

FIRST DIVISION

G.R. No. 240229 — PEOPLE OF THE PHILIPPINES, *plaintiff-appellee*,  
*versus* NIEL RAYMOND A. NOCIDO, *accused-appellant*.

Promulgated:

JUN 17 2020



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CONCURRING AND DISSENTING OPINION

CAGUIOA, J.:

I concur with the *ponencia* insofar as it affirms the guilt of the accused-appellant Niel Raymond A. Nocido (Nocido) for the crimes he was charged with.

I disagree, however, that the nomenclature of the crime should be modified from “rape by sexual assault” to “lascivious conduct under Section 5(b), Republic Act No. 7610,” and the penalty increased from “*prision mayor* to *reclusion temporal*”<sup>1</sup> to “*reclusion temporal* in its medium period to *reclusion perpetua*.”<sup>2</sup>

I reiterate and maintain my position in *People v. Tulagan*<sup>3</sup> that Republic Act No. (RA) 7610 and the Revised Penal Code (RPC), as amended by RA 8353, “have different spheres of application; they exist to complement each other such that there would be no gaps in our criminal laws. They were not meant to operate simultaneously in each and every case of sexual abuse committed against minors.”<sup>4</sup> Section 5(b) of RA 7610 applies only to the **specific** and **limited instances** where the child-victim is “exploited in prostitution or subjected to other sexual abuse” (EPSOSA).

In other words, for an act to be considered under the purview of Section 5(b), RA 7610, so as to trigger the higher penalty provided therein, “the following essential elements need to be proved: (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.”<sup>5</sup> Hence, it is not enough that the victim be under 18 years of age. The element of the victim being EPSOSA — *a separate and distinct element* — must first be both

<sup>1</sup> Penalty imposed under Article 266-B, Republic Act No. 3815, as amended by Section 2, Republic Act No. 8353, for Rape by Sexual Assault committed by two or more persons.

<sup>2</sup> Penalty imposed under Section 5(b), Republic Act No. 7610 for Lascivious Conduct.

<sup>3</sup> G.R. No. 227363, March 12, 2019, accessed at <<http://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>>.

<sup>4</sup> Dissenting Opinion of Justice Caguioa in *People v. Tulagan*, id.

<sup>5</sup> Id., citing *People v. Abello*, 601 Phil 373, 392 (2009).



alleged and proved before a conviction under Section 5(b), RA 7610 may be reached.

Specifically, in order to impose the higher penalty provided in Section 5(b) as compared to Article 266-B of the RPC, as amended by RA 8353, 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.<sup>6</sup>

In this case, the Information only alleged that the victim was a 12-year-old minor, but it did not allege that she was EPSOSA. Likewise, there was no proof or evidence presented during the trial that she indulged in sexual intercourse of lascivious conduct either for a consideration, or due to the coercion or influence of any adult.

Thus, while I agree that Nocido's guilt was proven beyond reasonable doubt, it is my view that his conviction in Criminal Case No. 09-1773 should be for Rape by Sexual Assault, defined and punished under Article 266-A(2), in relation to Article 266-B, of the RPC, as amended by RA 8353 — not Lascivious Conduct under Section 5(b), RA 7610. Accordingly, the penalty that ought to be imposed on him should be within the range of *prision correccional to reclusion temporal*<sup>7</sup> instead of the one imposed by the *ponencia* which is within the range of *prision mayor to reclusion temporal*.

Meanwhile, I fully concur with the *ponencia* as regards its affirmance of his conviction in Criminal Case No. 09-1772 for Rape by Sexual Intercourse, defined and punished under Article 266-A(1)(a), in relation to Article 266-B, of the RPC, as amended by RA 8353.



ALFREDO BENJAMIN S. CAGUIOA  
Associate Justice

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<sup>6</sup> Id.

<sup>7</sup> After the application of the Indeterminate Sentence Law.