

THIRD DIVISION

MISAELO DOMINGO C. BATTUNGIE
 Division Clerk of Court
 Third Division

JAN 07 2021

G.R. No. 235610 – RODAN A. BANGAYAN, *petitioner*, v. PEOPLE OF THE PHILIPPINES, *respondent*.

Promulgated:
 September 16, 2020

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 MISAELO DOMINGO C. BATTUNGIE
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DISSENTING OPINION

LEONEN, J.:

With the greatest respect, I cannot accept that our laws can be interpreted so that a 12-year-old girl, barely in the sixth grade, can give her mature consent to sexual intercourse.

Sexual intercourse is a complex act which is not only physical or sensual. Beyond that, it comes with the complexity of intimacy, relationship, and reproductive consequences. I fail to see how a grade six student can understand all of these.

I urge the *ponente* to re-evaluate the precedent We create to further disempower our young daughters and granddaughters against patriarchy.

This case is an opportunity to clarify the application of Republic Act No. 7610 *vis-à-vis* Article 336 of the Revised Penal Code, with respect to victims within the ages of 12 to 18 years old. The *obiter dictum* laid down in *People v. Tulagan* must be qualified and refined.

I

Rodan Bangayan (Bangayan) was charged with rape under Article 266-A of the Revised Penal Code, in relation to Republic Act No. 7610. The accusatory portion of the Information reads:

That sometime in the month of January 2012 at [REDACTED] Province of Quirino, Philippines, within the jurisdiction of this Honorable Court, the above-named Accused, with intent to abuse, [harass] and degrade [AAA], a twelve (12) years old minor at that time, and gratify the sexual desire of said accused, the latter did then and there, willfully, unlawfully[,] and feloniously, had sexual intercourse with said [AAA], in her dwelling against her will and consent.¹

¹ Rollo, p. 54. Regional Trial Court Decision.

Upon arraignment, Bangayan pleaded not guilty. His counsel manifested that AAA, then 14 years old, was no longer interested in pursuing the case because she and Bangayan were already living together as husband and wife.² The counsel submitted AAA's Affidavit of Desistance.³

However, due to AAA's minority and the lack of assistance of an elder-relative in the execution of the affidavit, the trial court directed the Municipal Social Welfare and Development Office of Nagtipunan, Quirino (Social Welfare Office) to conduct a case study on AAA.⁴

The Social Welfare Office found that AAA was abused as a child, and as a result, her longing for a parental figure impelled her to live with Bangayan. The Social Welfare Office then argued against the cohabitation of Bangayan and AAA, considering that Bangayan was abusing AAA and was incapable of providing for her basic needs such as food, shelter, and education. A portion of the findings states:

RECOMMENDATION

Based on the above information, the client suffered multiple emotional [crises] that hampered her growth and development. She has the time, knowledge, potentials, and abilities that could enhance her total development. However, as early as 7 years old, she had crisis due to role confusion.

Being abused, she was unable to develop her unique values or personality. She was not allowed the opportunities to acquire friends, develop skills and knowledge through formal education.

Living together with the perpetrator could support her longing for a parental figure. He served as support for her existence but considering his weaknesses such as abusing her, the lack of sense of responsibility and assertiveness as lack of resources could affect the future of the minor and son. He could not provide the basic needs such as food, shelter, and education with his disposition in life.

The minor had the CHANCE to grab the opportunities of the PRESENT and the FUTURE once she is AWAY from her perpetrator. Support from relatives is highly recommended for direction.

The honored court is then requested for favorable action that will promote the general welfare of the minor-[AAA] and her family.⁵

Pre-trial and trial then ensued.⁶

² Id.

³ Id.

⁴ Id.

⁵ Id. at 55.

⁶ Id.

The prosecution presented the following witnesses: (1) Dr. Luis Villar (Dr. Villar); (2) Police Inspector Rosalita Manilao (P/Insp. Manilao); and (3) BBB.⁷

Dr. Villar, the Municipal Health Officer of Nagtipunan, Quirino, testified as the physician who conducted the physical examination on AAA. He narrated that during his interview with AAA, he noticed that she was avoiding eye contact, "because she was ashamed of what happened to her." AAA allegedly confided to Dr. Villar and told him that Bangayan would kill her if she refused to have sex with him. AAA further disclosed that she had sexual intercourse with Bangayan twice in the past: (1) in the second grade when she was only nine (9) years old; and (2) in the fourth grade when she was just 11 years old.⁸

Dr. Villar noted that there was no recent hymenal injury and that "the edges are smooth." However, AAA's opening approximates the size of an index finger, which is not normal for a young patient. The tests also showed that AAA was already 2-3 months pregnant, compatible with her claim that she was raped before January 2012.⁹

P/Insp. Manilao testified that AAA and her aunt came to their station to file a complaint against Bangayan. Upon their arrival, she noticed that AAA appeared to be traumatized. She then took AAA's sworn statement and clarified that AAA answered the questions on her own.¹⁰

BBB is AAA's brother. He narrated that Bangayan was living with them because the latter was helping him cultivate their cornfield. On January 5, 2012, upon arriving home from the farm, he found Bangayan on top of AAA, both of them naked from the waist down. AAA was crying and Bangayan, though unarmed, threatened to kill BBB if he reports the incident.¹¹

On the other hand, Bangayan is the sole witness for the defense. He denied having raped AAA, claiming that it was consensual sex because they are in a relationship. At the time he testified in court, he claims that they were already living together as husband and wife with two (2) children, despite not being married yet. Furthermore, he claimed that AAA only filed the case due to a misunderstanding that they had.¹²

⁷ Id. at 56-57.

⁸ Id. at 56.

⁹ Id.

¹⁰ Id. at 56-57.

¹¹ Id. at 57.

¹² Id. at 57.

The trial court found Bangayan guilty of violation of Section 5(b), Article III of Republic Act No. 7610.¹³ It held that the element of sexual abuse with a child is present, considering that AAA was only 12 years old at the time of the incident. Likewise, the element of coercion or influence is present because Bangayan, who was 27 years old at that time, had sexual intercourse with a minor. The trial court concluded that the age gap between the two (2) indicated Bangayan's moral ascendancy and influence over AAA. Bangayan's father-figure image is reflected in the case study conducted by the Social Welfare Office.¹⁴

The trial court ruled that AAA's consent is immaterial because the submission or consent of a child⁹ due to the influence of an adult is not a defense in sexual abuse.¹⁵

On the issue of AAA's affidavit of desistance, the trial court considered the document as a hearsay evidence because AAA did not testify regarding its execution. Further, affidavits of desistance are frowned upon by courts.¹⁶

Upon appeal, the Court of Appeals affirmed the conviction of Bangayan. The appellate court ruled that the sweetheart defense cannot be given credence under Republic Act No. 7610 because "[a] child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse[.]"¹⁷

The Court of Appeals maintained that the elements of sexual abuse are present in this case:

First, Bangayan was identified as the person who had sexual intercourse with AAA, who is a minor.¹⁸

Second, AAA was subjected to sexual abuse due to the coercion and influence of Bangayan. Sexual abuse contemplates situations wherein "a child indulges in sexual intercourse or. . . influence of any adult." Considering that AAA was only 12 years old while Bangayan was already 27 years old at that time, the 15-year age gap between them made AAA vulnerable to the influence and deception of adults.¹⁹

Lastly, AAA was a minor at the time of the incident.²⁰

¹³ Id. at 54–61. The Decision was penned by Executive Judge Menrado V. Corpuz of Branch 38, Regional Trial Court, Maddela Quirino.

¹⁴ Id. at 59.

¹⁵ Id.

¹⁶ Id. at 60.

¹⁷ Id. at 29–30.

¹⁸ Id. at 30–31.

¹⁹ Id. at 32.

²⁰ Id. at 32.

Bangayan then moved for the reconsideration of the decision, but to no avail.²¹

Petitioner now comes before this Court, asserting that: (1) he proved by clear and convincing evidence that he should not be held criminally liable, because he was in a relationship with the victim at the time of the incident; (2) the victim gave her sexual consent, indicated by the fact that they are now living together with two (2) children; and (3) this continuing relationship is an absolute cause.²²

In acquitting petitioner, the *ponencia* held that:

1. “[T]he prosecution failed to establish all the elements of sexual abuse contemplated under Section 5(b) of Article III of Republic Act No. 7610[.]”²³
2. Section 5 of Republic Act No. 7610, which requires that sexual intercourse with a child “for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate[,] or group,” leaves room for a child between 12 and 18 years old to give his or her sexual consent.²⁴
3. Citing *People v. Tulagan*, the *ponencia* concludes that, since the victim: (1) consented to the sexual intercourse; and (2) there was no coercion, intimidation or influence of an adult, Bangayan is not guilty of sexual abuse under Republic Act No. 7610.²⁵
4. The victim’s consent to the sexual act is indicated by her conduct during and after the commission of the act.²⁶

The *ponencia* primarily draws its conclusion based on the ruling of this Court in *People v. Tulagan*.²⁷ In *Tulagan*, it was established that Tulagan raped and inserted his finger into a nine-year-old girl’s vagina. As a result, the trial court and the appellate court convicted Tulagan. Upon appeal, this Court affirmed that he is guilty of sexual assault and rape under Article 266-A, par. 2 of the Revised Penal Code, in relation to Section 5(b) of Republic Act No. 7610.²⁸

²¹ Id. at 36–37. Court of Appeals Resolution. The Resolution was penned by Associate Justice Mario V. Lopez, and concurred in by Associate Justices Remedios A. Salazar-Fernando and Eduardo B. Peralta, Jr. of the Former Second Division, Court of Appeals, Manila.

²² Id. at 46–49.

²³ Ponencia, p. 6.

²⁴ Id. at 7–8.

²⁵ Id. at 8–12.

²⁶ Id. at 12.

²⁷ G.R. No. 227363, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>> [Per J. Peralta, En Banc].

²⁸ Id.

In upholding Tulagan's conviction, this Court discussed the effect of the enactment of Republic Act No. 7610 to Revised Penal Code provisions on rape and lascivious conduct. When Republic Act No. 7610 took effect, special forms of acts of lasciviousness were no longer punished under Article 336 of the Revised Penal Code, but it is now a distinct crime of sexual assault under Article 266-A, paragraph 2 of the Revised Penal Code.²⁹

Unfortunately, much of the discussion in *Tulagan*, with respect to children between 12 and 18 years old, was only conjectural. Without factual parameters, this Court proceeded to create permutations and possible scenarios on rape cases that were not yet filed. This led to lengthy discussions and guesswork on rape victims within this age range. Now, with the actual facts before us, the application of the law must be refined and clarified.

II

Republic Act No. 7610, otherwise known as *The Special Protection of Children Against Abuse, Exploitation and Discrimination Act*, sought "to provide special protection to children from all forms of abuse, neglect, cruelty exploitation and discrimination and other conditions, prejudicial their development[.]"³⁰

One of the salient provisions of the law is the criminal liability on "Child Prostitution and Other Sexual Abuse" under Section 5. It states:

ARTICLE III

Child Prostitution and Other Sexual Abuse

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

²⁹ Id.

³⁰ Rep. Act No. 7610 (1992), sec. 2 provides:

SECTION 2. *Declaration of State Policy and Principles.* — It is hereby declared to be the policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty exploitation and discrimination and other conditions, prejudicial their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation and discrimination. The State shall intervene on behalf of the child when the parent, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation and discrimination or when such acts against the child are committed by the said parent, guardian, teacher or person having care and custody of the same.

It shall be the policy of the State to protect and rehabilitate children gravely threatened or endangered by circumstances which affect or will affect their survival and normal development and over which they have no control.

The best interests of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principle of First Call for Children as enunciated in the United Nations Convention of the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.

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:

(a) Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:

- (1) Acting as a procurer of a child prostitute;
- (2) Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;
- (3) Taking advantage of influence or relationship to procure a child as prostitute;
- (4) Threatening or using violence towards a child to engage him as a prostitute; or
- (5) Giving monetary consideration, goods or other pecuniary benefit to a child with intent to engage such child in prostitution.

(b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected 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. 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; and

(c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment.³¹ (Emphasis in the original)

A plain textual reading shows that the provision penalizes two (2) offenses: (1) child prostitution; and (2) other sexual abuse.

Children subjected to prostitution are those “who for money, profit, or any other consideration. . . indulge in sexual intercourse or lascivious conduct[.]” Further, children subjected to other forms of sexual abuse are those who “due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct[.]”³²

³¹ REV. PEN. CODE, art. 335 has been repealed by Republic Act No. 8353 or the Anti-Rape law of 1997. New provisions on rape are found in REV. PEN. CODE, art. 266-A to 266-D under Crimes Against Persons.

³² Separate Opinion of J. Leonen in *People v. Tulagan*, G.R. No. 227363, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>> [Per J. Peralta, En Banc].

For sexual intercourse with children below 12 years old or otherwise demented, the crime committed is rape under Article 266-A (1) of the Revised Penal Code. The law refers to the modification introduced by Republic Act No. 8353, thus:

Article 266-A. *Rape: When And How Committed.* — Rape is committed —

1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

a) Through force, threat, or intimidation;

b) When the offended party is deprived of reason or otherwise unconscious;

c) By means of fraudulent machination or grave abuse of authority; and

d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present. (Emphasis supplied)

As *Tulagan* explained, consent is immaterial in sexual intercourse with children under 12 years of age, because they are presumed to be incapable of giving consent, thus:

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.

.....

It bears emphasis that violation of the first clause of Section 5(b), Article III of R.A. No. 7610 on sexual intercourse with a child exploited in prostitution or subject to other sexual abuse, is separate and distinct from statutory rape under paragraph 1(d), Article 266-A of the RPC. Aside from being dissimilar in the sense that the former is an offense under special law, while the latter is a felony under the RPC, they also have different elements. Nevertheless, sexual intercourse with a victim who is under 12 years of age or is demented is always statutory rape, as Section 5(b) of R.A. No. 7610 expressly states that the perpetrator will be prosecuted under Article 335, paragraph 3 of the RPC (now paragraph 1(d), Article 266-A of the RPC as amended by R.A. No. 8353).

Even if the girl who is below twelve (12) years old or is demented consents to the sexual intercourse, it is always a crime of statutory rape

under the RPC, and the offender should no longer be held liable under R.A. No. 7610. For example, a nine (9)-year-old girl was sold by a pimp to a customer, the crime committed by the latter if he commits sexual intercourse with the girl is still statutory rape, because even if the girl consented or is demented, the law presumes that she is incapable of giving a rational consent[.]³³ (Citations omitted)

It bears emphasis that the protection under the Revised Penal Code only applies to children below 12 years old, while the age of majority is at 18 years old. This situation presents a lacuna, which Republic Act No. 7610 resolved by providing criminal liability for acts of prostitution or other forms of sexual abuse done with a child between 12 and 18 years old.

Nevertheless, Republic Act No. 7610 takes into consideration that the age of sexual consent remains at 12 years old. This is “one [1] of the lowest globally and the lowest in the Asia-Pacific Region. [While] the average age of consent is 16 years old.”³⁴ This is despite the fact that under our laws, minors do not have the capacity to enter contracts or marriage. However, a strict reading of the Revised Penal Code keeps the age of sexual consent at 12 years old.

Thus, in sexual intercourse with children between 12 and 18 years of age, as *Tulagan* concludes, Section 5(b) of Republic Act No. 7610 leaves room for a child to give consent.³⁵ But this must be read with the policy espoused by the law, which states that “[t]he best interests of children shall be the paramount consideration[.]”³⁶ This obliges the courts to determine how consent to sexual conduct was given by the child, despite reaching an age where they could have reasonable discernment. To have a correct interpretation of the provision, this Court should first turn to the law’s chapeau. It 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[.] (Emphasis supplied)

The text of the law mandates that children exploited in prostitution or subject to other forms of sexual abuse (children in EPSOSA) must have consented: (1) due to money, profit, or any other consideration; or (2) due to the coercion or influence of an adult.

³³ Id.

³⁴ Id.

³⁵ *People v. Tulagan*, G.R. No. 227363, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>> [Per J. Peralta, En Banc].

³⁶ Republic Act No. 7610 (1992), sec. 2.

In cases of children subjected to sexual abuse, the courts must determine whether coercion or influence was present, which compelled the child to indulge in sexual conduct. The resolution of this issue cannot be formulaic, but it must be based on the unique factual parameters of each case. Considering the range of age which covers children in EPSOSA, the courts must carefully ascertain if the child freely gave sexual consent to the sexual act.

For example, a 12-year-old child's judgment cannot be equated to that of a 17-year-old's. Moreover, the relationship of the child to the perpetrator must be taken into account. For instance, a 17-year-old, who is still deemed a child, who had sexual intercourse with an 18-year-old, is not comparable to a sexual intercourse of a 12-year-old with an adult twice or thrice his or her age.

Factors such as age difference, the victim and perpetrators' relationship, and the child's psychological disposition must be considered by this Court, having in mind the child's best interest.

III

In this case, it cannot be said that the victim freely consented to having sexual intercourse with petitioner.

This Court has concluded that the age difference between the victim and petitioner indicates coercion and intimidation. In *Caballo v. People*,³⁷ accused Caballo was 23 years old at the time he met AAA, who was then 17 years old. Caballo was able to persuade AAA to have sexual intercourse with him due to promises of marriage and the assurance that he would not get her pregnant. This Court ruled that the element of coercion or influence is present:

[C]ase law further clarifies that sexual intercourse or lascivious conduct under the coercion or influence of any adult exists when there is some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party's free will. Corollary thereto, Section 2 (g) of the Rules on Child Abuse Cases conveys that sexual abuse involves the element of influence which manifests in a variety of forms. It is defined as:

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.

To note, the term "influence" means the "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective." Meanwhile, "coercion" is the "improper use of . . . power to

³⁷ 710 Phil. 792 (2013) [Per J. Perlas-Bernabe, Second Division].

compel another to submit to the wishes of one who wields it."³⁸ (Citations omitted)

This Court considered, among other factors, the age difference between AAA and Caballo as an indicium of coercion and influence:

[C]oupled with AAA's minority is Caballo's seniority. Records indicate that Caballo was 23 years old at the time of the commission of the offense and therefore, 6 years older than AAA, more or less. The age disparity between an adult and a minor placed Caballo in a stronger position over AAA so as to enable him to force his will upon the latter.³⁹

In *People v. Errojo*:⁴⁰

At a tender age of fourteen, innocent of the ways of the world, complainant is no match to the accused-appellant, a forty-one year old married individual who sexually assaulted her. The sheer force and strength of the accused-appellant would have easily overcome any resistance that complainant could have put up. What more if the assault was committed with a deadly knife, the sight of which would have necessarily evoked fear in complainant. Thus, it is understandable if she easily succumbed to the sexual intrusion. Her failure to disclose the outrage on her person to anybody including her parents is due to the threats on her life and her brothers. Indeed, one cannot expect her to act like an adult or a mature and experienced woman who would have the courage and intelligence to disregard a threat to her life and complain immediately that she had been sexually assaulted. It is not uncommon for young girls to conceal for sometime the assaults on their virtue because of the rapist's threats on their lives.⁴¹

Similarly, in *People v. Clado*:⁴²

It is therefore enough that it produces fear — fear that if the victim does not yield to the bestial demands of the accused, something would happen to heart the moment or thereafter, as when she is threatened with death if she reports the incident. This Court has noted in several cases that minors could be easily intimidated and cowed into silence even by the mildest threat against their lives. At the time of the commission of the crimes, Salve was a fifteen-year old girl who had just arrived in town to tend the beauty parlor of her sister. She was left all alone that night and intimidation would explain why she did not put up a determined resistance against her defiler.⁴³ (Citations omitted)

In these cases, this Court resolved that the victim's minority is an important consideration in determining whether he or she could freely and

³⁸ Id. at 805–806.

³⁹ Id. at 807.

⁴⁰ 299 Phil. 51 (1994) [Per J. Nocon, Second Division].

⁴¹ Id. at 60.

⁴² 397 Phil. 813 (2000) [Per J. Gonzaga-Reyes, Third Division].

⁴³ Id. at 826.

rationally give consent to a sexual act with an adult. Moreover, the victim and the adult's age difference could be a sign of coercion and intimidation. This is because a vast age difference can facilitate the assertion of dominance by the perpetrator over the victim.

Here, the 15-year age gap between petitioner and the victim indicates that there is coercion and intimidation in the sexual intercourse. It is difficult to accept how the victim, who just turned 12 years old at that time, could have entered into a relationship with an adult 15 years her senior.

Moreover, the victim's psychological disposition showed that she is vulnerable to petitioner's cajolery. As the Social Welfare Office report showed, the victim suffered multiple emotional crises as a child and that her decision to live with the accused is a result of her longing for a parental figure. This Court should also consider that the victim experienced sexual abuse when she was younger. Further, she was raped twice when she was just nine (9) and 11 years old.⁴⁴

As the case study noted, the psychological trauma impeded the victim's growth and development. Given her psychological state, the *ponencia* should have been more cautious in concluding that there was sexual consent. This Court should not tolerate and further cement the abuse and psychological trauma on victims. Considering the wide age difference between petitioner and the victim, and the victim's psychological condition, there is coercion and intimidation. Accused evidently used the victim's minority and vulnerability to compel her to have sexual intercourse with him.

Moreover, petitioner's theory that they were sweethearts at that time is made questionable by the victim's filing of the criminal case against him. Petitioner's self-serving excuse that the victim's filing was only a result of a misunderstanding should not be given credence, considering the distressing process the victim had to go through just to be able to file the case. It is incomprehensible why the victim would choose to concoct a false story, to undergo physical examination, and to convince her brother to testify at court if she only wanted to get back at the accused.

While the victim allegedly filed an affidavit of desistance, this affidavit was not testified to by the victim in court. Moreover, it was not executed with the assistance of an older relative.⁴⁵

Lastly, the *ponencia* maintains that the victim's cohabitation with petitioner, and the fact that they had another child, signifies her consent.

⁴⁴ *Rollo*, p. 55.

⁴⁵ *Id.* at 60.

I disagree.

Subsequent cohabitation cannot act as pardon to the sexual abuse committed against the victim.

In *People v. Bongbonga*,⁴⁶ the accused was charged with the rape of AAA. As a defense, accused claimed that their sexual intercourse was consensual and that they were now living together as partners. In affirming the accused's guilt, this Court rejected his sweetheart defense and ruled that subsequent cohabitation does not pardon the prior sexual abuses done by the accused:

On this note, Ruben anchors his claim of consensual sexual congress on the fact of his cohabitation with AAA. However, such claim was already addressed by the CA in the questioned Decision, which affirmed the findings of the RTC, that such cohabitation occurred only after the respective dates of the incidents. Here, such fact of cohabitation, by itself, had no bearing on the prior forcible advances committed by Ruben upon AAA. In fact, contrary to Ruben's assertions, any consent implied from the fact of cohabitation is dispelled by AAA's express declarations that she was forced against her will to live with Ruben out of fear of her father.

To be sure, that a man and a woman are living in the same house is not enough to rule out the bestial act of forced sexual intercourse. Here, the fact of cohabitation is immaterial to the charge of rape as it only took place after the alleged incidents. In *People v. Bautista*, the Court aptly held:

Besides, even if he and the victim were really sweethearts, such a fact would not necessarily establish consent. It has been consistently ruled that "a love affair does not justify rape, for the beloved cannot be sexually violated against her will." The fact that a woman voluntarily goes out on a date with her lover does not give him unbridled license to have sex with her against her will.⁴⁷ (Citations omitted)

Moreover, the ruling of the *ponencia* is consistent with the idea that rape or sexual abuse may be pardoned. This Court has settled that rape is no longer pardoned through marriage. In *People v. Jumawan*:⁴⁸

In 1997, R.A. No. 8353 eradicated the stereotype concept of rape in Article 335 of the RPC. The law reclassified rape as a crime against person and removed it from the ambit of crimes against chastity. More particular to the present case, and perhaps the law's most progressive proviso is the 2nd paragraph of Section 2 thereof recognizing the reality of marital rape and criminalizing its perpetration, viz.:

⁴⁶ 816 Phil. 596 (2017) [Per J. Caguioa, First Division].

⁴⁷ Id. at 608-609.

⁴⁸ 733 Phil. 102 (2014) [Per J. Reyes, First Division].

Article 266-C. *Effect of Pardon.* — The subsequent valid marriage between the offended party shall extinguish the criminal action or the penalty imposed.

In case it is the legal husband who is the offender, the subsequent forgiveness by the wife as the offended party shall extinguish the criminal action or the penalty: Provided, That the crime shall not be extinguished or the penalty shall not be abated if the marriage is void *ab initio*.

....

The paradigm shift on marital rape in the Philippine jurisdiction is further affirmed by R.A. No. 9262, which regards rape within marriage as a form of sexual violence that may be committed by a man against his wife within or outside the family abode[.]

....

Clearly, it is now acknowledged that rape, as a form of sexual violence, exists within marriage. A man who penetrates her wife without her consent or against her will commits sexual violence upon her, and the Philippines, as a State Party to the CEDAW and its accompanying Declaration, defines and penalizes the act as rape under R.A. No. 8353.

A woman is no longer the chattel-antiquated practices labeled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent. Surely, the Philippines cannot renege on its international commitments and accommodate conservative yet irrational notions on marital activities that have lost their relevance in a progressive society.⁴⁹

Jumawan considered the enactment of Republic Act No. 8353, which reclassified rape as a crime against person, and no longer a crime against chastity. This reclassification is not only nominal but a crucial shift in understanding the gravity and nature of rape.

Rape, including other forms of sexual abuse, should no longer be viewed as a crime against chastity, which focuses on the dishonor to the victim's father or family. Rape and sexual abuse is a strike against the person of the victim. It is a violation of one's autonomy, a "violation of free will, or the freely made choice to engage in sexual intimacy."⁵⁰

To reiterate, sexual intercourse is a complex act which is not only physical or sensual. Beyond that, it comes with the complexity of intimacy, relationship, and reproductive consequences.

⁴⁹ Id. at 133–141.

⁵⁰ Rosemary Hunter, et al., *Choice and Consent* 97 (2007).

Sexual intimacy may be primarily done for procreation⁵¹ or solely for pleasure.⁵² How sexuality and intimacy is expressed, what constitutes sex, and with whom to be intimate with is a person's choice.⁵³

Therefore, consent to sex does not only cover the physical act. Sex does not only involve the body, but it necessarily involves the mind as well. It embraces the moral and psychological dispositions of the persons engaged in the act, along with the socio-cultural expectation and baggage that comes with the act.⁵⁴ For instance, there are observed differences in sexual expectations and behaviors among different genders, and more so, among individuals. The wide range of sexual desire and behavior are not only shaped by biology, but by culture and prevailing norms as well.⁵⁵ Full and genuine consent to sex, therefore, is "preceded by a number of conditions which must exist in order for act of consent to be performed."⁵⁶

Part and parcel of a valid consent is the ability to have the intellectual resources and capacity to make a choice that reflects his or her judgments and values.⁵⁷ For someone to give sexual consent, he or she must have reached a certain level of maturity.⁵⁸

This observation becomes more apparent in determining the validity of sexual consent given by adults compared to children. Sexual consent is not a switch, but a spectrum. As a child grows into adolescence, and later to adulthood, the measure of sexual consent shifts from capacity to voluntariness.⁵⁹ Under the law, sexual consent from a child is immaterial, because he or she is deemed incapable of giving an intelligent consent.⁶⁰ However, this presumption is relaxed as the child matures. In our jurisdiction, the gradual scale begins when the child reaches the age of 12 years old. From this age, the law may admit voluntariness on the part of the child.

Nevertheless, voluntariness or informed sexual consent of a child must be determined cautiously. Cases involving younger victims must be resolved through more stringent criteria. Several factors, such as the age of the child, his or her psychological state, intellectual capability, relationship with the accused, their age difference, and other signs of coercion or manipulation must be taken into account in order to protect the child.

⁵¹ Alan Wertheimer, *Consent To Sexual Relations* 53–54 (2003).

⁵² *Id.* at 56.

⁵³ *See* J. Leonen, *Dissenting Opinion in People v. Tulagan*, G.R. No. 227363, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>> [Per J. Peralta, En Banc].

⁵⁴ Alan Wertheimer, *Consent To Sexual Relations* 37–49 (2003).

⁵⁵ *Id.*

⁵⁶ Rosemary Hunter, et al., *Choice and Consent* 98 (2007).

⁵⁷ Alan Wertheimer, *Consent To Sexual Relations* 126 (2003).

⁵⁸ Franklin Miller, et al., *The Ethics of Consent* 5 (2009). *See also* David Archard, *Sexual Consent* 91 (1997).

⁵⁹ Joseph J. Fischel, *Sex and Harm in the Age of Consent* 102–103 (2016).

⁶⁰ *See People v. Andres*, 324 Phil. 124 (1996) [Per J. Puno, Second Division].

In this case, I am not convinced that a 12-year-old girl, who is merely in the sixth grade, can give a mature and informed consent to sexual intercourse with an adult 15 years her senior. Children of her age, generally, are still under the supervision of their parents or guardian, needing guidance and direction as they are only about to enter adolescence.

Considering her tender age, the victim could not have fully comprehended the significance and implications of sexual intimacy with another person. It was neither shown that she was mature enough to understand and express her sexuality nor to enter a relationship with an adult, more so to bear their child at such a young age.

Further, the victim's psychological disposition made her more vulnerable to petitioner's exploitation. This Court should have been warned by the findings of the lower courts, as well as the Social Welfare Office, confirming that the victim is psychologically vulnerable and emotionally abused. Her hampered development and longing for a father figure was taken advantage of by petitioner, manipulating her into relational dependence on him.

Given the circumstances of this case, I am not persuaded that sexual consent was given by the victim, who was only 12 years old at that time. While our laws regrettably contemplate cases of consensual sex with a child, the case before us clearly does not fall within this concession.

ACCORDINGLY, I vote to **DENY** the Petition.



MARVIC M.V.F. LEONEN

Associate Justice

CERTIFIED TRUE COPY

Misael
MISAELO DOMINGO C. BATTUNG III
Division Clerk of Court
Third Division

JAN 07 2021