makati. The case was raffled to RTC, Branch 139, Makati City, presided by Honorable Judge Benjamin T. Pozon.

An amended information was filed by the City Prosecutor which was however, denied by the court in its Order dated April 28, 2006. The accused L/CPL. Daniel Smith, S/SGT. Chad Brian Carpentier, L/CPL. Dominic Duplantis and L/CPL Keith Silkwood were arraigned on April 28, 2006 but refused to enter any plea upon instruction of their respective counsel. Hence, a plea of not guilty was entered into the records for all the accused.

At the pre-trial on May 26, 2006, stipulations were entered into as to the identity of the accused, the jurisdiction of the Honorable Court over the case, and that they were all members of the United States Marines Corps assigned at the 31st Marine Expeditionary Unit, S6, Unit 5621, FPO, AP 96606 based in Okinawa, Japan which participated in the RP-US joint military

exercises at the Subic Bay Freeport Zone, Olongapo City and at Clark Airbase from August to November 2005, with the qualification that there were no military exercises conducted at the Subic Freeport Zone in Olongapo City between said period.

None of the accused made any offer for stipulation. Exhibits for both prosecution and defense were marked.

Trial on the merits ensued.

PROSECUTION EVIDENCE

NICOLE is a young woman of 22 years, a graduate of Bachelor of Science in Management Accounting from the Ateneo de Davao University.

After graduation in March, 2002 she enrolled for a nursing course at the Ateneo de Zamboanga University but dropped out when she encountered some problems with certain nursing subjects. At the time, she was managing the family-owned canteen at the Southern Command in Zamboanga City while her mother was a Civilian Supervisor at the Philippine Navy, and her father was a former Philippine Navy Officer himself who died in 1989. Her mother's second husband is the father of her step sister AA and half sister CC.

As might be expected, the customers at the canteen were mostly men in uniform --- Filipino and American soldiers.

Nicole's odyssey started on October 30, 2005 when she, together with AA and CC decided to go someplace else, for a change.

Since there was a standing invitation from Carlos Ocasio (Ocasio) and Chris Mills (Mills) --- both navy men they met at the canteen and whom they considered as friends --- for the sisters to take a vacation in Subic, they took it as an opportune time and an

auspicious place to escape from the drudgery of their everyday life in Zamboanga.

Ocasio and Mills promised to pay for their accommodation in Subic for three to four days. Nicole had a boyfriend, a U.S. Marine named Brian Goodrich (Brian) who was stationed in Okinawa, Japan and he knew about her vacation in Subic.

Not to waste time for what they came for, on their first night in Subic on the 30th of October, 2005 after dinner at the Grand Leisure Hotel, Nicole, AA, and Ocasio immediately went bar-hopping. First, at the Scuba Shack, Ocasio ordered rum coke and she took a sip and so did AA, but they left the place when Nicole was miffed after she noticed a Filipina sitting on the lap of an American and saw another couple kissing. At Pier 1, where they went to next, Ocasio ordered Vodka Sprite which she and AA consumed, one glass each. When Mills arrived, he ordered two shots of alcoholic drinks but both girls did not like the taste. Still, not to hurt Mills' feelings, Nicole took them as if on a spree and drank the two shots, after which she embraced AA, complaining she felt dizzy.

From Pier 1, they hopped to Neptune Club and Nicole enjoyed it because she liked to dance. She wanted to dance with Ocasio but he did not feel like dancing and instead introduced her to a friend who danced with her. They stayed for an hour then back to Grand Leisure Hotel and slept at about 2:00 a.m. of October 31.

They woke up at 7:00 a.m. then went to Legenda Hotel, met with Ocasio, and from there proceeded to Subic Safari until 1:30 p.m. They also dropped at Ocean Adventure but did not stay long as Ocasio's boss called up to say that his liberty pass had been terminated. Then they went to Subic Royale, then back to the hotel, and around midnight Ocasio called up to tell them that he was at the

Legenda and she and AA followed. After playing black jack and roulette at the casino (they were taught how to play by Ocasio who also gave them chips); eventually, they repaired back to the Grand Leisure Hotel and went for a midnight swim. It was quarter to 2:00 a.m. of November 1, when they went to sleep and woke up at 8:00 later that morning, took breakfast and went swimming in the afternoon.

Obviously, they were having a good time of their young lives.

They went to San Roque Chapel to light candles for the dead but the chapel was closed so they went to the Duty Free Shop. Mills called her to say he was at the Grand Leisure Hotel and asked if she wanted pizza for dinner. At about 6:00 p.m., Mills arrived with his buddy Garcia whom she saw earlier at the Legenda. Then she, AA, Mills and Garcia went to the casino, played black jack and roulette and stayed there up to about 8 o'clock in the evening.

At the Neptune Club where they went to next, Mills treated them to hard drinks such as Vodka Sprite and B-52 and she drank them "straight, bottoms-up", as Mills taught her to take them that way. Nicole complained of dizziness but when she was given Singaporean Sling she drank it, too, as well as the other B-53 drink, justifying it by saying that that was the reason they went to Subic for --- "to enjoy".

She was in that state of euphoric self-indulgence while dancing when somebody, a foreigner, pulled her hand. She was a bit alarmed, and looked at Mills hinting surprise but Mills said, "It's okay, go on and enjoy," and addressing the man, he said, "Just take care of her."

And she danced with the foreigner with gusto because she also loved to dance, part of why she was in Subic. While dancing,

memories of American soldiers going to the canteen she managed in Zamboanga suddenly came rushing back and she found herself asking the man his name several times and it was not clear because it was a noisy place but she thought it was "Gerard" or "Genard". What was clear was that he belonged to the Marines and that he was 20 years old. She remembers his face, positively, heart-shaped, white, pointed nose and tall. She also remembered the dark blue shirt with red and green stripes in the middle he was wearing: She pointed to Lance Corporal Daniel Smith as the man.

During that night of their first encounter, it was obvious they were enjoying each other's company as she danced with him through 3 or 4 songs, after which she got tired and went back to her seat. Everyone was in a happy mood inside the club, drinking and dancing and laughing the night away.

Mills ordered drinks again – Long Island Ice Tea. She finished half a glass, but did not like the taste. She and AA were dancing and she remembered she was dancing with Smith again. After the dance, she remembered drinking half a pitcher of Garcia's Bullfrog which tasted like pineapple without using a glass but took it directly from the pitcher, which elicited reactions from some men who said, "WHOA...!" She did not notice where Garcia or Mills or AA were. Then Smith pulled her wrist inviting her to go out because it was hot inside. She was waiting for her sister and declined, but he was insistent, so they went out for some fresh air.

Suddenly, she said, she became aware she was lying on her back and realized Smith was on top of her, kissing her while she cried²

²TSN., July 6, 2006, pp. 107-108.

Feeling very dizzy and drunk (“yong feeling ko na yong mundo mo umiikot”) she felt his weight and she resisted and tried to push him away because she did not like what he was doing to her – kissing her on the lips, neck and breasts.

Amidst all this, she heard the music playing and people laughing and she thought there might be other people around, other than themselves. Still, she forced herself to be awake despite her drunkenness and sleepiness to ward off Smith's advances, kissing her and touching her breasts.

When, according to her, she “regained consciousness”, she was fixing her pants and while at it, she discovered the zipper was at the back not in front, as it was when she first got into Neptune Club. She then felt dizzy again with a headache, and did not remember anything.

But then at one point she saw hazily in her mind that she alighted from a police pick up and went with the policemen to look for Smith at the Neptune Club “because I wanted to kill him because he raped me.”³

At the Grand Leisure Hotel where she went from the Neptune Club, she was still feeling confused and dizzy and the pain all over her body was getting to be distressing, particularly her vagina, a confirmation, according to her, that indeed she was raped and confided to AA she would file a complaint against Smith.

At the James Gordon Hospital, accompanied by AA, she had a check-up at 3 o'clock in the morning of November 2, 2005 but had a tussle with the doctor. The doctor asked if she was Nicole but when she did not answer, the doctor asked, “na-rape ka ba?” Then added, “baka ginusto mo?” She felt aggrieved and hysterically answered

³TSN., July 10, 2006, p. 31.

back, "Sino ba ang gustong mangyari ito?" Then the doctor left her to attend to a pregnant woman and made her wait for a long time. When the doctor returned, she was examined and swabbed. But before that, she asked AA to inquire from the mid-wife if it was alright to urinate before examination and when told it was okay, she did.

But she had another big problem that kept bothering her and that was how to tell her mother about what happened to her. She had asked Nicole to go back home to Zamboanga earlier after learning that Ocasio's leave of absence had already lapsed.

At the Intelligence and Investigation Office (IIO) of the SBMA, she was referred to a lady investigator, Elsie Cabral, after she complained that she was uncomfortable with a male investigator. The interview took long because she continued crying after every question, complaining that she was confused and was not feeling well.

At one point, a certain Fe Castro together with one Joseph Khounghun identified her as the woman unloaded from the van by U.S. servicemen "like a pig". The comment enraged her as she felt they really tried to abuse her ("pakiramdam ko talagang binaboy nila ako").

On November 3, 2005, after medical examination at the James Gordon Hospital, she filed a formal complaint with the Prosecutor's Office. She, together with her mother, who came to fetch her and a brother, stayed for two weeks in Olongapo City in a safe house never to return to Zamboanga City again after she had been portrayed as a bad girl in the national media.

On cross-examination, Nicole said that she had P20,000.00 which covered the plane fare, but the expenses for the Subic Safari,

Ocean Adventure, Bat Kingdom, island-hopping, sailing and horse-back riding, were all shouldered by Ocasio. Her boyfriend, Brian knew about the trip to Subic but she did not tell him that it was Mills and Ocasio who would pay for it.

When she went to Pier 1 the night they arrived in Subic, it was not her first time to go to such a place where there were drinking and dancing. She said she guzzled up 2 shots of alcoholic drinks although she could not identify them and stayed to have dinner despite her dizziness. Ocasio paid the bill. They proceeded to Neptune Club where she danced with his friend. They left before midnight.

On November 1, 2005, they went to a casino and left at 8:20 pm. They again went to Neptune Club and when they got there, she took her first glass of Vodka Sprite. She took another one. On her third glass, she felt dizzy. Her fourth drink was a half glass of Singaporean Sling. She had a 5th and 6th drink, but could not remember the intervals of each drink nor the time Mills left her and AA at the Neptune Club.

Nicole's step-sister AA testified that she came to Manila from Zamboanga with Nicole and their 12-year old half-sister CC via PAL on October 30, 2005, then to Subic in a rented van to join their American Navy friends Chris Mills and Carlos Ocasio, whom they met in their canteen in Zamboanga and became their friends. The two men promised to provide for their hotel accommodation and other expenses for a 3-day holiday.

AA affirmed Nicole's narration of their activities in Subic until that evening of November 1, 2005 when, after sharing pizza with Nicole, Mills and his buddy Garcia, they later went to the casino and stayed there for more than an hour, then proceeded to the Neptune

Club at around 8:30. Mills ordered drinks first, Vodka Sprite, one glass for her and one glass for Nicole, then B52 which she and Nicole had one shot each. Again Mills ordered Singaporean Sling and the two of them gulped down one glass each. She felt dizzy, Mills asked Nicole how she felt then he ordered again Long Island Ice Tea. Nicole finished only half a glass while she finished one and a half glasses. Then Nicole drank half a pitcher of Bullfrog upon urgings of some Americans around causing her to walk "pasuray-suray" afterward. Both of them were dancing, Nicole with Mills and another American, later she saw Mills dancing with another girl named Jenny whom Mills brought once to their canteen. Nicole was dancing with an American later identified as Smith for about fifteen minutes. Nicole danced with him 3 times. Some American guys were asking AA to dance but she did not mind them as she was busy with her cellphone. Garcia went outside and got into trouble and Mills went after him. Meanwhile, she was looking for Nicole and saw her walking around, "pasuray-suray" not minding her until she finally caught her attention and told her that they needed to go home because Mills had left them. They started to go outside as she held Nicole's hand along the pathway of Neptune Club. She was in a hurry as she wanted to get to the hotel immediately but Nicole was not, so when she reached Waterfront and Taft Road and looked back, Nicole was nowhere behind her. Mills was trying to calm down Garcia coaxing him to go with the shore patrol. Then they started looking for Nicole, not finding her anywhere from Neptune Club, to Scuba Shock to Pier 1. Mills advised her to stay at the hotel with sister CC while he was looking for Nicole. She was feeling fidgety, so she and CC went back to Neptune Club and was told by the security guard that he saw a Filipina taken into a van. The

receptionist likewise saw the same Filipina. Ultimately, she received a call from the hotel manager to go down and she saw her sister in front of the hotel with SBMA police. She cried and asked Nicole and the SBMA police told her that something bad happened to her. They went back to the IIO to report the incident and proceeded to James Gordon Hospital in the morning of November 2. Nicole was treated rudely by the doctor who asked if she was raped or maybe she wanted it which angered her sister who said she did not like what happened to her. They were asked to come back in the morning and then went to the IIO to give a voluntary statement. In the course of the investigation, they saw a man later identified as Gerald who resembled the one who danced with Nicole. Then a man "malaking tao" offered to pay them but they refused because Nicole decided to pursue the case. Nicole had a medico legal examination conducted by Dr. Ortiz on November 3 and they filed a complaint at the Prosecutor's Office in Olongapo City. She said the incident affected their family like a nightmare.

On cross-examination, among others, AA said that a Singaporean Sling tasted like juice just as Mills said. She was drunk but she knew what she was doing. After Nicole drank straight from a pitcher of Bullfrog, she saw her dancing and lost sight of her after dancing with the American 3 times. As she and Nicole decided to leave Neptune, she was holding Nicole's hand and along the pathway, she released her hand and when she looked back, she saw Nicole walking behind her. She saw Mills sitting on the gutter when she reached Taft Avenue and Waterfront Streets. When she looked back, Nicole was not following her anymore.

Nicole and AA's friend, **CHRISTOPHER JAMES MILLS (MILLS)** US Navy, knows Nicole because he was deployed on

board the US NS Stockham and was periodically going to Zamboanga to take supplies. He first met the mother of Nicole who owns a café in the Philippines base in Zamboanga where they sell soda, beer, etc. While taking their supplies in the port, he usually went to the café and met Nicole for the first time in July, 2005. He and his friend, Carlos Ocasio invited Nicole and her sister AA to go to Subic, a month before their trip. The sisters said they could not afford the trip and they had a lot of work to do. But he and Ocasio offered to pay for their hotel accommodation and the sisters could pay for their fare. So it was agreed that the sisters would be in Subic from October 30 to November 2 and he made a reservation at the Legenda. When he arrived in Subic on board the USNS Stockham about 10:00 a.m. on October 30, he was still working on the deck and went out at about 6:00 p.m. He and his liberty partner, Arsenio Garcia went to Subic and checked in at Legenda Suite, went out to eat and went barhopping and also went to the casinos and Scuba Shock. About midnight, he ran into Nicole and AA at the Legenda.

The girls were with Ocasio. He stayed with them until early morning of October 31. The following day, he went to work full day and after that, he and Garcia called up the sisters to meet them at Grand Leisure Hotel and asked if they wanted pizza. They stayed there for an hour, went to Legenda Casino at about 7:30 p.m., played black jack and roulette and all the girls had to do was "gamble with my money". They left at about 10:00 p.m. Nicole was wearing blue jeans and T-shirt like AA. They met some of their friends and other securities at Club Neptune at about 10:30 p.m. He asked the two if they wanted to drink, but said they did not know what to order. He recommended some drinks like Long Island Iced Tea, Vodka Sprite and Bullfrog. The sisters consumed about 4

to 5 drinks while he took the same amount. He paid for the drinks. They also danced. It was dark with disco lighting inside the club and the music was rock, hip-hop, Rn'B and alternative. The place was crowded with customers. He was dancing with AA and Nicole when someone approached her and asked to dance with her, and she looked scared and turned to him asking, "Is it okay to dance?" And he said, "It is fine, go ahead dance and have fun." While he was still dancing with AA, some security people approached him and said that his liberty buddy was having a problem with the shore patrol. So he told AA about it and said he would go back. When he went out he saw Garcia arguing with the shore patrol who were taking Garcia back to the Essex and when he protested that Garcia was not from the Essex, the shore patrol said it did not matter. Mills was arguing with the shore patrol for about an hour and then he saw AA who told him that they should be going back to the hotel. AA told him that Nicole was missing. They looked for her and asked around and the guard said that there was a girl who got into a van but he was not sure who she was. Then at two in the morning he received a call from AA to inform him that Nicole was found and if they could go to the hospital. They went there, saw Nicole sitting on a chair, her head down, in tears, saying she could not remember anything. Later, they were brought to the Philippine Police Station at about 10:00 a.m. of November 2.

It was NCIS Agent Guy Papageorge who investigated him at the station. He was asking him to point to the man who was dancing with Nicole. They went looking for the said person and saw the one he thought danced with Nicole, and his name was Gerald. Nicole and AA also identified him as the same guy. In his statement

he said he was 99% sure it was the guy he saw with Nicole. Mills left that night for Singapore.

On cross-examination, Mills said Nicole had 5 drinks in an hour, she was drunk but was still in control of herself. He said that because she was dancing with a serviceman at that time. The man that he, Nicole and AA pointed to as the one with Nicole that night of the incident, was released as he was the wrong guy. When they played at the casino he gave the sisters P4,000.00 to P5,000.00 each for gambling. He chose Bullfrog because it does not taste much like alcohol although there is some alcohol content in it. Nicole never complained to him that she was intoxicated. While dancing, he could not tell if she was staggering but she did not fall.

A junior bartender at Neptune Club, **ROGER SANIDAD** explained the different kinds of drink served there like Vodka Sprite which is made up of 1 shot vodka, three shots of Sprite served in an 8-oz. glass; B-52 named after Bomber 52 is a mixture of Kahlua, Baileys and Grand Marnier; B-53 is a mixture of Kahlua, Baileys and Vodka in the proportion of 1/3 each. Kahlua is a coffee liquor, Baileys is an Irish whiskey with cream and Grand Marnier is cognac with orange flavor, served in an ounce of one shot glass; Singaporean Sling is gin, lemon juice, soda water and cherry brandy. The proportion is 1 shot Gilbey's gin and 1/2 shot lemon juice, three shots of soda water and 1/2 shot cherry brandy, served in an 8-oz. glass with a straw; Long Island Iced-Tea, served in a 10-ounce glass, is a mixture of 1/3 vodka, 1/3 gin and 1/3 tequila, 1/3 shot white rum, triple sec liquor orange flavor, 1/3 shot lemon juice, 1/2 shot and coke, 3 shots, 1/2 vodka.

The alcohol content of Gilbey's is 40%; Jose Cuervo tequila 30%; Bacardi white rum 40%; Walsh triple sec 39%. Kahlua has a low alcohol content, Bailey's 11% and Marnier 40%.

Bullfrog is composed of vodka, gin, pineapple juice, Sprite, lime juice. The proportion is one shot vodka, one shot gin, 2 shots pineapple juice, 2 shots Sprite, 1 shot lime juice, served in a 10-oz. glass or in a pitcher which is equivalent to 6 glasses.

On cross examination, he said he does not recall serving Nicole during the evening of November 1, nor did he see Nicole from 8:30 up to 11:15 p.m.

TOMAS CORPUZ, JR. a security guard assigned at the Neptune Club, arrived there at 11:00 p.m. on November 1, 2005 to start duty inside the club, while Gerald Muyot of the Vanguard Security Agency was assigned outside. From where he was, he could see the customers who were drinking and dancing. He noticed a woman, apparently drunk walking about "pasuray-suray" holding on to the tables as she walked. When she passed by him he smelled liquor. After that he did not notice her anymore. He identified the woman as Nicole. He was investigated and gave a statement about what he saw.

Meanwhile, **GERALD MUYOT** was at the external perimeter of the Neptune Club that night when he noticed an American coming out of the Neptune Club with a Filipina woman whom he noticed was drunk, carrying her "bakay-bakay" demonstrating the arm of the American around the shoulder of the woman whose head was "nakalungayngay". The American told him as he passed by, "She is with me and we gonna go now." They went to a green colored Starex van, with the American guy opening the door with his left hand and slowly loaded the girl. He placed his left arm on the

thigh and his right hand holding the back of the girl. After both boarded the van, they left. He did not notice the driver but saw several persons inside. Suspicious, he took a piece of paper and jotted down the plate number of the van (WKF 162). Later, in the early morning of November 2, another American arrived with a Filipino woman asking about her sister who was having a good time in the club. He told them about a drunken woman with an American who was boarded in a van. Later, a mobile car arrived with a woman who came out "pasuray-suray" and asked if there were American marines inside because they did something bad to her. It was the same woman he saw earlier. He escorted her inside and finding the club empty, left in the same mobile car. He was invited to the Law Enforcement Department and gave a voluntary statement.

While patrolling the Waterfront Road of the SBMA on November 1, 2005 at about 10:00 p.m., **NOEL AGUAS PAULE**, a bike patrol officer of the SBMA, noticed a woman crying. He approached her who was in the company of about 8 and asked one who said, "minolestiya siya ng US servicemen." She was leaning against a van. As he tried to talk to her, she embraced him and said, "Dito ka lang huwag mo akong iwan, pag nalaman ito ng mama ko, papatayin niya ako." She kept repeating those words. She identified that woman as Nicole. She looked like wilted vegetable (lantang gulay), very drunk, and the pants she was wearing was inverted (baliktad) "nakababa hanggang puwitan at bukas ang zipper, baliktad." He immediately called for back-up and soon, Lt. Dinguin and Officer Avila arrived. She continued embracing him and he tried to convince her to board the patrol car. Together with Lt. Dinguin, other officers, he and Nicole boarded a double car pick-

up and brought her to the IIO for investigation. He surrendered the woman as well as the trip ticket he picked up from the parking lot to Major Paje.

On cross-examination, he admitted, among others, that in his "Salaysay", the words allegedly uttered by the girl does not appear. It did not also say that the woman was embracing her. She never told him she was raped. The term 'possible rape' was said by a bystander.⁴ He denied having been hit by the woman although he suffered a lower lip injury when she embraced him.

The call by radio sent by Paule asking for assistance was received by **JAIME AVILA**, also a bike patrol of the Law Enforcement Department, SBMA, who was on duty along Jefferson St., in the early morning of November 2. Upon arriving at the place, he saw a woman crying and embracing Paule. As he went around the place, he saw a used condom, he picked it up and wrapped it in a piece of paper and placed it in his pocket. He turned it over to the investigator.

On cross-examination, he said he did not talk to the woman who kept crying. He did not ask her if she was molested. The condom looked used because there was something inside.

Businessman **JOSEPH KHONGHUN**, was at the seawall beside the Telecommunication Bldg., at around 11:30 in the evening of November 1, 2005 watching the Americans running towards the ship at Alaba Pier, SBMA, Olongapo City. He came from Pier 1, proceeded to Alaba Pier in an Amina van with Ms. Fe Castro and several others. He parked the van and proceeded to the sea wall. He saw a dark colored Starex van stop in front of the Amina van and the sliding door opened and an African American emerged from the

⁴TSN., June 9, 2006, p. 47.

van, walked towards the seawall and sat on the gutter while another Caucasian also came out, walked to the seawall with a bottle of beer which he emptied and dropped the bottle and walked back to the van holding a woman by the armpit. He was identified as Daniel Smith. The woman, identified as Nicole was put down on the pavement. She was trying to pull her pants which were below her knees. A bystander came and tried to hold her up. The van left and Nicole was leaning against the Amina van crying. Fe Castro, his companion approached her and she saw something dangling from the back of Nicole's panty, it was a condom. Nicole was not able to put her pants properly because the front part was at the back. He asked where she came from and what was her name, but she answered, "Ha, hindi ko matandaan." A bike patrol passed by chance and Khonghun hailed him. The bike patrol called through the radio and soon two SBMA officers in a patrol car arrived and were told by the bystanders that she could be a possible rape victim. She was seated at the back but stepped out and ran about. She was subdued by the officers. His affidavit is marked Exhibit T.

A complaint for investigation was received by **RAMON PAJE Y MANZANO**, an Investigator of Intelligence and Investigation Office of SMBA, when Security Officers Noel Paule, Jaime Avila and others arrived 12:35 in the morning of November 2, 2005, accompanying Nicole, who according to them was abused ("Na siya ay napagsamantalahan"). He tried to talk to Nicole but she was "lupaypay at amoy alak" (very weak) so he asked Nicole to sit down and rest. He instructed Security Officers Tucayon and Michael Marmito to bring Nicole to James Gordon Memorial Hospital for examination. Nicole requested to be brought to the Neptune Club to look for the Americans. He himself went to the

Neptune Club and conducted an investigation and talked to Gerald Muyot and Internal Security Tomas Corpuz and they were invited to his office where they made their voluntary statements⁵. Nicole made a voluntary statement marked as Exhibit C. Likewise, AA and Christopher James Mills made their voluntary statements⁶ and he prepared a blotter worksheet and a Final Report.⁷

Paje informed **PAQUITO TOLENTINO TORRES**, the Chief of the Intelligence and Investigation Office about the reported rape and the recovery of evidence which included a booklet of trip ticket of Starways Travel and Tours, a used condom and a bottle of beer. Torres instructed Mr. Paje to have the items covered with a custody receipt and asked him to locate the complainant and look for other witnesses. He requested Ms. Elsie Cabral to talk to the complainant.

When he learned about the alleged rape case from Torres, **ANTONIO RAMOS**, a Criminal Investigator of the NCIS, went to Torres' office and was informed that the complainant was in a hotel. He told Special Agent Guy Papageorge of the NCIS that he found the complainant in a Korean Hotel talking with the Assistant Manager and Papageorge invited her for investigation at the SBMA office. The name "Gerald" was mentioned by the complainant and some IIO officers saw one "Gerard" in a restaurant nearby, was asked by Papageorge to come for investigation. Timoteo Soriano, the driver of the Starex van arrived and said "Gerard" was his passenger. Gerard was however released. He accompanied Papageorge to US Essex to investigate the marines allegedly involved in the incident.

⁵Exhibits L and K.

⁶Exhibits N and O.

⁷Exhibit Z.

Investigator of the Intelligence and Investigation Office of SBMA, **MELCHOR DELIQUINA** was in the office of Torres who was interviewing Mr. Timoteo Soriano in the presence of Director JV Magsaysay, Congresswoman Mitos Magsaysay, two NCIS agents and Mr. Villaluz. Mr. Torres was asking Soriano questions and typing his answers after which Soriano signed his statement. Then he took photographs of the evidence gathered such as the blue denim pants, the panty, the used condom, the medicine wrapper and the trip ticket.

A US-NCIS Special Agent and a resident agent in-charge of US-Naval Criminal Investigative Service (NCIS) in Manila **RONALD BELTZ**, testified that there was an independent fact-finding investigation conducted by the NCIS on the rape case; that he met and interviewed on 16 November 2005 Timoteo Soriano who told him about the events that occurred inside the van on the night of the alleged assault; that he prepared a report on the details of the said interview. On cross examination, he said that as a resident agent in charge, his unit was only engaged in fact-finding and did not make recommendations.

Special Agent **GUY PAPAGEORGE** of the NCIS invited Nicole to the SBMA Investigation Office and heard her mention the name Gerard or Gerald. He received information about a certain "Gerard" in a restaurant nearby, and invited him in. Then Timoteo Soriano, the driver of the van arrived and said Gerard was his passenger and he was likewise identified by Nicole and AA but Gerard was released. Papageorge went to the US Essex where he interviewed Staff Sergeant Carpentier and LCPL Smith on November 3, 2005 and made a report. Carpentier could hardly recall there was an Asian woman with Smith inside the van along

with other marines and when they reached the iron gate near the ship, the female was pulled from the van in a partial state of undress. He also investigated Smith.

Another US NCIS Special Agent **BRUCE ROBERT WARSHAWSKY** was in Singapore with Special Agent Ron Beltz and Papageorge when informed of the alleged rape incident. He and Special Agents Beltz and Brian Curley proceeded to Manila to conduct the investigation and he interviewed 2 of the alleged suspects, Carpentier and Silkwood and some other Filipinos.

A Special Agent of the US Naval Criminal Investigation Service based in Singapore **BRIAN CURLEY** was asked to come to Manila to assist in the investigation of the alleged rape case. He was with Sgt. Bruce Warshawsky.

Nicole was examined by **ROLANDO MARFIL ORTIZ II**, Medico Legal Officer on November 5, 2005 (see medical certificate marked Exh. E) after initial examination by another physician on November 2. Briefly, his findings consisted of: a) contusion 1 1/2 x 1 cm. lateral aspect, right forearm; b) contusion 1 1/2 cm x 11/2 cm. an. aspect M/3 left arm, anterior aspect, left arm; c) contusion 1 1/2 x 2 cm. post aspect M/3 left forearm; d) contusion 3 x 2 cm. aspect M/3 right leg; and e) contusion No. 5 4 x 4 cm. lateral aspect P/3 right leg. Contusion is a discoloration of the skin caused by the escape of blood following an injury secondary to trauma usually caused by force or blunt object; she could have bumped herself; also secondary to application of external pressure or application of a digital pressure.

Under the heading of Pelvis, the findings were: "normal looking external genitalia, with no anatomical abnormalities on her organ". It was called "nulliparous introitus" as it appears she has

not given birth and he saw whitish discharge around the fourchette area and labia minora, the structure just before the hymen and after the hymen, the vagina. There were contusion on both sides of the labia minora, which are secondary to a blunt injury upon forcible entry of a blunt object like a vibrator. He said, maybe there was forcible entry because the labia minora was not open or maybe the thighs were closed so it was hard to insert something and it would produce contusion and especially if there is no lubrication. Lubrication occurs when there is adequate physical response to a sexual stimuli to make the vaginal area slippery; there would be relaxation of the vagina and probably enlarge the opening and aid the partner in inserting the penis. He said the contusion is consistent with non-consensual sex. Upon internal examination, he said: vagina admits 1 finger with unusual tenderness probably because the vagina was traumatized. It was found negative for spermatozoa maybe because the person did not ejaculate or he was wearing a condom.

On cross-examination, he said that while it is probable that the sexual act was with the use of force, it was also probable in consensual sex when there is a brutal sexual behavior. The contusions he said could have been inflicted by finger grabs.⁸

Medico Legal Officer and Chief of the Forensic DNA Analysis Section of the PNP Crime Laboratory, Camp Crame Laboratory, Quezon City, **DR. FRANCISCO SUPE, JR.** examined 2 envelopes: one brown envelope which contained the underwear; and one white envelope which contained the used condom. The test consisted of passing a "black light" over the object to determine the presence of any biological fluid on the materials which fluids may

⁸TSN., June 29, 2006, p. 163.

actually be saliva, blood, semen, sweat or tears. The panty was crumpled and there were several stains on some portions. The condom was folded and looked used. There was stain or discoloration in the condom. The stains in the panty were somewhat bluish, blackish and violet, a mixture of these colors. The condom appeared to be dirty, crumpled and folded on its side and they labeled it as side A and side B and they measured it. The conclusion was that the profile on Side B under 'Condom' and the profile on specimen B 'Underwear' matched. Under side 1, side 2 and side 3, yielded female DNA profile and they all matched with the different regions of the DNA, meaning there was only one female DNA profile in the condom and on the panty.

A forensic DNA analyst and chemist for the Philippine National Police, Crime laboratory, DNA Section, **EDMAR DELA TORRE** received a request for DNA analysis and concluded that on Specimen A, which was a condom, they generated a female DNA profile and on Specimen B, which was the underwear, on various sites, they generated both female and male DNA profile; that blood samples were also taken from Nicole which were used as reference/control sample; when the blood samples were compared with the result of Specimen A and B⁹, the female DNA profile matched that of the DNA profile of Nicole.

The testimony of **GENEVIEVE PUNO**, evidence custodian, was abbreviated with the stipulation that the pieces of evidence received were already transferred to the PNP Crime Laboratory Olongapo City. She said there was no tear in the maong pants; neither was there a tear in the underwear. She received the condom wrapped in a piece of bond paper inside a bag together with the

⁹condom and underwear.

maong pants and underwear. There was residue inside the condom, it was sandy and sticky.

Expert witness **DR. KENNETH GO**, a medical doctor since 1986 and a toxicologist, a UP graduate of the College of Medicine, had a short-term fellowship at Okayama University, Japan and a two-year fellowship at the University of Mukasa, United Kingdom with a Degree of Clinical Pharmacology and specialized in internal medicine, clinical pharmacology and medical toxicology. He was asked to give his opinion on Nicole's level of intoxication.

He admitted that the basis of his testimony was the data provided him, namely, the testimonies of the witnesses, the transcript of stenographic notes of AA and other witnesses, and the report of the bartender on the amount of drinks served. He explained that the presence or absence of food in the stomach could increase or decrease the absorption of alcohol. Also, the person's weight and built, muscle mass and fats could come into play. Thus considering Nicole's case, she had breakfast, lunch and a slice of pizza in the early evening of November 1 and she took various alcoholic drinks from 8:30 to 11:30 p.m. that night and considering further that the food intake is usually cleared in 2 hours, he deduced that Nicole drank liquor on an empty stomach and made intoxication faster and at a higher level. He said that considering the drinks she took namely, Vodka sprite, B52, B53, Singaporean Sling, Long Island Tea and Bullfrog, her level of intoxication would be 445.2, blood alcohol content (BAC). At that rate Nicole would not be able to board a vehicle by herself, she would not be able to defend, resist or move voluntarily or make sound decision in response to danger or to give consent to any sexual contact. And

the fact that she could not remember what transpired that night is normal for someone heavily intoxicated.

On cross-examination, he agreed that water dilutes the effect of alcohol; that the liquors taken by the private complainant were filled with ice which melted as water and which consequently possibly lessened the effect of the alcohol; that to determine the body's alcohol content, blood examination was more important and accurate than urine examination. He did not have a chance to conduct blood examination; that alcohol is excreted from the body through urination, sweating or perspiration and breathing or it is also possible for some of the alcohol to be eliminated while dancing.

A forensic pathologist **DR. RAQUEL FORTUN**, testified on the medico legal report of Dr. Ortiz, as follows: the absence of seminal stains on the used condom and underwear may be due to the fact that the Florence test used in the examination is a very old test, not used in the modern laboratories at present, is believed to be unreliable, as in fact, present writings and publication no longer mention of it; it is difficult to analyze the significance of the report on such absence of semen considering that there is no showing in the said report how the examination was done, no description of the condom or the underwear, no indication what part of the condom or underwear was sampled, and that the test used (Florence) is unreliable.

On the contusions as stated in the medico legal report, Dr. Fortun said that contusions #1 to #5 could have been caused by an application of a blunt force, and fingertip pressure is one explanation, that the grayish to black color of the contusions meant that the contusions could have been sustained within the day or two days prior to the examination. As to the contusion on both sides of

the labia minora, Dr. Fortun said that it indicates injury due to blunt force, as a result of forcible penetration of the opening of the vagina, that the blunt object commonly used would be an erect penis, that where the vagina admits one finger with unusual tenderness, it indicates that injury most probably is recent, which is within one to two days.

Asked on genital injuries and extra genital injuries as related to human sexual response, Dr. Fortun said that genital injuries are unusual in a normal consensual activity, and conversely, genital injury is consistent with a non-consensual sexual activity. She explained that in case of consensual sexual activity, the position of the two individuals, considering the built and angle of the pelvis, would be in such a way that the vagina is more receptive to the thrusts of an erect penis, that if the female partner is not relaxed, and more so, resisting, the likelihood of the occurrence of wound is higher because the vagina would not be receptive to the thrusts of a penis, that if a female is enjoying the sexual act, she would have natural lubrication that the vaginal opening would become moist and wet and facilitate the entry of a penis. Dr. Fortun supported her answers with various literature stating that injury is unusual in consensual intercourse.

As to the negative finding of spermatozoa in the vaginal canal, Dr. Fortun explained that semen was not deposited in the vaginal canal on account of the use of condom or an ejaculation somewhere else, or because of time interval between the contact and the examination.

On cross-examination by Atty. Rebosa, Dr. Fortun admitted that using the florence test, it is possible that actually there is no semen in the used condom and underwear. On contusion #1, Dr.

Fortun admitted that the other forefinger would also produce contusions on the opposite side of the forearm. On contusion #2 on the left arm, Dr. Fortun said it could have been caused by gripping, or by a thumb or another forefinger. She also admitted that it is possible that the contusions would not have been caused by fingertip or thumb pressure, as it could have been caused by any other blunt object. Admitting that she is not a gynecologist or an obstetrician, Dr. Fortun expressed unawareness as to the possibility of the contusions being related to menstruations or post-menstruations. On the 3, 6 and 9 o'clock lacerations on the hymen, Dr. Fortun reiterated that these could be caused by injury consistent with previous sexual intercourse of even more than thirty days from the time of examination, but the condition of the hymen is not an indication of a sexual activity of a woman, as even in young children, notches may be found, which might be misconstrued as resulting from sexual intercourse.

On the role of lubrication of the vagina which would result to possible lacerations or injuries in the genitalia, Dr. Fortun added that some women, even if they are sexually aroused, may not be fully lubricated, and in such case, when a huge object is inserted, swelling may occur, even if the act is consensual. An erect penis inside a condom can cause lacerations or swelling. Dr. Fortun declared that Dr. Ortiz, in his medico report, did not indicate the color of the contusion which is important for purposes of describing the contusion, and that the ground stain results in the said report are non-specific, meaning it may or may not point to an infection.

Dr. Fortun admitted that consensual sex might happen even if the woman is not yet aroused and the vagina not lubricated, in which case injury in the vagina might also occur, and that if the space

where the intercourse happened is cramped or limited like the Starex van, the woman may not be able to position her pelvis or body in order to allow the penis to penetrate without experiencing pain. Asked about the contusions in the arm near the wrist of the complainant, Dr. Fortun admitted that the holding of her arms by Paule as she was being boarded back inside the patrol car may be the probable cause of the contusions. As to the testimony of Joseph Khonghun that he saw two Americans carrying the complainant by the arm, under the armpit and the other holding her legs, Dr. Fortun stated that based on the description of Dr. Ortiz, it is unlikely that the contusions resulted from such manner of carrying, adding that there were contusions only on the left leg.

On further cross-examination by Atty. Rodrigo, Dr. Fortun agreed with experts that "lacerations, abrasions or bruises at the posterior fourchette have all been described after consensual activity, that "lacerations and ruptures (full thickness lacerations) of the vagina have been described in the medical literature after consensual sexual acts". As to the experts' opinion that vigorous or intense or overenthusiastic intercourse explain the victim's injuries, Dr. Fortun agrees but only when put in context of the entire paragraph in the quoted literature, and that they refer to both consensual and non-consensual sex, noting that there are limitations to existing studies and that there is no case control yet as to really determine the injuries caused by consensual sex or non-consensual sex.

After the prosecution rested its case, defense presented its evidence.

DEFENSE EVIDENCE

LANCE CORPORAL DANIEL SMITH denied having raped anybody and said that the Information for Rape filed against him by Nicole is untrue. He recalled that in the morning of November 1, 2005 he was on board the ship US Essex docked at Subic Bay for joint military exercises. At about 8:00 o'clock in the morning he woke up and went down to the cafeteria, had breakfast and in the afternoon was told to wait for their liberty calls which meant that their superior would give them information on the flight deck and the instruction for liberty or whether they can go out for relaxation time. After receiving the instruction, he and his companions went back to their quarters to change their military uniforms to civilian clothes. He wore a long sleeved white shirt, white socks, blue jeans and shoes. They went down to the hangar bay to sign out the liberty logbook. The liberty logbook contains their names and the name of their liberty buddy and the time they signed out. That was in the afternoon but then he, Lance Corporal Silkwood and some other marines went to look for something to eat uptown at a restaurant in the waterfront road where they stayed for about an hour, then walked out of the gate and saw a makeshift flea market where they bought some gifts and souvenirs for their families and friends. He himself bought some items for his sister, mom, dad and two brothers. That was around 2:30 in the afternoon. From there, some of the guys needed money so they went to the ATM, but were told that the 2 ATM machines were off-line. They learned that the casino could be the right place to get money. The first casino was so crowded that they decided to go to the other casino just across the street where they played black jack and poker, and stayed

there up to 5:30 in the afternoon. Since one of his friends had to be back to the ship by 6:00 for duty, they walked back to the ship. They brought their bags of purchases made at the flea market to their quarters. It was about 6:30 pm then, and he and Duplantis decided to go back to the casino, and played a few more games up to about 45 minutes later. From there, they went to Dewey's, a bar with a small dance floor with some tables around. They occupied a table and ordered San Mig Lite. They got bored, and because they heard about the Neptune Club where lots of people were having a good time, they got curious. They called a cab and asked the driver to take them to the said club. They arrived at the club between 9:00 and 9:30 in the evening. They walked through the front door of the Neptune Club, to a small reception room but they found the place very crowded, so they entered the door of the main room. It was dimly lit but there were flashing and dancing lights that made visible the dance floor surrounded by tables. He saw about a hundred or so people dancing, and he thought of it as a kind of a dance club. His group took a table and ordered drinks. He was with Silkwood, Duplantis and some other marines. He went to the counter to order for his drink, went back to the table, sat down, and listened to the music as he took his beer. Then, they decided to go to the dance floor and joined the crowd. Looking around they saw a few female marines and some local Filipinas dancing, but did not get to know them. After dancing, he started sweating, so he went to the bathroom, cleaned up and refreshed himself. On the way back to his seat, he saw other marines drinking at the bar. Half-way across the bar, he noticed a Filipina smiling at him. He looked around to be sure it was him she was looking at, and he just walked in the same direction. That was about 10:30 to 10:45 in the evening. Then this

Filipina stepped towards him and said, "Hello!", and in response, he said, "Hi, I'm Dan." He could not remember how she introduced herself to him because she was talking in her own dialect. After the introduction, since the place was crowded, they went to the bar and he offered her to sit down at the table with him and she obliged, saying, its okay. He pointed to Nicole as the girl. They just talked with each other for a little while, but he could not remember what the entire conversation was all about, since they were just getting to know each other and it was like, 'where are you from', 'what is your name' and so on. The conversations took about ten to fifteen minutes. He asked her if she wanted to dance and since he was not a great dancer, he just moved his body to the tempo of hip-hop and a bit of slow music. After about 3 songs or so or for about fifteen minutes, they went back to their table and sat down. He sat down on his chair and Nicole sat down on his lap. He was momentarily motionless, and then she asked if she could kiss him and he said yes, so they kissed. He surmised some people might have giggled around because they were in the middle of everybody, and thought their kiss was both friendly and passionate. It must have lasted for about 10 seconds, he said. She remained seated on his lap as they talked a little, and kissing longer and longer. He described her position sitting sideways on his lap with her one hand on his chest. It was already 11:30 and he saw S/Sgt. Chad Carpentier rounding up the remaining marines in the club, telling them that they were about to leave. Hearing this, Nicole asked him if he could stay a little longer, but he told her that he had to be back before midnight. She was visibly upset about him leaving at that time. She seemed to be by herself, alone, as he did not see anybody with her. He asked her if she wanted to have a short ride back to the pier with him and she

readily said, yes, she wanted to go with him. There was a curfew that was set for them which was why it was important that he be back by midnight, otherwise he would be in trouble, which could mean losing his rank. So he and Nicole walked towards the door outside and boarded the waiting van. They walked as he guided her through the crowd because the van was parked near the front door. Near the van were S/Sgt. Chad Carpentier, Duplantis and Silkwood, who were standing outside because the door of the van was locked and they were waiting for the driver Timoteo Soriano to open it. Upon opening the door, Nicole stepped inside the van, and sat down at the back seat. He followed and sat down next to her at the back seat while Carpentier, Duplantis and Silkwood were seated in front and in the middle seat. There was no conversation between them except for a few words and then they started kissing again. Since there was only a small space at the back seat, they sat forward and she helped their knees held towards each other.¹⁰ The space was not enough and as the van started moving, they continued kissing, only more passionately. He initiated the kiss and Nicole responded, her hands on his back and herself leaning back towards the window pulling him towards her. Jokingly he asked her, "Can we have sex right here?" She said, yes and he sensed she was not joking, and he was kind of surprised. He started to get undressed and she did the same. So they both pulled their pants down to their ankles¹¹ while he was reaching for his pocket to get his wallet with the condom in there. He took it out, removed its wrapper and put it on. Nicole was, in fact, assisting him by holding his penis while he was putting on the condom and her other hand on his back. Then she leaned back to the window of the van and pulling him, they started having sex.

¹⁰TSN., Sept. 11, 2006, pp. 4 to 56.

¹¹TSN., Sept. 11, 2006, pp. 57.

Since it was a tight space, he tried to be on top of her while she was positioning herself for him to enter. Under the situation and with her assistance, he was able to enter her. Her leg was somewhat hanging up and spread out. While they were having sex for not more than 3 minutes, the van stopped and when he looked up, he saw that they were in front of a pizza place and he heard the door of the van opened and people were talking asking to get a ride. He came to learn later that they were the two other marines. They were Lance Corporal Burris and Lance Corporal Lara and that was about 11:50 because he looked at his watch. When the van stopped, they were in the same position and had stopped having sex. He pulled out because they didn't have enough time. Nicole asked, "Are you done already?" He looked around and feeling somewhat embarrassed, just told her that they were getting back to the gate. They started getting dressed, she had her panty on and pulled her pants up but because of the small space and having tight jeans so she could not pull up her jeans well. They came to another stop at the gate area, at the pier of the ship and he walked out of the van along with Silkwood, Duplantis and Nicole following behind. But before that, he even let her know that he was going back to the club the following day if she wanted to see him. While getting out of the van, he heard a remark but could not remember who said it, "Hurry up! You bitch, get out of here!" At that instant Nicole's mood suddenly and drastically changed from happy to total madness, until she started screaming, "I am not a bitch!, I am not a bitch!" He tried to calm her down. She seemed to calm down for a moment and came down from the van. She had a hard time pulling her pants up and went to sit down on the curb of the sidewalk. He tried to hail a cab but it did not stop and he told her to find her way of getting her cab. She just

nodded her head and agreed. They were then at the Alaba Pier near the ship and he told her again that he would be back at the club the next day if she wanted to have a good time with him. He hurriedly went back to his ship but he was 3 minutes late but they made it appear that it was 12 o'clock so there would be no problem. At noon time of November 2, there was another liberty call, he went down and got to change to regular clothes but that day, some marines had decided to just watch a movie, instead of going out, staying there from 2:00 up to quarter to 5:00. Then he hurriedly went downstairs, signed the logbook and went downtown to have dinner in a restaurant along the road together with Duplantis and some other marines. They stayed in the restaurant for an hour and a half. He went back to the Neptune as he promised Nicole, to spend more time with her because she was really a nice person to talk to and they had fun together. He assumed the feeling was mutual because she liked him too as they were talking, dancing, kissing and then had sex at the end of the night. At the Neptune Club, he looked around for Nicole but he did not see her. Then for about 45 minutes to an hour there was a fight that broke out among the servicemen and a voice announcing that all the navy and marines had to leave the club at that time. So they left and went back to Dewey's and stayed there until 11:00 o'clock, then they bought pizza and other things and went back to the ship together with Duplantis and other marines. They went to their quarters, changed their clothes, watched movie, ate the pizza and went to sleep. That was November 3. Then about 2 or 3 hours after he went to sleep, an officer came and woke him up and some guys brought him to a room. After an hour or so sitting in that room, NCIS Guy Papageorge came, grabbed him and interrogated him for several hours. At first, he thought he was going to be asked

about the fight that broke out at the Neptune among the servicemen but then he learned that he was being accused of rape. Still he had no idea about what they were talking about. He told them he knew a girl he had sex with the night before and asked why they were accusing him of rape. They started asking him questions about the incident. Papageorge did not show him the notes that he jotted down in the course of the interrogation. After that, he was pulled out of the room and brought somewhere else, then brought back to the same room and then asked to go back to his quarters and pack his things. It was around 7 o'clock in the morning. The ship left at about 9:30 in the morning leaving him sitting down in the pier with S/Sgt. Carpentier, Lance Corp. Silkwood, Duplantis and Burris. Then a ride came and two men brought them to Manila where they were taken to a safe house run by the US Embassy until the time the Embassy got a room for them. He called up his parents to inform them what happened. Her mother was shocked, never expecting things like that which was being attributed to him would ever happen and she started to cry, and he, too, cried over the phone.

On cross-examination, he said that when he arrived at Neptune Club he had only one beer and had a conversation with Nicole after he met her coming from the rest room along the hallway of the club. She did not appear intoxicated at the time they were talking up to the time they left Neptune. She had no single drink that time. They started dancing and talking and then dancing again for about 15 minutes. They were kissing for the second time when he noticed Sgt. Carpentier standing at the door with some other marines signaling them to leave. When they left the club at that time, Nicole's one hand was at his back, the place was so crowded and he was guiding her in getting out of the place. Nicole went up to

the van with him at the back. Other persons inside the van were Lance Corp. Silkwood, Duplantis and Burris. S/Sgt. Carpentier and driver Soriano were in the front seat. While inside the van, Nicole pulled him towards her and that was the time he jokingly asked if she wanted to have sex with him and she said, yes. He was able to get on top of her, her arms were on his back on the back seat. She pulled him towards the window of the van. She pushed down her pants asking his assistance. Her left foot was hanging and her right foot was placed on top of the seat. The reason why he did not come was because the van stopped at the pizza place. When they got off at the area where they were supposed to be dropped off, that was the time when somebody said, "You bitch, get out of there!" referring to Nicole and that was when she got mad. Before that, they were having a good conversation and he even promised to meet her again at the Neptune the next day. When Nicole went down from the van her panty was already on but her pants were still up to her thigh. She was able to pull her pants after they got out of the van and saw her seated on the curb of the sidewalk. He was not sure what he did with the condom, maybe he threw it on the floor of the van. It is standard procedure that a box of condom was placed next to the logbook and when you sign the liberty logbook, you can get one. It is not mandatory but most people get one and in his case, he got one. He had no intention of using it but it was better to be safe. When Sgt. Carpentier saw Nicole with him at that time they were rushing to the van, he did not say anything to him. He just told him that they had to go back to the ship. Likewise, their companions that time did not say anything when they saw Nicole. During that time that they were having sex, he did not pay attention to the other persons inside the van. When he was interrogated by Papageorge, he admitted that

they read to him his rights under Article 31B of the United States Manual of Criminal Justice System but insisted that he did not give any statement, they were just jotting down what he was saying. But when he read the report that was furnished to him later, he learned that a lot of statements attributed to him were misquoted. He did not do anything, it was already done, he thought, and since the case had already started and he knew that he was going to testify, that would be the time when the truth would come out. When shown the NCIS report, he said he had seen it several times. He does not remember being asked by Papageorge if he consumed 5 bottles of beer. He denied having answered that the marines were cheering him while having sex with Nicole because his answer was, "No." The normal drunken laughter of his buddies was going on, but not directed to them. He was not paying attention to them. He did not reach a climax because it was too short a time to consummate it. He felt bad because he was not able to get a cab for Nicole. He did not anymore call the attention of Papageorge to the misquoted statements, he just told his lawyer about them and his lawyer advised him that once he testified in court, he could rectify them. When asked about Nicole's condition when he first saw her, he said that, "that while she was out there maybe she was drinking but she was not intoxicated." He danced with Nicole for about 45 minutes to an hour. He repeated with certainty that Nicole verbally and physically consented to the sexual act. He denied that his companions were cheering them. He insisted that he had 3 bottles of beer and he knew that the sex was consummated by a mutual consent of willing partners. It took less than 5 minutes before he stopped.

On additional cross-examination conducted by Prosecutor Quiambao, he said it took them 15 minutes from the time they left until the time they reached the ship including the time that they stopped at the pizza place.

DR. TERESITA SANCHEZ, a lawyer-doctor, an ob-gynecologist and presented as an expert witness, testified that Atty. Formoso consulted her and asked her to give her expert opinions or comments on the findings of Dr. Rolando Ortiz who conducted a medical examination on complainant Nicole on November 3, 2005, as contained in the medico-legal certificate marked as Exh. "U" for the prosecution. She explained that the color of the contusion is not determinative of the time when it was actually sustained because its color may remain unchanged even after more than a week. The usual color of the contusion is bluish-black but the color of Nicole's contusion was not described in the medico-legal certificate. Contusion No. 1 located at the right forearm could have been caused by a blunt object and not by digital pressures or finger grab as claimed by Dr. Fortun nor due to pressure or force from a thumb as described in the medico-legal certificate because one has to use all his fingers in order to grab a person and this would necessarily produce more than one contusion. Contusion Nos. 2 and 3 are found on the left arm, No. 4 is in the anterior aspect of the right leg while No. 5 is in the posterior third of the left ankle. After looking at the anatomical diagram depicting the locations of the injuries sustained by complainant, she opined that the said injuries do not suggest that there was rape or force applied on the victim. Her basis for such statement is the absence of contusions in the inner thighs and inner knees of complainant which are the classic injuries sustained by a rape victim due to forcible separation of the legs

during a rape or attempted rape as discussed in Chapter 16 of the Forensic Medicine Book by J.K. Mason. Speaking in general, a woman who is dead drunk, not aware of what is happening around her and hence, uncooperative, has heavy legs just like one under anesthesia and to be able to penetrate her, one has to use force to open up her legs. This force will then cause contusions or bruises especially to one who is prone to such. Rape victims should be examined by an ob-gynecologist who is more familiar with the female anatomy than a forensic pathologist. Penetrating a vagina with a small opening in a confined space such as inside a moving van, would certainly produce contusions on the labia minora of the woman even when the sexual intercourse is consensual. The whitish discharge around the labia minora and fourchette area is a normal discharge usually during ovulation time or during sexual arousal. Referring to deeply healed lacerations at 3, 6 and 9 o'clock positions, she opined that these could have healed more than a month prior to the incident but she could not determine the number of sexual intercourses that the victim had which have produced them. The contusions on both sides of the labia minora could have been caused by an attempt to enter the penis into the vagina. When a person's level of alcohol is from 300 to 400 mg, that person would be stuporous, meaning he is asleep, practically unconscious, and any attempt to wake him up is futile because he would just go back to sleep. At this condition, such person cannot really intelligently communicate with another and cannot do logical movements. If the alcohol content in the body of a person is from 400 to 500 mg., then he can easily go to coma or even die based on the book entitled Medico Legal Investigation of Death, 3rd Edition, p. 773 by Spits and Fisher.

On cross-examination¹² Dr. Sanchez reiterated that her statements given during direct examination regarding the conditions of one whose body has a 300 to 400 mg or 400 to 500 mg alcohol content, were based on the book of Spits and Fisher. She did not make an independent study of the factual circumstances of this case particularly on the drunkenness or behavior of private complainant or on the alcoholic beverages taken by her. Her analysis is based on the test conducted by Dr. Go. She alleged that 99% of hymenal lacerations are caused by sexual intercourse. But it may also be true that the hymen may remain intact or there can be no hymenal lacerations though there was a previous sexual intercourse. She stressed that the absence of significant injuries as contusions in the inner thighs and inner knees of the complainant negates the latter's claim of rape or of force applied on her person. She explains that based on the overall medico legal examinations, complainant is very susceptible or prone to contusions and since she allegedly refused the sexual advances made on her, she should have sustained contusions on her inner thighs and legs because the culprit would have to use force to open her legs. A woman who is dead drunk with a stuporous condition would still offer resistance to the opening of her legs. As a rule, a victim who puts up a resistance is bound to sustain injuries on certain portions of her body.

L/CPL JUSTIN MICHAEL BAMBERGER, a US Marine based at Okinawa, Japan came to know Nicole when he was stationed at Camp Navarro in Zamboanga City about the end of September to December 2005; Nicole became his close friend and saw her the day before she left for Manila and she told him she would be away for about a week; they started communicating

¹²TSN dated September 25, 2006, pp. 1-47.

through text messages and she told him about her activities while on vacation and that she was having fun. Her text messages were recorded in his cellphone and he made a sworn statement regarding those text messages. Later, he heard about the incident involving Nicole, so he texted her asking about the news that six marines allegedly raped her, but Nicole said that it was a stupid rumor; that he received again another message saying that she (Nicole) was messed up and she was asking him to pray for her; when Nicole said that she was raped, he began to worry and asked her if she was alright and Nicole said that she was okay.

The testimonies of the other accused who were acquitted are briefly narrated to complete the story:

CHAD BRIAN CARPENTIER, Staff Sgt. of the United States Marine Corps and designated as Technical Comptroller of the Joint Task Force Enabler in charge of overseeing the day-to-day activities of those in his charge and to ensure their well-being on board the USS Essex docked at Olongapo City, testified that on November 1, 2005 on or around 9:15 in the evening, his liberty buddy Gunnery Sergeant Paul Taylor asked him to go out and eat;. They signed the liberty logbook and proceeded to the parking area, rode a Starex van driven by Timoteo Soriano and ate at Aresi Restaurant where he made a phone call to Corporal Burris, a member of their platoon, to make sure everything was all right; Burris told him that a large group of the platoon were in Neptune Club. He told Burris he would pick them up to ensure they followed their curfew. Just then, his liberty buddy Gunner Taylor told him he was not feeling well and wanted to go back to the hotel to freshen up in his room and relax. Taylor was then dropped off at the hotel and he and Soriano proceeded to Neptune Club. Driver Soriano

parked the van right in front of the club and he saw Burris outside, somewhat intoxicated. He went inside the club, found several members of the platoon there and ran into Lance Corporal Silkwood. He was most concerned with the younger guys who had a midnight curfew, such as Lance Corporal Smith, Lance Corporal Silkwood, Lance Corporal Duplantis and Lance Corporal Lara and also Corporal Burris. While inside the club, he noticed Daniel Smith seated in a chair with a Filipino girl on his lap (later identified as Nicole). They were aggressively, flirtatiously, kind of kissing each other.¹³ It was around that time when he ran into Lance Corporal Silkwood and told him to start gathering their people. He did not personally address Smith and his lady companion. So they started heading towards the club's exit. Then he noticed again that Burris was missing and was told that Burris and Lara took off to get pizza. He was irked because Burris knew that he was there to pick up the men and yet they left. He went out of the club and saw Silkwood and Duplantis by the van. Smith was also there with the same girl. He noticed Smith was seated in the farthest back seat with Nicole. In front of them were Silkwood and Duplantis. Carpentier was sat in the front of the passenger seat next to Soriano. When they were about to leave, a security guard from the Neptune club approached the driver side window and started talking with Soriano in Tagalog, apparently asking for a tip. They proceeded and again a guard according to Soriano was offering them females. He was agitated and told Soriano, "Just drive and get us back to the ship." They were off and passed by Yellow Cab Pizza and noticed a gathering of American servicemen outside. They saw Lara and Burris walking along the sidewalk carrying pizza. Soriano parked the van beside the

¹³TSN, September 19, 2006, p. 15.

road and told Lara and Burris to get into the van. Lara began conversing with Silkwood or Duplantis while he talked to Burris. They stopped about 50 feet from the ship in a barricaded area. He jumped out opened up the sliding door and instructed them to get out so they could all be back to the ship. The first to get out from the van was Lance Corporal Silkwood, followed by Lance Corporal Duplantis then Lance Corporal Smith. Just as Smith and the Filipino girl were coming out, someone had called her a bitch. That enraged her and was yelling, "I am not a bitch! Don't call me a bitch!" and stepped down from the van. The area was crowded and people were rushing because it was just prior to curfew hour. He did not share the same curfew hour with the younger marines and had to pick up his liberty buddy, Paul Taylor to meet their curfew of 2 o'clock a.m. That was his first night out in Subic. In the evening of November 2, he and his buddy Taylor were called over the ship's PA system to report to the Command Center of the ship. The Chief Adjutant was waiting for them and a member of the platoon, Capt. Hardgate led them to Major Vandenberg, their OIC. She told them that a Filipino female said she had been raped. He thought at first that it was some kind of a joke but when the officer started to cry, he knew she was not joking. He panicked, sort of worried trying to figure out how an accusation like that could be made. He could not think of any activity he had or any interaction with a female or even how an allegation could be made like that. Later, one of the NCIS agents Guy Papageorge brought him to the ship's interrogation room. The interrogation took several hours. Papageorge produced a document – a request for him to waive his rights under the Uniformed Code of Military Justice for him to sign that he was going to be questioned regarding an allegation of a possible kidnapping

and rape. He asked to talk to a military lawyer aboard the ship. But when told that there was none and the nearest lawyer who could assist him was in Okinawa, he just waived his rights. Papageorge then said he wanted to speak with Smith. In the morning around 8:00 o'clock of November 3, Capt. Hardgate went to the berthing area and instructed him to pack up his things because he was going to disembark from the ship. He was with L/C Smith, L/C Silkwood, L/C Duplantis, L/C Lara, Corporal Burris and Capt. Laballe. Then the ship left. They were brought to the US Embassy safehouse on the same day. He had never been to Manila before. On November 5, at around 3:30 p.m., he was introduced to NCIS Agents Bruce Warshawsky and Brian Curley. He was interrogated and again, he waived his rights. He executed a counter-affidavit during the preliminary investigation at the Office of Olongapo City Prosecutor.

On cross-examination, among others, he said that he was not involved absolutely in the incident complained of but feels he was included in the charge for obvious reason – Nicole was ashamed and embarrassed about her behavior and how she conducted herself that night and that there were casual observers at the sidewalk who approached her and came up with the conspiracy story. He admitted not lifting a finger to extend assistance to Nicole that night.

KEITH SILKWOOD, a member of the US Marines Corps arrived in the Philippines to participate in the military exercises in November, 2005. He was on board the ship, US Essex docked at the Subic Bay. He recalled that on November 1, 2005 at around 1:00 in the afternoon he availed of his liberty pass with his liberty buddy L/CPL Smith and other marines. They went to the market place and after getting some money from an ATM at a casino, they went to another casino and played games and listened to music. After 7:00

in the evening, they went to Dewey's Club. He was with L/CPL Smith, L/CPL Duplantis, L/CPL Lara, L/CPL Burris and other marines. They listened to some music, danced a bit and got drunk. They stayed there for about three hours and then they went to the Neptune Club with the same group. There was a dance floor and a lot of people dancing. They occupied one table and later he saw Sgt. Chad Brian Carpentier who told him to gather up the marines and go back to the ship. The curfew was 12:00 midnight and he tried to look for his other companions. Smith had a Filipino girl (identified later as Nicole) who was sitting on his lap and they were talking.¹⁴ He told Smith about Carpentier's order so, Smith and the Filipina stood up together and then walked out of the door towards the van. Soriano unlocked the door, then Smith opened the sliding door and Nicole jumped into the third row back seat with him. Carpentier was beside the driver. While inside the van, he noticed that Smith and Nicole were kissing and they were flirting, giggling and he could hear sounds and knew what was going on; he knew that they were having sex and knew that it was none of his business. Soon they stopped at a Yellow Cab pizza place to pick up L/CPL Burris and L/CPL Lara. After that, he heard Smith saying something like he had no time to finish after his companion asked "Are you done already?" When the van stopped, Duplantis alighted first, followed by him. They waited for a few seconds outside the van and then Smith's companion got out from the van with Smith giving her a hand. Smith was trying to hail a taxi for her so they could start going back to the ship to meet their curfew of 12:00 o'clock or be penalized like losing money or privileges. He denied the testimony of Khionghun that a Filipino woman was carried like a pig by two Caucasians; that

¹⁴TSN, September 21, 2006, p 25.

the truth was she stepped out of the van with Smith's assistance; that the place where they alighted was a place where many people were walking for it was the main pathway to get back to the ship and Nicole did not ask assistance from them. He identified his Affidavit and affirmed that he had the chance to observe how Nicole was dressed when she got out of the van – that her pants were not all the way down.

On cross examination, among others, he said that while he did not glance towards the back where Smith and Nicole were, he knew that Smith and Nicole were kissing which was normal. He noticed some movements and the next thing he knew, the girl was lying on her back, he saw Smith was rocking his hip back and forth like he was having sex with her. He was drinking at Dewey's bar and then transferred to Neptune Club where he also drank about 4 bottles of beer. He noticed that Duplantis was drunk because he walked funny but he did not get any help to get back to the van. He saw Nicole had her shirt on but her pants were not on all the way, meaning he could see her panty. At some point, he could have said "get the bitch out of the van." He did not know if Nicole was too drunk or if she sat down in frustration. Inside the Neptune, he noticed Nicole when he approached L/CPL Smith but he did not see her take any drink.

LANCE CORPORAL DOMINIC J. DUPLANTIS, a member of the US Marine Corp was at the Neptune Club in Subic Bay in the evening of November 1, 2005 drinking with his friends and several other US Marines among them Silkwood, Smith, Lara, and Burris. After staying in the Neptune Club about almost two hours, they proceeded back to the ship to meet the midnight curfew and they rode on a van which was parked in front of the Neptune Club. His companions were Carpentier, Silkwood, Smith and a

female Filipino whom he did not know (later identified as Nicole). He did not know the driver either because it was the first time that he saw him; that he saw Nicole for the first time inside the van. Smith and Nicole were seated behind him at the back seat and he (Duplantis) was in the middle seat. He noticed Nicole and Smith kissing and laughing and having a small talk at the back seat. Before they reached the pier, they stopped for Lance Corporal Burris and Lance Corporal Lara, then they proceeded to the dock. He was having small talk with Silkwood while Smith and Nicole were actively involved with each other at the back --- there were kissing and moaning and laughter was coming from the back. When they reached the dock, he opened the door and then he got out and proceeded to walk towards the gate. His companions also got out of the van and walked towards the ship. He did not see Nicole but he presumed that she got out too. The following evening, they went again to the Neptune Club and stayed there for an hour and went back to the ship at 11 o'clock. In the morning of November 3, 2005, he went downstairs for breakfast and he was called and told to pack up his things and get out of the ship. When he asked Lance Corporal Burris, he was told that the 6 of them were charged of rape. He was surprised because he was not involved with a female lady the whole time that he was out there. He identified the document prepared by NCIS Special Agents Brian Curry and Warshawsky and his counter affidavit.

On cross examination, he identified the Military Suspect Acknowledgment and Waiver of Rights to which he affixed his initials. His liberty buddy was L/CLP David Haiden. At the casino, after they took lunch, he had 3 or more beers and his liberty buddy Haiden got back at 6:00p.m. for work. He went back to the

Diamond Casino with Silkwood to Subic Bay and stayed there for two hours. He drank almost four (4) bottles of draft beer in plastic cups. They stayed there for two hours and went to Dewey Bar and they drank and danced. He took about 3 more beers and they stayed there until 10:30p.m. and they went to the Neptune Club. He could not observe what his companions were doing. All in all, he took about 13 bottles of beers. He saw S/Sgt. Chad Brian Carpentier rounding them up at 11:30p.m. to go back to the ship. He noticed that Smith and the girl were laughing cheerfully; that he heard noises at his back. After Lance Corporal Burris and Lance Corporal Lara went up to the van, he glanced towards the rear of the van, he observed Smith on top of the girl humping, the bottom part of his body was moving up and down; then he turned back to Burris and Lara and they were laughing and clowning around and they were just being playful. He agreed that he was the most drunk of the group but despite the bottles of beer he took he could remember vividly what happened. He did not meet Nicole at the club, he only saw her inside the van but he did not have any conversation with her. He did not know why Nicole filed a case against them.

Thereafter, the trial Court rendered a Decision, the dispositive portion of which reads:

“WHEREFORE, premises considered, for failure of the prosecution to adduce sufficient evidence against accused S/SGT. CHAD BRIAN CARPTENTIER, L/CPL. KEITH SILKWOOD AND L/CPL. DOMINIC DUPLANTIS, all of the US Marine Corps assigned at the USS Essex, are hereby ACQUITTED of the crime charged.

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.

Pursuant to Article V, paragraph No. 10, of the Visiting Forces Agreement entered into by the Philippines and the United States, accused L/CPL DANIEL J. SMITH shall serve his sentence in the facilities that shall, hereafter, be agreed upon by appropriate Philippine and United States authorities. Pending agreement on such facilities, accused L/CPL. DANIEL J. SMITH is hereby temporarily committed to the Makati City Jail.

Accused L/CPL. DANIEL J. SMITH is further sentenced to indemnify complainant NICOLE in the amount of P50,000.00 as compensatory damages plus P50,000.00 as moral damages.

SO ORDERED."

Hence this appeal where the accused-appellant assigns the following 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.

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." (Appellant's Brief, pp. 0276-0278)

Appellant in seeking the reversal of the Decision underscores the fact that not only was his guilt not proven beyond reasonable doubt for failure of the prosecution to present sufficient evidence to

establish all the elements of Rape penalized 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 an accused.

The prosecution's evidence to support the allegation of force or intimidation was not sufficient. From Nicole's account virtually no force was employed by appellant to consummate the sexual intercourse with her. She never alleged that the appellant had any sort of weapon with him that made her fear for her life, neither did he inflict any physical harm on her nor did he threaten to take her life or any of her relatives if he did not have sex with him. Her only act of resistance according to her was when she tried to push him away, only that she was already weak and appellant was too heavy. This does not show any sort of force or intimidation on appellant's part that led Nicole no other choice but to give in to his desire. As held by the Supreme Court in similar cases, the alleged victim's act of resisting the accused by pushing him away, is not sufficient to show that force was employed against the victim and resistance on the victim's part. (People vs. Librado, G.R. No. 141074, October 16, 2003) As likewise held in People vs. Gavina, G.R. No. 143237, October 28, 2002 where the trial court's finding concerning the element of force and intimidation is a perfunctory sentence that "she pushed him but accused threatened her." The Supreme Court held that the element of force or intimidation was absent to support the charge of rape. Appellant notes that in this case at bar, Nicole did not even in any way suggest that Smith threatened her and the

appellant also pointed out that the vaginal contusions on the labia minora are also consistent with consensual sex.

Again, appellant pointed to the trial court's bias when it blatantly ignored Dr. Ortiz's findings and even the opinion of the prosecution's expert witness, Dr. Fortun on cross-examination that complainant's contusions are equally consistent with consensual sexual intercourse and that Nicole's contusions in her arms and legs are the result of her struggle with the police officers as she resisted in boarding the patrol car and had to be dragged. As testified by Khonghun, he saw Nicole who was seated at the back of the police car, stepped out and ran. She was pursued by 2 police officers who dragged her and took her back to the van. In fact, he did not know how it happened but one of the lips of the bike officer was hit. Even Ma. Fe Castro's supplemental affidavit where she said that: "Sa pagpupumiglas niya, nakita ko na 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, xxx xxx xxx."

He also underscores the fact that the evidence of the prosecution which tends to show that the complainant was unconscious at the time of rape should not have been admitted by the trial court for being violative of appellant's constitutional right to due process. It must be stressed that the defense made clear the continuing objection to show that the complainant was unconscious at the time of the commission of rape. This mode of commission which was not alleged in the information, is a gross violation of appellant's right to due process. Hence, the information was fatally

infirm because the information left unstated that appellant had carnal knowledge of the complainant while the latter was deprived of reason or otherwise unconscious.

Thus, the trial court completely relied on the totality of complainant's testimony that the appellant had carnal knowledge of her when she was unconscious, while the Supreme Court has invariably ruled that where the allegation is through force or intimidation while the evidence tends to show commission of 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. Appellant also posits that Nicole's motive of falsely accusing him of having raped her especially as she was referred to as a "bitch". She was also afraid of what her mother will say.

The Office of the Solicitor General (OSG), representing the People of the Philippines, on the other hand, argues among others, that (a) the allegation that appellant took advantage of Nicole's intoxication sufficiently bears the element of unconsciousness required under Article 266-A [1][b] of the Revised Penal Code, as amended by RA 8353; (b) the appellant is guilty of rape beyond reasonable doubt; (c) appellant's alleged mistake in believing that Nicole herself wanted to have sex with him is totally belied by the evidence; (d) the trial court never gave any probative weight to Timoteo Soriano, Jr's out of court statement precisely for being hearsay; (e) it is a matter of record that appellant fully exercised his right to confront and cross-examine Drs. Rolando Ortiz II and Raquel Fortun; (f) the case of the People v. Castillon (217 SCRA 76), cited by appellant, does not apply to the present case; and (g) the award of damages should include civil indemnity.

To support the above-mentioned arguments, the OSG maintains that the Information charging appellant and his co-accused contains an adequate factual description of rape, and that the phrase "by means of superior strength and taking advantage of the intoxication of the victim" squarely fits with the provision of Art. 266-A, the pertinent provisions of which state: "Rape is committed... when the offended is deprived of reason or is otherwise unconscious." The indictment need not employ the exact words of the statute in describing the offense charged, for what controls is the description of acts or omissions constituting the offense charged and not the specification of the law alleged to have been violated, the preamble of the complaint or information, or the language of the statute alleged to have been violated.

The OSG further invokes the long standing rule that when a woman says she was violated, she says in effect all that is necessary to show that she was raped. It is highly inconceivable for a young unmarried woman like Nicole to fabricate a serious charge of rape, submit herself to a medical examination of her private parts and undergo trauma and ordeal of a public trial during which she had to narrate in detail her tragic experience.

It added, even assuming that Nicole did initially exhibit inviting signs to appellant and his co-accused on the night of 01 November 2005, the moment that the same subsequently turned into signs of resistance, with Nicole even completely passing out, appellant should have desisted from pushing through with the sexual act. The fact that he did not, as he instead proceeded to have carnal knowledge with Nicole is constitutive of rape.

In fine, the OSG posits that the trial court did not err in convicting the accused-appellant.

Lance Corporal Daniel Smith was charged with Rape for allegedly having sexual intercourse with one Nicole through “force, threat, and intimidation, with abuse of superior strength and taking advantage of intoxication of the victim” x x x.

Rape under Art. 266-A of the Revised Penal Code is committed by a man who shall have carnal knowledge of a woman under any of the following circumstances:

1. thru force, threat, or intimidation;
2. xxx
3. xxx
4. xxx

It shall be punished by *reclusion perpetua*.

In support of her complaint for Rape, Nicole told the Court, in between sobs, that in the evening of Nov. 1, 2005, she and her step-sister AA, after a dinner of pizza and playing blackjack and roulette at the casino, went with Chris Mills and Carlos Ocasio to the Neptune Club. Mills and Ocasio were the two American Navy men whom the sisters met in Zamboanga, became their friends, and who invited them for a short vacation in Subic. The two Navy men also provided for their hotel accommodations at the Grand Leisure Hotel and other necessities including gambling bets in casinos during their Subic holiday. At the club, Mills treated them to alcoholic drinks like Sprite Vodka and B-52, which Nicole drank “bottoms-up”. Dizzy but captured by the mood of the moment, so to speak, when offered a glass of Singaporean Sling, she drank it as well as the B-53 and capped it by guzzling half a pitcher of Bullfrog, explaining to herself that it was the reason why they were there in Subic --- “to enjoy”. She was in that mood while dancing when a foreigner pulled her hand to dance, and sensing the intrusion, she looked at Mills,

asking if it was alright. When Mills said it was okay, she started to dance with the foreigner, and dance they did for about 15 minutes. Amid the noise on the dance floor, she thought she heard him say his name was "Gerald" or "Gerand". It was getting hot inside that he asked her to go outside for fresh air. Hesitant at first, she nonetheless acceded as he was insistent. She related that the next time she became aware, she was already lying on her back with the man, who was now identified as Smith, on top of her, kissing her while she was helplessly crying. Dizzy and drunk, and with his weight upon her, she pushed him with her hands even as he kept kissing her on the lips, neck and her breasts. She forced upon herself to stay awake, to ward off Smith's advances. Even so when she felt she had recovered, and was fixing herself, she noticed her pants and discovered it was "baliktad"--- with the zipper at the back. Momentarily, she could not remember anything again. Her body ached all over especially the vagina area, and it was at that instant that it dawned on her that Smith must have raped her. Thereafter, she was investigated and examined at the James Gordon Hospital. Then she filed a complaint for Rape against the American marine.

AA, her step-sister, affirmed Nicole's story that they were at the Neptune Club that night of November 1, 2006; that they drank several alcoholic beverages, including Vodka Sprite, Singaporean Sling, B-53 and B-53, and Bullfrog, which Nicole drank half a pitcher. They were both dizzy but kept on dancing with Mills until his buddy Garcia got into an argument with a shore patrol and had to leave. Meanwhile, she noticed Nicole dizzy, "pasuray-suray", walking about but she did not mind her. She saw Nicole dance with a foreigner, whom she later identified as Smith, continuously for about fifteen minutes. Then she asked Nicole to go with her back to

the hotel as Mills had already left. She was holding Nicole's hand while walking along the pathway outside the club, but because she was walking fast, and Nicole was walking slowly and could not catch up, she lagged behind. After walking for about fifteen minutes, she saw Mills still arguing with the shore patrol, but Nicole was nowhere. Eventually when they found her later, she was in a state of shock, and was crying.

Nicole was examined by Medico Legal Officer Dr. Rolando Ortiz who found several contusions in her arms and left ankle as well as contusions on both sides of her labia minora consistent, he said, with sexual assault because the labia minora was not open hence, the difficulty of insertion of the penis. He added however, that it could also happen in consensual sex and could have been inflicted by finger grabs.

Dr. Fortun, one of two forensic pathologists in the Philippines sustained the findings of Dr. Ortiz but likewise admitted on cross-examination that injury in the vagina could also occur during consensual sex if the woman is not yet aroused, and her vagina is not lubricated, particularly when the space where the intercourse occurred is cramped like a Starex van, and the woman not being able to position her pelvis for entry of the penis without pain.

Dr. Kenneth Go, a toxicology expert testified on Nicole's degree of intoxication, based his opinion only on the testimonies on record and AA's account and said he did not perform a blood test which was a more reliable test of a person's intoxication adding that factors like urinating, sweating or dancing decrease the alcohol in the body.

Conversely, accused Daniel Smith vehemently rejected allegations he forced himself on Nicole insisting that what happened

between them was consensual sex which they both willed and enjoyed, albeit interrupted. What changed her mood he said was when a marine companion of his, imprudently told her, "Get out of here, you bitch" or something to that effect, which suddenly enraged Nicole.

Dr. Teresita Sanchez testified for the defense and opined among others that if a woman is dead drunk, hence, uncooperative, her legs would be heavy like one under anesthesia and to penetrate her, one has to use force to open up her legs and the usual injuries due to forcible separation of a woman's leg, in rape or attempted rape, would be sustained in the inner thighs or the inner legs. There was no such findings in Nicole's case.

The appeal is meritorious.

In the prosecution of any offense it is fundamental that the prosecution must prove its case beyond reasonable doubt and must not rely on the weakness of the evidence of the defense (*People vs. Angel Tubales*, G.R. No. 175692, October 29, 2008).

Every person accused has the right to be presumed innocent until the contrary is proven beyond reasonable doubt. The presumption of innocence stands as a fundamental principle of both constitutional and criminal law. (Section 14(2), Article III, 1987 Constitution; Section 1(a), Rule 115, Rules of Court). Thus, the prosecution has the burden of proving every single fact establishing guilt (*People v. Joven*, G.R. No. L-36022, 22 May 1975, 64 SCRA 126). Every vestige of doubt having a rational basis must be removed (*People vs. Capilitan*, G.R. No. 73382, 15 February 1990, 182 SCRA 313). The defense of the accused even if weak, is no reason to convict (*People vs. Ortiz*, G.R. No. 111713, 27 January 1997, 266 SCRA 641). Within this framework, the prosecution must prove

its case beyond any hint of uncertainty. The defense need not even speak at all. The presumption of innocence is enough: It is more than sufficient.

In rape cases, the following principles have been formulated to guide the courts in the decision of these cases: (1) it is difficult to prove rape, but even more difficult for the person accused, though innocent, to disprove it; (2) in view of the intrinsic nature of the crime of rape, where only two persons are usually involved, the testimony of the complainant is scrutinized with extreme caution; and (3) the evidence of prosecution stands or falls on its own merits and cannot be allowed to draw strength from the weakness of the defense. (People vs. Wilfredo D. Matugas, G.R. Nos. 139698-726, February 20, 2002)

In a prosecution for Rape, the credibility of the private complainant becomes the single, most important issue considering that her testimony alone "if credible, natural, convincing, and consistent with human nature and the normal course of things" is sufficient for conviction. (PP vs. Regala G.R. No. 140995 August 30, 2001 citing the case of People vs. Velasquez G.R. No. 137383-84 November 23, 2000)

Corollary to this rule is the exhortation that findings of fact of the trial court, especially on the credibility of the witness are not to be disturbed on appeal as the trial court is in the best position to properly evaluate testimonial evidences because of their unique opportunity to directly observe the witness' demeanor, conduct, deportment, and manner of testifying. This is eloquently enunciated in the case of "People of the Philippines vs. Oscar De Guzman" G.R. No. 76742 August 7, 1990, where the Supreme Court said:

“The record will not reveal those tell-tale signs that will confirm the truth or expose the contrivance, like the angry flush of an insisted assertion, or the sudden pallor of a discovered lie, or the tremulous mutter of a reluctant answer, or the forthright tone of a ready reply. The record will not show if the eyes have darted in evasion, or looked down in confession, or gazed steadily with a serenity that has nothing to distort or conceal. The record will not show if tears were shed in anger, or in shame, or in remembered pain, or in feigned innocence. Only the judge trying the case can see all these and on the basis of his observations arrive at an informed and reasoned verdict.” x x x

But then, this is not without exception. When there appears on record that the trial court has overlooked, ignored, or disregarded some fact or circumstance of weight or significance that, if considered, would alter the results, this Court may disregard the findings of the trial court and make its own conclusions. (*People vs. Rogelio Milan G.R. No. 125086 July 28, 1999*)

While true indeed, that we did not have the unique advantage of the trial court in observing and monitoring within hearing and sight the demeanor and conduct of the witnesses as they testified in court, still, a careful reading, grasp and comprehension of the testimonies of the witnesses, and particularly that of the private complainant's, through the impersonal and cold pages of the transcripts, could point to serious discrepancies and inconsistencies that leap out from the records, that precisely contradict and argue against the reliability of her narration. Facts and circumstances which were overlooked --- such as the serious gaps in her testimony, the uniform answers that unveiled the studied reactions to questions, and the overall actuations that are contrary to common experience, human nature and the natural course of things, which

are the accepted standards of what is true: all these are best perceived and understood in truthfulness and veracity of the written word.

We consider the following: This Court finds it deceptively posturing Nicole's portrayal of herself as a demure provinciana lass, going on a first-time vacation to Subic and expressed her disgust to see an American guy with a Filipina girl, seated on his lap, cavorting in the bar, and another couple kissing amid those people around in the club. We find that she meticulously laid this out because that was what she did later that night in Neptune Club. This was not rebutted by the prosecution. On hindsight, we see this protestation of decency as a protective shield against her own indecorous behavior when she did exactly that as testified by Smith himself in a straight-forward manner and affirmed by Carpentier and Silkwood. Her going to Subic from far away Zamboanga with her step-sister, allowing two American friends whom they met only about three months earlier, and accepting their offer of free hotel accommodations and other things as well, in her words --- "to enjoy" --- do not coincide with the demure provinciana lass we are talking about. She testified that she drank a shot of Vodka Sprite and B-52, bottoms up, which made her feel giddy and yet still took Singaporean Sling, B-53, Long Island Iced Tea, and to top it all, half a pitcher of Bullfrog, making her really drunk but in the same breath, tells the court that she danced with a man whom she thought was "Gerard" but was later identified as Smith, through several disco beats, lasting fifteen minutes or so. There was no testimony that she stumbled or fell out of her alleged drunken state. The curious thing is that, she danced non-stop to the urgent beat of rock and hip-hop

music in an inebriated state for fifteen minutes without stumbling clumsily on the floor.

She told the court that after dancing with Smith for fifteen minutes or so, he asked her to go out for some fresh air, and that was the last thing she could remember. In her words, "when I recovered consciousness, he was already on top of me, kissing me all over even as I was resisting his advances." This gap in her narration with the malingering explanation that she was dizzy and could not remember is dubiously fanciful for being what the court perceptively describes as "contrary to ordinary experience of man".

Her story, by the way, that she went out of the club with Smith to get some fresh air gives no sense to her step-sister's testimony that when Nicole passed by her inside the club in drunken stupor, she grabbed her hand and told her they better be going as Mills had already left to settle some problems of his buddy. They walked through the pathway, AA walking briskly because she was not feeling well herself and wanted to be back at the hotel immediately, while Nicole was walking slowly and lagging behind, and by the time she saw Mills arguing with the shore patrol, she looked back and realized Nicole was nowhere.

Nicole tells us that when she realized that Smith was on top of her, kissing her lips, neck, and breasts, she tried to push him away but was helpless because of Smith's weight. As she dramatized her ordeal, in-between sobs, the court repeatedly asked if she wanted to exclude the public but she refused and preferred to testify at a full-packed gallery and yet, when asked by the court how Smith kissed her breasts, she coyly answered, "I am ashamed." These vacillating behaviors infuse ambivalent messages that surely inflict damage to the trustworthiness of her testimony.

At another instance where Smith was allegedly on top of her, on the narrow back seat of a moving Starex van, she said she was fighting him off by pushing him away. Instinctively, she could have also cried out to the driver, a Filipino, for help. Resistance by words of mouth does not suffice to establish that she indeed did not give her consent to the sexual intercourse, but it must be by an act done in good faith and not through a mere pretense or token resistance under the circumstance. A woman has means to protect herself: she is equipped to interpose effective obstacles, by means of her hands and nails, her limbs or even her pelvic muscles. Again, her claim that she was unconscious rings hollow, delusive and untrue.

The degree of Nicole's supposed intoxication was not clearly established. From the narration, after draining all those drinks of Sprite Vodka, B-52's, Singaporean Sling, B-53, and half a pitcher of Bullfrog, although feeling dizzy, she danced with Smith through all four songs for about 15 minutes. She did not drop on the floor nor did she vomit. This was affirmed by AA, who saw Nicole dance with Smith three times and walked around "pasuray-suray" until she asked Nicole to go back to the hotel, and hand-in-hand, they walked along the pathway. Mills was likewise positive that Nicole, though possibly inebriated, was in control of herself because he saw her dancing continuously on the dance floor without any hint of imbalance or skewness; and that she never complained to him that she was intoxicated. He ordered Bullfrog because it does not have strong alcohol taste, but more of pineapple sweetness.

Dr. Kenneth Go, an expert on Toxicology, admitted he had no opportunity to perform a blood test on Nicole which could have provided a more accurate basis for determining her intoxication. He

likewise admitted that he based his expert opinion only on the records submitted to him and from the narration of AA.

Also, the bartender's elaborate description of the drinks he mixed does not help any, for in the first place, he did not serve Nicole--- he did not tell the court how much ice he put into the drinks which melts into water and consequently lessens the effects of alcohol.

When a woman is drunk, she can hardly rise, much more stand up and dance, or she would just drop. This is a common experience among Filipino girls.

The trial court, on the matter of the intoxication of Nicole relied on the testimonies of Tomas Corpus, Jr. who observed Nicole for about thirty minutes, whom he said was drunk, walking in a swaying manner (*pasuray-suray*), holding on to tables to prevent herself from falling, while roaming around the function area, and when she passed by, almost bumping him, he smelled her breath, reeking of liquor; Gerald Muyot also observed that Smith, when he went out of the Neptune Club, carrying complainant "*bakaybakay*", whom he thought was drunk, dizzy, and almost unconscious and her head was dangling "*nakalungayngay*". After two hours, he saw her again coming out from a police car "*pasuray-suray*", staggering; AA also testified that after taking all those drinks, Nicole was drunk and walked "*pasuray-suray*".

These are mere observations of the witnesses but they do not prove the degree of Nicole's intoxication. Even one who drinks a very small amount of wine smells of liquor from up close, but that does not mean he is intoxicated.

We also noted curiously how the witnesses uniformly used the word "*pasuray-suray*" and yet a careful reading of their earlier

statements, given to investigators do not show mention of the word. The uniform description gives the impression that the testimonies were rehearsed.

The trial court's decision in foot note number 28 cited *People vs. Querido* G.R. No. 95319, February 7, 1994, 229 SCRA 745 "N.B. IN THIS CASE, ALLEGATION IS FORCE AND INTIMIDATION YET EVIDENCE ON THE INTOXICATION OF THE VICTIM WAS ALLOWED." We visited and carefully pored over the said case, and nowhere was intoxication ever mentioned. It ruled that absence of external signs or physical injuries, does not negate the commission of the crime of rape.

Admittedly, there were contusions on the labia minora which according to Dr. Rolando Marfil Ortiz II, who was presented as a medico legal officer and not as an expert, nonetheless, said that maybe there was forcible entry because the labia minora was not opened or maybe the thighs were closed, hence the difficulty of inserting a penis, and because of lack of lubrication, this could easily produce contusion. On cross-examination however, he admitted it was also probable that even in consensual sex, contusions could be inflicted by finger grabs, as in Nicole's case.

As to the contusion on the forearms, left and right arms --- these are not necessarily related to a sexual assault as the doctor said. They could have been caused by force, or she could have bumped herself or it could be secondary to application of external pressure. It must be recalled that she was allegedly carried by the two marines and placed at the curb in a not-so-tender manner, later, she was breaking loose from the grip of the bike patrol as he and companions tried to subdue her and, in fact, Paule suffered an injury on the lips in the process.

Dr. Raquel Fortun, among others, opined that the contusions (1-5) as stated in the medico legal report, could have been caused by application of blunt force or fingertip pressure. As to contusion on the labia minora, it indicated injury like a forcible penetration of the vagina by an erect penis. On cross-examination, she agrees some women, even if sexually aroused, may not be fully lubricated, such that an erect penis inside a condom can cause laceration or swelling.

In this regard, it must be remembered that while an expert may be permitted to express his opinion, or even his belief, he cannot give his opinion upon the precise or ultimate fact in issue before the court, which must be determined by it. In other words, while a court is entitled to the aid of experts in determining the existence or non-existence of fact, not within common knowledge, an expert witness must not take the place of the court and declare his belief as to an ultimate fact.

The expert is called only as a witness and has no standing or capacity in court different from that of the ordinary witness; it is clearly not within his province to act as judge. Hence, a question requiring a statement of his opinion should be so framed as not to call upon him to determine a controverted issue of fact, or to pass upon the preponderance of testimony; otherwise, the question invites him to usurp the function of the court and decide upon the credibility of the witnesses and to weigh the evidence. (20 Am Jur. 653-654; The Revised Rules of Court, Vol. VII {Evidence} by Vicente J. Francisco and Ricardo J. Francisco, 1997 edition, page 656-657.)

After all the above-mentioned facts and circumstances which were ignored and overlooked by the trial court, but which when considered could alter the result, we find that there is more to the

exception than to the rule “that conclusions and findings of fact should not be disturbed unless for strong and cogent reason.”

“Under the criminal justice system in this country, the overriding consideration is not whether the court doubts the innocence of the accused but whether it entertains a reasonable doubt as to his guilt.” (People vs. Ninoy Malbog @ Saturnino Malbog, Madeo Viernes, and Salvador Bambilla G.R. No. 106634 October 12, 2000)

As in this case, a careful and judicious perusal of the evidence on record does not convince the prudent mind about the moral certainty of the guilt of the accused, hence, we must acquit. To the point of triteness, it has been repeatedly stressed that in this jurisdiction, accusation is not synonymous with guilt and that this has still to be proved beyond reasonable doubt. That strict standard is not deemed satisfied simply because the accused has submitted an implausible defense. (Capilitan, *supra*)

What we see was the unfolding of a spontaneous, unplanned romantic episode with both parties carried away by their passions and stirred up by the urgency of the moment caused probably by alcoholic drinks they took, only to be rudely interrupted when the van suddenly stopped to pick up some passengers.

Suddenly the moment of parting came and the marines had to rush to the ship. In that situation, reality dawned on Nicole – what her audacity and reckless abandon, flirting with Smith and leading him on, brought upon her. That must have been shattering, but added to this was the mocking moments she heard from inside the van: “leave that bitch!” or words to that effect – which really broke her as she shouted back in denial: “I am not a bitch!” Tearfully, bewildered, alone, and confused, in a strange place, dumped in a

curb literally with her pants down, she remembered her mother and what she would say. She remembered too, her boyfriend Brian. She had to hit back in the only way she could – to salvage, at least, a vestige of her self-esteem.

One thing was certain, the marines had a curfew at 12 midnight or they would be in trouble, such that Carpentier was rounding them up, ordering them to hurry. Would it be normal for them to get involved with an unconscious woman as claimed, and face the consequences?

And by the way, the Information charges the accused with rape by means of “force, threat, and intimidation” and “taking advantage of the intoxication of the victim”.

But no evidence was introduced to show force, threat and intimidation applied by the accused upon Nicole even as prosecution vainly tried to highlight her supposed intoxication and alleged unconsciousness at the time of the sexual act. But it must be stressed that the Information did not allege “deprived of reason or otherwise unconscious.” Hence, evidence as to said means of committing rape cannot be considered and which indeed was objected to at every step during the trial.

As held in the case of *People vs. Gavina* (G.R. No. 143237 October 28, 2002)

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 Art. 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 Art. 266-A (1) (b) of the said code. The element of unconsciousness on the victims 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" (see Rule of Court, Rule 110 sections 8 and 9)

Indeed we go back to the fundamental precept that an accused must be informed of the nature and cause of the accusation against him to allow the accused to prepare fully for his defense to prevent surprises during the trial. (People vs. Ibarrientos (G.R. No. 148063-64 June 17, 2004)

Again, we cite the case of People vs. Mendigurin (G.R. No. 127128 august 15, 2003) which is enlightening on this point.

As the prosecution failed to present evidence to substantiated 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 p[roving that complainant was violated while in a state of unconsciousness, as provided under second paragraph of Art. 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 him. Convicting him of a ground not alleged while he is concentrating his defense against the ground alleged would plainly be unfair and under-handed.

Ultimately, it must be pointed out that in resolving the case, we disregard the alleged recantation of Nicole submitted on March

8, 2009. Nor did we open the sealed draft Decision penned by retired Justice Agustin S. Dizon which was attached to the records.

WHEREFORE, on reasonable ground, the accused Lance Corporal Daniel Smith is hereby **ACQUITTED** of the crime of Rape as alleged in the information. He is ordered released immediately unless held for other lawful cause.

SO ORDERED.

ORIGINAL SIGNED
MONINA AREVALO-ZENAROSA
Associate Justice

WE CONCUR:

ORIGINAL SIGNED
REMEDIOS S. FERNANDO
Chairman, Special Eleventh Division

ORIGINAL SIGNED
MYRNA DIMARANAN-VIDAL
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby certified that the conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ORIGINAL SIGNED
REMEDIOS SALAZAR- FERNANDO
Chairman, Special Eleventh Division