G.R. No. 249307 — BBB,[1] *petitioner, versus* PEOPLE OF THE PHILIPPINES, *respondent.*

Promulgated:

AUG 27 2020

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CONCURRING AND DISSENTING OPINION

CAGUIOA, *J.*:

I concur with the *ponencia* insofar as it affirms petitioner BBB's (BBB) conviction of rape by sexual assault under Article 266-A, paragraph 2 of the Revised Penal Code (RPC) as amended by Republic Act No. (R.A.) 8353, and its ruling that R.A. 7610 is inapplicable in the present case. However, I dissent as to the basis of such inapplicability.

The *ponencia* holds that the stiffer penalty under R.A. 7610 may not be imposed in the place of that provided in Article 266-A, paragraph 2 of the RPC, but grounds the same on the fact that BBB, at the time of the commission of the crime, was also himself a minor at 15 years old, and R.A. 7610 only covers adult offenders, thus excluding him.[2] This basis predictably proceeds from the prior legal conclusion that had BBB been of majority age at the time of the offense, he would have been meted the penalty prescribed in R.A. 7610, under the premise that the elements of rape by sexual assault under Article 266-A, paragraph 2 are likewise covered under Section 5 of R.A. 7610.

Contrarily, I reiterate and maintain my position in *People v. Tulagan*[3] that R.A. 7610 and the RPC, as amended by R.A. 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."[4] Section 5, paragraph b of R.A. 7610 applies only to the **<u>specific</u>** and

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[1] The identity of the victims or any information which could establish or compromise their identities, as well as those of their immediate family or household members, shall be withheld pursuant to R.A. 7610, titled "AN ACT PROVIDING FOR STRONGER DETERRENCE AND SPECIAL PROTECTION AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION, AND FOR OTHER PURPOSES," approved on June 17, 1992; R.A. 9262, titled "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; and Section 40 of A.M. No. 04-10-11-SC, otherwise known as the "Rule on Violence against Women and Their Children" (November 15, 2004). [*See* footnote 4 in *People v. Cadano, Jr.*, 729 Phil. 576, 578 (2014), citing *People v. Lomaque*, 710 Phil. 338, 342 (2013). *See also* Amended Administrative Circular No. 83-2015, titled "PROTOCOLS AND PROCEDURES IN THE PROMULGATION, PUBLICATION, AND POSTING ON THE WEBSITES OF DECISIONS, FINAL RESOLUTIONS, AND FINAL ORDERS USING FICTITIOUS NAMES/PERSONAL CIRCUMSTANCES," dated September 5, 2017; and *People v. XXX and YYY*, G.R. No. 235652, July 9, 2018.]

[2] *Ponencia*, pp. 16-18.

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

[4] Dissenting Opinion of Justice Caguioa in *People v. Tulagan*, id.

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, paragraph b of R.A. 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."[5] 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 alleged and proved before a conviction under Section 5, paragraph b of R.A. 7610 may be reached.

Specifically, in order to impose the higher penalty provided in Section 5, paragraph b as compared to Article 266-B of the RPC, as amended by R.A. 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.[6]

In this case, the Information only alleged that the victim was an 11-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 or lascivious conduct either for a consideration, or due to the coercion or influence of any adult.

Thus, while I agree that BBB's guilt was proven beyond reasonable doubt of rape by sexual assault as proscribed by the RPC, I reiterate that the penalty under R.A. 7610 may not be imposed herein for the primary reason that the elements of the crime under RPC *vis-à-vis* R.A. 7610 differ in the pivotal point of whether or not minor victim was, in fact and as alleged, EPSOSA.

More so, that the element of EPSOSA must be the sole litmus test in drawing distinctions between crimes under Article 266-A and Section 5 of R.A. 7610, as opposed to the minority of the victim, is only further supported by the fact that the criterion of minority of the victim is shown in this case to be an under-inclusive impetus for despite the minority of the victim here, R.A. 7610 was nevertheless deemed inconsequential with respect to the determination of the imposable penalty.

Finally, it is worth noting that if we proceed from the line of ratiocination that the gauge for inapplicability or applicability of the penalty under R.A. 7610 is the age of minority of either the victim or the offender, and not the distinct element of EPSOSA, it may well be conceived that for as

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

6 Id.

long as the offender is a minor, regardless of whether the victim was in point of fact exposed to EPSOSA, the offender will still not be meted the penalty under R.A. 7610. Such a scenario, arguably permitted by the premise of the *ponencia* on inapplicability of R.A. 7610, is decidedly incongruent with the legislative intent behind R.A. 7610, and takes significantly away from its impetus involving the specialized protection of children who are sexually exploited and abused for consideration. This all the more makes salient the important criterion of EPSOSA, for any other determinant than this will inevitably allow for offenses which this law was designed to punish to no less than slip through the cracks.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice