

THIRD DIVISION

G.R. No. 246702 – JAN VICTOR CARBONELL y BALLESTEROS,
Petitioner, v. PEOPLE OF THE PHILIPPINES, *Respondent*.

Promulgated:

April 28, 2021

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SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur. Petitioner Jan Victor Carbonell y Ballesteros was properly convicted of lascivious conduct under Section 5(b) of Republic Act No. 7610. However, I wish to add a few points.

Petitioner had been charged with the crime of acts of lasciviousness under Article 336 of the Revised Penal Code.¹ The Regional Trial Court gave full credence to the victim's testimony and convicted petitioner of the crime charged.² The Court of Appeals affirmed but modified this ruling, and found petitioner guilty of committing an act of lasciviousness under Section 5(b) of Republic Act No. 7610.³

The *ponencia* affirmed the Court of Appeals Decision, but it modified the offense's nomenclature to lascivious conduct under Section 5(b) of Republic Act No. 7610.

The *ponencia* decreed that when the abuse victim is under 18 years old, Republic Act No. 7610 applies.⁴ It further ruled that petitioner may be convicted of lascivious conduct under Republic Act No. 7610 despite it being omitted from the Information. It stressed that in determining the committed crime, what controls is not the caption or designation of the offense charged, but the circumstances stated in the Information.⁵

I agree.

Section 5(b) of Republic Act No. 7610 states:

¹ Ponencia, p. 2.

² Id. at 3.

³ Id. at 4.

⁴ Id. at 6.

⁵ Id. at 8.

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.

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 subjected 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[.]

To sustain a conviction for lascivious conduct, the prosecution must establish the following elements:

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.
3. The child, whether male or female, is below 18 years of age.⁶ (Citation omitted)

Here, petitioner subjected the victim, AAA, to lascivious conduct when he grabbed and mashed her breasts. So that she would not fight back, petitioner threatened that he would ruin her reputation by telling her friends that she was taking contraceptive pills. AAA was 15 years old then, the younger sister of petitioner's partner. She had treated him as her older brother.⁷ All these circumstances show that petitioner is guilty of lascivious conduct under Section 5(b) of Republic Act No. 7610.

I do stress that indicting petitioner for acts of lasciviousness under Article 336 of the Revised Penal Code might not be proper.

As I had expressed in *Quimvel v. People*⁸ and *People v. Tulagan*,⁹ the

⁶ *People v. Villacampa*, 823 Phil. 70, 84 (2018) [Per J. Carpio, Second Division].

⁷ Ponencia, p. 8.

⁸ 808 Phil. 889 (2017) [Per J. Velasco, Jr., En Banc].

Revised Penal Code provision on acts of lasciviousness was repealed by Republic Act No. 8353, or the Anti-Rape Law of 1997.

Article 336 of the Revised Penal Code provided:

ARTICLE 336. Acts of Lasciviousness. — 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 “preceding article” mentioned in Article 336 refers to Article 335, under which the crime of rape had formerly been punished. Both rape and acts of lasciviousness were considered crimes against chastity under Title XI of the Revised Penal Code. With the Anti-Rape Law enacted, rape was reclassified as a crime against person and transferred to Title VIII. Left without the provision it used to refer to, Article 336 was rendered incomplete and ineffective.

However, victims of acts of lasciviousness are not without recourse. These acts may still be punished under different laws, such as Republic Act No. 7610 or Republic Act No. 9262, which impose stricter penalties.¹⁰

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



MARVIC M.V.F. LEONEN
Associate Justice

⁹ G.R. No. 227363, March 12, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65020>> [Per J. Peralta, En Banc].

¹⁰ J. Leonen, Separate 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].