Republic of the Philippines
Supreme Court
Manila

EN BANC

MUSTAPHA DIMAKUTA y MARUHOM,		**G.R. No. 206513**
Petitioner,		**Present:**
		SERENO, *C.J.*, CARPIO,* VELASCO, JR., LEONARDO-DE CASTRO, BRION, PERALTA, BERSAMIN, DEL CASTILLO,* VILLARAMA, JR., PEREZ,* MENDOZA, REYES, PERLAS-BERNABE, LEONEN, and JARDELEZA,** *JJ.*
- *versus* -		
		Promulgated:
PEOPLE OF THE PHILIPPINES,		
Respondent.		October 20, 2015
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DECISION

PERALTA, *J.*:

The Court is now faced with one of the predicaments I discussed in my Dissenting and Concurring Opinion in *Colinares v. People*.[1] The question regarding the application of the Probation Law is again inescapably

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* On official leave.
** No part.
1 678 Phil. 482 (2011).

intertwined with the present petition. Consequently, I must reiterate my assertions and arguments in *Colinares* to the case at bar.

In the present controversy, petitioner Mustapha Dimakuta *y* Maruhom *alias* Boyet was indicted for Violation of Section 5 Paragraph (b), Article III of Republic Act (R.A.) No. 7610 or the *Special Protection of Children Against Abuse, Exploitation and Discriminatory Act*. The Information reads:

> That on or about the 24th day of September 2005, in the City of Las Piñas, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd designs, did then and there willfully, unlawfully and feloniously commit a lascivious conduct upon the person of one AAA, who was then a sixteen (16) year old minor, by then and there embracing her, touching her breast and private part against her will and without her consent and the act complained of is prejudicial to the physical and psychological development of the complainant.[2]

After trial, the RTC promulgated its Decision[3] which convicted petitioner of the crime charged and sentenced him to suffer an indeterminate penalty of imprisonment ranging from ten (10) years of *prision mayor*, as minimum, to seventeen (17) years, four (4) months and one (1) day of *reclusion temporal*, as maximum, with the accessory penalty of perpetual absolute disqualification. In addition, he was directed to pay a fine of ₱20,000.00, civil indemnity of ₱25,000.00, and moral damages of ₱25,000.00.[4]

Feeling aggrieved, petitioner elevated the case to the Court of Appeals (*CA*) arguing, among other things, that even assuming he committed the acts imputed, still there is no evidence showing that the same were done without the victim's consent or through force, duress, intimidation or violence upon her. Surprisingly, when asked to comment on the appeal, the Office of the Solicitor General (*OSG*), relying heavily on *People v. Abello*,[5] opined that petitioner should have been convicted only of Acts of Lasciviousness under Article 336 of the Revised Penal Code (*RPC*) in view of the prosecution's failure to establish that the lascivious acts were attended by force or coercion because the victim was asleep at the time the alleged acts were committed.

On June 28, 2012, the CA rendered a Decision[6] adopting the recommendation of the OSG. In modifying the RTC Decision, petitioner was found guilty of Acts of Lasciviousness under Article 336 of the RPC

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2 *Rollo*, p. 33.
3 Penned by Presiding Judge Joselito dj. Vibandor (*Id*. at 33-43).
4 *Id*. at 42-43.
5 601 Phil. 373 (2009).
6 Penned by Associate Justice Myra V. Garcia-Fernandez, with Associate Justices Vicente S.E. Veloso and Stephen C. Cruz concurring (*Rollo*, pp. 117-130).

and was sentenced to suffer the indeterminate penalty of six (6) months of *arresto mayor*, as minimum, to four (4) years and two (2) months of *prision correccional*, as maximum. Likewise, he was ordered to pay ₱20,000.00 as civil indemnity and ₱30,000.00 as moral damages.

Petitioner received a copy of CA Decision on July 6, 2012.[7] Instead of further appealing the case, he filed on July 23, 2012 before the CA a manifestation with motion to allow him to apply for probation upon remand of the case to the RTC.[8] Petitioner invoked the case of *Colinares v. People*[9] which allowed petitioner therein to apply for probation after his sentence was later reduced on appeal by the Supreme Court.

The CA issued a Resolution on September 3, 2012 denying petitioner's manifestation with motion.[10] It was ruled that *Colinares* is inapplicable since petitioner therein raised as sole issue the correctness of the penalty imposed and claimed that the evidence presented warranted only a conviction for the lesser offense. Instead, the appellate court viewed as appropriate the case of *Lagrosa v. People*,[11] wherein the application for probation was denied because petitioners therein put in issue on appeal the merits of their conviction and did not simply assail the propriety of the penalties imposed.

Petitioner filed a motion for reconsideration,[12] but it was denied in a Resolution[13] dated March 13, 2013; hence, this petition.

The petition should be denied.

At the outset, tracing the evolution of the present Probation Law is warranted in order to better understand and apply the wisdom of its framers to cases invoking its application.

In this jurisdiction, the concept of probation was introduced during the American colonial period.[14] For juvenile delinquents, Act No. 3203[15] was enacted on December 3, 1924. It was later amended by Act Nos. 3309,[16]

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7 *Id*. at 132.
8 *Id*. at 132-144.
9 678 Phil. 482 (2011).
10 *Rollo*, pp. 26-29.
11 453 Phil. 270 (2003).
12 *Rollo*, pp. 146-155.
13 *Id*. at 31.
14 1898-1945.
15 AN ACT RELATING TO THE CARE AND CUSTODY OF NEGLECTED AND DELINQUENT CHILDREN; PROVIDING PROBATION OFFICERS THEREFOR; IMPOSING PENALTIES FOR VIOLATIONS OF ITS PROVISIONS AND FOR OTHER PURPOSES.
16 Effective on December 2, 1926.

3559,[17] and 3725.[18] As to offenders who are eighteen years old and above, Act No. 4221[19] was passed by the legislature and took effect on August 7, 1935. Said Act allowed defendants who are convicted and sentenced by a Court of First Instance or by the Supreme Court on appeal, except those who are convicted of offenses enumerated in Section 8 thereof,[20] to be placed on probation upon application after the sentence has become final and before its service has begun.[21] However, We declared in *People v. Vera* [22] that Act No. 4221 is unconstitutional and void as it constitutes an improper and unlawful delegation of legislative authority to the provincial boards.

During the martial law period, then President Ferdinand E. Marcos issued Presidential Decree (P.D.) No. 968[23] on July 24, 1976. Originally, P.D. No. 968 allowed the filing of an application for probation at any time after the defendant had been convicted and sentenced. Section 4 of which provides:

> **SEC. 4.** *Grant of Probation*. – Subject to the provisions of this Decree, the court may, **after it shall have convicted and sentenced a defendant and upon application <u>at any time</u> of said defendant**, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.
>
> Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. An order granting or denying probation shall not be appealable.[24]

Later, the filing of an application for probation pending appeal was still allowed when Section 4 of P.D. No. 968 was amended by P.D. No.

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17 Effective on November 26, 1929.

18 Effective on November 21, 1930.

19 AN ACT ESTABLISHING PROBATION FOR PERSONS, EIGHTEEN YEARS OF AGE OR ABOVE, CONVICTED OF CERTAIN CRIMES BY THE COURTS OF THE PHILIPPINE ISLANDS; PROVIDING PROBATION OFFICERS THEREFOR; AND FOR OTHER PURPOSES, Dated August 7, 1935.

20 SEC. 8. This Act shall not apply to persons convicted of offenses punishable by death or life imprisonment; to those convicted of homicide, treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, sedition or espionage; to those convicted of piracy, brigandage, arson, or robbery in band; to those convicted of robbery with violence on persons when it is found that they displayed a deadly weapon; to those convicted of corruption of minors; to those who are habitual delinquents; to those who have been once on probation; and to those already-sentenced by final judgment at the time of the approval of this Act.

21 Sec. 1.

22 65 Phil. 56 (1937).

23 ESTABLISHING A PROBATION SYSTEM, APPROPRIATING FUNDS THEREFOR AND OTHER PURPOSES.

24 Emphasis supplied.

1257[25] on December 1, 1977 by providing that such application may be made after the defendant had been convicted and sentenced but before he begins to serve his sentence. Thus:

> **SEC. 4.** *Grant of Probation.* – Subject to the provisions of this Decree, the court may, **after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application**, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.
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> The prosecuting officer concerned shall be notified by the court of the filing of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.
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> Probation may be granted whether the sentence imposes a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case, however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.
>
> An order granting or denying probation shall not be appealable.[26]

On October 5, 1985, Section 4 was subsequently amended by P.D. No. 1990.[27] Henceforth, the policy has been to allow convicted and sentenced defendant to apply for probation within the 15-day period for perfecting an appeal. As modified, Section 4 of the Probation Law now reads:

> **SEC. 4.** *Grant of Probation.* – Subject to the provisions of this Decree, the trial court may, **after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal**, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; *Provided*, that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.
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> Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed

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[25] AMENDING CERTAIN SECTIONS OF PRESIDENTIAL DECREE NUMBERED NINE HUNDRED AND SIXTY-EIGHT, OTHERWISE KNOWN AS THE PROBATION LAW OF 1976, Effective on December 1, 1977.

[26] Emphasis supplied.

[27] AMENDING PRESIDENTIAL DECREE NO. 968, OTHERWISE KNOWN AS THE PROBATION LAW OF 1976, Issued on October 5, 1985.

> with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.
>
> An order granting or denying probation shall not be appealable.[28]

The reason for the disallowance may be inferred from the preamble of P.D. No. 1990, thus:

> **WHEREAS,** it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;
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> **WHEREAS,** the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;
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> **WHEREAS,** the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;
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> **WHEREAS,** probation was not intended as an escape hatch and should not be used to obstruct and delay the administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated;
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> **WHEREAS,** it becomes imperative to remedy the problems abovementioned confronting our probation system[.]

Observing the developments in our Probation Law, the Court settled in *Llamado v. Court of Appeals*:[29]

> Examination of Section 4, after its amendment by P.D. No. 1257, reveals that it had established a prolonged but definite period during which an application for probation may be granted by the trial court. That period was: "After [the trial court] shall have convicted and sentenced a defendant *but before he begins to serve his sentence*." Clearly, the cut-off time – commencement of service of sentence – takes place *not only after an appeal has been taken* from the sentence of conviction, but even *after judgment has been rendered by the appellate court* and *after judgment has become final*. Indeed, in this last situation, Section 4, as amended by P.D. No. 1257 provides that "the application [for probation] shall be acted upon by the trial court *on the basis of the judgment of the appellate court*"; for the appellate court might have increased or reduced the original penalty imposed by the trial court. x x x

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28 Emphasis supplied

29 256 Phil. 328 (1989).

x x x x

In sharp contrast with Section 4 as amended by PD No. 1257, in its present form, Section 4 establishes a much narrower period during which an application for probation may be filed with the trial court: "after [the trial court] shall have convicted and sentenced a defendant and – *within the period for perfecting an appeal* –." As if to provide emphasis, a new proviso was appended to the first paragraph of Section 4 that expressly *prohibits* the grant of an application for probation "*if the defendant has perfected an appeal from the judgment of conviction*." It is worthy of note too that Section 4 in its present form has *dropped* the phrase which said that the filing of an application for probation means "the automatic *withdrawal* of a *pending appeal*." The deletion is quite logical since an application for probation can no longer be filed once an appeal is perfected; there can, therefore, be no *pending* appeal that would have to be withdrawn.

x x x x

We find ourselves unable to accept the eloquently stated arguments of petitioner's counsel and the dissenting opinion. We are unable to persuade ourselves that Section 4 as it now stands, in authorizing the trial court to grant probation "upon application by [the] defendant *within the period for perfecting an appeal*" and in reiterating in the proviso that

"*no application* for probation *shall be* entertained or *granted if the defendant has perfected an appeal* from the judgment of conviction."

did not really mean to refer to the fifteen-day period established, as indicated above, by B.P. Blg. 129, the Interim Rules and Guidelines Implementing B.P. Blg. 129 and the 1985 Rules on Criminal Procedure, but rather to some vague and undefined time, i.e., "the earliest opportunity" to withdraw the defendant's appeal. The *whereas* clauses invoked by petitioner did not, of course, refer to the fifteen-day period. There was absolutely no reason why they should have so referred to that period for the operative words of Section 4 already do refer, in our view, to such fifteen-day period. *Whereas* clauses do not form part of a statute, strictly speaking; they are not part of the *operative language* of the statute. Nonetheless, *whereas* clauses may be helpful to the extent they articulate the *general purpose* or reason underlying a new enactment, in the present case, an enactment which drastically but clearly changed the substantive content of Section 4 existing before the promulgation of P.D. No. 1990. *Whereas* clauses, however, cannot control the *specific terms* of the statute; in the instant case, the *whereas* clauses of P.D. No. 1990 do *not* purport to control or modify the terms of Section 4 as amended. Upon the other hand, the term "period for perfecting an appeal" used in Section 4 may be seen to furnish specification for the loose language "first opportunity" employed in the fourth whereas clause. "Perfection of an appeal" is, of course, a term of art but it is a term of art widely understood by lawyers and judges and Section 4 of the Probation Law addresses itself essentially to judges and lawyers. "Perfecting an appeal" has no sensible meaning apart from the meaning given to those words in our procedural law and so

> the law-making agency could only have intended to refer to the meaning of those words in the context of procedural law.[30]

In *Sable v. People, et al.*,[31] this Court stated that Section 4 of the Probation Law was amended precisely to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid.[32] The Probation Law "expressly requires that an accused must not have appealed his conviction before he can avail himself of probation. This outlaws the element of speculation on the part of the accused – to wager on the result of his appeal – that when his conviction is finally affirmed on appeal, the moment of truth well nigh at hand and the service of his sentence inevitable, he now applies for probation as an 'escape hatch,' thus rendering nugatory the appellate court's affirmance of his conviction."[33]

Verily, Section 4 of the Probation Law provides that the application for probation must be filed with the trial court within the 15-day period for perfecting an appeal. The need to file it within such period is intended to encourage offenders, who are willing to be reformed and rehabilitated, to avail themselves of probation at the first opportunity.[34] If the application for probation is filed beyond the 15-day period, then the judgment becomes final and executory and the lower court can no longer act on the application for probation. On the other hand, if a notice of appeal is perfected, the trial court that rendered the judgment of conviction is divested of any jurisdiction to act on the case, except the execution of the judgment when it has become final and executory.

In view of the latest amendment to Section 4 of the Probation Law that "*no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction*," prevailing jurisprudence[35] treats appeal and probation as mutually exclusive remedies because the law is unmistakable about it.[36] Indeed, the law is very clear and a contrary interpretation would counter its envisioned mandate. Courts have no authority to invoke "liberal interpretation" or "the spirit of the law" where the words of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation.[37] To be sure, the remedy of convicted felons who want to avail of the benefits of

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30 *Llamado v. Court of Appeals*, *supra*, at 335-339.
31 602 Phil. 989 (2009).
32 *Sable v. People, et al.*, *supra*, at 997.
33 *Id*.
34 *Id.* at 996.
35 *Sable v. People, et al.*, *supra* note 31; *Francisco v. Court of Appeals*, 313 Phil. 241 (1995); and *Llamado v. Court of Appeals*, supra note 29.
36 *Sable v. People, et al*, *supra* note 31.
37 *Llamado v. Court of Appeals*, *supra* note 29, at 339-340.

probation even after the remedy of an appeal is to go to the Congress and ask for the amendment of the law. To surmise a converse construal of the provision would be dangerously encroaching on the power of the legislature to enact laws and is tantamount to judicial legislation.

With due respect, however, to the *ponente* and the majority opinion in *Colinares*,[38] the application of the Probation Law in the said case deserves a second hard look so as to correct the mistake in the application of the law in that particular case and in similar cases which will be filed before the courts and inevitably elevated to Us like this petition.

To refresh, *Colinares* concluded that since the trial court imposed a penalty beyond what is allowed by the Probation Law, *albeit* erroneously, the accused was deprived of his choice to apply for probation and instead was compelled to appeal the case. The reprehensible practice intended to be avoided by the law was, therefore, not present when he appealed the trial court's decision. Taking into account that the accused argued in his appeal that the evidence presented against him warranted his conviction only for attempted, not frustrated, homicide, the majority of the Court opined that the accused had purposely sought to bring down the impossible penalty in order to allow him to apply for probation.

It was obvious then, as it is now, that the accused in *Colinares* should not have been allowed the benefit of probation. As I have previously stated and insisted upon, probation is not a right granted to a convicted offender; it is a special privilege granted by the State to a penitent qualified offender,[39] who does not possess the disqualifications under Section 9 of P.D. No. 968, as amended.[40] Likewise, the Probation Law is not a penal law for it to be liberally construed to favor the accused.[41]

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[38] The Court En Banc voted 9-6 in favor of *Justice Roberto A. Abad, ponente.*
Corona (then C.J.), Carpio, Velasco, Jr., Leonardo-De Castro, Del Castillo, Perez, Mendoza, and *Reyes, JJ.,* concur.
Brion, J., joining *J.* Peralta's Concurring and Dissenting Opinion.
Peralta, J., Concurring and Dissenting Opinion.
Bersamin, J., joining *J.* Peralta's Concurring and Dissenting Opinion.
Villarama, Jr., Concurring and Dissenting Opinion.
Sereno, J. (now C.J.), joining Justices Peralta and Villarama.
Perlas-Bernabe, J., joining *J.* Villarama.

[39] *Sable v. People, et al., supra* note 31, at 995.

[40] **SEC. 9.** *Disqualified Offenders*. – The benefits of this Decree shall not be extended to those:
a. sentenced to serve a maximum term of imprisonment of more than six years;
b. convicted of subversion or any crime against the national security or the public order;
c. who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
d. who have been once on probation under the provisions of this Decree; and
e. who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.

[41] *Pablo v. Castillo*, 391 Phil. 873, 878 (2000); *Llamado v. Court of Appeals, supra* note 28, at 338.

In the American law paradigm, probation is considered as an act of clemency and grace, not a matter of right.[42] It is a privilege granted by the State, not a right to which a criminal defendant is entitled.[43] In *City of Aberdeen v. Regan*,[44] it was pronounced that:

> The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a *rehabilitative* measure and, as such, is not a matter of *right* but is a matter of grace, privilege, or clemency granted to the *deserving*.

As such, even in the American criminal justice model, probation should be granted only to the deserving or, in our system, only to qualified "penitent offenders" who are willing to be reformed and rehabilitated. Corollarily, in this jurisdiction, the wisdom behind the Probation Law is outlined in its stated purposes, to wit:

> (a) promote the correction and rehabilitation of an offender by providing him with individualized treatment;
> (b) provide an opportunity for the **reformation of a penitent offender** which might be less probable if he were to serve a prison sentence; and
> (c) prevent the commission of offenses.[45]

As I have previously indicated in *Colinares*, if this Court will adopt as jurisprudential doctrine the opinion that an accused may still be allowed to apply for probation even if he has filed a notice of appeal, it must be categorically stated that such appeal must be limited to the following grounds:

> 1. When the appeal is merely intended for the *correction of the penalty imposed* by the lower court, which when corrected would entitle the accused to apply for probation; and
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> 2. When the appeal is merely intended *to review the crime* for which the accused was convicted and that the accused should only be liable to the lesser offense which is necessarily included in the crime for which he was originally convicted and the proper penalty imposable is within the probationable period.

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42 *People v. Anderson*, 50 Cal. 4th 19, 235 P.3d 11 (2010).
43 *Dean v. State*, 57 So.3d 169 (2010)
44 170 Wash. 2d 103, 239 P.3d 1102 (2010). (Emphasis supplied)
45 P.D. No. 968, Sec. 2. (Emphasis supplied)

In both instances, the penalty imposed by the trial court for the crime committed by the accused is more than six years; hence, the sentence disqualifies the accused from applying for probation. The accused should then be allowed to file an appeal under the afore-stated grounds to seek a review of the crime and/or penalty imposed by the trial court. If, on appeal, the appellate court finds it proper to modify the crime and/or the penalty imposed, and the penalty finally imposed is within the probationable period, the accused should still be allowed to apply for probation.

In addition, *before* an appeal is filed based on the grounds enumerated above, the accused should first file a motion for reconsideration of the decision of the trial court anchored on the above-stated grounds and manifest his intent to apply for probation if the motion is granted. The motion for reconsideration will give the trial court an opportunity to review and rectify any errors in its judgment, while the manifestation of the accused will immediately show that he is agreeable to the judgment of conviction and does not intend to appeal from it, but he only seeks a review of the crime and/or penalty imposed, so that in the event that the penalty will be modified within the probationable limit, he will immediately apply for probation. Without such motion for reconsideration, the notice of appeal should be denied outright.

The notice of appeal should contain the following averments:

(1) that an earlier motion for reconsideration was filed but was denied by the trial court;

(2) that the appeal is only for reviewing the penalty imposed by the lower court or the conviction should only be for a lesser crime necessarily included in the crime charged in the information; and

(3) that the accused-appellant is not seeking acquittal of the conviction.

To note, what Section 4 of the Probation Law prohibits is an appeal from the *judgment of conviction*, which involves a review of the merits of the case and the determination of whether the accused is entitled to acquittal. However, under the recommended grounds for appeal which were enumerated earlier, the purpose of the appeal is not to assail the judgment of conviction but to question only the propriety of the sentence, particularly the penalty imposed or the crime for which the accused was convicted, as the accused intends to apply for probation upon correction of the penalty or conviction for the lesser offense. If the CA finds it proper to modify the sentence, and the penalty finally imposed by the appellate court is within the probationable period, or the crime for which the accused is eventually

convicted imposes a probationable penalty, application for probation after the case is remanded to the trial court for execution should be allowed.

It is believed that the recommended grounds for appeal do not contravene Section 4 of the Probation Law, which expressly prohibits only an appeal from the judgment of conviction. In such instances, the ultimate reason of the accused for filing the appeal based on the afore-stated grounds is to determine whether he may avail of probation based on the review by the appellate court of the crime and/or penalty imposed by the trial court. Allowing the afore-stated grounds for appeal would give an accused the opportunity to apply for probation if his ground for appeal is found to be meritorious by the appellate court, thus, serving the purpose of the Probation Law to promote the reformation of a penitent offender outside of prison.

On the other hand, probation should *not* be granted to the accused in the following instances:

> 1. When the accused is convicted by the trial court of a crime *where the penalty imposed is within the probationable period or a fine*, and the accused files a notice of appeal; and
>
> 2. When the accused files a notice of appeal which *puts the merits of his conviction in issue*, *even if* there is an alternative prayer for the correction of the penalty imposed by the trial court or for a conviction to a lesser crime, which is necessarily included in the crime in which he was convicted where the penalty is within the probationable period.

Both instances violate the spirit and letter of the law, as Section 4 of the Probation Law prohibits granting an application for probation if an appeal from the *sentence of conviction* has been perfected by the accused.

In this case, petitioner appealed the trial court's judgment of conviction before the CA alleging that it was error on the part of the RTC to have found him guilty of violating Section 5(b), Article III of R.A. No. 7610. He argued that the RTC should not have given much faith and credence to the testimony of the victim because it was tainted with inconsistencies. Moreover, he went on to assert that even assuming he committed the acts imputed on him, still there was no evidence showing that the lascivious acts were committed without consent or through force, duress, intimidation or violence because the victim at that time was in deep slumber. It is apparent that petitioner anchored his appeal on a claim of innocence and/or lack of sufficient evidence to support his conviction of the offense charged, which is clearly inconsistent with the tenor of the Probation Law

that only qualified penitent offender are allowed to apply for probation. The CA, therefore, did not err in applying the similar case of *Lagrosa v. People*[46] wherein the protestations of petitioners therein did not simply assail the propriety of the penalties imposed but meant a profession of guiltlessness, if not complete innocence.

To be sure, if petitioner intended in the first instance to be entitled to apply for probation he should have admitted his guilt and buttressed his appeal on a claim that the penalty imposed by the RTC was erroneous or that he is only guilty of a lesser offense necessarily included in the crime for which he was originally convicted. Unfortunately for him, he already perfected his appeal and it is late in the day to avail the benefits of probation despite the imposition of the CA of a probationable penalty.

As regards the CA Decision convicting petitioner of the crime of Acts of Lasciviousness under Article 336 of the RPC, such conclusion clearly contravenes the law and existing jurisprudence.

Petitioner was charged and convicted by the trial court with violation of Section 5(b), Article III of R.A. No. 7610 based on the complaint of a sixteen (16)-year-old girl for allegedly molesting her by touching her breast and vagina while she was sleeping. The provision reads:

> **SEC. 5.** *Child Prostitution and Other Sexual Abuse*. – Children, whether male or female, who for money, profit, or any other consideration or **due to the coercion or influence of any adult**, syndicate or group, indulge in sexual intercourse or **lascivious conduct**, are deemed to be children exploited in prostitution and other sexual abuse.
>
> The penalty of *reclusion temporal* in its medium period to *reclusion perpetua* shall be imposed upon the following:
>
> x x x x
>
> (b) Those who commit the act of sexual intercourse or **lascivious conduct** with a child exploited in prostitution or subject to other sexual abuse; *Provided,* That when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: *Provided,* That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be *reclusion temporal* in its medium period; x x x (Emphasis supplied)

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[46] 453 Phil. 270 (2003).

The elements of sexual abuse are as follows:

1. The accused commits the act of sexual intercourse or lascivious conduct.
2. The said act is performed with a child exploited in prostitution or subjected to sexual abuse.
3. The child, whether male or female, is below 18 years of age.[47]

Under Section 5, Article III of R.A. No. 7610, a child is deemed subjected to other sexual abuse when he or she indulges in lascivious conduct under the coercion or influence of any adult.[48] This statutory provision must be distinguished from Acts of Lasciviousness under Articles 336 and 339 of the RPC. As defined in Article 336 of the RPC, Acts of Lasciviousness has the following elements:

(1) That the offender commits any act of lasciviousness or lewdness;
(2) That it is done under any of the following circumstances:
    a. By using force or intimidation; or
    b. When the offended party is deprived of reason or otherwise unconscious; or
    c. When the offended party is under 12 years of age; and
(3) That the offended party is another person of either sex.[49]

Article 339 of the RPC likewise punishes acts of lasciviousness committed with the **consent** of the offended party if done by the same persons and under the same circumstances mentioned in Articles 337 and 338 of the RPC, to wit:

> 1. if committed against a virgin **over twelve years and under eighteen years of age** by any person in public authority, priest, home-servant, domestic, guardian, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman; or
>
> 2. if committed by means of deceit against a woman who is single or a widow of good reputation, **over twelve but under eighteen years of age**.

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[47] *People v. Larin*, 357 Phil. 987, 997 (1998). See also *Imbo v. People*, G.R. No. 197712, April 20, 2015; *People v. Gaduyon*, G.R. No. 181473, November 11, 2013, 709 SCRA 129, 149; *Caballo v. People*, G.R. No. 198732, June 10, 2013, 698 SCRA 227, 238; *Navarrete v. People*, 542 Phil. 496, 510 (2007); and *Amployo v. People*, 496 Phil. 747, 758 (2005).

[48] *Olivarez v. Court of Appeals*, 503 Phil. 421, 432 (2005), citing *People v. Larin*, *supra*, and *Amployo v. People*, *supra*.

[49] *People v. Bonaagua*, G.R. No. 188897, June 6, 2011, 650 SCRA 620, 638; *Flordeliz v. People*, 628 Phil. 124, 140-141 (2010); *Navarrete v. People*, *supra* note 47, at 506; and *Amployo v. People*, *supra* note 47, at 755.

Therefore, if the victim of the lascivious acts or conduct is over 12 years of age and under eighteen (18) years of age, the accused shall be liable for:

> 1. Other acts of lasciviousness under Art. 339 of the RPC, where the victim is a **virgin** and **consents** to the lascivious acts through abuse of confidence or when the victim is **single** or a **widow of good reputation** and consents to the lascivious acts through deceit, or;
>
> 2. Acts of lasciviousness under Art. 336 if the act of lasciviousness is not covered by lascivious conduct as defined in R.A. No. 7610. In case the acts of lasciviousness is covered by lascivious conduct under R.A. No. 7610 and it is done through coercion or influence, which establishes absence or lack of consent, then Art. 336 of the RPC is no longer applicable
>
> 3. Section 5(b), Article III of R.A. No. 7610, where there was no consent on the part of the victim to the lascivious conduct, which was done through the employment of coercion or influence. The offender may likewise be liable for sexual abuse under R.A. No. 7610 if the victim is at least eighteen (18) years and she is unable to fully take care of herself or protect herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.[50]

Article 226-A, paragraph 2 of the RPC, punishes inserting of the penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person if the victim did not consent either it was done through force, threat or intimidation; or when the victim is deprived of reason or is otherwise unconscious; or by means of fraudulent machination or grave abuse of authority as sexual assault as a form of rape. However, in instances where the lascivious conduct is covered by the definition under R.A. No. 7610, where the penalty is *reclusion temporal* medium, and the act is likewise covered by sexual assault under Article 266-A, paragraph 2 of the RPC, which is punishable by *prision mayor*, the offender should be liable for violation of Section 5(b), Article III of R.A. No. 7610, where the law provides for the higher penalty of *reclusion temporal* medium, if the offended party is a child victim. But if the victim is at least eighteen (18) years of age, the offender should be liable under Art. 266-A, par. 2 of the RPC and not R.A. No. 7610, unless the victim is at least eighteen (18) years and she is unable to fully take care of herself or protect herself from abuse, neglect, cruelty, exploitation or discrimination because

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[50] R.A. No. 7610, Sec. 3(a).

of a physical or mental disability or condition, in which case, the offender may still be held liable for sexual abuse under R.A. No. 7610.

There could be no other conclusion, a child is presumed by law to be incapable of giving rational consent to any lascivious act, taking into account the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual and social well-being of the youth, as well as, in harmony with the foremost consideration of the child's best interests in all actions concerning him or her.[51] This is equally consistent with the with the declared policy of the State to **provide special protection to children from all forms of abuse,** neglect, cruelty, **exploitation** and discrimination, and other conditions prejudicial to their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation, and discrimination.[52] Besides, if it was the intention of the framers of the law to make child offenders liable only of Article 266-A of the RPC, which provides for a lower penalty than R.A. No. 7610, the law could have expressly made such statements.

As correctly found by the trial court, all the elements of sexual abuse under Section 5(b), Article III of R.A. No. 7610 are present in the case at bar.

First, petitioner's lewd advances of touching the breasts and vagina of his hapless victim constitute lascivious conduct as defined in Section 32, Article XIII of the Implementing Rules and Regulations (IRR) of R.A. No. 7610:

> [T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.[53]

Second, petitioner clearly has moral ascendancy over the minor victim not just because of his relative seniority but more importantly due to the presumed presence of mutual trust and confidence between them by virtue of an existing employment relationship, AAA being a domestic helper in petitioner's household. Notably, a child is considered as sexually abused

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51 See *Malto v. People*, 560 Phil. 119, 139-142 (2007)

52 R.A. No. 7610, Art. I, Sec. 2.

53 *People v. Larin*, *supra* note 47, at 1005-1006. See also *Imbo v. People*, G.R. No. 197712, April 20, 2015; *People v. Gaduyon*, *supra* note 47, at 148; *Navarrete v. People*, *supra* note 47, at 511; and *Amployo v. People*, *supra* note 47, at 759.

under Section 5(b) of R.A. No. 7610 when he or she is subjected to lascivious conduct under the **coercion or influence** of any adult. Intimidation need not necessarily be irresistible. It is sufficient that some compulsion equivalent to intimidation annuls or subdues the free exercise of the will of the offended party.[54] The law does not require physical violence on the person of the victim; moral coercion or ascendancy is sufficient.[55] On this point, *Caballo v. People*[56] explicated:

> As it is presently worded, Section 5, Article III of RA 7610 provides that **when a child indulges in sexual intercourse or any lascivious conduct due to the coercion or influence of any adult**, the child is deemed to be a ***"child exploited in prostitution and other sexual abuse."*** In this manner, the law is able to act as an effective deterrent to quell all forms of abuse, neglect, cruelty, exploitation and discrimination against children, prejudicial as they are to their development.
>
> In this relation, case law further clarifies that sexual intercourse or lascivious conduct under the coercion or influence of any adult exists when ***there is some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party's free will***. Corollary thereto, Section 2(g) of the Rules on Child Abuse Cases conveys that sexual abuse **involves the element of influence which manifests in a variety of forms**. It is defined as:
>
> > The employment, use, persuasion, inducement, enticement or coercion of a child to engage in, or assist another person to engage in, sexual intercourse or lascivious conduct or the molestation, prostitution, or incest with children.
>
> To note, the term *"influence"* means the "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective." Meanwhile, "coercion" is the "improper use of x x x power to compel another to submit to the wishes of one who wields it."[57]

Finally, the victim is 16 years of age at the time of the commission of the offense. Under Section 3 (a) of R.A. No. 7610, "children" refers to "persons below eighteen (18) years of age or those over but unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition."

The decision of the trial court finding the petitioner guilty of Violation of Section 5(b), Article III R.A. No. 7610 should have been upheld by the

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54 *People v. Gerandoy*, G.R. No. 202838, September 17, 2014, 735 SCRA 520, 540; *Caballo v. People*, *supra* note 47, at 242-243; *Garingarao v. People*, 669 Phil. 512, 524 (2011); *People v. Rellota*, 640 Phil. 471 (2010); *People v. Abello*, *supra* note 5, at 393; and *Amployo v. People*, *supra* note 47, at 759.

55 *People v. Larin*, *supra* note 47, at 1008.

56 *Supra* note 47.

57 *Caballo v. People*, *supra* note 47, at 242-243.

CA instead of erroneously adopting the recommendation of the OSG, which inaccurately relied on *People v. Abello*.[58] In said case, the decisive factor for the acquittal of the accused was not the absence of coercion or intimidation on the offended party, who was then sleeping at the time the lascivious act was committed, but the fact that the victim could not be considered as a "child" under R.A. No. 7610. This Court held that while the twenty-one year old woman has *polio* as a physical disability that rendered her incapable of normal function, the prosecution did not present any testimonial or documentary evidence – any medical evaluation or finding from a qualified physician, psychologist or psychiatrist – attesting that the physical condition rendered her incapable of fully taking care of herself or of protecting herself against sexual abuse.

Thus, it is clear that petitioner could not have been entitled to apply for probation in the first place. Regrettably, since neither the accused nor the OSG questioned the CA Decision, it has attained finality and to correct the error at this stage is already barred by the right of the accused against double jeopardy.

Based on the above disquisitions, the petitioner should be denied the benefit of the Probation Law and that the Court should adopt the recommendations above-stated in situations where an accused files an appeal for the sole purpose of correcting the penalty imposed to qualify him for probation or where he files an appeal specifically claiming that he should be found guilty of a lesser offense necessarily included with the crime originally filed with a prescribed penalty which is probationable.

SO ORDERED.

DIOSDADO M. PERALTA
Associate Justice

WE CONCUR:

MARIA LOURDES P. A. SERENO
Chief Justice

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58 *Supra* note 5.

I join dissent of Justice Mendoza and register also my dissenting opinion

On official leave
ANTONIO T. CARPIO
Associate Justice

PRESBITERO J. VELASCO, JR.
Associate Justice

I join the dissenting opinion of Justice Mendoza.
Teresita Leonardo de Castro

TERESITA J. LEONARDO-DE CASTRO
Associate Justice

ARTURO D. BRION
Associate Justice

LUCAS P. BERSAMIN
Associate Justice

On official leave
MARIANO C. DEL CASTILLO
Associate Justice

MARTIN S. VILLARAMA, JR.
Associate Justice

On official leave
JOSE PORTUGAL PEREZ
Associate Justice

See dissenting opinion

JOSE CATRAL MENDOZA
Associate Justice

BIENVENIDO L. REYES
Associate Justice

See concurring opinion

ESTELA M. PERLAS-BERNABE
Associate Justice

MARVIC M.V.F. LEONEN
Associate Justice

No part
FRANCIS H. JARDELEZA
Associate Justice

CERTIFICATION

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

MARIA LOURDES P. A. SERENO
Chief Justice

CERTIFIED XEROX COPY:
FELIPA B. ANAMA
CLERK OF COURT, EN BANC
SUPREME COURT