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Third Division

JAN 07 2021

THIRD DIVISION

G.R. No. 235610 - Rodan A. Bangayan, *Petitioner,* **v. People of the Philippines,** *Respondent.*

Date of Promulgation:

September 16, 2020

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SEPARATE CONCURRING OPINION

ZALAMEDA, *J.*:

In the recent case of *People v. Tulagan,*[1] the Court clarified the significance of consent in sexual abuse cases when the offended party is a child 12 years old and above, but below 18 years old, or when the child is 18 years or older under special circumstances, to wit:

> We take exception, however, to the sweeping conclusions in *Malto* (1) that "a child is presumed by law to be incapable of giving rational consent to any lascivious conduct or sexual intercourse" and (2) that "consent of the child is immaterial in criminal cases involving violation of Section 5, Article III of RA 7610" because they would virtually eradicate the concepts of statutory rape and statutory acts of lasciviousness, and trample upon the express provision of the said law.
>
> Recall that in statutory rape, the only subject of inquiry is whether the woman is below 12 years old or is demented and whether carnal knowledge took place; whereas force, intimidation and physical evidence of injury are not relevant considerations. With respect to acts of lasciviousness, R.A. No. 8353 modified Article 336 of the RPC by retaining the circumstance that the offended party is under 12 years old in order for acts of lasciviousness to be considered as statutory and by adding the circumstance that the offended party is demented, thereby rendering the evidence of force or intimidation immaterial. **This is because the law presumes that the victim who is under 12 years old or is demented does not and cannot have a will of her own on account of her tender years or dementia; thus, a child's or a demented person's consent is immaterial because of her presumed incapacity to discern good from evil.**

[1] G.R. No. 227363, 12 March 2019.

However, considering the definition under Section 3 (a) of R.A. No. 7610 of the term "children" which refers to persons below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition, We find that the opinion in *Malto*, that a child is presumed by law to be incapable of giving rational consent, unduly extends the concept of statutory rape or acts of lasciviousness to those victims who are within the range of 12 to 17 years old, and even those 18 years old and above under special circumstances who are still considered as "children" under Section 3 (a) of R.A. No. 7610. **While *Malto* is correct that consent is immaterial in cases under R.A. No. 7610 where the offended party is below 12 years of age, We clarify that consent of the child is material and may even be a defense in criminal cases involving violation of Section 5, Article III of R.A. No. 7610 when the offended party is 12 years old or below 18, or above 18 under special circumstances. Such consent may be implied from the failure to prove that the said victim engaged in sexual intercourse either"due to money, profit or any other consideration or due to the coercion or influence of any adult, syndicate or group."**

x x x x

If the victim who is 12 years old or less than 18 and is deemed to be a child "exploited in prostitution and other sexual abuse" because she agreed to indulge in sexual intercourse "for money, profit or any other consideration or due to coercion or influence of any adult, syndicate or group," then the crime could not be rape under the RPC, because this no longer falls under the concept of statutory rape, and there was consent. That is why the offender will now be penalized under Section 5 (b), R.A. No. 7610, and not under Article 335 of the RPC [now Article 266-A]. But if the said victim does not give her consent to sexual intercourse in the sense that the sexual intercourse was committed through force, threat or intimidation, the crime is rape under paragraph 1, Article 266-A of the RPC. **However, if the same victim gave her consent to the sexual intercourse, and no money, profit, consideration, coercion or influence is involved, then there is no crime committed, except in those cases where "force, threat or intimidation" as an element of rape is substituted by "moral ascendancy or moral authority,"** like in the cases of incestuous rape, and unless it is punished under the RPC as qualified seduction under Article 337 or simple seduction under Article 338.[2] (Emphasis and underscoring supplied)

This notion was reiterated by the Court in *Monroy v. People,*[3] *viz:*

x x x The concept of consent under Section 5 (b), Article III of RA 7610 peculiarly relates to the second element of the crime – that is, the act of sexual intercourse is performed with a child exploited in prostitution or

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2 Id.

3 G.R. No. 235799, 29 July 2019.

> subjected to other sexual abuse. **A child is considered "exploited in prostitution or subjected to other sexual abuse" when the child is pre-disposed to indulge in sexual intercourse or lascivious conduct because**
>
> **of money, profit or any other consideration or due to the coercion of any adult, syndicate, or group,** which was not shown in this case; hence, petitioner's conviction for the said crime cannot be sustained.[4] (Emphasis supplied)

Hence, for the successful prosecution of a violation of Section 5(b) of Republic Act No. (RA) 7610, it must be proven that the **child engaged in sexual intercourse or lascivious conduct due to money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group.**

To note, the term "other 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. It also includes the molestation or prostitution of children, or committing incestuous acts against children.[5]

Meanwhile, the term "coercion and influence" broadly covers "force and intimidation." "Coercion" is defined as "compulsion, force or duress," while "[undue] influence" means "persuasion carried to the point of overpowering the will" or "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective." On the other hand, "intimidation" is defined as "unlawful coercion; extortion; duress; putting in fear."[6]

As enunciated in RA 7610, it is the policy of the State to provide special protection to children against all forms of abuse, neglect, cruelty, exploitation, discrimination, and other conditions prejudicial to their development. The best interest of the child shall be the paramount consideration of the court, which shall exert effort to promote the welfare of children and enhance their opportunities for a useful and happy life.[7]

The same law defines "children" as persons below 18 years of age, or those over 18 but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition.[8] The law looks upon

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4 Id.

5 *Ramilo v. People,* G.R. No. 234841, 03 June 2019.

6 *Quimvel v. People,* 808 Phil. 889-1000 (2017); G.R. No. 214497, 18 April 2017, 823 SCRA 192, 230.

7 Section 2, RA 7610.

8 Section 3, RA 7610.

this group as a special class of persons, in varying extents, by recognizing that they are unable to fully take care of or protect themselves from abuse, neglect, cruelty, exploitation or discrimination.

In our jurisdiction, it is conclusively presumed that all children under 12 years old do not have a will of their own due to their tender age, and therefore cannot give intelligent consent to the sexual act. For that reason, the law does not recognize voluntariness on the part of a victim in lascivious conduct or rape cases as a valid defense.[9] More importantly, it is essential that we examine the reason for adopting the age of 12 as the age of consent.

Before the enactment of RA 8353 or *The Anti-Rape Law of 1997,* the Senate proposed to increase the age of consent from 12 to 14 years with the intention of providing greater protection to children. In fact, the final version of Senate Bill No. 950 provides for the age of 14 as the threshold. However, during the Bicameral Conference Committee Meetings, the House panel strongly opposed such a change. They pointed out that the age 13 or 14 is usually regarded as the age of discovery, and these children may have been engaging in carnal knowledge only as innocent acts of discovery. Considering that the imposable penalty is death, the House panel felt that the increase in the age for statutory rape may prove to be unduly harsh. In the end, 12 years old remained as the age of consent.[10]

Critical to this discussion, however, is to underscore that intelligence and understanding to give effective consent is not developed overnight. The wisdom of a child who just turned 12 years old, as opposed to a child who is a few days shy of that age, cannot be considered as vastly different, or fully developed enough to effectively discern good from evil. In the same vein, it cannot be denied that there is a difference in the level of maturity between a 12-year-old from that of a 17-year-old child.

Thus, taking this reality into account, the concept of consent of a child under RA No. 7610 should be viewed as a **spectrum** where, the closer a child's age is to 12 years, the more vulnerable and susceptible he or she is to abuse, neglect, cruelty, exploitation, or discrimination. In other words, the younger the child, the more **likely** he or she is to give ineffectual consent, whether direct or implied.

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[9] *People v. Andres,* 324 Phil. 124-131 (1996); G.R. No. 114936, 20 February 1996, 253 SCRA 751, 757.

[10] Lique, Venus V. *The Anti-Rape Law and the Changing Times: Nature, Issues and Incidents.* 43 ATENEO L.J. 141 (1999). See https://drive.google.com/file/d/13FwizXkNFs7Im_bfqpBijpTJWQ2zgqqf/view.

Still, the numerical age of the child should not be the absolute and deciding ground to determine the efficacy of consent. Rather, it should be assessed in conjunction with other factors, such as the **age of accused, familial influence, sexual knowledge of the child, power of the accused over the child, trust accorded by the child to accused, and all other dynamics that influence the formation of a rational decision pertaining to sexual matters. Coercion, intimidation, or influence must be ascertained in light of the victim's perception and judgment at the time of the commission of the crime, and not by any hard and fast rule.** These are the elements that should guide the courts in determining whether there was consent to indulge in a sexual act and whether that consent was given due to coercion, intimidation, or influence of the accused.

Hence, while I agree with the *ponente*'s discussion on the development in our jurisprudence regarding the consent of a child to sexual activity, the discourse should be broadened to include other relevant factors that influence or inform that consent.

At this point, I would like to emphasize that the prosecution bears the burden to establish the guilt of the accused beyond reasonable doubt.[11] Accordingly, in order to prove indulgence in sexual intercourse or lascivious conduct due to money, profit, or any other consideration, or due to the coercion or influence of any adult, syndicate, or group, **it is the prosecution's duty to likewise show the presence of factors, similar to the ones discussed above, affect that consent.**

In the case at bar, I cannot conclude with certainty that AAA engaged in sexual intercourse with accused-appellant **due to the latter's coercion or influence.** Records are bereft of evidence to support the prosecution's theory mainly because AAA did not testify against accused-appellant. BBB's testimony alone was insufficient to establish the elements of the crime charged because his testimony merely proved the fact of sexual intercourse and not the element of coercion or influence.

In our criminal justice system, the overriding consideration is not whether the courts doubt the innocence of the accused but whether there is reasonable doubt as to his guilt. Where there is reasonable doubt as to the guilt of the accused, he must be acquitted even though there is still a level of doubt as to his innocence. This is demanded by the Constitution itself, which accepts nothing less than proof beyond reasonable doubt to overthrow the presumption of innocence.[12]

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[11] *Patula v. People*, 685 Phil. 376-411 (2012); G.R. No. 164457, 11 April 2012, 669 SCRA 135, 150.

[12] *People v. Baulite,* 419 Phil. 191-199 (2001); G.R. No. 137599, 08 October 2001, 366 SCRA 732, 737.

Indeed, even in *Monroy v. People,*[13] the recent case cited by the *ponente,* the Court specifically stated in the dispositive portion that the acquittal of therein accused was on the ground of reasonable doubt. The following pronouncement was also made to clarify the opinion of the Court:

> It bears stressing that **the Court's finding does not mean absolute certainty that petitioner did not coerce AAA to engage in the sexual act.** It is simply that the evidence presented by the prosecution fall short of the quantum of proof required to support a conviction. Jurisprudence has consistently held that "[a] conviction in a criminal case must be supported by proof beyond reasonable doubt, which means a moral certainty that the accused is guilty; the burden of proof rests upon the prosecution." If the prosecution fails to do so, "the presumption of innocence of the accused must be sustained and his exoneration be granted as a matter of right. For the prosecution's evidence must stand or fall on its own merit and cannot be allowed to draw strength from the weakness of the evidence for the defense," as in this case. (Emphasis supplied)

Evaluating the facts of this case with the relevant factors that **may** have influenced AAA's perception and judgment at the time of the commission of the crime, I believe the Court should similarly acquit herein accused-appellant on account of reasonable doubt. Compared to *Monroy*, where the 14-year-old victim professed her love to therein accused through a letter, the supposed "consent" of herein victim, who just barely turned 12 years old when the incident occurred, is less recognizable. Accordingly, rather than absolving accused-appellant because AAA absolutely and undoubtedly "consented" to having sexual intercourse with him, I believe that the Court should, instead, acquit accused-appellant on the ground of reasonable doubt engendered by to the prosecution's failure to present evidence on other factors that may have affected AAA's consent such that it can be considered ineffectual or driven by coercion or influence.

ACCORDINGLY, I vote to ACQUIT accused-appellant **on the ground of reasonable doubt.**

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RODIL V. ZALAMEDA
Associate Justice

[13] *Supra* at note 3.