G.R. No. 227363 - People of the Philippines, *Plaintiff-Appellee v.* Salvador Tulagan, *Accused-Appellant.*

Promulgated:

March 12, 2019

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SEPARATE OPINION

PERLAS-BERNABE, *J.*:

While I agree with the resulting verdict against accused-appellant Salvador Tulagan (Tulagan), I tender this Opinion to address the relevant points stated in the *ponencia* anent the proper application of Section 5 (b), Article III of Republic Act No. (RA) 7610[1] in sexual abuse cases involving minors. As will be made evident below, there is a fundamental difference between the *ponencia*'s and my underlying postulations, which therefore precludes me from concurring with the majority.

At its core, the *ponencia* propounds an expansive view on the application of Section 5 (b), Article III of RA 7610. Citing *Quimvel v. People*[2] (*Quimvel*), the *ponencia* explains that RA 7610 does not only cover a situation where a child is abused for profit but also one in which a child, through coercion or intimidation, engages in sexual intercourse or lascivious conduct.[3] To recall, the majority ruling in *Quimvel* observed that "[a]lthough the presence of an offeror or a pimp is the typical set up in prostitution rings, this does not foreclose the possibility of a child voluntarily submitting himself or herself to another's lewd design for consideration, monetary or otherwise, without third person intervention."[4] As such, "[i]t is immaterial whether or not the accused himself employed the coercion or influence to subdue the will of the child for the latter to submit to his sexual advances for him to be convicted under paragraph (b). [Section 5, Article III] of RA 7610 even provides that the offense can be committed by 'any adult, syndicate or group,' without qualification."[5] Based on these pronouncements, the *ponencia* therefore concludes that the mere act of sexual abuse against any child qualifies him or her to be "subject to other sexual abuse," and hence, under the coverage of RA 7610.[6]

In addition, the *ponencia* points out that the policy of RA 7610 is "to provide stronger deterrence and special protection to children from all forms of abuse,

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1 Entitled "AN ACT PROVIDING FOR STRONGER DETERRENCE AND SPECIAL PROTECTION AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION, PROVIDING PENALTIES FOR ITS VIOLATION, AND FOR OTHER PURPOSES," approved on June 17, 1992.

2 G.R. No. 214497, April 18, 2017, 823 SCRA 192.

3 See *ponencia*, p. 51.

4 *Quimvel v. People*, supra note 2, at 239.

5 Id. at 239-240.

6 See *ponencia*, p. 51-53. See also Concurring Opinion of Associate Justice Diosdado M. Peralta in *Quimvel v. People*, supra note 2, at 272-285.

neglect, cruelty, exploitation, discrimination and other conditions prejudicial to their development."[7] It further cites the sponsorship speeches of Senators Jose Lina (Sen. Lina) and Santanina Rasul (Sen. Rasul) to explain that the intent of RA 7610 is to protect all children against all forms of abuse,[8] as well as the amendment introduced by Senator Edgardo J. Angara (Sen. Angara), *i.e.*, the addition of the phrase "or other sexual abuse" to "exploited in prostitution," which supposedly highlights the intention of Congress to expand the scope of Section 5, Article III of RA 7610 to incorporate the broader concept of "child abuse."[9] With these in tow, the *ponencia* thus finds it "hard to understand why the legislature would enact a penal law on child abuse that would create an unreasonable classification between those who are considered ['*exploited in prostitution or subject to other sexual abuse*' (EPSOSA for brevity)] and those who are not."[10] However, the *ponencia* qualifies that RA 7610 would not apply if the minor is under twelve (12) years of age since the accused would be punished under the provisions on statutory rape.[11]

With all due respect, I disagree that RA 7610 would be generally applicable to all cases of sexual abuse involving minors, except those who are under twelve (12) years of age. After much reflection, I instead concur with the views originally advanced by Senior Associate Justice Antonio T. Carpio (Justice Carpio) and Associate Justice Alfredo Benjamin S. Caguioa (Justice Caguioa)[12] that Section 5 (b), Article III of RA 7610 only applies in instances where the child-victim is "*exploited in prostitution or subject to other sexual abuse.*" To my mind, this limited view, as opposed to the *ponencia*'s expansive view, is not only supported by several textual indicators both in the law and the deliberations, it also squares with practical logic and reason, as will be explained below:

(1) As the law's title itself denotes, RA 7610 was intended to provide **stronger deterrence** and **special protection** against child abuse, exploitation and discrimination.[13] The idea of providing "stronger deterrence" and "special protection" connotes that Congress was not only establishing a more robust form of penal legislation, it was also creating something new. Thus, to suppose that RA 7610 would generally cover acts already punished under the Revised Penal Code (RPC) would defy the operational logic behind the introduction of this special law. Notably, the Court can take judicial notice of the fact that in the past decades of increasing modernity, Congress has been passing laws to penalize reprehensible acts which were not contemplated under the RPC. With respect to children, special penal laws such as the Child and Youth Welfare Code,[14] the Anti-Child Pornography Act

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7 *Ponencia*, p. 36.
8 Id. at 36-37.
9 Id. at 50-52.
10 Id. at 36.
11 See id. at 19-20.
12 See Dissenting Opinions of Justice Carpio and Justice Caguioa in *Quimvel v. People*, supra note 2, at 253-263 and 296-323, respectively.
13 See also Section 2 of RA 7610.
14 Presidential Decree No. 603 approved on December 10, 1974.

of 2009,[15] and the Anti-Violence Against Women and Their Children Act of 2004[16] created new havens of protection which were previously uncharted by the RPC. As I see it, RA 7610, especially with its peculiar signification of children "exploited in prostitution or subject to other sexual abuse," should be similarly regarded as these laws.

To expound, neither the old provisions of the RPC nor existing jurisprudence at the time RA 7610 was passed ever mentioned the phrase "*exploited in prostitution or subject to other sexual abuse*." Commonsensically therefore, the concept of EPSOSA should be deemed as a novel introduction by legislature. The driving force behind this legislative innovation can be gleaned from the deliberations. As explicated in her Sponsorship Speech, Sen. Rasul recognized that one of the reasons for introducing Senate Bill No. 1209 (which later became RA 7610) was to address the lack of criminal laws involving abused children as noted by the Supreme Court in the case of *People v. Ritter* (*Ritter*).[17] Notably, in *Ritter,* the Court acquitted the accused of rape on the ground that the child was not proven to be below the statutory age of twelve (12) years old nor was it proven that the sexual intercourse was attended with force or intimidation.[18] Thus, it was observed:

> **[Sen.] Rasul.** x x x
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> x x x x
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> 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. 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 street children from exploitation by pedophiles.** x x x.[19]

Borne from this legal hiatus, RA 7610 was enacted to, practically speaking, protect those who, like the child-victim in *Ritter*, "willingly engaged" in sexual acts, not out of a desire to satisfy their own sexual gratification, but because of their **vulnerable pre-disposition as exploited children**. This vulnerable pre-disposition is embodied in the concept of EPSOSA, which, as opposed to the RPC, effectively dispenses with the need to prove the lack of consent at the time the act of sexual abuse is committed. Accordingly, when it comes to a prosecution under Section 5 (b), Article III of RA 7610, consent at the time the sexual act is consummated is,

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[15] RA 9775 entitled "AN ACT DEFINING THE CRIME OF CHILD PORNOGRAPHY, PRESCRIBING PENALTIES THEREFOR AND FOR OTHER PURPOSES," approved on November 17, 2009.

[16] RA 9262 entitled "AN ACT DEFINING VIOLENCE AGAINST WOMEN AND THEIR CHILDREN, PROVIDING FOR PROTECTIVE MEASURES FOR VICTIMS, PRESCRIBING PENALTIES THEREFOR, AND FOR OTHER PURPOSES," approved on March 8, 2004.

[17] 272 Phil. 532 (1991).

[18] See id. at 546-570.

[19] Record of the Senate, Vol. III, No. 104, March 19, 1991, p. 1204.

unlike in the RPC, not anymore a defense. It is in this light that RA 7610 fills in the gaps of the RPC.

With these in mind, it is thus my view that RA 7610, specifically with its introduction of the EPSOSA element, is a lucid recognition by Congress that a child need not be forced, intimidated or, in any manner prevailed upon, at the time of the act's commission to be considered sexually abused or exploited; rather, it is enough that the child is put under a vulnerable pre-disposition that leads him or her to "consent" to the sexual deed. This niche situation, whether based on monetary ("exploited in prostitution") or non-monetary ("or subject to other sexual abuse") considerations, is what Section 5 (b), Article III of RA 7610 uniquely punishes. And in so doing, RA 7610 expands the range of existing child protection laws and effectively complements (and not redundantly supplants) the RPC. This intended complementarity is extant in Sen. Lina's sponsorship speech on RA 7610, *viz.*:

> **[Sen.] Lina.** x x x
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> 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 the 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**.
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> x x x x[20] (Emphasis and underscoring supplied)

(2) In relation to the first point, it is noteworthy that a general view on the application of RA 7610 would also lead to an unnerving incongruence between the law's policy objective and certain penalties imposed thereunder. For instance, if we were to subscribe to the *ponencia*'s theory that RA 7610 would generally apply to all sexual abuse cases involving minors twelve (12) years of age and above, then *why would RA 7610 – which was supposedly intended to provide stronger deterrence and special protection against child abuse – provide for a lower penalty for child abuse committed through sexual intercourse than that provided under the then existing RPC framework?* For context, under Article 335 of the RPC prior to its amendment by RA 8353 (or the Anti-Rape Law of 1997), the crime of rape committed against a minor, who is not under twelve (12) years of age and not falling under the enumerated qualifying circumstances, is punished with the penalty of *reclusion perpetua* to death. On the other hand, under Section 5 (b), Article III of RA 7610, the crime of sexual abuse committed through sexual intercourse (or lascivious conduct) against a child EPSOSA is punished with the penalty of *reclusion temporal* in its medium period to *reclusion perpetua*. Clearly, it would not make sense for Congress to pass a supposedly stronger law against child abuse if the same carries a lower penalty for the same act of rape already punished under the old RPC provision.

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[20] Record of the Senate, Vol. IV, No. 111, April 29, 1991, pp. 190-191.

This incongruence is only made possible if one considers Section 5 (b), Article III of RA 7610 to have overlapped with an act already punished under the existing penal code. Verily, this could not have been the intent of our lawmakers. On the other hand, respecting the complementarity between RA 7610 and RPC would cogently subserve the policy objective to provide stronger deterrence and special protection against child abuse. As Justice Caguioa astutely remarked, "[RA] 7610 and the RPC x x x have different spheres of application; they exist to complement each other such that there would be no gaps in our criminal laws."[21] Thus, given that the application of RA 7610 is **independent – and in fact, mutually exclusive – from** the RPC's rape and acts of lasciviousness provisions, the penchant of the *ponencia*[22] to determine which law would apply based on which law provides the higher penalty therefor becomes unneccessary. Simply put, if **(a)** RA 7610 applies in a scenario where the accused sexually abuses a child who "consents" to the deed but is nonetheless EPSOSA, and **(b)** this case is treated separately and differently from the RPC scenario wherein the child does not consent to the sexual act because he is forced, intimidated, or otherwise prevailed upon by the accused, then **there would be no quandary in choosing which law to apply based on which provides the higher penalty therefor**. Neither would there be any need for corrective legislation as the *ponencia* suggests[23] if only RA 7610's provisions are interpreted correctly. Again, as originally and meticulously designed by Congress, the laws on sexual abuse of minors have their own distinct spheres of application: apply RA 7610 in scenario (a); apply the RPC in scenario (b). In understanding the intent of Congress to fill in the gaps in the law, it is my position that Section 5, Article III of RA 7610 must be treated as a *separate and distinct statutory complement which works side-by-side with the RPC*; it should not, as the *ponencia* assumes, be deemed as a fully comprehensive statute which substantively subsumes and even supplants the sexual abuse scenarios already covered by the RPC. If it were so, then RA 7610 should not have been crafted as a special penal law but as amendatory statute of the existing penal code.

(3) The proviso under Section 5 (b), Article III of RA 7610 – which provides that "*when the [victim] is under twelve (12) years of age, the perpetrators **shall be prosecuted under x x x the Revised Penal Code**, for rape or lascivious conduct, as the case may be*" – is a *textual indicator* that RA 7610 has a specific application only to children who are pre-disposed to "consent" to a sexual act because they are "exploited in prostitution or subject to other sexual abuse." For reference, Section 5 (b), Article III of RA 7610 reads in full:

> **Section 5.** ***Child Prostitution and Other Sexual Abuse.*** – x x x
>
> 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 victims 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.*

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21 See Concurring and Dissenting Opinion of Justice Caguioa, p. 33.

22 See *ponencia*, pp. 38-40. See also *Dimakuta v. People*, 771 Phil. 641, 670-671 (2015).

23 See *ponencia*, pp. 43-44.

> *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
>
> x x x x (Emphasis and underscoring supplied)

While the phrase "*shall be prosecuted under*" has not been discussed in existing case law, it is my view that the same is a clear instruction by the lawmakers to defer any application of Section 5 (b), Article III of RA 7610, irrespective of the presence of EPSOSA, when the victim is under twelve (12). As a consequence, when an accused is prosecuted under the provisions of the RPC, only the elements of the crimes defined thereunder must be alleged and proved. Necessarily too, unless further qualified, as in the second proviso, *i.e.*, *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*, the penalties provided under the RPC would apply.

In this relation, it may thus be ruminated: *why did RA 7610 defer application to the RPC, when the victim is under twelve (12) years of age*? After much thought, it is my opinion that this self-evident deference to the RPC hints on the meaning of EPSOSA and consequentially, Section 5 (b), Article III of RA 7610's niche application. As discussed, EPSOSA is a circumstantial pre-disposition which effectively taints the child's consent. As a "consent-tainting" element which is integral and unique to RA 7610, the proviso "shall be prosecuted under [the RPC]" recognizes that one cannot prosecute a sex offender under RA 7610 when a child is under twelve (12) years of age. **This is because the concept of consent is altogether immaterial when a child is below twelve (12) years of age because the latter is conclusively presumed to be incapable of giving consent.**[24] In other words, since the question of consent will never be at issue when the victim is under twelve (12) years of age, then the application of Section 5 (b), Article III of RA 7610 becomes technically impossible.

The foregoing analysis, to my mind, reinforces the point that RA 7610 was meant to apply only to cases **where the consent of the child** (insofar as his pre-disposition to consent [which should be contradistinguished from consent at the time of the act's consummation which falls under the RPC]) **is at question**. To this end, *if RA 7610 was intended to apply to "all forms of sexual abuse" under a general reading of the law, then why does RA 7610 need to defer to the RPC provisions on statutory rape or lascivious conduct*? *If RA 7610 overlapped with and equally covered the acts punished under the RPC, then why the need of inserting a qualifying proviso when the child-victim is under twelve (12) years of age?* **Surely, if the intendment of RA 7610 was to generally apply to all forms of sexual abuse, then it could have very well applied to cases wherein the child is under twelve (12) years of age.** The explicit qualification contained in the first proviso of Section 5

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[24] See *People v. Manaligod*, G.R. No. 218584, April 25, 2018.

(b), Article III of RA 7610 apparently negates the *ponencia*'s theory of general applicability.

Notably, the *ponencia* utilizes *the fact that the first proviso of Section 5 (b), Article III of RA 7610 explicitly mentions the RPC* as basis to support its position that Section 5 (b), Article III of RA 7610 should not only be limited to the unique context of "child prostitution, other sexual abuse in relation to prostitution, and the specific acts punished under RA 7610."[25] In other words, the *ponencia* theorizes that since Section 5 (b), Article III of RA 7610 mentions the RPC in its provisos, then *ipso facto* RA 7610 was meant to generally cover even acts of sexual abuse previously punished under the already existing RPC. Accordingly, it submits the following interpretation: "[w]hen the first proviso of Section 5 (b) states that 'when the victim is under 12 years of age[, the perpetrators] shall be prosecuted under the RPC,' it only means that the elements of rape under then Article 335, paragraph 3 of the RPC [now Article 266-A, paragraph 1 (d)], and of acts of lasciviousness under Article 336 of the RPC, have to be considered, alongside the element of the child being 'exploited in prostitution and or other sexual abuse.'"[26]

I respectfully disagree. The fact that Section 5 (b), Article III of RA 7610 mentions the RPC does not automatically mean that it was meant to cover the acts already punished in the RPC. To properly interpret its sense, the context in which the RPC is mentioned must be taken into consideration; after all, words do not simply appear on the face of a statute without purposive and rational intention. Here, the RPC is mentioned in a proviso. Jurisprudence dictates that "[t]he office of a proviso is to limit the application of the law. It is contrary to the nature of a proviso to enlarge the operation of the law."[27] Simply stated, a proviso, by nature, is meant to either be a qualifier or an exception. As afore-discussed, it is my view that EPSOSA is a special element meant to address a situation not contemplated under the RPC. The general rule is that "[t]hose who commit the act of sexual intercourse of lascivious conduct with a child exploited in prostitution or subject to other sexual abuse" should be punished under Section 5 (b) of RA 7610 because this is the unique situation sought to be covered by the special law. However, if a child is below 12 the law conclusively presumes the lack of consent – may it be consent at the time the crime is consummated or consent as a pre-disposition to give in into a sexual act. Since consent is lacking in a case where the child is 12 years old, EPSOSA which is intrinsically a "consent-element" virtually vanishes from the equation. Therefore, *since there would never be a case of EPSOSA when the child is less than 12*, the proviso – being an exceptive clause which limits the application of the law, *i.e.*, Section 5 (b), Article III of RA 7610 – actually directs that the prosecution of accused should fall under the RPC where EPSOSA is not material. In this regard, the proviso serves as a statutory recognition of Section 5 (b), Article III of RA 7610's own limitations, hence, the need to defer prosecution under the elements of the RPC. To my mind, this interpretation, which only becomes possible under the proposed limited view of Section 5 (b), Article III of RA 7610, squares with the nature of a proviso.

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[25] *Ponencia*, p. 38.
[26] Id.
[27] *Borromeo v. Mariano*, 41 Phil. 322, 326 (1921).

Besides, the *ponencia*'s above-interpretation of the first proviso of Section 5 (b), Article III of RA 7610 (*i.e.*, that the elements of the RPC should be read alongside with the element of EPSOSA) does not carry any practical value *since the elements of rape and acts of lasciviousness when considered alongside the element of EPSOSA already constitute the crime punished under the general clause prior to the proviso*. In particular, the opening phrase of Section 5 (b), Article III of RA 7610 already punishes "[t]hose who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject to other sexual abuse." Thus, under the *ponencia*'s interpretation, the first proviso of Section 5(b) would practically add nothing to the law since when one is prosecuted under the opening phrase, the elements of rape and acts of lasciviousness[28] are already considered. As such, the opening phrase of Section 5 (b) of RA 7610 would have served the purpose of punishing a sex offender who has sexual intercourse or commits acts of lasciviousness against a child, even without the first proviso.

(4) In the deliberations of RA 7610, Sen. Lina explained that despite the presence of monetary considerations, the prosecution of the accused will still be under Article 335 of the RPC, and the concept of Rape under the RPC shall be followed, *viz.*:

> **Senator Pimentel.** At any rate, Mr. President, before a clean copy is finally made available, perhaps, the distinguished Gentleman can tell us already **what will be the effect of this particular amendment on the rape provisions of the Revised Penal Code**. Would it mean that the rape of a female child below 12 years old, whether or not there is force, but there is no profit motive constitutes rape? In other words, are we limiting the scope of the crime of rape of a child below 12 years old to that particular instance?
>
> **[Sen.] 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**?
>
> **[Sen.] 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**

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[28] The elements of rape are: "(1) sexual congress, (2) with a woman, (3) by force and without consent x x x." Meanwhile, "[t]he elements of the crime of acts of lasciviousness are: (1) that the offender commits any act of lasciviousness or lewdness; (2) that it is done (a) by using force or intimidation or (b) when the offended party is under 12 years of age; and (3) that the offended party is another person of either sex." (*People v. Dela Cuesta*, 430 Phil. 742, 751-752 [2002].)

With the exception of the EPSOSA element, the above-stated elements, *when committed against a child*, are substantively present in the crime of violation of Section 5 (b), Article III of RA 7610: (a) **the accused commits the act of sexual intercourse or lascivious conduct**; (*b*) the said act is performed with a child exploited in prostitution or subjected to other sexual abuse; and (c) the child, whether male or female, is below 18 years of age. (See *Olivarez v. Court of Appeals*, 503 Phil. 421, 431 [2005].)

> **monetary consideration, regardless of consent,** the perpetrator will still be charged with statutory rape.
>
> x x x x[29] (Emphases and underscoring supplied)

Hence, to support the preceding point, there seems to be a conscious *delineation* by members of Congress between the concept of Rape under the RPC and the violation under Section 5, Article III of RA 7610.

To be sure, the fact that the original phrase "exploited in prostitution" was later extended to include the phrase "or subject to other sexual abuse" is not sufficient basis to break this delineation. As the deliberations further show, the intent behind the addition is to plug the loophole on exploitative circumstances that are not based on non-monetary considerations:

> **[Sen.] 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 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?
>
> **[Sen.] 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.
>
> **[Sen.] 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
>
> **[Sen.] Angara**. The new section will read something like this, Mr. President: MINORS, WHETHER MALE OR FEMALE, WHO FOR MONEY,

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[29] Record of the Senate, Vol. IV, No. 116, May 9, 1991, pp. 333-334.

> PROFIT, OR ANY OTHER CONSIDERATION OR INFLUENCE OF ANY ADULT, SYNDICATE OR GROUP INDULGE IN SEXUAL INTERCOURSE, *et cetera*."[30] (Emphases supplied)

As Justice Carpio rationalized in *Quimvel*, "[t]he phrase 'or any other consideration or due to the coercion or influence of any adult, syndicate or group' was added to merely cover situations where a child is abused or misused for sexual purposes without any monetary gain or profit. This was significant because profit or monetary gain is essential in prostitution. Thus, the lawmakers intended that in case all the other elements of prostitution are present, but the monetary gain or profit is missing, the sexually abused and misused child would still be afforded the same protection of the law as if he or she were in the same situation as a child exploited in prostitution."[31]

Clearly therefore, the phrase "or subject to other sexual abuse" was meant only to expand the range of circumstances that are nonetheless, relevant to the child's circumstantial pre-disposition and hence, should not be confounded with the act of sexual abuse which is a separate and distinct element under the law.[32]

(5) Finally, a literal reading of the law itself confirms that the phrase "exploited in prostitution or subject to other sexual abuse" was intended to be appreciated separately from the act of sexual abuse itself. For reference, Section 5, Article III of RA 7610 states:

> Section 5. Child Prostitution and Other Sexual Abuse. – Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are **deemed to be children exploited in prostitution and other sexual abuse.**
>
> The penalty of *reclusion temporal* in its medium period to *reclusion perpetua* shall be imposed upon the following:
>
> 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**; x x x
>
> x x x x (Emphases and underscoring supplied)

As plainly worded, the law punishes those who commit the act of sexual intercourse or lascivious conduct with *a child "exploited in prostitution or **subject** to other sexual abuse."* The word "subject" is a clear qualification of the term "child," which means it is descriptive of the same. Hence, if Congress intended to equate the term *"subject to other sexual abuse"* with the act of sexual intercourse or

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30 Record of the Senate, Vol. 1, No. 7, August 1, 1991, pp. 261-263.

31 See Dissenting Opinion of Justice Carpio in *Quimvel v. People*, supra note 2, at 257-258.

32 See id. at 256-260.

lascivious conduct itself, then it could have easily phrased the provision as: "those who commit the act of sexual intercourse or lascivious conduct with children."

However, it is fairly evident that with the coining of the new phrase "a child exploited in prostitution or subject to other sexual abuse," Congress intended to establish a special classification of children, *i.e.*, those EPSOSA, which is further suggested by the term "*deemed.*" It is a cardinal rule in statutory construction that when the law is clear and free from any doubt or ambiguity, there is no room for construction or interpretation. There is only room for application.[33] As the statute is clear, plain, and free from ambiguity, it must be given its literal meaning and applied without attempted interpretation.[34]

CONCLUSION

Based on the foregoing analysis, I therefore submit the following table of application:

Acts done by the accused consist of:	*Crime committed if the victim is under twelve (12) years old or demented*	*Crime committed if the victim is twelve (12) years old or older but below eighteen (18), or is eighteen (18) years old but under special circumstances*[35]	*Crime committed if victim is eighteen (18) years old and above*
Acts of Lasciviousness	Statutory[36] Acts of Lasciviousness under Article 336 of the RPC in relation to[37] the second proviso of Section 5 (b), Article III of RA 7610 **Penalty**: *Reclusion*	If committed against a child not EPSOSA, the crime committed would be **Acts of Lasciviousness** under Article 336 of the RPC Penalty: ***Prision Correccional***	Acts of Lasciviousness under Article 336 of the RPC Penalty: ***Prision Correccional***

[33] *Amores v. House of Representatives Electoral Tribunal*, 636 Phil. 600, 608 (2010), citing *Twin Ace Holdings Corporation v. Rufina and Company*, 523 Phil. 766, 777 (2006).

[34] *Padua v. People*, 581 Phil. 489, 501 (2008).

[35] Or "is 18 years or older but under special circumstances (as defined in RA 7610) and engaged in prostitution or subjected to other sexual abuse."

[36] The word "Statutory," while not stated in the law, has been used as a matter of practice to indicate that the sexual act is committed against a child below the age of twelve (12), as in its application in its often-used term "Statutory Rape."

[37] The phrase "in relation to" is used, as a matter of practice, to indicate that a provision of a penal law which defines the crime is related another provision that provides the penalty imposable therefor.

	temporal in its medium period **NOTE:** Based on the first proviso of Section 5 (b), Article III of RA 7610, even if the victim is a child EPSOSA, the prosecution shall be under the RPC; hence, if the child is less than twelve (12), EPSOSA is irrelevant	If committed against a child EPSOSA, the crime committed would be **Violation of Section 5 (b), Article III of RA 7610 through Lascivious Conduct** (term used in the Implementing Rules and Regulations [IRR][38]) and the penalty would be ***reclusion temporal* in its medium period to *reclusion perpetua*.**[39]	
Sexual Assault	Statutory Sexual Assault under Article 266-A (2) of the RPC, as amended by RA 8353 in relation to the second proviso of Section 5 (b), Article III of RA 7610	If committed against a child not EPSOSA, **Sexual Assault** under Article 266-A (2) of the RPC, as amended by RA 8353 **Penalty: *prision mayor***	Sexual Assault under Article 266-A (2) of the RPC. **Penalty: *prision mayor***

[38] Section 2 (h) of the IRR (Rules and Regulations on the Reporting and Investigation of Child Abuse Cases) provides:

> Section 2. *Definition of Terms.* x x x
>
> x x x x
>
> h) "Lascivious conduct" means the 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;
>
> x x x x

[39] By operation of the second proviso of Section 5 (b), Article III of RA 7610; see discussion on pages 14-15.

	Penalty: *Reclusion temporal* in its medium period **NOTE:** Based on the first proviso of Section 5 (b), Article III of RA 7610, even if the victim is a child EPSOSA, the prosecution shall be under the RPC; hence, if the child is less than 12, EPSOSA is irrelevant	If committed against a child EPSOSA, the crime would be **Violation of Section 5 (b), Article III of RA 7610 through Lascivious Conduct** (concept of "sexual assault" subsumed under the term "Lascivious Conduct" used in the IRR[40]) and the penalty would be ***reclusion temporal* in its medium period to *reclusion perpetua***[41]	
Carnal knowledge / Rape by Sexual Intercourse	Statutory Rape under Article 266-A (1) (d) of the RPC, as amended by RA 8353 **Penalty:** ***reclusion perpetua***, except when the victim is below seven (7) years old in which case death penalty shall be imposed **NOTE:** Based on the first proviso of Section 5 (b), Article III of RA 7610, even if the victim is a child EPSOSA, the prosecution shall	If committed against a child not EPSOSA, Rape under Article 266-A (1) of the RPC, as amended by RA 8353 **Penalty:** ***reclusion perpetua*** If committed against a child EPSOSA, the crime would be **Violation of Section 5 (b), Article III of RA 7610 through Sexual Abuse** (term used in the IRR[42]) and the	Rape under Article 266-A (1) of the RPC, as amended by RA 8353 **Penalty:** ***reclusion perpetua***

40 See note 38.

41 By operation of the second proviso of Section 5 (b), Article III of RA 7610; see discussion on pages 14-15.

42 Section 2 (g) of the IRR (Rules and Regulations on the Reporting and Investigation of Child Abuse Cases) provides:

	be under the RPC; hence, if the child is less than twelve (12), EPSOSA is irrelevant	penalty would be ***reclusion temporal* in its medium period to *reclusion perpetua***	

Notably, as earlier mentioned, when the child-victim is under twelve (12) years of age and, hence, conclusively presumed to be incapable of giving consent, Section 5 (b), Article III of RA 7610 instructs that the prosecution of the accused shall be under the provisions of the RPC and, hence, making it unnecessary to determine the presence or absence of EPSOSA. Accordingly:

Under twelve (12) years old cases

(*1*) If done through sexual intercourse, the crime is "*Rape*" under Article 266-A (1) of the RPC, as amended by RA 8353;

(*2*) If done through acts classified as sexual assault, the crime is "*Sexual Assault*" under Article 266-A (2) of the RPC, as amended by RA 8353; and

(*3*) If done through lascivious conduct not classified as sexual assault, the crime is "*Acts of Lasciviousness*" under Article 336 of the RPC.

In instances of Rape, the prescribed penalty is *reclusion perpetua*, subject to the existence of qualifying circumstances.

However, in cases of Sexual Assault or Acts of Lasciviousness, it is my position that the second proviso in Section 5 (b), Article III of RA 7610, which provides that "*the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period*": ***first***, amended the prescribed penalty of *prision correccional* under Article 336 of the RPC on Acts of Lasciviousness; and ***second***, ought to prevail over the prescribed penalty of *prision mayor* under Article 266-A, par. 2, in relation to Article 266-B, of the RPC, as amended by RA 8353, albeit the latter law is the more recent statutory enactment. The reasons on this second point are: (**1**) pursuant to its IRR, the concept of lascivious conduct under Section 5, Article III of RA 7610 was already broad enough to cover the specific acts prescribed under Article 266-A, par. 2 of RA 8353[43] and,

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Section 2. *Definition of Terms*. x x x

x x x x

g) "Sexual abuse" includes 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;

x x x x

[43] See note 38.

hence, already subsumes the concept of Sexual Assault; (**2**) RA 8353 introduced the concept of "sexual assault" essentially to punish graver forms of acts of lasciviousness which were not accounted for in the RPC (not in RA 7610); and (**3**) at any rate, the penalty imposed for Sexual Assault under RA 8353 does not take into account the fact that the act is committed against a child-victim under twelve (12) years of age. Accordingly, based on these substantive considerations (and not solely on penalty gravity[44]), RA 8353's lesser penalty of *prison correctional* imposed in general cases of Sexual Assault cannot prevail over Section 5 (b), Article III of RA 7610's penalty of *reclusion temporal* in its medium period in cases where the lascivious conduct, irrespective of kind, is committed against a child-victim under 12.

As a final note, I am well-aware of the ruling in *People v. Ejercito*[45] *(Ejercito)* wherein the former Second Division of this Court had ruled that RA 8353 (amending the RPC) should now be uniformly applied in cases involving sexual intercourse committed against minors, and not Section 5 (b), Article III of RA 7610.[46] To recount, the conclusion was largely based on the following premise:

> [T]he x x x provisions of RA 8353 already accounted for the circumstance of minority under certain peculiar instances. **The consequence therefore is a clear overlap with minority as an element of the crime of sexual intercourse against a minor under Section 5 (b) of RA 7610**. However, as it was earlier intimated, RA 8353 is not only the more recent statutory enactment but more importantly, the more comprehensive law on rape; therefore, the Court herein clarifies that in cases where a minor is raped through sexual intercourse, the provisions of RA 8353 amending the RPC ought to prevail over Section 5 (b) of RA 7610 although the latter also penalizes the act of sexual intercourse against a minor.[47] (Emphasis and underscoring supplied)

However, it must now be clarified that the above-stated overlap on the concept of minority in the *Ejercito* case is an observation only made possible when applying the then-prevailing *Quimvel* ruling. Again, *Quimvel* did not recognize that EPSOSA is a special and unique element that is peculiar to RA 7610. However, as herein discussed, RA 7610 actually introduced the EPSOSA element which was not contemplated under the RPC, as amended by RA 8353. This means that RA 8353 cannot now overlap with the RA 7610 since the latter contains a peculiar element which is unique to it; hence, applying the principle of *lex specialis derogant generali*,[48] Section 5 (b), Article III of RA 7610 ought to prevail when the EPSOSA element is alleged and proven in a particular case.

To this end, it goes without saying that when the circumstance of a child EPSOSA is not alleged in the Information and later, proven during trial, it is erroneous to prosecute – much more, convict – the accused under Section 5 (b), Article III of RA 7610, else his constitutional right to be informed of the nature and

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44 See *People v. Ejercito*, G.R. No. 229861, July 2, 2018.
45 Id.
46 See id.
47 See id.
48 See *Barcelote v. Republic*, G.R. No. 222095, August 7, 2017, 834 SCRA 564, 578.

cause of the accusation against him be violated.[49] Insofar as this case is concerned, the EPSOSA element is missing from both Informations in Criminal Case Nos. SCC-6210 and SCC-6211. Nonetheless, EPSOSA is immaterial given that the child-victim is, in both instances, under twelve (12) years of age. Hence, same as the result reached by the *ponencia* albeit our fundamental differences in reasoning, Tulagan should be convicted of:

(a) In Criminal Case No. SCC-6210, Statutory Sexual Assault under Article 266-A (2) of the RPC, as amended by RA 8353, in relation to the second proviso of Section 5 (b), Article III of RA 7610, and thereby, meted with the penalty of *reclusion temporal* in its medium period; and

(b) In Criminal Case No. SCC-6211, Statutory Rape under Article 266-A (1) (d) of the RPC, as amended by RA 8353, and thereby, meted with the penalty of *reclusion perpetua*.

Meanwhile, anent the damages to be awarded, I fully support the *ponencia*'s prudent decision to adjust the same based on the jurisprudential[50] equivalence of the above-stated penalties. Hence, Tulagan should pay the adjusted amounts of: (*a*) in Criminal Case No. SCC0-6210, ₱50,000.00 as civil indemnity, ₱50,000.00 as moral damages, and ₱50,000.00 as exemplary damages; and (*b*) in Criminal Case No. SCC-6211, ₱75,000.00 as civil indemnity, ₱75,000.00 as moral damages, and ₱75,000.00 as exemplary damages.

ESTELA M. PERLAS-BERNABE
Associate Justice

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[49] "It must be stressed that in all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation against him to ensure that his due process rights are observed. Thus, every indictment must embody the essential elements of the crime charged with reasonable particularity as to the name of the accused, the time and place of commission of the offense, and the circumstances thereof. Hence, to consider matters not specifically alleged in the Information, even if proven in trial, would be tantamount to the deprivation of the accused's right to be informed of the charge lodged against him." (*People v. Bagamano*, 793 Phil. 602, 608-609 [2016]; citations omitted.)

[50] See *People v. Jugueta*, 783 Phil. 806, 847-853 (2016).