

EN BANC

G.R. No. 214497 – EDUARDO QUIMVEL y BRAGA, *petitioner, versus*
PEOPLE OF THE PHILIPPINES, *respondent.*

Promulgated:

April 18, 2017

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DISSENTING OPINION

CAGUIOA, J.:

The People’s evidence show that: 7-year-old AAA lived with her father and siblings in a house close to her grandfather’s; accused Quimvel worked for AAA’s grandfather as caretaker of ducks and lived in the grandfather’s house; one evening, AAA was left alone with her siblings when her father left the house to buy kerosene; on that night, Quimvel brought a vegetable viand to AAA’s house; whereupon, AAA asked Quimvel to stay with her and her siblings because they were afraid; Quimvel acceded; *AAA fell asleep and awakened to Quimvel’s leg over her body and his hand being inserted into her shorts, then caressing her vagina*; she removed Quimvel’s hand from inside her shorts; Quimvel left just as AAA’s father arrived.

Quimvel was indicted for the crime of acts of lasciviousness in relation to Section 5(b) of Republic Act No. 7610 (RA 7610).¹ He was convicted by the Regional Trial Court (RTC) and sentenced to fourteen (14) years, eight (8) months and one (1) day of *reclusion temporal* in its medium period as minimum to fifteen (15) years, six (6) months and nineteen (19) days of *reclusion temporal* in its medium period as maximum.² The Court of Appeals (CA) affirmed the conviction.³

On petition for review on *certiorari* before this Court, Quimvel asserts that the prosecution failed to prove his guilt beyond reasonable doubt, and that assuming that he is guilty, he could only be convicted of acts of lasciviousness under Article 336 of the Revised Penal Code (RPC) and not in relation to Section 5(b) of RA 7610.⁴

The *ponencia* affirms his conviction for acts of lasciviousness in relation to Section 5(b).

¹ Decision, p. 2.

² Decision, p. 3.

³ With modification as to the amount of damages; Decision, p. 4.

⁴ Decision, p. 4.

I dissent. The majority opinion's interpretation of Section 5(b) of RA 7610 effectively repeals Articles 226-A and 336 with respect to offended parties who are under twelve (12) years old. Moreover, its cavalier treatment of the concepts of "force or intimidation" and "coercion or influence" muddles the essential elements of what are otherwise separate and distinct offenses punished under Article 336 and Section 5(b).

The evidence establishes that no money, profit or other consideration and no coercion or influence attended AAA's sexual abuse.

The definition of a child exploited in prostitution or subjected to other sexual abuse is provided by Section 5 of RA 7610, namely: as a child, who (a) for money, profit or other consideration, or (b) due to coercion or influence by an adult, group, or syndicate, indulges in sexual intercourse or lascivious conduct.

There is no question that the sexual abuse of AAA was not for money, profit or other consideration. There is also no dispute that there was no coercion or influence exerted on AAA by Quimvel or any other person for the simple reason that the act of lasciviousness (*i.e.*, caressing her vagina) was done while she was asleep. On this score alone, it is easy to see that AAA does not fall in the definition of a child exploited in prostitution or subjected to other sexual abuse. Accordingly, the evidence negates the application of Section 5(b).⁵

Thus, as far as Quimvel is concerned, he can only be convicted of acts of lasciviousness under Article 336 in relation to Article 266-A(d) of the RPC and meted the penalty only of *prision correccional*. Hence, in disposing of this case, there really is no need to further discuss the nuances of the proper application of Section 5(b) of RA 7610. Nevertheless, I submit this dissent on the different issues that have been made a part of the majority decision.

RA 7610 was not intended to cover all sexual abuses against children.

At the outset, I join Justice Carpio's observation that if the intention of RA 7610 is to penalize all sexual abuses against children under its provisions to the exclusion of the RPC, it would have expressly stated so and would have done away with the qualification that the child be "exploited in

⁵ See *People v. Abello*, 601 Phil. 373, 393 (2009); an extended discussion of *Abello* is found in pages 9-10.



prostitution or subjected to other sexual abuse.”⁶ It did not.

When the statute speaks unequivocally, there is nothing for the courts to do but to apply it. Section 5(b) is a provision of specific and limited application, and must be applied as worded — a separate and distinct offense from the “common” or “ordinary” acts of lasciviousness under Article 336 of the RPC.

Upon the premise that the language of Section 5(b) is ambiguous and is susceptible to interpretation, I have conscientiously studied the deliberations of RA 7610 to ascertain the intent of the law with respect to how it would interplay with the provisions of the RPC and other laws that penalize the same or similar acts.

While the Senate, in its deliberations, would appear to equivocate in the protection of children against all or specific types of abuse, it cannot be escaped that the overriding impetus for the passage of the law is based on a certain recurring theme. Senator Rasul, one of RA 7610’s sponsors, in her speech, stated:

Senator Rasul. x x x

x x x x

But undoubtedly, the most disturbing, to say the least, is the persistent report of children being sexually exploited and molested for purely material gains. Children with ages ranging from three to 18 years are used and abused. We hear and read stories of rape, manhandling and sexual molestation in the hands of cruel sexual perverts, local and foreigners alike. As of October 1990, records show that 50 cases of physical abuse were reported, with the ratio of six females to four males. x x x

x x x x

x x x No less than the Supreme Court, in the recent case of *People vs. Ritter*, held that **we lack criminal laws which will adequately protect streetchildren from exploitation by pedophiles.** x x x⁷

The case referred to by Senator Rasul, *People v. Ritter*,⁸ is a 1991 case which involved an Austrian national who was charged with rape with homicide for having ultimately caused the death of Rosario, a street child, by inserting a foreign object into her vagina during the course of performing sexual acts with her. Ritter was acquitted based on reasonable doubt on account of, among others, the failure of the prosecution to (1) establish the age of Rosario to be within the range of statutory rape, and (2) show force or intimidation as an essential element of rape in the face of the finding that Rosario was a child prostitute who willingly engaged in sexual acts with

⁶ J. Carpio Separate Opinion, p. 5.

⁷ Record of the Senate, Vol. III, No. 104, March 19, 1991, p. 1204; emphasis and underscoring supplied.

⁸ 272 Phil. 532 (1991).

Ritter.

Constrained to acquit Ritter, the Court made the following pronouncements:

It is with distressing reluctance that we have to seemingly set back the efforts of Government to dramatize the death of Rosario Baluyot as a means of galvanizing the nation to care for its street children. It would have meant a lot to social workers and prosecutors alike if one pedophile-killer could be brought to justice so that his example would arouse public concern, sufficient for the formulation and implementation of meaningful remedies. However, we cannot convict on anything less than proof beyond reasonable doubt. The protections of the Bill of Rights and our criminal justice system are as much, if not more so, for the perverts and outcasts of society as they are for normal, decent, and law-abiding people.

x x x x

And finally, **the Court deplores the lack of criminal laws which will adequately protect street children from exploitation by pedophiles, pimps, and, perhaps, their own parents or guardians who profit from the sale of young bodies.** The provisions on statutory rape and other related offenses were never intended for the relatively recent influx of pedophiles taking advantage of rampant poverty among the forgotten segments of our society. Newspaper and magazine articles, media exposes, college dissertations, and other studies deal at length with this serious social problem but pedophiles like the appellant will continue to enter the Philippines and foreign publications catering to them will continue to advertise the availability of Filipino street children unless the Government acts and acts soon. We have to acquit the appellant because the Bill of Rights commands us to do so. We, however, express the Court's concern about the problem of street children and the evils committed against them. Something must be done about it.⁹

That the protection of street children from exploitation is the thrust of RA 7610 is further confirmed by Senator Lina's elucidation on the application of Section 6 following questions from Senator Enrile:

Senator Enrile. Pareho silang hubad na hubad at naliligo. Walang ginagawa. Walang touching po, basta naliligo lamang. Walang akapan, walang touching, naliligo lamang sila. Ano po ang ibig sabihin noon? Hindi po ba puwedeng sabihin, kagaya ng standard na ginamit natin, na UNDER CIRCUMSTANCES WHICH WOULD LEAD A REASONABLE PERSON TO BELIEVE THAT THE CHILD IS ABOUT TO BE SEXUALLY EXPLOITED, OR ABUSED.

Senator Lina. Kung mayroon pong balangkas or amendment to cover that situation, tatanggapin ng Representation na ito. Baka ang sitwasyong iyon ay hindi na ma-cover nito sapagkat, at the back of our minds, Mr. President, **ang sitwasyong talagang gusto nating ma-address ay maparusahan iyong tinatawag na "pedophjilia" or prey on our children.** Hindi sila makakasuhan sapagkat their activities are undertaken or are committed in the privacy of homes, inns, hotels, motels and similar

⁹ Id. at 563-564, 569-570; emphasis and underscoring supplied.

establishments.¹⁰

And when he explained his vote, Senator Lina stated the following:

With this legislation, child traffickers could be easily prosecuted and penalized. Incestuous abuse and those where victims are under twelve years of age are penalized gravely, ranging from *reclusion temporal* to *reclusion perpetua*, in its maximum period. **It also imposes the penalty of reclusion temporal in its medium period to reclusion perpetua** equivalent to a 14-30 year prison term **for those:** “(a) who promote or facilitate child prostitution; (b) **commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution;** (c) derive profit or advantage whether as manager or owner of an establishment where the prostitution takes place or of the sauna, disco, bar resort, place of entertainment or establishment serving as a cover or which engages in a prostitution in addition to the activity for which the license has been issued to said establishment.”¹¹

The Senate deliberations on RA 7610 is replete with similar disquisitions tending to show the intendment to make the law applicable to cases involving child exploitation through prostitution, sexual abuse, child trafficking, pornography and other types of abuses; the passage of the law was the Senate’s act of heeding the call of the Supreme Court to afford protection to a special class of children and not to cover any and all crimes against children that are already covered by other penal laws such as the RPC and the Child and Youth Welfare Code.

The structure of RA 7610 confirms the foregoing intendment.

In this regard, even the structure of RA 7610 demonstrates its intended application.

Article I lays the preliminaries including state policy and defines the terms used in the statute. Article II mandates the creation of a comprehensive program to protect children from sexual abuse, exploitation, and discrimination — and thereafter enumerated the headings of subsequent articles that grouped prohibited acts according to the classes of abuse that RA 7610 penalizes. Article III penalizes child prostitution and other sexual abuse; Article IV, child trafficking; Article V, obscene publications and indecent shows; Article VI, other acts of abuse; and Article VII for sanctions for establishments wherein these prohibited acts are promoted, facilitated or conducted. The remaining articles cover circumstances which gravely threaten or endanger the survival and normal development of children.

By both literal and purposive tests, I find nothing in the language of

¹⁰ Record of the Senate, Vol. I, No. 7, August 1, 1991, pp. 264-265; emphasis and underscoring supplied.

¹¹ Record of the Senate, Vol. II, No. 58, December 2, 1991, pp. 793-794; emphasis and underscoring supplied.

the law or in the Senate deliberations that necessarily leads to the conclusion that RA 7610 subsumes all instances of sexual abuse against children.

The language of Section 5(b) cannot be read in isolation and should be read in the context of the intendment of RA 7610.

Section 5(b) 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 subjected 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.¹²

Its essential elements are: (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 other sexual abuse; and (3) The child whether male or female, is below 18 years of age.¹³

The unique circumstances of the children exploited in prostitution or subjected to other sexual abuse for which the provisions of RA 7610 are intended are highlighted in this exchange:

The Presiding Officer [Senator Mercado]. Senator Pimentel.

Senator Pimentel. Just this question, Mr. President, if the Gentleman will allow.

Will this amendment¹⁴ also affect the Revised Penal Code provisions on seduction?

Senator Lina. No, Mr. President. Article 336 of Act No. 3815 will remain unaffected by this amendment we are introducing here. **As a backgrounder, the difficulty in the prosecution of so-called**

¹² Underscoring supplied.

¹³ *People v. Abello*, supra note 5, at 392.

¹⁴ N.B. On the provisions relating to attempt to commit child prostitution.

“pedophiles” can be traced to this problem of having to catch the malefactor committing the sexual act on the victim. And those in the law enforcement agencies and in the prosecution service of the Government have found it difficult to prosecute. Because if an old person, especially a foreigner, is seen with a child with whom he has no relation—blood or otherwise—and they are just seen in a room and there is no way to enter the room and to see them in *flagrante delicto*, then it will be very difficult for the prosecution to charge or to hale to court these pedophiles.

So, we are introducing into this bill, Mr. President, an act that is considered already an attempt to commit child prostitution. **This, in no way, affects the Revised Penal Code provision on acts of lasciviousness or qualified seduction.**¹⁵

As to the proviso of Section 5(b), some guidance may be had as to its import during the period of committee amendments:

Senator Lina. On page 3, between lines 12 and 13, insert the following: PROVIDED THAT WHEN THE VICTIM IS TWELVE (12) YEARS OR LESS, THE PERPETRATORS SHALL BE PROSECUTED UNDER ARTICLE 335, PARAGRAPH 3, AND ARTICLE 336 OF REPUBLIC ACT 3815, AS AMENDED, THE REVISED PENAL CODE, FOR RAPE OR LASCIVIOUS CONDUCT AS THE CASE MAY BE.

The Presiding Officer [Senator Mercado]. Is there any objection? [Silence] Hearing none, the amendment is approved.

X X X X

Senator Lina. No, Mr. President, as stated in the Committee amendment which has just been approved but which, of course, can still stand some individual amendments during the period of individual amendment, it is stated that, “PROVIDED, THAT WHEN THE VICTIM IS TWELVE (12) YEARS OR LESS, THE PERPETRATOR SHALL BE PROSECUTED UNDER ARTICLE 335, PAR. 3, AND ARTICLE 336 OF R.A. 3815, AS AMENDED.”

Article 335 of the Revised Penal Code, Mr. President, is, precisely, entitled: “When And How Rape Is Committed.” So, prosecution will still be under Article 335, when the victim is 12 years old or below.

Senator Pimentel. Despite the presence of monetary considerations?

Senator Lina. Yes, Mr. President. It will still be rape. We will follow the concept as it has been observed under the Revised Penal Code. Regardless of monetary consideration, regardless of consent, the perpetrator will still be charged with statutory rape.

Senator Pimentel. So, it is only when the victim or the child who was abused is a male that the offender would probably be prosecuted under the distinguished Gentleman’s amendment because, obviously, the crime of rape does not cover child abuse of males.

¹⁵ Record of the Senate, Vol. IV, No. 116, May 9, 1991, pp. 334-335; emphasis and underscoring supplied.

Senator Lina. Yes, that will be the effect, Mr. President.

Senator Pimentel. Thank you, Mr. President.¹⁶

Bearing these in mind, there is no disagreement as to the first and third elements of Section 5(b). The core of the discussion relates to the meaning of the second element — that the said act is performed with a child exploited in prostitution or subjected to other sexual abuse.

To my mind, a person can only be convicted of violation of Article 336 in relation to Section 5(b), upon allegation and proof of the unique circumstances of the child — that he or she is exploited in prostitution or subject to other sexual abuse. In this light, I quote in agreement Justice Carpio's dissenting opinion in *Olivarez v. Court of Appeals*¹⁷:

Section 5 of RA 7610 deals with a situation where the acts of lasciviousness are committed on a child already either exploited in prostitution or subjected to "**other sexual abuse.**" Clearly, the acts of lasciviousness committed on the child are separate and distinct from the **other** circumstance — that the child is either exploited in prostitution or subjected to "**other sexual abuse.**"

x x x x

Section 5 of RA 7610 penalizes those "who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse." The act of sexual intercourse or lascivious conduct may be committed on a child **already exploited in prostitution**, whether the child engages in prostitution for profit or someone coerces her into prostitution against her will. The element of profit or coercion refers to the practice of prostitution, not to the sexual intercourse or lascivious conduct committed by the accused. A person may commit acts of lasciviousness even on a prostitute, as when a person mashes the private parts of a prostitute against her will.

The sexual intercourse or act of lasciviousness may be committed on a child **already subjected to other sexual abuse**. The child may be subjected to such **other** sexual abuse for profit or through coercion, as when the child is employed or coerced into pornography. A complete stranger, through force or intimidation, may commit acts of lasciviousness on such child in violation of Section 5 of RA 7610.

The phrase "**other sexual abuse**" plainly means that the child is already subjected to sexual abuse **other** than the crime for which the accused is charged under Section 5 of RA 7610. The "**other sexual abuse**" is an element separate and distinct from the acts of lasciviousness that the accused performs on the child. The majority opinion admits this when it enumerates the second element of the crime under Section 5 of RA 7610 — that the lascivious "act is performed with a child x x x subjected to other sexual abuse."¹⁸

¹⁶ Id. at 333-334.

¹⁷ 503 Phil. 421 (2005).

¹⁸ Id. at 445-447; italics omitted, emphasis supplied.



In its bare essentials, the second element can be met by allegation and proof of either circumstance:

- a) the child is exploited in prostitution; OR
- b) the child is subjected to other sexual abuse.

which should already be existing at the time of sexual intercourse or lascivious conduct complained of.

Otherwise stated, in order to impose the higher penalty provided in Section 5(b) as compared to Article 336, it must be alleged and proved that the child — (1) for money, profit, or any other consideration or (2) due to the coercion or influence of any adult, syndicate or group — indulges in sexual intercourse or lascivious conduct.

In *People v. Fragante*,¹⁹ the accused was convicted of seven (7) counts of acts of lasciviousness and one (1) count of rape committed against his own minor daughter. The Court found that the elements of Section 5(b) were present. Remarkably, the Court meticulously explained the interplay of the elements of rape and acts of lasciviousness and Section 5(b).

It held that actual force or intimidation need not be employed in incestuous rape of a minor because the moral and physical dominion of the father is sufficient to cow the victim into submission.²⁰ The appreciation of how the sexual intercourse and lascivious conduct in this case fell within the ambit of Section 5(b) is cogently explained thus: appellant, as a father having moral ascendancy over his daughter, coerced AAA to engage in lascivious conduct, which is within the purview of sexual abuse.²¹

In *People v. Abello*,²² one of the reasons the accused was convicted of rape by sexual assault and acts of lasciviousness and penalized under the RPC and not under Section 5(b) was because there was no showing of coercion or influence required by the second element. The Court ratiocinated:

In *Olivarez v. Court of Appeals*, we explained that the phrase, “other sexual abuse” in the above provision covers not only a child who is abused for profit, but also one who engages in lascivious conduct **through the coercion or intimidation** by an adult. In the latter case, there must be some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party’s will.

In the present case, **the prosecution failed to present any evidence showing that force or coercion attended Abello’s sexual abuse on AAA; the evidence reveals that she was asleep** at the time

¹⁹ 657 Phil. 577 (2011).

²⁰ Id. at 592.

²¹ Id. at 597.

²² Supra note 5.

these crimes happened and only awoke when she felt her breasts being fondled. Hence, she could have not resisted Abello's advances as she was unconscious at the time it happened. In the same manner, there was also no evidence showing that Abello compelled her, or cowed her into silence to bear his sexual assault, after being roused from sleep. Neither is there evidence that she had the time to manifest conscious lack of consent or resistance to Abello's assault.²³

Prior sexual affront is not always required for Section 5(b) to apply.

That is not to say that in every instance, prior sexual affront upon the child must be shown to characterize the child as one "subjected to other sexual abuse". What is only necessary is to show that the child is already a child exploited in prostitution or subjected to other sexual abuse at the time the sexual intercourse or lascivious conduct complained of was committed or that circumstances obtain prior or during the first instance of abuse that constitutes such first instance of sexual intercourse or lascivious conduct as having converted the child into a child "exploited in prostitution or subjected to other sexual abuse."

I am, therefore, in full agreement with Justice Bernabe that alleging and proving the second element do not require a prior sexual affront;²⁴ precisely, because a prior sexual affront is not the only way to satisfy the second element.

It is in this light that I had, during the deliberations of this case, discussed the need to contextualize the operation of Section 5(b) in reference to Section 5(a) and the other parts of Section 5. I understand the structure of Section 5 as following the more common model or progression of child prostitution or other forms of sexual exploitation:

A child is procured, induced, or threatened to become a prostitute by any person, in violation of Section 5(a). In this instance, the person who has sexual intercourse or performs lascivious acts upon the child, even if this were the very first act by the child, already makes the person liable under Section 5(b), because the very fact that someone had procured the child to be used for another person's sexual gratification in exchange for money, profit or other consideration already qualifies the child as a child exploited in prostitution. In this instance, no requirement of a prior sexual affront is required.

In cases where any person, under the circumstances of Section 5(a), procures, induces, or threatens a child to engage in any sexual activity with another person, even without an allegation or showing that the impetus is

²³ Id. at 393; additional emphasis and underscoring supplied.

²⁴ J. Bernabe Concurring Opinion, p. 3.

money, profit or other consideration, the first sexual affront by the person to whom the child is offered already triggers Section 5(b) because the circumstance of the child being offered to another already qualifies the child as one subjected to other sexual abuse. Similar to these situations, the first sexual affront upon a child shown to be performing in obscene publications and indecent shows, or under circumstances falling under Section 6 is already a violation of Section 5(b) because these circumstances are sufficient to qualify the child as one subjected to other sexual abuse.

In certain cases, however, it appears that a first sexual affront, on its own, cannot be considered a violation of Section 5(b). For example, a person who has moral ascendancy or influence over a child cannot be automatically considered to have coerced or influenced the child into indulging in sexual intercourse or lascivious conduct with him on account only of his or her ascendancy over the child, unless there are circumstances that would allow the inference that the relationship between the perpetrator and the victim amounts to coercion or influence (*e.g.*, as when a person who has ascendancy over a child is later found with the child under the circumstances of Section 6, any subsequent sexual activity squarely violates Section 5(b), because the circumstances of Section 6 may be the basis to infer that the accused conducted his relationship with the child with the view of inducing him or her to indulge in sexual intercourse or lascivious conduct, thus furnishing the element of coercion or influence). Otherwise, it appears that without the circumstances of Section 5(a) or independent evidence of coercion or influence, a single instance of sexual intercourse or lascivious conduct may not be sufficient to meet the second element of Section 5(b). However, as with the “discrepancy” in the penalties,²⁵ this state of law should be addressed by remedial legislation, and not adjusted by the Court based on its own value judgment.

***Larin* does not support the extension of Section 5(b) to all cases of lascivious conduct against a child.**

*People v. Larin*²⁶ has been used as jurisprudential support for the proposition that Section 5(b) applies to all instances of lascivious conduct against children because of the phrase “other consideration”. *Larin*’s use of this passage in the deliberations is oft-cited:

Senator Angara. I refer to line 9, ‘who for money or profit’. I would like to amend this, Mr. President, *to cover a situation where the*

²⁵ The President Pro Tempore noted this discrepancy in penalties during the deliberations, thus: “The penalty in the case of those who commit acts of lasciviousness is that they are punished under the Penal Code with merely *prision correccional*. That seems to be rather odd, because this is if the child, in the Penal Code, is less than 15, the penalty is higher or heavier. That is *reclusion temporal*, whereas, if the child is less than 12, it is only *prision correccional*.” (Record of the Senate, Vol. II, No. 52, August 21, 1991, p. 605.)

²⁶ 357 Phil. 987 (1998).

minor may have been coerced or intimidated into this lascivious conduct, not necessarily for money or profit, so that we can cover those situations and not leave loophole in this section.

The proposal I have is something like this: WHO FOR MONEY, PROFIT, OR ANY OTHER CONSIDERATION OR *DUE TO THE COERCION OR INFLUENCE* OF ANY ADULT, SYNDICATE OR GROUP INDULGE, *et cetera*.

The President Pro Tempore. I see. That would mean also changing the subtitle of Section 4. Will it no longer be child prostitution?

Senator Angara. No, no. Not necessarily, Mr. President, because we are still talking of the child who is being misused for sexual purposes either for money or for consideration. What I am trying to cover is the other consideration. Because, here, it is limited only to the child being abused or misused for sexual purposes, only for money or profit.

I am contending, Mr. President, that *there may be situations where the child may not have been used for profit or . . .*

The President Pro Tempore. So, it is no longer prostitution. Because the essence of prostitution is profit.

Senator Angara. Well, the Gentleman is right. Maybe the heading ought to be expanded. But, still, the President will agree that that is a form or manner of child abuse.

The President Pro Tempore. What does the Sponsor say? Will the Gentleman kindly restate the amendment?

ANGARA AMENDMENT

Senator Angara. The new section will read something like this, Mr. President: MINORS, WHETHER MALE OR FEMALE, WHO FOR MONEY, PROFIT, OR ANY OTHER CONSIDERATION OR INFLUENCE OF ANY ADULT, SYNDICATE OR GROUP INDULGE IN SEXUAL INTERCOURSE, *et cetera*.

Senator Lina. It is accepted, Mr. President.

The President Pro Tempore. Is there any objection? [*Silence*] Hearing none, the amendment is approved.

How about the title, 'Child Prostitution,' shall we change that too?

Senator Angara. Yes, Mr. President, to cover the expanded scope.

The President Pro Tempore. Is that not what we would call probable 'child abuse'?

Senator Angara. Yes, Mr. President.

The President Pro Tempore. Subject to rewording. Is there any objection? [*Silence*] Hearing none, the amendment is approved. x x x²⁷

²⁷ Id. at 998-999.

While this amendment undoubtedly expanded the scope of Section 5(b) to include non-monetary consideration, this does not furnish support for the interpretation that all cases of sexual intercourse or lascivious conduct against a child should be prosecuted in relation to Section 5(b). Worthy of note are the following statements of Senator Angara who proposed the amendment:

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Senator Lina. It is accepted, Mr. President.

The President Pro Tempore. Is there any objection? [*Silence*] Hearing none, the amendment is approved.²⁸

That *Larin's* crime is subsumed in Section 5(b) is not doubted. However, the reliance on this passage in the Senate deliberations cannot be used to extend the application of Section 5(b) beyond what is expressly stated by its provisions.

In *Larin*, the Court held that the elements of Section 5(b) are present. *Larin*, being an adult and the swimming trainer of his 14-year-old victim, had the influence and ascendancy to cow her into submission. Evidence was introduced to show that *Larin* employed psychological coercion upon his

²⁸ Record of the Senate, Vol. I, No. 7, August 1, 1991, p. 262; emphasis and underscoring supplied.

child victim by attacking her self-esteem and then pretending to be attentive to her needs and making himself out to be the only one who could accept her inadequacies.

The independent proof given of psychological coercion, prior to the first lascivious conduct against the child victim, coupled with the fact that the lascivious conduct happened on two separate occasions indubitably proved the second element — that the child victim was coerced or influenced by Larin to engage in lascivious conduct at the first instance of lascivious conduct, or, to be sure, on the second instance of lascivious conduct (as the first was already sufficient to convert the child victim into a child exploited in prostitution or subjected to other sexual abuse).

Verily, this factual milieu sufficiently places *Larin* within the ambit of Section 5(b) because of coercion and influence and not because of “other consideration.” The relationship and the manner of committing the lascivious conduct in *Larin* distinguish it from the facts of *Quimvel*.

Understanding the last proviso of Section 5(b).

It has been submitted that the interpretation of the final proviso of Section 5(b) imposing *reclusion temporal* in its medium period if the child is under twelve (12) years old should be made to depend only on the proviso preceding it.²⁹ The practical effect of this submission is that whenever the victim of lascivious conduct is any child under twelve (12) years of age, the prosecution shall be under Article 336 of the RPC and the penalty automatically becomes *reclusion temporal*.

I disagree. True, the office of the proviso is to qualify or modify only the phrase immediately preceding it or restrains or limits the generality of the clause that immediately follows. As applied to Section 5(b), the understanding of the last proviso should not lose sight of the fact that what it qualifies is another proviso, which also operates only within the meaning of the phrase preceding the latter:

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected 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[.]

Therefore, I submit that the proper understanding of Section 5(b) with both provisos in operation would be: in prosecutions for lascivious conduct

²⁹ J. Peralta Separate Opinion.



under Article 336 when the victim is (1) a child exploited in prostitution or subjected to other sexual abuse, **AND** (2) under twelve (12) years old, the penalty would be *reclusion temporal* in its medium period.

In this context, it cannot be said that the penalty for all prosecutions for lascivious conduct under Article 336 is *reclusion temporal* in its medium period. As it should be, prosecution for acts of lasciviousness that do not involve a child exploited in prostitution or subjected to other sexual abuse even if she were under twelve (12) years old, the penalty should — as it should be meted on Quimvel — be the penalty provided in the RPC, which is *prision correccional*.

Section 5(b), as worded and as intended, is a small subset of the universe of lascivious conduct covered by Article 336, thereby requiring allegation and proof of the specific circumstances required for it to operate — which, put simply, are composed of its essential elements.

RA 7610 did not repeal Article 336.

In this light, I concur with the majority that Article 336 remains an operative provision, and the crime of acts of lasciviousness under the RPC remains a distinct and subsisting crime from RA 7610. While rape was relocated to the title on crimes against persons, Article 336 can fairly be read to refer to the provision that replaced Article 335 (Article 266) to save it from becoming non-operational.

The legislative intent to have the provisions of RA 7610 to operate *side by side* with the provisions of the RPC — and a recognition that the latter remain effective — can be gleaned from Section 10 of the law:

Section 10. *Other Acts of Neglect, Abuse, Cruelty or Exploitation and Other Conditions Prejudicial to the Child's Development.* —

(a) Any person who shall commit **any other acts of child abuse, cruelty or exploitation** or to be responsible for other conditions prejudicial to the child's development including those covered by Article 59 of Presidential Decree No. 603, as amended, **but not covered by the Revised Penal Code, as amended**, shall suffer the penalty of prison mayor in its minimum period.

This is confirmed by Senator Lina in his sponsorship speech of RA 7610, thus:

Senator Lina. x x x

x x x x

Senate Bill No. 1209, Mr. President, is intended to provide stiffer penalties for abuse of children and to facilitate prosecution of perpetrators of abuse. **It is intended to complement provisions of the Revised Penal**



Code where the crimes committed are those which lead children to prostitution and sexual abuse, trafficking in children and use of the young in pornographic activities.

These are the three areas of concern which are specifically included in the United Nations Convention on the Rights of the Child. As a signatory to this Convention, to which the Senate concurred in 1990, our country is required to pass measures which protect the child against these forms of abuse.

X X X X

Mr. President, this bill on providing higher penalties for abusers and exploiters, setting up legal presumptions to facilitate prosecution of perpetrators of abuse, and **complementing the existing penal provisions** of crimes which involve children below 18 years of age is a part of a national program for protection of children.

X X X X

Mr. President, subject to perfecting amendments, I am hopeful that the Senate will approve this bill and thereby add to the growing program for special protection of children and youth. We need this measure to deter abuse. We need a law to prevent exploitation. We need a framework for the effective and swift administration of justice for the violation of the rights of children.³⁰

This same deference to the discreteness and subsistence of the felonies in the RPC is apparent in this interpellation with respect to seduction:

Senator Lina. This is qualified seduction. Simple seduction is seduction of a woman who is single or a widow of good reputation over 12, but under 18 years of age, committed by means of deceit. Here the subject is a woman.

In our proposal, it will be both male and female. But that is not the only difference, Mr. President. The situation that we would like to cover that will lead to easier prosecution and to overcome this present problem of government enforcement agencies in booking or charging an alleged so-called "pedophile" is that we want the fact of being present, say, inside a hotel, sauna, or an inn, between the presence of a person without any relationship with a child under 18 years of age and there is no sexual contact. It is not proved that there is sexual contact. There is no need for proof of lewd design. The fact that they are there will be considered an attempt to commit child prostitution.

We are, in effect, advancing a new concept or theory, Mr. President, to cover this gap in our present statutes, making it easier or making it difficult for the prosecution to hale to court this so-called "pedophile." **So, this is different from consented abduction, qualified seduction or simple deduction.**³¹

³⁰ Record of the Senate, Vol. IV, No. 111, April 29, 1991, pp. 191-193; emphasis and underscoring supplied.

³¹ Record of the Senate, Vol. IV, No. 116, May 9, 1991, pp. 335-336; emphasis and underscoring supplied.

Force or intimidation does not equate to coercion or influence.

Since Section 5(b) penalizes a specific class of lascivious conduct, I cannot concur with the *ponencia* when it states that the element of coercion or influence under Section 5(b) was met by the allegation in the Information of force and intimidation — an element of Article 336.

“Common” or “ordinary” acts of lasciviousness under Article 336 and lascivious conduct under Article 336 in relation to Section 5(b) are separate offenses, with distinct essential elements. To hold that the allegation and proof of the existence of an element of one can take the place of what has been jurisprudentially defined as an element of another muddles the understanding of these two offenses, and effectively constitutes judicial legislation as it results in a partial repeal of Article 336 through a change of its essential elements.

The essential elements of acts of lasciviousness under Article 336 of the RPC are as follows:

1. That the offender commits any act of lasciviousness or lewdness;
2. That the act of lasciviousness is committed against a person of either sex;
3. 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. By means of fraudulent machination or grave abuse of authority; or
 - d. When the offended party is under 12 years of age or is demented. (Italics supplied)³²

On the other hand, Section 5(b)’s essential elements 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 other sexual abuse.
3. The child, whether male or female, is below 18 years of age.³³

³² Dissenting Opinion of J. Carpio in *Olivarez v. Court of Appeals*, supra note 17, at 442-443.

³³ *People v. Fragante*, supra note 19, at 596, citing *People v. Abello*, supra note 5, at 392, further citing *People v. Larin*, supra note 26, at 997; *Amployo v. People*, 496 Phil. 747, 758 (2005); *Olivarez v. Court of Appeals*, supra note 17, at 431 and 444; and *Malto v. People*, 560 Phil. 119, 134 (2007).

The muddling is made even more inopportune by the fact that the people's evidence shows neither force or intimidation, nor coercion or influence employed by Quimvel upon AAA. Quimvel took advantage of the fact that AAA was asleep, committed lascivious conduct upon her, and forthwith ceased when she awoke and removed his hand from within her shorts — her being asleep a circumstance properly belonging to being unconscious.

However, even as the Information alleged the use of force or intimidation, the evidence established only that AAA was unconscious or asleep; meaning that Quimvel could not be convicted of Section 5(b) but could be convicted only of Article 336.

It has been argued that neither force or intimidation nor coercion or influence need be shown if the offended party is a child under twelve (12) years old. This proposition is correct IF the prosecution is for Articles 266-A or 336, as the age of the offended party is a circumstance that, on its own, already satisfies the conditions of Articles 266-A and 336. However, I maintain that in a prosecution under Section 5(b), coercion or influence (or otherwise, that the child indulged in sexual intercourse or lascivious conduct for money, profit or other consideration) is a textually-provided circumstance that must be separately shown apart from the age of the child victim.

Issues of operationalization.

A challenge to this interpretation has been articulated that the requirement of showing what Justice Carpio calls as the “circumstances of the child” is difficult to operationalize.³⁴ I disagree. The circumstances of the child can be proved in any manner allowed by the Rules of Court, as by testimony of the child himself or herself, or any other person who has personal knowledge of the child's circumstances. Ultimately, if difficulty is encountered in operationalizing a provision — in terms of evidence required — it is within the province of the Court to lay down guidelines in appreciating a fact as an element of the crime or as a qualifying circumstance, as it had done in *People v. Pruna*³⁵ as to the question of proving a victim's age.

In view of the foregoing discussion, Section 5(b), to my mind, is, as earlier intimated, correctly understood to be a subset of the universe of acts of lasciviousness covered by Article 336, thereby requiring allegation and proof of the specific circumstances required for it to operate — which, again, are simply composed of its essential elements.

³⁴ J. Bernabe Concurring Opinion.

³⁵ *People v. Pruna*, 439 Phil. 440 (2002).



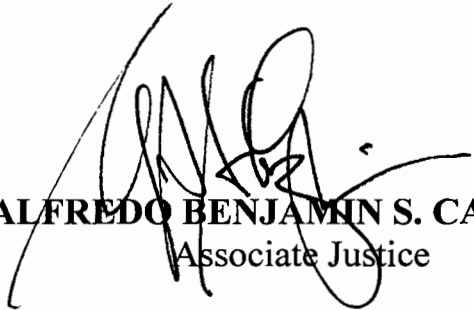
The Court's role is to punish the guilty with the penalty provided by law for the offense proved by the People's evidence. While I share the sentiment that the highest degree of protection must be afforded to children, I am mindful of the fact that, as far as this protection is equated to the proper penalty upon persons that offend against children, the extent of this protection only goes as far as the law can be reasonably and equitably interpreted to allow.

It is in this light that I cannot join the majority in imposing the higher penalty of *reclusion temporal* as provided in RA 7610, despite the fact that I stand with the rest of the members of the Court in absolute condemnation of the abuse committed against the child victim.

Recapitulation.

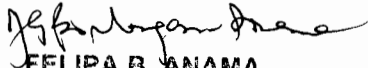
A dispassionate evaluation of the evidence shows that what the prosecution only proved were the essential elements of Article 336: that (1) Quimvel committed an act of lasciviousness or lewdness by caressing AAA's vagina; (2) he committed the said act against AAA; and (3) the said act was done while AAA, a 7-year-old, was asleep.

I vote to convict Quimvel only of acts of lasciviousness and impose upon him the penalty of *prision correccional* under Article 336 of the RPC.



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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