EN BANC

G.R. No. 206513 – MUSTAPHA DIMAKUTA y MARUHOM, Petitioner, **v. PEOPLE OF THE PHILIPPINES,** Respondent.

Promulgated:
October 20, 2015

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CONCURRING OPINION

LEONEN, *J.*:

Fiat justitia ruat caelum.[1]

The accused touched the breast and vagina of a 16-year-old minor.

The Court of Appeals failed to appreciate that this would not have been possible without intimidation or coercion. It lowered the penalty from a minimum imprisonment of ten (10) years[2] to a minimum imprisonment of six (6) months.[3] If the Decision of the Court of Appeals is upheld, he will not serve a single day in prison for his acts. This is not what the law requires. This is definitely not what it intends.

Probation and appeal are mutually exclusive remedies. Probation is a mere privilege granted only to offenders who are willing to be reformed and rehabilitated. It cannot be availed of when an offender has already perfected his or her appeal from the judgment of conviction.

Generally, after a finding of fact by a trial court of the guilt of an accused beyond reasonable doubt, society is entitled to the expectation that he or she serve his or her sentence. In this sense, probation is a mere privilege: an exception granted to a general rule that is both reasonable and just.

I submit that *Colinares v. People*[4] should not be made to apply to this case for two reasons. First, *Colinares* has not yet become established doctrine, and the dissents of the case offer a sound and logical approach to

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1 "Let justice be done though the heavens fall."

2 Ponencia, p. 2. The Regional Trial Court sentenced petitioner to imprisonment of ten (10) years *prision mayor* as minimum to seventeen (17) years, four (4) months and one (1) day *reclusion temporal* as maximum.

3 Ponencia, p. 3. The Court of Appeals lowered the penalty to imprisonment of six (6) months *arresto mayor* as minimum to four (4) years and two (2) months *prision correccional* as maximum.

4 678 Phil. 482 (2011) [Per J. Abad, En Banc].

the issue. *Colinares* read an outcome, which is not supported by the text of law. Second, even assuming that the ratio in *Colinares* is good law, it finds no application to this case since the Court of Appeals erred in modifying the judgment of the trial court.

I

Probation was first established in this jurisdiction through Act No. 4221[5] dated August 7, 1935. According to the provisions of the Act, those who have not been convicted of any offense punishable by death or life imprisonment[6] may be placed under probation after the sentence becomes final and before the offender begins the service of sentence.[7]

The current law on probation is Presidential Decree No. 968,[8] which was signed into law on July 24, 1976. An accused was originally allowed to apply for probation before the trial court even pending appeal, as long as notice was given to the Court of Appeals where the appeal was pending.[9] According to Section 4 of the Decree:

> SECTION 4. Grant of Probation. — Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.
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> Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. *An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application*

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5 An Act Establishing Probation for Persons, Eighteen Years of Age or Above, Convicted of Certain Crimes by the Courts of the Philippine Islands; Providing Probation Officers Therefor; and for Other Purposes.

6 Act No. 4221 (1935), sec. 8 provides:
SECTION 8. This Act shall not apply to persons convicted of offenses punishable by death or life imprisonment; to those convicted of homicide, treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, sedition or espionage; to those convicted of piracy, brigandage, arson, or robbery in band; to those convicted of robbery with violence on persons when it is found that they displayed a deadly weapon; to those convicted of corruption of minors; to those who are habitual delinquents; to those who have been once on probation; and to those already sentenced by final judgment at the time of the approval of this Act.

7 Act No. 4221 (1935), sec. 1 provides:
SECTION 1. Whenever any person eighteen years of age or more at the time of committing a criminal offense or misdemeanor is convicted and sentenced by a Court of First Instance or by the Supreme Court on appeal, for such offense or misdemeanor, the proper Court of First Instance may after the sentence has become final and before the defendant has begun the service thereof, suspend the execution of said sentence and place the defendant on probation for such period as it may determine not less nor exceeding the minimum and maximum periods prescribed in this Act. No person, however, shall be placed on probation until an investigation and report by the probation officer shall have been made to the court of the circumstances of his offense, his criminal record, if any, and his social history and until the provincial fiscal shall have been given an opportunity to be heard. The court shall enter in the minutes the reasons for its action.

8 Establishing a Probation System, Appropriating Funds Therefor and for Other Purposes.

9 Pres. Decree No. 968 (1976), sec. 4.

> *shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal*.
>
> An order granting or denying probation shall not be appealable. (Emphasis supplied)

The Decree, however, declared that probation cannot be availed of by the following offenders:

> SECTION 9. Disqualified Offenders. — The benefits of this Decree shall not be extended to those:
>
> (a) sentenced to serve a maximum term of imprisonment of more than six years;
>
> (b) convicted of subversion or any crime against the national security or the public order;
>
> (c) who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
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> (d) who have been once on probation under the provisions of this Decree; and
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> (e) who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.[10]

Section 4 of the Decree was amended twice: first, by Presidential Decree No. 1257 on December 1, 1977, and again, by Presidential Decree No. 1990 on October 5, 1985.

The amendments of Presidential Decree No. 1257 increased the period when an application for probation may be granted, thus:

> Section 1. Section 4 of Presidential Decree No. 968, otherwise known as the Probation Law of 1976, is hereby amended to read as follows:
>
> "Sec. 4. Grant of Probation. Subject to the provisions of this Decree, the court may, *after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application*, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

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[10] This section was amended by Batas Blg. 76 dated June 13, 1980 to include offenders sentenced to imprisonment of six years *and one day*. This amendment, however, was repealed by Presidential Decree No. 1990 in 1985, which restored the original text of Section 9 in Presidential Decree No. 968.

> The prosecuting officer concerned shall be notified by the court of the filling [sic] of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.
>
> Probation may be granted whether the sentence impose a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with trial court, with notice to appellate court if an appeal has been taken from the sentence of conviction. The filling [sic] of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. *In the latter case[,] however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court*.
>
> An order granting or denying probation shall not be appealable." (Emphasis supplied)

In 1985, however, a substantial amendment was made to the Probation Law, which categorically prohibited applications for probation if the appeal has been perfected:

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

> SECTION 1. Section 4 of Presidential Decree No. 968 is hereby amended to read as follows:
>
> > "SEC. 4. Grant of Probation. – Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That *no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction*.
>
> "Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.
>
> "An order granting or denying probation shall not be appealable."[11] (Emphasis supplied)

Thus, the present law makes an appeal and an application for probation mutually exclusive remedies. An accused who has been sentenced to a penalty of less than six (6) years of imprisonment may only apply for probation if he or she has not yet perfected his or her appeal from the judgment of conviction. *There are no exceptions to the rule in the text of the law. The intent to make the choices exclusive from each other is seen in the context of the history of the amendments to this law.*

The amendment to Section 4 of the Probation Law has also been the subject of several cases before this court. Two cases, in particular, established the following principles:

1. The Probation Law is not a penal statute that may be interpreted liberally in favor of the accused; and

2. Section 4 of the Probation Law clearly mandates that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

The first of these cases applied Section 4 as it is stated in the law, effectively ruling that the law does not admit exceptions. In *Llamado v. Court of Appeals*,[12] Ricardo A. Llamado (Llamado) was convicted by the

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[11] Pres. Decree No. 1990 (1985).

[12] 256 Phil. 328 (1989) [Per J. Feliciano, Third Division].

trial court of violation of Batas Pambansa Bilang 22 and sentenced to imprisonment of one (1) year of *prision correccional*.[13]

After the decision had been read to him, Llamado orally manifested before the trial court that he was taking an appeal. The trial court forwarded the records of the case to the Court of Appeals on the same day. Llamado received notices from the Court of Appeals to file his Appellant's Brief, to which he secured several extensions.[14]

While his Appellant's Brief was being finalized by his counsel on record, Llamado sought advice from another lawyer.[15] Heeding the advice of his new counsel, he filed before the trial court a Petition for Probation under the Probation Law.[16] The Petition was not accepted by the trial court as "the records of [his] case had already been forwarded to the Court of Appeals."[17] Llamado then filed a Manifestation and Petition for Probation before the Court of Appeals, asking it to grant his Petition or, in the alternative, to remand the Petition to the trial court along with the records of the case.[18] While the Petition was pending before the Court of Appeals, he filed a Manifestation and Motion formally withdrawing his appeal "conditioned . . . on the approval of his Petition for Probation."[19]

The Court of Appeals denied the Petition, which prompted Llamado to file a Petition for Review before this court, on the sole issue of whether his application for probation was filed after he had already perfected his appeal.[20]

This court, however, affirmed the Court of Appeals and ruled that Llamado already perfected his appeal when he orally manifested in open court his intention to appeal.[21] As such, he cannot be allowed to apply for probation by virtue of Section 4 of Presidential Decree No. 968, as amended by Presidential Decree No. 1990.[22] This court was also hesitant to liberally interpret Section 4 of Presidential Decree No. 968 since the Decree was not a penal statute.[23] The court stated:

> Turning to petitioner's invocation of "liberal interpretation" of penal statutes, we note at the outset that the Probation Law is not a penal statute. We, however, understand petitioner's argument to be really that

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13 Id. at 332.
14 Id.
15 Id.
16 Id. at 332–333.
17 Id. at 333.
18 Id.
19 Id.
20 Id. at 333–334.
21 Id. at 337.
22 Id. at 337–339.
23 Id. at 339.

> any statutory language that appears to favor the accused in a criminal case should be given a "liberal interpretation." *Courts, however, have no authority to invoke "liberal interpretation" or "the spirit of the law" where the words of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation*. We do not believe that "the spirit of law" may legitimately be invoked to set at naught words which have a clear and definite meaning imparted to them by our procedural law. The "true legislative intent" must obviously be given effect by judges and all others who are charged with the application and implementation of a statute. It is absolutely essential to bear in mind, however, that the spirit of the law and the intent that is to be given effect are to be derived from the words actually used by the law-maker, and not from some external, mystical or metajuridical source independent of and transcending the words of the legislature.
>
> *The Court is not here to be understood as giving a "strict" interpretation" rather than a "liberal" one to Section 4 of the Probation Law of 1976 as amended by P.D. No. 1990. "Strict" and "liberal" are adjectives which too frequently impede a disciplined and principled search for the meaning which the law-making authority projected when it promulgated the language which we must apply. That meaning is clearly visible in the text of Section 4, as plain and unmistakable as the nose on a man's face. The Court is simply reading Section 4 as it is in fact written. There is no need for the involved process of construction that petitioner invites us to engage in, a process made necessary only because petitioner rejects the conclusion or meaning which shines through the words of the statute*. The first duty of a judge is to take and apply a statute as he finds it, not as he would like it to be. Otherwise, as this Court in *Yangco v. Court of First Instance of Manila* warned, confusion and uncertainty in application will surely follow, making, we might add, stability and continuity in the law much more difficult to achieve[.][24] (Emphasis supplied)

The issue of whether an application for probation is allowed after the perfection of an appeal was again taken up by this court in *Francisco v. Court of Appeals*.[25]

In *Francisco*, Pablo C. Francisco (Francisco) was convicted by the Metropolitan Trial Court of four (4) counts of grave oral defamation and sentenced to imprisonment of "one (1) year and one (1) day to one (1) year and eight (8) months of *prision correccional* 'in each crime committed on each date of each case[.]'"[26] On appeal before the Regional Trial Court, the trial court affirmed his conviction but appreciated a mitigating circumstance in his favor. His penalty was reduced to a straight penalty of eight (8) months of imprisonment. This Decision became final and executory upon his failure to file an appeal. Before the Decision could be executed, however, he applied for probation before the Metropolitan Trial Court. His

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[24] Id. at 339–340.
[25] 313 Phil. 241 (1995) [Per J. Bellosillo, En Banc].
[26] Id. at 251.

application was denied, as was his subsequent Petition for Certiorari before the Court of Appeals.[27]

Francisco then brought a Petition before this court, arguing that "he [had] not yet lost his right to avail [himself] of probation[.]"[28] He argued that the judgment of the Metropolitan Trial Court was such that he could not be qualified for probation, which was precisely the reason for his appeal, so that he could avail himself of the benefits of probation.[29]

This court, speaking through Justice Bellosillo, denied his Petition and ruled that Francisco was no longer eligible for probation.[30] This court stated that:

> *Probation is a mere privilege, not a right. Its benefits cannot extend to those not expressly included. Probation is not a right of an accused, but rather an act of grace and clemency or immunity conferred by the state which may be granted by the court to a seemingly deserving defendant who thereby escapes the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. It is a special prerogative granted by law to a person or group of persons not enjoyed by others or by all. Accordingly, the grant of probation rests solely upon the discretion of the court which is to be exercised primarily for the benefit of organized society, and only incidentally for the benefit of the accused. The Probation Law should not therefore be permitted to divest the state or its government of any of the latter's prerogatives, rights or remedies, unless the intention of the legislature to this end is clearly expressed, and no person should benefit from the terms of the law who is not clearly within them.*
>
> Neither Sec. 4 of the Probation Law, as amended, which clearly mandates that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction," nor *Llamado v. Court of Appeals* which interprets the quoted provision, offers any ambiguity or qualification. As such, the application of the law should not be subjected to any to suit the case of petitioner. *While the proposition that an appeal should not bar the accused from applying for probation if the appeal is solely to reduce the penalty to within the probationable limit may be equitable, we are not yet prepared to accept this interpretation under existing law and jurisprudence*.[31] (Emphasis supplied)

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27 Id. at 252.
28 Id. at 254.
29 Id.
30 Id.
31 Id. at 254–255, *citing Baclayon v. Hon. Mutia, etc., et al.*, 214 Phil. 126, 131 (1984) [Per J. Teehankee, First Division], *Amandy v. People*, 244 Phil. 457, 465 (1988) [Per J. Gutierrez, Jr., Third Division], 34 Words and Phrases 111, *Bala v. Judge Martinez*, 260 Phil. 488, 498–499 (1990) [Per J. Sarmiento, Second Division], and *Llamado v. Court of Appeals*, 256 Phil. 328, 334–337 (1989) [Per J. Feliciano, Third Division].

Moreover, this court ruled that the penalties imposed by the Metropolitan Trial Court were already probationable since "the sum of the multiple prison terms imposed against an applicant should not be determinative of his [or her] eligibility for, nay his [or her] disqualification from, probation."[32] It also pointed out that Francisco appealed his conviction before the Regional Trial Court not to reduce his penalty to make him eligible for probation but "to assert his innocence."[33]

Justice V. V. Mendoza, however, took exception to the majority view and voted to reverse the judgment of the Court of Appeals.[34] In his Dissenting Opinion, he stated that:

> *[I]f under the sentence given to him an accused is not qualified for probation, as when the penalty imposed on him by the court singly or in their totality exceeds six (6) years but on appeal the sentence is modified so that he becomes qualified, I believe that the accused should not be denied the benefit of probation.*
>
> Before its amendment by P.D. No. 1990, the law allowed — even encouraged — speculation on the outcome of appeals by permitting the accused to apply for probation after he had appealed and failed to obtain an acquittal. It was to change this that Sec. 4 was amended by P.D. No. 1990 by expressly providing that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." For an accused, despite the fact that he is eligible for probation, may be tempted to appeal in the hope of obtaining an acquittal if he knows he can any way apply for probation in the event his conviction is affirmed.
>
> *There is, however, nothing in the amendatory Decree to suggest that in limiting the accused to the choice of either appealing from the decision of the trial court or applying for probation, the purpose is to deny him the right to probation in cases like the one at bar where he becomes eligible for probation only because on appeal his sentence is reduced.* The purpose of the amendment, it bears repeating, is simply to prevent speculation or opportunism on the part of an accused who, although eligible for probation, does not at once apply for probation, doing so only after failing in his appeal.[35] (Emphasis supplied, citations omitted)

Justice V. V. Mendoza also submitted that the original sentence imposed on Francisco should be taken in its totality to determine whether he was qualified for probation.[36] In his opinion, the policy of the law treats

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32 Id. at 258.
33 Id. at 262.
34 J. Mendoza, Dissenting Opinion in *Francisco v. Court of Appeals*, 313 Phil. 241, 267 (1995) [Per J. Bellosillo, En Banc].
35 Id. at 268–272.
36 Id. at 275–276.

"multiple sentences imposed in cases which are jointly tried and decided [37] as only one sentence.

Justice Vitug also offered a Separate Opinion, in that he agreed with Justice V. V. Mendoza that an accused originally not qualified for probation must not be denied the benefit of probation if on appeal, the sentence was reduced within the probationable period.[38] He, however, concurred with the majority that "the number of offenses is immaterial as long as all the penalties imposed, taken separately, are within the probationable period."[39]

The exception suggested by Justice V. V. Mendoza, i.e., that the accused should be allowed to apply for probation if an originally unprobationable offense is reduced to a probationable one on appeal, would ultimately become this court's ratio in *Colinares*.

With all due respect, *Colinares* does not apply to this case.

II

In *Colinares*, the accused, Arnel Colinares (Colinares), was found guilty by the Regional Trial Court of frustrated homicide. He was sentenced to an indeterminate penalty of two (2) years and four (4) months of *prision correccional* as minimum to six (6) years and one (1) day of *prision mayor* as maximum.[40]

Colinares appealed before the Court of Appeals invoking self-defense. He also alternatively sought conviction for the lesser crime of attempted homicide. The Court of Appeals denied his appeal which prompted him to file a Petition for Review before this court.[41]

During the pendency of the case, this court required Colinares and the Office of the Solicitor General to submit their respective positions on whether, assuming that Colinares was only guilty of the lesser crime of attempted homicide, "he could still apply for probation upon remand of [this] case to the trial court."[42] Colinares argued that he was eligible while the Office of the Solicitor General argued for his ineligibility.[43]

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37 Id. at 276.
38 J. Vitug, Separate Opinion in *Francisco v. Court of Appeals*, 313 Phil. 241, 277–278 (1995) [Per J. Bellosillo, En Banc].
39 Id. at 278.
40 *Colinares v. People*, 678 Phil. 482, 491 (2011) [Per J. Abad, En Banc].
41 Id.
42 Id. at 492.
43 Id.

This court eventually ruled that Colinares was only guilty of attempted homicide which was punishable by imprisonment of four (4) months of *arresto mayor* as minimum and two (2) years and four (4) months of *prision correccional* as maximum.[44] This court also found Colinares eligible for probation despite having appealed his conviction.[45] The Decision, penned by Justice Abad, stated that the accused should not be denied the right of probation if it was through the fault of the trial court that he did not have a chance to apply for probation:

> *. . . Arnel did not appeal from a judgment that would have allowed him to apply for probation. He did not have a choice between appeal and probation. He was not in a position to say, "By taking this appeal, I choose not to apply for probation." The stiff penalty that the trial court imposed on him denied him that choice. Thus, a ruling that would allow Arnel to now seek probation under this Court's greatly diminished penalty will not dilute the sound ruling in Francisco. It remains that those who will appeal from judgments of conviction, when they have the option to try for probation, forfeit their right to apply for that privilege.*
>
> *Besides, in appealing his case, Arnel raised the issue of correctness of the penalty imposed on him. He claimed that the evidence at best warranted his conviction only for attempted, not frustrated, homicide, which crime called for a probationable penalty. In a way, therefore, Arnel sought from the beginning to bring down the penalty to the level where the law would allow him to apply for probation.*
>
> In a real sense, the Court's finding that Arnel was guilty, not of frustrated homicide, but only of attempted homicide, is an original conviction that for the first time imposes on him a probationable penalty. Had the RTC done him right from the start, it would have found him guilty of the correct offense and imposed on him the right penalty of two years and four months maximum. This would have afforded Arnel the right to apply for probation.
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> *The Probation Law never intended to deny an accused his right to probation through no fault of his. The underlying philosophy of probation is one of liberality towards the accused. Such philosophy is not served by a harsh and stringent interpretation of the statutory provisions*. As Justice Vicente V. Mendoza said in his dissent in *Francisco*, the Probation Law must not be regarded as a mere privilege to be given to the accused only where it clearly appears he comes within its letter; to do so would be to disregard the teaching in many cases that the Probation Law should be applied in favor of the accused not because it is a criminal law but to achieve its beneficent purpose.[46] (Emphasis supplied)

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44 Id. at 501.

45 Id.

46 Id. at 499–500, *citing Yusi, et al. v. Hon. Judge Morales*, 206 Phil. 734, 740 (1983) [Per J. Gutierrez, Jr., First Division] and J. Mendoza, Dissenting Opinion in *Francisco v. Court of Appeals*, 313 Phil. 241, 273 (1995) [Per J. Bellosillo, En Banc].

This Decision by the court was contentious in the least, with this court's En Banc voting 9-6[47] in favor of the ponencia and with Justice Peralta and Justice Villarama offering their Separate Opinions.

With all due respect, Justice Villarama correctly stated in *Colinares* that an application of liberality in the interpretation of Section 4 is "misplaced."[48]

It is a settled principle of statutory construction that only penal statutes are construed liberally in favor of the accused.[49] It is also equally settled that the Probation Law is *not* a penal statute.[50] The provisions of the law, including Section 4, should be interpreted as stated, which is that once an appeal has been perfected by the accused, he or she is not anymore entitled to the benefits of probation.

The Probation Law intends to benefit only *penitent* offenders, or those who admit to their offense and are willing to undergo rehabilitation. According to Section 2 of the Probation Law:

> Section 2. Purpose. This Decree shall be interpreted so as to:
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> (a) promote the correction and rehabilitation of an offender by providing him with individualized treatment;
>
> (b) provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and
>
> (c) prevent the commission of offenses.

Moreover, the law was amended precisely to prohibit those offenders from taking advantage of the benefits of the Probation Law when their appeals for innocence are rendered futile. The first Whereas clause of Presidential Decree No. 1990 states:

> WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court,

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47 Former Chief Justice Renato C. Corona and Associate Justices Antonio T. Carpio, Presbitero J. Velasco, Jr., Teresita J. Leonardo-De Castro, Mariano C. Del Castillo, Jose P. Perez, Jose C. Mendoza, and Bienvenido L. Reyes concurred in the ponencia. Associate Justices Diosdado M. Peralta and Martin S. Villarama, Jr. dissented. Associate Justices Arturo D. Brion, Lucas P. Bersamin, Ma. Lourdes P. A. Sereno (now Chief Justice), and Estela M. Perlas-Bernabe joined in the dissents.

48 J. Villarama, Jr., Concurring and Dissenting Opinion in *Colinares v. People*, 678 Phil. 482, 512 (2011) [Per J. Abad, En Banc].

49 *See People v. Ladjaalam*, 395 Phil. 1, 35 (2000) [Per J. Panganiban, Third Division], *citing People v. Atop*, 349 Phil. 825, 839 (1998) [Per J. Panganiban, En Banc] and *People v. Deleverio*, 352 Phil. 382, 404 (1998) [Per J. Vitug, En Banc].

50 *See Llamado v. Court of Appeals*, 256 Phil. 328, 339 (1989) [Per J. Feliciano, Third Division].

> only to pursue their application for probation when their appeal is eventually dismissed;

It is thus abhorrent to the intention of the law if those who have appealed their convictions, i.e., those who asked the court to review their convictions in the hope of securing an acquittal, are still allowed to apply for probation.

In these situations, the privilege of probation becomes an "escape hatch"[51] for those whose appeals were found unmeritorious. In *Sable v. People, et al.*:[52]

> *The law expressly requires that an accused must not have appealed his conviction before he can avail himself of probation. This outlaws the element of speculation on the part of the accused — to wager on the result of his appeal — that when his conviction is finally affirmed on appeal, the moment of truth well nigh at hand and the service of his sentence inevitable, he now applies for probation as an "escape hatch," thus rendering nugatory the appellate court's affirmance of his conviction. Consequently, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated; who manifest spontaneity, contrition and remorse*.
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> This was the reason why the Probation Law was amended, precisely to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid.[53] (Emphasis supplied)

Similarly, Justice Villarama stated in his Separate Opinion in *Colinares* that:

> *It must be stressed that in foreclosing the right to appeal his conviction once the accused files an application for probation, the State proceeds from the reasonable assumption that the accused's submission to rehabilitation and reform is indicative of remorse. And in prohibiting the trial court from entertaining an application for probation if the accused has perfected his appeal, the State ensures that the accused takes seriously the privilege or clemency extended to him, that at the very least he disavows criminal tendencies. Consequently, this Court's grant of relief to herein accused whose sentence was reduced by this Court to within the probationable limit, with a declaration that accused may now apply for probation, would diminish the seriousness of that privilege because in questioning his conviction accused never admitted his guilt.* It is of no moment that the trial court's

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51 *Sable v. People, et al.*, 602 Phil. 989, 997 (2009) [Per J. Chico-Nazario, Third Division].

52 602 Phil. 989 (2009) [Per J. Chico-Nazario, Third Division].

53 Id. at 997, *citing Francisco v. Court of Appeals*, 313 Phil. 241, 250 (1995) [Per J. Bellosillo, En Banc] and *People v. Judge Evangelista*, 324 Phil. 80, 85–86 (1996) [Per J. Mendoza, Second Division].

> conviction of petitioner for frustrated homicide is now corrected by this Court to only attempted homicide. Petitioner's physical assault on the victim with intent to kill is unlawful or criminal regardless of whether the stage of commission was frustrated or attempted only. Allowing the petitioner the right to apply for probation under the reduced penalty glosses over the fact that accused's availment of appeal with such expectation amounts to the same thing: speculation and opportunism on the part of the accused in violation of the rule that appeal and probation are mutually exclusive remedies.[54] (Emphasis supplied)

The underlying theory, therefore, of the amendment to Section 4 is that the grant of probation to an accused whose sentence was reduced must proceed from an accused's remorse and willingness to undergo rehabilitation, which is antithetical to the filing of an appeal to seek the reversal of his or her conviction.

A more lenient approach was offered by Justice Peralta in *Colinares*. He was more open to finding exceptions to the rule and was of the opinion that what Section 4 of the Probation Law prohibited are only appeals from the judgment of conviction.[55] He opined that probation, even after one's filing of the notice of appeal, should be allowed in the following instances:

> 1. When the appeal is merely intended for the *correction of the penalty imposed* by the lower court, which when corrected would entitle the accused to apply for probation; and
>
> 2. When the appeal is merely intended *to review the crime* for which the accused was convicted and that the accused should only be liable to the lesser offense which is necessarily included in the crime for which he was originally convicted and the proper penalty imposable is within the probationable period.[56] (Emphasis in the original)

Justice Peralta stated that in these instances, the appeal is intended to question only the propriety of the penalty imposed, rather than review the merits of the case.[57] He believed, however, that probation should not be granted in the following instances:

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

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54 J. Villarama, Jr., Concurring and Dissenting Opinion in *Colinares v. People*, 678 Phil. 482, 511–512 (2011) [Per J. Abad, En Banc].

55 J. Peralta, Dissenting and Concurring Opinion in *Colinares v. People*, 678 Phil. 482, 506 (2011) [Per J. Abad, En Banc].

56 Id. at 507.

57 Id. at 508.

> correction of the penalty imposed by the trial court or for a conviction to a lesser crime, which is necessarily included in the crime in which he was convicted where the penalty is within the probationable period.[58] (Emphasis and underscoring in the original)

This case is one of the instances mentioned by Justice Peralta wherein an application of *Colinares* would violate the spirit and intent of the law.

The facts state that petitioner appealed his conviction before the Court of Appeals on the basis that the trial court erred in giving credence to the victim's testimony as it was laced with inconsistencies and improbabilities. He argued that even if he did commit lascivious conduct against the victim, he still should not be charged with violation of Article 336 of the Revised Penal Code since the prosecution failed to establish the essential elements of the crime. This is tantamount to an assertion of his innocence.[59]

For him to still be eligible for probation, his appeal should have argued that the trial court erred in finding him guilty of violation of Republic Act No. 7610 since his offense was merely acts of lasciviousness.

The first appeal determines whether he comes under the exception.

Petitioner's appeal before the Court of Appeals was made for the purpose of securing an acquittal; it was not for the purpose of lowering his penalty to one within the probationable period. To allow him to apply for probation would be to disregard the intent of the law: that appeal and probation are mutually exclusive remedies.

III

Even assuming that the ratio in *Colinares* is sound, it finds no application in this case simply because the Court of Appeals erroneously modified the offense.

Petitioner had been convicted by the trial court of violation of Article III, Section 5(b) of Republic Act No. 7610 for allegedly molesting a 16-year-old girl. The provision 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

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58 Id. at 509.

59 Ponencia, p. 12.

> 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:
>
> . . . .
>
> (b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subject to other sexual abuse; Provided, That when the victim is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be; Provided, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period[.]

In *Garingarao v. People*,[60] the elements of this offense 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; and
>
> 3. The child, whether male or female, is below 18 years of age.[61]

Lascivious conduct is defined as:

> [T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with the 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.[62]

Here, petitioner is accused of touching the breast and vagina of a 16-year-old girl.[63] On appeal, however, the Court of Appeals modified the offense, finding that the prosecution failed to prove that the lascivious conduct was done with coercion or intimidation.[64] It found petitioner to be guilty only of acts of lasciviousness under Article 336 of the Revised Penal

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60 669 Phil. 512 (2011) [Per J. Carpio, Second Division].

61 Id. at 523, *citing Olivarez v. Court of Appeals*, 503 Phil. 421, 431 (2005) [Per J. Ynares-Santiago, First Division].

62 Id., *citing Olivarez v. Court of Appeals*, 503 Phil. 421, 431–432 (2005) [Per J. Ynares-Santiago, First Division], *citing in turn* Implementing Rules and Regulations of Rep. Act No. 7610 (1992), art. XIII, sec. 32.

63 Ponencia, p. 2.

64 Id.

Code.[65] The provision states:

> ARTICLE 336. Acts of Lasciviousnes. – Any person who shall commit any act of lasciviousness upon other persons of either sex, under any of the circumstances mentioned in the preceding article, shall be punished by prision correccional.

The Court of Appeals, however, erred in modifying the offense. According to *Navarrete v. People*,[66] the elements of Article 336 of the Revised Penal Code are:

> (1) The offender commits any act of lasciviousness or lewdness;
>
> (2) It is done under any of the following circumstances:
>
> a. ***By using force or intimidation***; or.
>
> b. When the offended party is deprived of reason or otherwise unconscious; or
>
> c. When the offended party is under 12 years of age; and
>
> (3) The offended party is another person of either sex.[67] (Emphasis supplied)

In the first place, it is illogical for the Court of Appeals to have found the offense committed with force or intimidation and, at the same time, without coercion or intimidation. Second, the fact that the victim in this case was a minor who was molested by an adult is enough to prove that the victim's free will was subdued in view of her minority and immaturity. The moral ascendancy of the adult offender was enough to intimidate the minor victim. In *Garingarao*:

> The Court has ruled that *a child is deemed subject to other sexual abuse when the child is the victim of lascivious conduct under the coercion or influence of any adult. In lascivious conduct under the coercion or influence of any adult, there must be some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party's free will*.[68] (Emphasis supplied)

Thus, petitioner was correctly found by the trial court guilty of

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65 Id. at 2–3.

66 542 Phil. 496 (2007) [Per J. Corona, First Division].

67 Id. at 506, *citing People v. Bon*, 444 Phil. 571, 583–584 (2003) [Per J. Ynares-Santiago, En Banc].

68 *Garingarao v. People*, 669 Phil. 512, 524 (2011) [Per J. Carpio, Second Division], *citing Olivarez v. Court of Appeals*, 503 Phil. 421, 432 (2005) [Per J. Ynares-Santiago, First Division] and *People v. Abello*, 601 Phil. 373, 393 (2009) [Per J. Brion, Second Division].

violation of Article III, Section 5(b) of Republic Act No. 7610. Since this offense is punishable by *reclusion temporal* or an imprisonment of more than six (6) years, petitioner is not eligible for probation.

Accordingly, I concur with the ponencia.

MARVIC M.V.F. LEONEN
Associate Justice

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CLERK OF COURT, EN BANC
SUPREME COURT