

**PEOPLE OF THE PHILIPPINES, PETITIONER, V. NOEL GO CAOILI
ALIAS "BOY TAGALOG", RESPONDENT.***G.R. No. 196342. August 08, 2017*

Ponente: TIJAM, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-196342/>**TIJAM, J.:**

Assailed in these consolidated petitions for review[1] under Rule 45 of the Rules of Court are the July 22, 2010 Decision[2] and March 29, 2011 Resolution[3] of the Court of Appeals (CA) in CA-G.R. CR-HC No. 00576-MIN, which set aside the June 17, 2008 Decision[4] of the Regional Trial Court (RTC) of Surigao City, Branch 30, in Criminal Case No. 7363, finding Noel Go Caoili (Caoili) alias "Boy Tagalog" guilty of the crime of Rape by Sexual Assault under paragraph 2 of Article 266-A of the Revised Penal Code (RPC), as amended by Republic Act (R.A.) No. 8353,[5] and remanded the case to the RTC for further proceedings consistent with the CA's opinion.

The Facts

On June 22, 2006, First Assistant Provincial Prosecutor Raul O. Nasayao filed an Information against Caoili, charging him with the crime of rape through sexual intercourse in violation of Article 266-A, in relation to Article 266-B, of the RPC as amended by R.A. No. 8353, and R.A. No. 7610.[6] The accusatory portion of the Information reads:

That on or about the 23[rd]day of October 2005, at 7:00 o'clock in the evening, more or less, in Purok [III], Barangay [JJJ], [KKK], [LLL], Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with full freedom and intelligence, with lewd design, did, then and there, willfully, unlawfully and feloniously had sexual intercourse with one [AAA],[7] a minor, fifteen (15) years of age and the daughter of the herein accused, through force, threat and intimidation and against her will, to her damage and prejudice in the amount as may be allowed by law.

CONTRARY TO Article 266-A, in relation to Article 266-B of R.A. 8353, with the aggravating circumstance that the accused is the father of the victim and R.A. 7610[.][8]

On July 31, 2006, the RTC issued an Order[9] confirming Caoili 's detention at the Municipal Station of the Bureau of Jail Management and Penology after his arrest[10] on October 25, 2005.

Upon arraignment on September 15, 2006,[11] Caoili pleaded not guilty to the crime charged. After the pre-trial, trial on the merits ensued.

The victim, AAA, testified that on October 23, 2005, at 7:00p.m., her father, Caoili, sexually molested her at their house located in Barangay JJJ, Municipality of KKK, in the Province of LLL. Caoili kissed her lips, touched and mashed her breast, inserted the fourth finger of his left hand into her vagina, and made a push and pull movement into her vagina with such finger for 30 minutes. AAA felt excruciating pain during and after the ordeal. Against her father's harsh warning not to go out of the house, AAA proceeded to the house of her uncle, BBB, located 20

meters away from their house. When he learned of this, Caoili fetched AAA and dragged her home. He beat and hit her with a piece of wood, and boxed her on the stomach.[12]

On October 26, 2005, AAA disclosed to Emelia Loayon (Loayon), the guidance counselor at AAA's school, the sexual molestation and physical violence committed against her by her own father. Loayon accompanied AAA to the police station to report the sexual and physical abuse. AAA also executed a sworn statement[13] regarding the incident before the Municipal Mayor.[14]

AAA underwent a medical examination conducted by Dr. Ramie Hipe (Dr. Hipe) at the [KKK] Medicare Community Hospital. Dr. Hipe issued a medical certificate dated October 26, 2005 showing that AAA had suffered:[15]

xxxx

- Contusion, 5 inches in width, distal 3[rd], lateral aspect, left Thigh.
- Contusion, 2 cms in width, distal 3[rd], lateral aspect, left Forearm
- (+) tenderness, left parietal area, head
- (+)tenderness, over the upper periumbilical area of abdomen
- tenderness, over the hypogastric area

xxxx

Genital Examination

xxxx

Hymen

- fimbriated in shape
- with laceration on the following:
 - complete laceration - 12 o'clock position
 - partial laceration - 3 o'clock position
 - complete laceration - 6 o'clock position
 - partial laceration - 8 o'clock position
 - complete laceration - 9 o'clock position
 - partial laceration - 11 o'clock position[16]

Dr. Hipe referred AAA to a Medical Specialist, Dr. Lucila Clerino (Dr. Clerino), for further Medico-Legal examination and vaginal smear. Dr. Clerino issued a Supplementary Medical Certificate dated October 28, 2005, indicating that AAA's hymenal area had lacerations complete at 6 o'clock and 9 o'clock superficial laceration at 12 o'clock.[17]

AAA sought the assistance of the Department of Social Welfare and Development which facilitated her admission to a rehabilitation center run by the Missionary Sisters of Mary.[18]

For his defense, Caoili denied molesting AAA. He alleged that on October 23, 2005, at about 7:00p.m., he saw AAA with her boyfriend at the cassava plantation. He recognized AAA by the fragrance of her perfume and by the outline of her ponytail. He even greeted them "good evening" but they did not respond. He then went home. When AAA arrived at their house, he confronted her and the latter admitted that she was with her boyfriend "Dodong" earlier that evening. He was so angry so he struck AAA's right thigh with a piece of wood and pushed the same piece of wood on her forehead. When AAA cried out in pain, he became remorseful and asked for

forgiveness, but AAA kept mum. After they had supper, Caoili and his son slept in one room; while AAA and her siblings slept in another room.[19]

The RTC's Ruling

On June 17, 2008, the RTC rendered its Decision[20] declaring Caoili guilty of rape by sexual assault. The dispositive portion of the Decision reads:

WHEREFORE, finding the accused NOEL GO CAOILI alias "Boy Tagalog" guilty beyond reasonable doubt, as principal, of the crime of rape, defined and penalized in paragraph 2 of Article 266-A in relation to Article 266-B of the Revised Penal Code, as amended by R.A. No. 8353, and after considering the aggravating circumstance of being the parent of the complainant, who was fourteen (14) years, one (1) month and ten (10) days old at the time of the incident in question, there being no mitigating circumstance to off-set the same, this Court hereby sentences the said accused to suffer imprisonment for an indefinite period of TEN (10) YEARS and ONE (1) DAY of Prison Mayor in its maximum period, as minimum, to SEVENTEEN (17) YEARS, FOUR (4) MONTHS and ONE (1) DAY of Reclusion Temporal in its maximum period, as maximum, and to pay the costs. Four-fifths (4/5) of the preventive detention of said accused shall be credited to his favor.

The same accused is hereby ordered to pay complainant [AAA] an indemnity ex delicto of P50,000.00; moral damages of P50,000.00; and exemplary damages of another P50,000.00.

SO ORDERED.[21]

On September 29, 2008, pursuant to a Commitment Order[22] issued by the RTC on August 27, 2008, provincial jail guards escorted Caoili for his confinement at the Davao Prisons and Penal Farm, Panabo, Davao del Norte (Davao Penal Colony).[23]

Thereafter, Caoili filed his appeal before the CA.

The CA's Ruling

On July 22, 2010, the CA rendered the assailed Decision,[24] the dispositive portion of which reads, thus:

FOR THESE REASONS, the appealed Decision of Branch 30 of the Regional Trial Court of Surigao City, in Criminal Case Nos. 7363, is SET ASIDE. Let this case be as it is IMMEDIATELY REMANDED to the trial court for further proceedings consistent with this opinion. Costs de oficio.

SO ORDERED.[25]

The CA held that although Caoili is clearly guilty of rape by sexual assault, what the trial court should have done was to direct the State Prosecutor to file a new Information charging the proper offense, and after compliance therewith, to dismiss the original Information. The appellate court found it "imperative and morally upright" to set the judgment aside and to remand the case for further proceedings pursuant to Section 14, Rule 110,[26] in relation to Section 19, Rule 119[27] of the Rules of Court.

Thereafter, Caoili and the Office of the Solicitor General (OSG) filed their respective petitions for review before this Court: G.R. No. 196342 was instituted by the OSG and G.R. No. 196848 was filed by Caoili. These petitions were ordered consolidated by the Court in its Resolution[28] dated on August 1, 2011.

In G.R. No. 196342, the OSG assails the CA's Decision for not being in accord with the law and established jurisprudence. Their petition was anchored on the following grounds:[29]

I.

[CAOILI] WAS CONVICTED OF A CRIME NECESSARILY INCLUDED IN THE OFFENSE CHARGED IN THE INFORMATION AND EMBRACED WITHIN THE SAME ARTICLE OF [R.A. NO.] 8353.

II.

[CAOILI'S] CONSTITUTIONAL RIGHT TO BE INFORMED OF THE CHARGE AGAINST HIM WAS NOT VIOLATED SINCE HE ACTIVELY PARTICIPATED DURING THE TRIAL PROCEEDINGS AND NEVER QUESTIONED THE PRESENTATION OF EVIDENCE SHOWING THAT THE CRIME COMMITTED WAS SEXUAL ASSAULT AND NOT SIMPLE RAPE.

III.

THE HONORABLE [CA] HAS ALREADY AFFIRMED THE CONVICTION OF [CAOILI] FOR THE CRIME OF RAPE BY SEXUAL ASSAULT.

IV.

THE LAST PARAGRAPH OF SECTION 14, RULE 110 OF THE RULES OF COURT, IN RELATION TO SECTION 19, RULE 119, OF THE SAME RULES, IS NOT APPLICABLE IN THE INSTANT CASE.

In G.R. No. 196848, Caoili raises the following issues[30] for our consideration:

I.

WHETHER RAPE BY SEXUAL ASSAULT IS NECESSARILY INCLUDED IN RAPE BY SEXUAL INTERCOURSE;

II.

WHETHER THE CASE MAY BE REMANDED TO THE COURT A QUO FOR FURTHER PROCEEDINGS PURSUANT TO SECTION 14, RULE 110 AND SEC. 19, RULE 119 OF THE RULES OF COURT;

III.

WHETHER THE PROSECUTION HAS SUFFICIENTLY ESTABLISHED BEYOND REASONABLE DOUBT THE GUILT OF [CAOILI] ON [sic] THE CRIME CHARGED IN THE INFORMATION;

IV.

WHETHER THE DECISION OF THE HONORABLE [CA] ACQUITTED [CAOILI.]

The Court's Ruling

The petitions lack merit.

The prosecution has established rape by sexual assault.

R.A. No. 8353 or the "Anti-Rape Law of 1997" amended Article 335, the provision on rape in the RPC, reclassifying rape as a crime against persons and introducing rape by "sexual assault," as differentiated from rape through "carnal knowledge" or rape through "sexual intercourse." [31] Incorporated into the RPC by R.A. No. 8353, Article 266-A reads:

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 is 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[.]

2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.[32] (Emphasis ours)

Thus, rape under the RPC, as amended, can be committed in two ways:

- (1) Article 266-A paragraph 1 refers to rape through sexual intercourse, also known as "organ rape" or "penile rape." The central element in rape through sexual intercourse is carnal knowledge, which must be proven beyond reasonable doubt.
- (2) Article 266-A paragraph 2 refers to rape by sexual assault, also called "instrument or object rape," or "gender-free rape." It must be attended by any of the circumstances enumerated in sub-paragraphs (a) to (d) of paragraph 1.[33] (Emphasis ours)

Through AAA's testimony, the prosecution was able to prove that Caoili molested his own daughter when he inserted his finger into her vagina and thereafter made a push and pull movement with such finger for 30 minutes,[34] thus, clearly establishing rape by sexual assault[35] under paragraph 2, Article 266-A of the RPC.

Caoili, however, questions AAA's credibility, arguing that her testimony lacked veracity since she harbored hatred towards him due to the latter's strict upbringing.[36]

The Court however, oppugns the veracity of Caoili's claim.

It is settled that ill motives become inconsequential if there is an affirmative and credible declaration from the rape victim, which clearly establishes the liability of the accused.[37]

AAA was a little over 15 years old when she testified,[38] and she categorically identified Caoili as the one who defiled her. She positively and consistently declared that Caoili inserted his finger into her vagina and that she suffered tremendous pain during the insertion. Her account of the incident, as found by the RTC[39] and the CA,[40] was clear, convincing and straightforward, devoid of any material or significant inconsistencies.

In *People v. Pareja*,[41] the Court held that:

[T]he "assessment of the credibility of witnesses is a domain best left to the trial court judge because of his unique opportunity to observe their deportment and demeanor on the witness stand; a vantage point denied the appellate courts, and when his findings have been affirmed by the CA, these are generally binding and conclusive upon this Court." [42]

While there are recognized exceptions to the rule, this Court has found no substantial reason to overturn the identical conclusions of the trial and appellate courts on the matter of AAA's credibility.[43]

When a rape victim's testimony on the manner she was molested is straightforward and candid, and is corroborated by the medical findings of the examining physician, as in this case, the same is sufficient to support a conviction for rape.[44] In a long line of cases,[45] this Court has given full weight and credit to the testimonies

of child victims, considering that their youth and immaturity are generally badges of truth and sincerity. Indeed, leeway should be given to witnesses who are minors, especially when they are relating past incidents of abuse.[46]

It is likewise settled that in cases where the rape is committed by a close kin, such as the victim's father, stepfather, uncle, or the common-law spouse of her mother, it is not necessary that actual force or intimidation be employed; moral influence or ascendancy takes the place of violence or intimidation.[47]

Verily, the prosecution has sufficiently proved the crime of rape by sexual assault as defined in paragraph 2 of Article 266-A of the RPC. Caoili, however, cannot be convicted of said crime.

Rape by sexual assault is not subsumed in rape through sexual intercourse.

We cannot accept the OSG's argument that based on the variance doctrine,[48] Caoili can be convicted of rape by sexual assault because this offense is necessarily included in the crime of rape through sexual intercourse.

The variance doctrine, which allows the conviction of an accused for a crime proved which is different from but necessarily included in the crime charged, is embodied in Section 4, in relation to Section 5 of Rule 120 of the Rules of Court, which reads:

Sec. 4. Judgment in case of variance between allegation and proof. — When there is variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved. (Emphasis ours)

Sec. 5. When an offense includes or is included in another. - An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter.

By jurisprudence,[49] however, an accused charged in the Information with rape by sexual intercourse cannot be found guilty of rape by sexual assault, even though the latter crime was proven during trial. This is due to the substantial distinctions between these two modes of rape.[50]

The elements of rape through sexual intercourse are: (1) that the offender is a man; (2) that the offender had carnal knowledge of a woman; and (3) that such act is accomplished by using force or intimidation.[51] Rape by sexual intercourse is a crime committed by a man against a woman, and the central element is carnal knowledge.[52]

On the other hand, the elements of rape by sexual assault are: (1) that the offender commits an act of sexual assault; (2) that the act of sexual assault is committed by inserting his penis into another person's mouth or anal orifice or by inserting any instrument or object into the genital or anal orifice of another person; and that the act of sexual assault is accomplished by using force or intimidation, among others.[53]

In the first mode (rape by sexual intercourse): (1) the offender is always a man; (2) the offended party is always a woman; (3) rape is committed through penile penetration of the vagina; and (4) the penalty is reclusion perpetua.[54]

In the second mode (rape by sexual assault): (1) the offender may be a man or a woman; (2) the offended party may be a man or a woman; (3) rape is committed by inserting the penis into another person's mouth or anal orifice, or any instrument or object into the genital or anal orifice of another person; and (4) the penalty is prison mayor.[55]

The Court en banc's categorical pronouncement in *People v. Abulon*,[56] thus, finds application:

In view of the material differences between the two modes of rape, the first mode is not necessarily included in the second, and vice-versa. Thus, since the charge in the Information in Criminal Case No. SC-7424 is rape through carnal knowledge, appellant cannot be found guilty of rape by sexual assault although it was proven, without violating his constitutional right to be informed of the nature and cause of the accusation against him.[57]

Our esteemed colleague, Justice Marvic M.V.F. Leonen (Justice Leonen), is of the view that Caoili should be convicted of rape by sexual intercourse.[58] According to him, sexual intercourse encompasses a wide range of sexual activities, and is not limited to those involving penetration, genitals, and opposite sexes;[59] it may be penetrative or simply stimulative.[60] Thus, he maintains that Caoili's act of inserting his finger into his daughter's genitalia qualifies as carnal knowledge or sexual intercourse.[61]

The Court, however, cannot adopt Justice Leonen's theory.

The language of paragraphs 1 and 2 of Article 266-A of the RPC, as amended by R.A. No. 8353, provides the elements that substantially differentiate the two forms of rape, i.e., rape by sexual intercourse and rape by sexual assault. It is through legislative process that the dichotomy between these two modes of rape was created. To broaden the scope of rape by sexual assault, by eliminating its legal distinction from rape through sexual intercourse, calls for judicial legislation which We cannot traverse without violating the principle of separation of powers. The Court remains steadfast in confining its powers within the constitutional sphere of applying the law as enacted by the Legislature.

In fine, given the material distinctions between the two modes of rape introduced in R.A. No. 8353, the variance doctrine cannot be applied to convict an accused of rape by sexual assault if the crime charged is rape through sexual intercourse, since the former offense cannot be considered subsumed in the latter.

The Court, thus, takes this occasion to once again remind public prosecutors of their crucial role in drafting criminal complaints or Information. They have to be more judicious and circumspect in preparing the Information since a mistake or defect therein may not render full justice to the State, the offended party and even the offender.

Thus, in Pareja,[62] the Court held that:

The primary duty of a lawyer in public prosecution is to see that justice is done - to the State, that its penal laws are not broken and order maintained; to the victim, that his or her rights are vindicated; and to the offender, that he is justly punished for his crime.[63]

Caoili can be convicted of the crime of lascivious conduct under Section 5(b) of R.A. No. 7610.

R.A. No. 7610[64] finds application when the victims of abuse, exploitation or discrimination are children or those "persons below 18 years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition." [65]

It is undisputed that at the time of the commission of the lascivious act, AAA was fourteen (14) years, one (1) month and ten (10) days old. This calls for the application of Section 5(b) of R.A. No. 7610[66] which provides:

SEC. 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:

x x x x

(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. (Emphasis ours.)

The elements of sexual abuse under Section 5(b) of R.A. No. 7610 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.[67] (Emphasis ours)

The prosecution's evidence has sufficiently established the elements of lascivious conduct under Section 5(b) of R.A. No. 7610.

Caoili's lascivious conduct

The evidence confirms that Caoili committed lascivious acts against AAA when he kissed her lips, touched and mashed her breast, and inserted his finger into her vagina and made a push and pull movement with such finger for 30 minutes.

AAA's testimony during direct examination showed how her father, Caoili, committed lascivious acts against her:

(On Direct Examination)

Pros. Silvosa

Q

Now, was there any unusual incident that happened at around 7:00 o'clock in the evening of October 23, 2005?

A

Yes, sir.

Q

What happened on October 23, 2005 at around 7:00 o'clock in the evening?

A

First, he kissed my lips, 2[nd], he touched and mashed my breast and his 4[th] finger touched my private part.

Court

Q

4[th] finger of what hand?

A

Left, your Honor.

x x x x

Q

Who has done this to you?

A

Noel Go Caoili.

Pros. Silvosa

Q

If that Noel Go Caoili is present in the courtroom, can you identify him?

A

Yes, sir.

Court

Q

What is your relationship with Noel Caoili?

A

My father.

x x x x

Pros. Silvosa

Q

[AAA], you said that your father touched your vagina and inserted his, the 4[th] finger of his left hand, for how many minutes, if you could still recall, when he inserted... I withdraw the question, your Honor... What specifically did he do with his 4[th]finger in your vagina?

A

He inserted it in my vagina, sir.

Q

While the finger was already inside your vagina, what did he do with his finger?

A

He inserted it and pulled it, he inserted and pulled it inside my vagina.

Q

Can you still recall or how many or for how long did he made [sic] the push and pull movement of his fingers inside you vagina?

A

Thirty 30 minutes, sir.

Q

Now, what did you feel while the finger of your father was inserted in your vagina?

A

Pain, sir.[68] (Emphasis ours)

AAA likewise confirmed on cross examination[69] that Caoili molested her. She even recounted that her father threatened her not to tell anybody about the incident.

Caoili's acts are clearly covered by the definitions of "sexual abuse" and "lascivious conduct" under Section 2 of the rules and regulations[70] of R.A. No. 7610:

(g) "Sexual abuse" includes 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;

(h) "Lascivious conduct" means the 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 an 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. (Emphasis ours)

It has been settled that Section 5(b) of R.A. No. 7610 does not require a prior or contemporaneous abuse that is different from what is complained of, or that a third person should act in concert with the accused.[71]

The victim's minority

AAA was a child below 18 years old at the time the lascivious conduct was committed against her. Her minority was both sufficiently alleged in the Information and proved.

Influence and coercion

"Influence" is the improper use of power or trust in any way that deprives a person of free will and substitutes another's objective. On the other hand, "coercion" is the improper use of power to compel another to submit to the wishes of one who wields it.[72]

In *People v. Leonardo*,[73] the Court ruled that:

Section 5 of R.A. No. 7610 does not merely cover a situation of a child being abused for profit, but also one in which a child is coerced to engage in lascivious conduct. To repeat, intimidation need not necessarily be irresistible. It is sufficient that some compulsion equivalent to intimidation annuls or subdues the free exercise of the will of the offended party. This is especially true in the case of young, innocent and immature girls who could not be expected to act with equanimity of disposition and with nerves of steel. Young girls cannot be expected to act like adults under the same circumstances or to have the courage and intelligence to disregard the threat.[74]

It cannot be denied that AAA, who is only a little over 14 years old at the time the offense was committed, was vulnerable and would have been easily intimidated by an attacker who is not only a grown man but is also someone exercising parental authority over her. Even absent such coercion or intimidation, Caoili can still be convicted of lascivious conduct under Section 5(b) of R.A. No. 7610 as he evidently used his moral influence and ascendancy as a father in perpetrating his lascivious acts against AAA. It is doctrinal that moral influence or ascendancy takes the place of violence and intimidation.[75]

It bears emphasis, too, that consent is immaterial in cases involving violation of Section 5 of R.A. No. 7610.[76] The mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense because it is a *malum prohibitum*, an evil that is proscribed.[77]

Clearly, therefore, all the essential elements of lascivious conduct under Section 5(b) of R.A. No. 7610 have been proved, making Caoili liable for said offense.

Variance doctrine applied

Caoili had been charged with rape through sexual intercourse in violation of Article 266-A of the RPC and R.A. No. 7610. Applying the variance doctrine under Section 4, in relation to Section 5 of Rule 120 of the Revised Rules of Criminal Procedure, Caoili can be held guilty of the lesser crime of acts of lasciviousness performed on a child, i.e., lascivious conduct under Section 5(b) of R.A. No. 7610, which was the offense proved, because it is included in rape, the offense charged.[78] This echoes the Court's pronouncement in *Leonardo*, viz.:

This Court holds that the lower courts properly convicted the appellant in Criminal Case Nos. 546-V-02, 547-V-02, 548-V-02, 554-V-02 and 555-V-02 for five counts of sexual abuse under Section 5(b), Article III of Republic Act No. 7610 even though the charges against him in the aforesaid criminal cases were for rape in relation to Republic Act No. 7610. The lower court[s] ruling is in conformity with the variance doctrine embodied in Section 4, in relation to Section 5, Rule 120 of the Revised Rules of Criminal Procedure, x x x:

xxxx

With the aforesaid provisions, the appellant can be held guilty of a lesser crime of acts of lasciviousness performed on a child, i.e., sexual abuse under Section 5(b), Article III of Republic Act No. 7610, which was the offense proved because it is included in rape, the offense charged.[79] (Emphasis ours)

The due recognition of the constitutional right of an accused to be informed of the nature and cause of the accusation through the criminal complaint or information is decisive of whether his prosecution for a crime stands

or not.[80] Nonetheless, the right is not transgressed if the information sufficiently alleges facts and omissions constituting an offense that includes the offense established to have been committed by the accused,[81] which, in this case, is lascivious conduct under Section 5(b) of R.A. No. 7610.

Guidelines: Nomenclature of crime and penalties for lascivious conduct under Section 5(b) of R.A. No. 7610

The Court is aware of its previous pronouncements where, applying the variance doctrine, it convicted the accused, charged with the rape of a minor, for the offense designated not as "Lascivious Conduct under Section 5(b) of R.A. No. 7610" but as "Acts of Lasciviousness under Article 336 of the RPC in relation to Section 5(b) of R.A. No. 7610."

Thus, in *People v. Bon*,[82] the accused was charged with having carnal knowledge of a six-year-old child against her will and with the use of force and intimidation. The trial court convicted the accused of rape. The evidence, however, merely showed that accused inserted his finger into the victim's vaginal orifice. Applying the variance doctrine, the Court en banc held that the accused could still be made liable for acts of lasciviousness under the RPC because said crime is included in rape. The accused was convicted of Acts of Lasciviousness under Article 336 of the RPC in relation to Section 5(b) of R.A. No. 7610, since all the elements of the said offense were established.

Likewise, in *Navarrete v. People*,[83] the accused was charged with statutory rape for having sexual intercourse with a five-year-old girl. Absent clear and positive proof of the entry of accused's penis into the labia of the victim's vagina, the trial court convicted the accused of the crime of Acts of Lasciviousness under Article 336 of the RPC in relation to Section 5(b) of R.A. No. 7610. The CA and this Court affirmed the conviction. In the case of *Bon*,[84] the Court held that the crime of acts of lasciviousness is included in rape. The Court likewise found that the victim's testimony established that accused committed acts of lewdness which amounted to lascivious conduct under R.A. No. 7610.

So also, in *People v. Rellota*,[85] the Court modified the accused's conviction for attempted rape[86] of a 12-year-old minor to a conviction for Acts of Lasciviousness as defined in the RPC in relation to Section 5 of R.A. No. 7610, holding that the accused's acts, while lascivious, did not exactly demonstrate an intent to have carnal knowledge with the victim. The Court applied the variance doctrine and reiterated that the crime of acts of lasciviousness is included in rape. The conviction was based on the Court's finding that the elements of acts of lasciviousness under Article 336 of the RPC and of lascivious conduct as defined in the rules and regulations of R.A. No. 7610 have been established.

Based on the language of Section 5(b) of R.A. No. 7610, however, the offense designated as Acts of Lasciviousness under Article 336 of the RPC in relation to Section 5 of R.A. No. 7610 should be used when the victim is under 12 years of age at the time the offense was committed. This finds support in the first proviso in Section 5(b) of R.A. No. 7610 which requires 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." Thus, pursuant to this proviso, it has been held that before an accused can be convicted of child abuse through lascivious conduct on a minor below 12 years of age, the requisites for act of lasciviousness under Article 336 of the RPC must be met in addition to the requisites for sexual abuse under Section 5 of R.A. No. 7610.[87]

Conversely, when the victim, at the time the offense was committed, is aged twelve (12) years or over but under eighteen (18), or is eighteen (18) or older but unable to fully take care of herself/himself or protect himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition,[88] the nomenclature of the offense should be Lascivious Conduct under Section 5(b) of R.A. No.

7610, since the law no longer refers to Article 336 of the RPC, and the perpetrator is prosecuted solely under R.A. No. 7610.

In the case at bar, AAA was a little over 14 years old when the lascivious conduct was committed against her. Thus, We used the nomenclature "Lascivious Conduct" under Section 5(b) of R.A. No. 7610.

Accordingly, for the guidance of public prosecutors and the courts, the Court takes this opportunity to prescribe the following guidelines in designating or charging the proper offense in case lascivious conduct is committed under Section 5(b) of R.A. No. 7610, and in determining the imposable penalty:

1. The age of the victim is taken into consideration in designating or charging the offense, and in determining the imposable penalty.
2. If the victim is under twelve (12) years of age, the nomenclature of the crime should be "Acts of Lasciviousness under Article 336 of the Revised Penal Code in relation to Section 5(b) of R.A. No. 7610." Pursuant to the second proviso in Section 5(b) of R.A. No. 7610, the imposable penalty is reclusion temporal in its medium period.
3. If the victim is exactly twelve (12) years of age, or more than twelve (12) but below eighteen (18) years of age, or is eighteen (18) years old or older but is unable to fully take care of herself/himself or protect herself/himself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition, the crime should be designated as "Lascivious Conduct under Section 5(b) of R.A. No. 7610," and the imposable penalty is reclusion temporal in its medium period to reclusion perpetua.[89]

The CA's order to remand the case to the trial court is procedurally infirm.

The CA erred in remanding the case to the trial court for the purpose of filing the proper Information on the basis of the last paragraph of Section 14, Rule 110 and Section 19, Rule 119 of the Rules of Court, which read:

Sec. 14. Amendment or substitution. — x x x

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If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with section 19, Rule 119, provided the accused shall not be placed in double jeopardy. The court may require the witnesses to give bail for their appearance at the trial.

Sec. 19. When mistake has been made in charging the proper offense. — When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper information. (Emphasis ours)

It is clear that the rules are applicable only before judgment has been rendered. In this case, the trial has been concluded. The RTC already returned a guilty verdict, which has been reviewed by the CA whose decision, in turn, has been elevated to this Court.

The CA's judgment did not amount to an acquittal.

Contrary to Caoili's stance, the CA's decision did not amount to a judgment of acquittal. It is true the CA declared that given the substantial distinctions between rape through sexual intercourse, as charged, and rape by sexual assault, which was proved, "no valid conviction can be had without running afoul of the accused's Constitutional

right to be informed of the charge." This statement, however, must be read alongside the immediately succeeding directive of the appellate court, remanding the case to the RTC for further proceedings pursuant to Section 14, Rule 110 and Section 19, Rule 119 of the Rules of Court. Said directive clearly shows that the CA still had cause to detain Caoili and did not discharge him; in fact, the CA would have Caoili answer for the proper Information which it directed the prosecution to file. These are not consistent with the concept of acquittal which denotes a discharge, a formal certification of innocence, a release or an absolution.[90] While the procedure adopted by the CA is certainly incorrect, its decision cannot be deemed to have the effect of an acquittal.

Penalty and Damages

Considering that AAA was over 12 but under 18 years of age at the time of the commission of the lascivious act, the imposable penalty is reclusion temporal in its medium period to reclusion perpetua.

Since the crime was committed by the father of the offended party, the alternative circumstance of relationship should be appreciated.[91] In crimes against chastity, such as acts of lasciviousness, relationship is always aggravating.[92] With the presence of this aggravating circumstance and no mitigating circumstance, the penalty shall be applied in its maximum period, i.e., reclusion perpetua,[93] without eligibility of parole.[94] This is in consonance with Section 31(c)[95] of R.A. No. 7610 which expressly provides that the penalty shall be imposed in its maximum period when the perpetrator is, inter alia, the parent of the victim.

Likewise, Section 31(f)[96] of R.A. No. 7610 imposes a fine upon the perpetrator, which jurisprudence pegs in the amount of Php 15,000.[97]

Parenthetically, considering the gravity and seriousness of the offense, taken together with the evidence presented against Caoili, this Court finds it proper to award damages.

In light of recent jurisprudential rules, when the circumstances surrounding the crime call for the imposition of reclusion perpetua, the victim is entitled to civil indemnity, moral damages and exemplary damages each in the amount of Php 75,000.00, regardless of the number of qualifying aggravating circumstances present.[98]

The fine, civil indemnity and all damages thus imposed shall be subject to interest at the rate of six percent (6%) per annum from the date of finality of this judgment until fully paid.[99]

WHEREFORE, both petitions are DENIED. The Court of Appeals' July 22, 2010 Decision and March 29, 2011 Resolution are SET ASIDE. Accused Noel Go Caoili alias Boy Tagalog is guilty of Lascivious Conduct under Section 5(b) of Republic Act No. 7610. He is sentenced to suffer the penalty of reclusion perpetua, without eligibility of parole, and to pay a fine of Php 15,000.00. He is further ordered to pay the victim, AAA, civil indemnity, moral damages and exemplary damages each in the amount of Php 75,000.00. The fine, civil indemnity and damages so imposed are subject to interest at the rate of six percent (6%) per annum from the date of finality of this Decision until fully paid.

SO ORDERED.

Sereno, C.J., Carpio, Velasco, Jr., Leonardo-De Castro, Bersamin, Del Castillo, Mendoza, Perlas-Bernabe, Jardeleza, and Reyes, JJ., concur.

Peralta, J., see separate concurring opinion.

Leonen and Martires, JJ., see dissenting opinion.

Caguioa, J., see separate opinion.

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on August 8, 2017 a Decision/Resolution, copy attached herewith, was rendered by the Supreme Court in the above-entitled cases, the original of which was received by this Office on September 26, 2017 at 1:35 p.m.

Very truly yours,

(SGD.) FELIPA G. BORLONGAN-ANAMA
Clerk of Court

[1] Rollo (G.R. No. 196342), pp. 11-48; rollo (G.R. No. 196848), pp. 11-35.

[2] Penned by Associate Justice Edgardo A. Camello, concurred in by Associate Justices Leoncia R. Dimagiba and Nina G. Antonio-Valenzuela; CA rollo, pp. 109-119.

[3] Rollo (G.R. No. 196342), pp. 62-67.

[4] Penned by Presiding Judge Floripinas C. Buyser: records, pp. 87-97.

[5] The Anti-Rape Law of 1997.

[6] AN ACT PROVIDING FOR STRONGER DETERRENCE AND SPECIAL PROTECTION AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION, AND FOR OTHER PURPOSES. Approved on June 17, 1992.

[7] The identity of the victim or any information which could establish or compromise her identity, as well as those of her immediate family or household members, shall be withheld pursuant to Republic Act No. 7610, An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination. and for Other Purposes; Republic Act No. 9262, An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefrom; and for Other Purposes; and Section 40 of A.M. No. 04-10-11-SC, known as the Rule on Violence Against Women and Their Children, effective November 5, 2004. (People v. Dumadag, 667 Phil. 664 [2011])

[8] Records, p. 1.

[9] Id. at 17.

[10] Apprehension Report, id. at 8.

[11] Certificate of Arraignment, id. at 22.

[12] Rollo (G.R. No. 196342), pp. 15-16.

[13] Pangutana Ug Tubag, records, p. 5.

[14] Rollo (G.R. No. 196342), p. 17.

[15] Id.

[16] Exhibits, pp. 10-11.

[17] Rollo (G.R. No: 196342), p. 18.

[18] CA rollo, p. 44.

[19] Id. at 47-48.

[20] Records, pp. 87-97.

[21] Records, p. 97.

[22] CA rollo, p. 7.

[23] Id. at 8.

[24] Id. at 109-119.

[25] Id. at 119.

[26] Sec. 14. Amendment or substitution.—x x x

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If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with section 19, Rule 119, provided the accused shall not be placed in double jeopardy. The court may require the witnesses to give bail for their appearance at the trial.

[27] Sec. 19. When mistake has been made in charging the proper offense. — When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper information.

[28] Rollo (G.R. No. 196848), p. 160.

[29] Rollo (G.R. No. 196342), pp. 27-28.

[30] Rollo (G.R. No. 196848), pp. 21-22.

[31] People v. Pareja, 724 Phil. 759 (2014).

[32] Id. at 781.

[33] Id. at 782.

[34] Records, p. 88.

[35] Rape by sexual assault has the following elements: (1) That the offender commits an act of sexual assault; (2) That the act of sexual assault is committed by any of the following means: (a) By inserting his penis into another person's mouth or anal orifice; or (b) By inserting any instrument or object into the genital or anal orifice of another person; (3) That the act of sexual assault is accomplished under any of the following circumstances: (a) By using force and intimidation; (b) When the woman is deprived of reason or otherwise unconscious; or (c) By means of fraudulent machination or grave abuse of authority; or (d) When the woman is under 12 years of age or demented. (People v. Soria, 698 Phil. 676 [2012])

[36] Rollo (G.R. No. 196848), p. 28.

[37] *Rondina v. People*, 687 Phil. 274 (2012).

[38] Records, p. 96.

[39] The RTC's Decision states: "x x x this Court finds the testimony of AAA, who was little over fifteen years old at the time she testified, to be clear, convincing and straightforward, devoid of any material or significant inconsistencies. x x x." Id.

[40] The CA held: "We also find no cogent reason to disturb the findings of the trial court upholding [AAA]'s credibility. x x x." Rollo (G.R. No. 196342), p. 58.

[41] *Supra* note 31.

[42] Id. at 773.

[43] Id.

[44] *People v. Soria*, *supra* note 35.

[45] *Ricalde v. People*, 751 Phil. 793, 805 (2015), citing *Pielago v. People*, 706 Phil. 460 (2013); *Campos v. People*, 569 Phil. 658, 671 (2008), quoting *People v. Capareda*, 473 Phil. 301, 330 (2004); *People v. Galigao*, 443 Phil. 246, 260 (2003).

[46] *Ricalde v. People*, *supra* note 45.

[47] *People v. Padua*, 661 Phil. 366 (2011); *People v. Corpuz*, 597 Phil. 459 (2009).

[48] Embodied in Section 4, in relation to Section 5, Rule 120 of the Rules of Court.

[49] *People v. Abulon*, 557 Phil. 428 (2007); *People v. Pareja*, *supra* note 31; *People v. Cuaycong*, 718 Phil. 633 (2013).

[50] *People v. Pareja*, *supra* note 31.

[51] *People v. Alfredo*, 653 Phil. 435 (2010).

[52] *People v. Espera*, 718 Phil. 680 (2013).

[53] *People v. Alfredo*, *supra* note 51.

[54] *People v. Espera*, *supra* note 52, citing *People v. Abulon*, *supra* note 49.

[55] Id.

[56] *Supra* note 49.

[57] Id. at 455.

[58] Dissenting Opinion of Justice Marvic M.V.F. Leonen; p. 6.

[59] Id. at 12.

[60] Id.

[61] Id. at 7.

[62] *Supra* note 31.

[63] Id. at 785.

[64] Special Protection of Children against Abuse, Exploitation and Discrimination Act.

[65] *People v. Chingh*, 661 Phil. 208, 223 (2011).

[66] Id.

[67] *Roallos v. People*, 723 Phil. 655 (2013); *Caballo v. People*, 710 Phil. 792 (2013); *People v. Rayon, Sr.*, 702 Phil. 672 (2013); *Garingarao v. People*, 669 Phil. 672 (2011); and *Olivarez v. CA and People*, 503 Phil. 421 (2005).

[68] TSN, January 10, 2007, pp. 7-8, 12.

[69] Id. at 30-31.

[70] Rules and Regulations on the Reporting and Investigation of Child Abuse Cases (Done in the City of Manila: October 1993).

[71] *Quimvel v. People*, G.R. No. 214497, April 18, 2017.

[72] *Caballo v. People*, supra note 67.

[73] 638 Phil. 161 (2010).

[74] Id. at 188.

[75] *People v. Deligero*, 709 Phil. 783 (2013).

[76] *Caballo v. People*, supra note 67.

[77] Id.

[78] See *People v. Leonardo*, supra note 73.

[79] Id. at 197-198.

[80] *People v. Manansala*, 708 Phil. 66 (2013).

[81] Id.

[82] 444 Phil. 571 (2003).

[83] 542 Phil. 496 (2007).

[84] *People v. Bon*, supra note 82.

[85] 640 Phil. 471 (2010).

[86] Accused in this case was also convicted of two (2) counts of consummated rape.

[87] *People v. Bonaagua*, 665 Phil. 750 (2011); *Navarrete v. People*, supra note 83, citing *Amployo v. People*, 496 Phil. 747 (2005).

[88] See Section 3(a), R.A. No. 7610.

[89] *People v. Bacus*, G.R. No. 208354, August 26, 2015, 768 SCRA 318; *People v. Baraga*, 735 Phil. 466 (2014); and *People v. Rayon*, 702 Phil. 672 (2013).

[90] See definitions of "Acquittal" and "Acquitted" in Black's Law Dictionary, Fifth Edition.

[91] *People v. Sumingwa*, 618 Phil. 650 (2009).

[92] *Id.*

[93] *People v. Gaduyon*, 720 Phil. 750 (2013); *People v. Sumingwa*, *supra* note 91.

[94] *People v. Bacus*, *supra* note 89.

[95] Article XII, Section 31. Common Penal Provisions. -

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(c) The penalty provided herein shall be imposed in its maximum period when the perpetrator is an ascendant, parent, guardian, stepparent or collateral relative within the second degree of consanguinity or affinity, or a manager or owner of an establishment which has no license to operate or its license has expired or has been revoked.

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[96] Article XII, Section 31. Common Penal Provisions.-

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(f) A fine to be determined by the court shall be imposed and administered as a cash fund by the Department of Social Welfare and Development and disbursed for the rehabilitation of each child victim, or any immediate member of his family if the latter is the perpetrator of the offense.

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[97] *People v. Bacus*, *supra* note 89.

[98] *People v. Jugueta*, G.R. No. 202124, April 5, 2016, 788 SCRA 331.

[99] *Id.*

SEPARATE CONCURRING OPINION

PERALTA, J.:

I concur with the ponencia in finding accused Noel Go Caoili alias "Boy Tagalog" guilty beyond reasonable doubt of sexual abuse under Section 5(b), [1] Article III of Republic Act (R.A.) No. 7610, or the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act," and not the crime of acts of lasciviousness under Article 336[2] of the Revised Penal Code (RPC) in relation to Section 5(b) of R.A. No. 7610.

First. While there is a variance between the offense charged [rape by sexual intercourse] and those offenses proved [sexual abuse under Section 5(b), Article III of R.A. No. 7610 and rape by sexual assault], Caoili can be convicted of sexual abuse under R.A. No. 7610 because it was the offense proved during trial, and it is necessarily included in the crime of acts of lasciviousness under Article 336 of the RPC which, under settled jurisprudence, is necessarily included in rape. However, due to the material differences between the two modes of committing rape, settled jurisprudence holds that rape by sexual intercourse is not necessarily included in rape by sexual assault, vice-versa, and that an accused cannot be found guilty of rape by sexual assault even though it was proved, if the charge is rape by sexual intercourse.

Second. Exception must be taken as to the applicability to this case of *People v. Nazareno*[3] where it was held that rape by sexual assault committed at the time when the Anti-Rape Law of 1997 (R.A. No. 8353) was already in effect, although proven, should not have been considered by the trial and appellate courts for lack of a proper allegation in the information, which only charged the accused with rape by sexual intercourse.

Third. Sexual abuse under Section 5(b), Article III of R.A. No. 7610 and acts of lasciviousness under Article 336 of the RPC are separate and distinct from each other, despite the fact that the essential elements or ingredients of both crimes barely have material or substantial differences.

Fourth. The penalty for sexual abuse under Section 5(b), Article III of R.A. No. 7610 varies if the age of the child victim is either below 12 years of age or between Twelve (12) to Seventeen (17) years of age, as well as Eighteen (18) and above but under special circumstances.[4] Also, the crime of acts of lasciviousness under Article 336 of the RPC, in relation to Section 5(b) of R.A. No. 7610, can only be committed against a victim who is less than 12 years old or one who cannot give intelligent consent.

Fifth. In view of possible different opinions between and among the crimes of rape through carnal knowledge under Article 266, paragraph 1 of the RPC, rape by sexual assault under Article 266-A, paragraph 2, acts of lasciviousness under Article 336 of the RPC, and sexual abuse under Section 5(b), Article III of R.A. No. 7610, a copy of this Decision, including the Separate Opinions, should be furnished the President of the Republic of the Philippines, through the Department of Justice, as well as the President of the Senate and the Speaker of the House of Representatives, to enable them to review the said laws for possible amendments.

The antecedents are as follows:

On July 7, 2006, Caoili was indicted for rape by sexual intercourse committed against his fifteen (15)-year-old daughter, AAA. During trial, AAA testified that Caoili kissed her lips, touched and mashed her breasts, inserted the forefinger of his left hand into her vagina, then made a push-and-pull movement inside her for about thirty (30) minutes. The accusatory portion of the Information reads:

That, on or about the 23[rd] day of October 2005, at 7:00 o'clock in the evening, more or less, in Purok [III], Barangay [JJJ], [KKK], [LLL], Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with full freedom and intelligence, with lewd design, did then and there, willfully, unlawfully and feloniously had sexual intercourse with one [AAA], a minor, fifteen (15) years of age and the daughter of herein accused, through force, threat and intimidation and against her will, to her damage and prejudice in the amount as may be allowed by law.

CONTRARY TO Article 266-A, in relation to Article 266-B of R.A. 8353, with the aggravating circumstance that the accused is the father of the victim and R.A. 7610.[5]

After trial, the Regional Trial Court of Surigao City, Branch 30,[6] found Caoili guilty of rape by sexual assault. On appeal, the Court of Appeals[7] set aside the decision, and ordered the immediate remand of the case for further proceedings, pursuant to Section 14, Rule 110, in relation to Section 19, Rule 119 of the Rules of Court.

Before us, the ponencia opined that even if the elements of rape by sexual assault have been proven by the prosecution, Caoili could not be held guilty of the crime proved during trial. Citing *People v. Pareja*[8] and *People v. Abulon*,[9] the ponencia held that due to the material differences and substantial distinctions between the two modes of committing rape, rape by sexual intercourse is not necessarily included in rape by sexual assault, and vice-versa. Nonetheless, under the variance doctrine embodied under Sections 4 and 5, Rule 120 of the Rules of Court, sufficient evidence exists to convict Caoili of the crime of acts of lasciviousness under Article 336 of the RPC, in relation to Section 5(b), Article III of R.A. No. 7610. The ponencia sentenced Caoili to suffer reclusion perpetua, and to pay the victim a fine of P15,000.00, as well as civil indemnity, moral damages, and exemplary

damages, in the amount of P75,000.00 each, plus interest rate of six percent (6%) per annum from finality of the judgment until fully paid.

I explain my concurrence with the ponencia.

To be sure, Caoili cannot be merely convicted of the lesser crime of acts of lasciviousness under Article 336 of the RPC in an information charging rape by sexual intercourse, because what were proved during trial are sexual abuse under Section 5(b), Article III of R.A. No. 7610 and rape by sexual assault under Article 266-A, paragraph 2 of the RPC. Conviction for such lesser crime is not only unfair to the victim who is no less than his minor daughter, but also violates the declaration of state policy and principles under Section 2 of R.A. No. 7610 and Section 3(2), Article XV of the 1987 Constitution, which provide for special protection to children from all forms of abuse, neglect, cruelty, exploitation and other conditions prejudicial to their development.

I fully agree with the doctrine in *Abulon*[10] and *Pareja*[11] to the effect that an accused cannot be found guilty of rape by sexual assault although it was proven, if the charge in the information is rape by carnal knowledge in view of the material differences[12] between rape by sexual intercourse and rape by sexual assault, as well as the constitutional right to be informed of the nature and cause of the accusation against him. I also do not dispute the well-settled principles in the cases[13] cited by the ponencia that a charge of acts of lasciviousness is necessarily included in a complaint for rape, and that an accused charged with rape by carnal knowledge or sexual intercourse, can still be convicted of the lesser crime of acts of lasciviousness, pursuant to the variance doctrine under Section 4, in relation to Section 5, Rule 120[14] of the Rules of Court.

After a careful review of the relevant laws and jurisprudence, however, I find that Caoili should be convicted instead of sexual abuse under Section 5(b) of Article III of R.A. No. 7610, pursuant to the variance doctrine because it was the crime proved during trial, and it is necessarily included in acts of lasciviousness under Article 336 of the RPC which, under settled jurisprudence, is necessarily included in the crime of rape.

The 1987 Constitution mandates that in all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation against him.[15] From this fundamental law stems the rule that an accused can only be convicted of a crime charged in the information, and proved beyond reasonable doubt during trial.[16] To convict the accused of an offense other than that charged in the information would violate the Constitutional right to be informed of the nature and cause of the accusation, unless the crime is alleged or necessarily included in the information filed against him.[17]

For the variance doctrine to apply, it is required that (1) there is a variance between an offense charged and that proved, and (2) the offense as charged is included in or necessarily includes the offense proved. Under the variance doctrine, the accused shall either be convicted (1) of the offense proved which is included in the offense charged, or (2) of the offense charged which is included in the offense proved.

While there is a variance between the offense charged [rape by sexual intercourse] and that proved [sexual abuse under R.A. No. 7610 and rape by sexual assault], Caoili should be convicted of sexual abuse under Section 5(b), Article III of R.A. No. 7610 because it was the offense proved during trial, and it is necessarily included in the crime of acts of lasciviousness under Article 336 of the RPC which, under settled jurisprudence, is necessarily included in rape.

An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter, whereas an offense charged is necessarily included in the offense proved when the essential ingredients of the former constitute or form part of those constituting the latter.[18]

The elements of acts of lasciviousness under Article 336 of the RPC, on the one hand, are:

- The offender commits any act of lasciviousness or lewdness;
- That 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
- That the offended party is another person of either sex.

As correctly noted by the ponencia, lewdness is defined as an obscene, lustful, indecent, and lecherous act which signifies that form of immorality which has relation to moral impurity; or that which is carried in a wanton manner. Moreover, the presence or absence of lewd designs is inferred from the nature of the acts themselves and the environmental circumstances.

The elements of sexual abuse under Section 5(b), Article III of R.A. No. 7610, on the other hand, are:

- The accused commits a sexual intercourse or lascivious conduct;
- The said act was performed with a child exploited in prostitution or subjected to sexual abuse; and
- The child, whether male or female, is below 18 years of age.

Promulgated in relation to Section 32 of R.A. No. 7610 are the Rules and Regulations (IRR) on the Reporting and Investigation of Child Abuse Cases which define the terms "sexual abuse" and "lascivious conduct":

Section 2. Definition of Terms. - As used in these Rules, unless the context requires otherwise -

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g) "Sexual Abuse" includes 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;

h) "Lascivious conduct" means the 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 an 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; x x x[19]

A comparison of the essential elements or ingredients of sexual abuse under Section 5(b), Article III of R.A. No. 7610 and acts lasciviousness under Article 336 of the RPC barely reveals any material or substantial difference between them. The first element of sexual abuse under R.A. No. 7610, which includes lascivious conduct, lists the particular acts subsumed under the broad term "act of lasciviousness or lewdness" under Article 336. The second element of "coercion and influence" as appearing under R.A. No 7610 is likewise broad enough to cover "force and intimidation" as one of the circumstances under Article 336.[20] Anent the third element, the offended party under R.A. No. 7610 and Article 336 may be of either sex, save for the fact that the victim in the former must be a child. I, therefore, posit that the sexual abuse under Section 5(b), Article III of R.A. No. 7610 is necessarily included in the crime of acts of lasciviousness under Article 336 of the RPC.

Applying the variance doctrine in this case where the crime charged is rape by sexual intercourse, Caoili can still be convicted of sexual abuse under Section 5(b), Article III of R.A. No. 7610. This is because the same crime was proved during trial and is necessarily included in the crime of acts of lasciviousness under Article 336 of the RPC

which, under settled jurisprudence, is necessarily included in a complaint for rape. For the same reason, the CA erred in applying Section 14,[21] Rule 110, in relation to Section 19,[22] Rule 119 of the Rules of Court, and ordering the remand of the case for further proceedings. Suffice it to stress that the provisions on substitution of information applies only when (1) there is a mistake in charging the proper offense, and (2) the accused cannot be convicted of the offense charged or any other offense necessarily included in the offense charged. The second requisite is absent in this case.

As held in *Dimakuta v. People*,[23] if the victim of lascivious acts or conduct is over 12 years of age and under eighteen (18) years of age, the accused may be held liable for:

xxxx

2. Acts of lasciviousness under Art. 336 if the act of lasciviousness is not covered by lascivious conduct as defined in R.A. No. 7610. In case the acts of lasciviousness is covered by lascivious conduct under R.A. No. 7610 and it is done through coercion or influence, which establishes absence or lack of consent, then Art. 336 of the RPC is no longer applicable. x x x[24]

Before an accused can be held criminally liable of lascivious conduct, which is included in sexual abuse under Section 5(b), Article III of R.A. No. 7610, the requisites of acts of lasciviousness under Article 336 of the RPC must be met in addition to the requisites of sexual abuse under the said Section 5(b), namely: (1) the accused commits the act of sexual intercourse or lascivious conduct; (2) the said act was performed with a child exploited in prostitution or subjected to sexual abuse; and (3) the child, whether male or female, is below 18 years of age.[25] All these requisites are present in this case.

First. Caoili's lewd acts of kissing the victim's lips, mashing her breasts, inserting his finger into her vagina and making a push-and-pull movement inside her for thirty (30) minutes, constitute lascivious conduct as defined in the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases:

Section 2. Definition of Terms. - As used in these Rules, unless the context requires otherwise—

xxxx

h) "Lascivious conduct" means the 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 an 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; x x x[26]

Second. Caoili clearly has moral ascendancy over the victim who is his minor daughter. It is settled that in cases where rape is committed by a relative, such as a father, stepfather, uncle, or common law spouse, moral influence or ascendancy takes the place of violence. It bears emphasis that a child is considered as sexually abused under Section 5(b), Article III of R.A. No. 7610 when he or she is subjected to lascivious conduct under the coercion or influence of any adult, and that moral ascendancy is equivalent to intimidation, which annuls or subdues the free exercise of the will by the offended party. *Apropos* is *Caballo v. People*: [27]

As it is presently worded, Section 5, Article III of RA 7610 provides that when a child indulges in sexual intercourse or any lascivious conduct due to the coercion or influence of any adult, the child is deemed to be a "child exploited in prostitution and other sexual abuse." In this manner, the law is able to act as an effective deterrent to quell all forms of abuse, neglect, cruelty, exploitation and discrimination against children, prejudicial as they are to their development.

In this relation, case 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 compel another to submit to the wishes of one who wields it."

Third. The victim was admitted and proved to be 14 years old at the time of the commission of the offense. Under Section 3(a) of R.A. No. 7610, "children" refers to persons below eighteen (18) years of age or those over but unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition."

Accordingly, Caoili should be convicted of sexual abuse under Section 5(b), Article III of R.A. No. 7610, and not just acts of lasciviousness under Article 336 of the RPC, in relation to the same provision of R.A. No. 7610.

In *Quimvel v. People*,^[28] (*Quimvel*) the Court held that Section 5(b), Article III of R.A. No. 7610 punishes sexual intercourse or lascivious conduct committed on a child subjected to other sexual abuse, and covers not only a situation where a child is abused for profit but also one in which a child, through coercion, intimidation or influence, engages in sexual intercourse or lascivious conduct. The Court noted that the very definition of "child abuse" under Section 3(b) of R.A. No. 7610 does not require that the victim suffer a separate and distinct act of sexual abuse aside from the act complained of, for it refers to the maltreatment, whether habitual or not, of the child. Thus, a violation of Section 5(b) occurs even though the accused committed sexual abuse against the child victim only once, even without a prior sexual affront. Moreover, the Court pointed out that it is immaterial whether or not the accused himself employed the coercion or influence to subdue the will of the child for the latter to submit to his sexual advances for him to be convicted under paragraph (b). As can be gleaned from Section 5, Article III of R.A. No. 7610, the offense can be committed against "any adult, syndicate or group," without qualification. The clear language of the special law, therefore, does not preclude the prosecution of lascivious conduct performed by the same person who subdued the child through coercion or influence.

It may not be amiss to state that the absence of the phrase "exploited in prostitution or subject to other sexual abuse" or even the specific mention of "coercion" or "influence" in the Information filed against Caoili, is not a bar to uphold the finding of guilt against an accused for violation of Section 5(b), Article III of R.A. No. 7610. As held in *Quimvel*:

x x x Just as the Court held that it was enough for the Information in *Olivarez* to have alleged that the offense was committed by means of "force and intimidation," the Court must also rule that the information in the case at bench does not suffer from the alleged infirmity.

So too did the Court find no impediment in *People v. Abadies*, *Malto v. People*, *People v. Ching*, *People v. Bonaagua*, and *Caballo v. People* to convict the accused therein for violation of Sec. 5, RA 7610 notwithstanding the non-mention in the information of "coercion", influence", or "exploited in prostitution or subject to other abuse."^[29]

In seeking his acquittal, Caoili cites *People v. Nazareno*^[30] and argues that he cannot be convicted of rape by sexual assault because even if it was proved during trial, the crime specifically alleged in the information is sexual

intercourse, which is a separate and distinct crime. The accusatory portion of the said Information docketed as Criminal Case No. 2638 for violation of Article 266-A of the RPC, reads:

That from sometime in January 1990 up to December 1998 in Barangay Codon, Municipality of San Andres, Catanduanes, and within the jurisdiction of the Honorable Court, the said accused, being the father of the complainant, did then and there willfully, feloniously and criminally repeatedly had sexual intercourse with her daughter AAA, then five years old up to the time when she was 15 years old against her will.

CONTRARY TO LAW.

The Court ruled in Nazareno that considering that the Anti-Rape Law of 1997 (R.A. No. 8353) was already in force at the time of the insertion of appellant's finger in BBB's vagina on December 6, 1998, he should have been prosecuted and tried for rape by sexual assault and not under the traditional definition of rape. This is because under the Revised Rules of Criminal Procedure, the information must state the designation of the offense given by the statute and specify its qualifying and generic aggravating circumstances.[31] Stated otherwise, the accused cannot be convicted for the offense proved during trial if it was not properly alleged in the information. The Court, thus, held that in Criminal Case No. 2638, appellant should have been convicted only of qualified rape of BBB in January 1992, while the rape by sexual assault committed on December 6, 1998, although proven, should not have been considered by the trial and appellate courts for lack of a proper allegation in the information.

Contrary to Caoili's argument, Nazareno is inapplicable to this case for the simple reason that there is no allegation in the afore-quoted information docketed as Criminal Case No. 2638, which even remotely refers to acts constituting a violation of R.A. No. 7610. Caoili was sufficiently apprised of the offense being charged against him, and afforded opportunity to prepare his defense, because the designation of the offense appears in the Information filed against him, to wit:

That, on or about the 23[rd] day of October 2005m at 7:00 o'clock in the evening, more or less, in Purok [III], Barangay [JJJ], [KKK], [LLL], Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with full freedom and intelligence, with lewd design, did then and there, willfully, unlawfully and feloniously had sexual intercourse with one [AAA], a minor, fifteen (15) years of age and the daughter of herein accused, through force, threat and intimidation and against her will, to her damage and prejudice in the amount as may be allowed by law.

CONTRARY TO Article 266-A, in relation to Art. 266-B of R.A. 8353, with aggravating circumstance that the accused is the father of the victim and R.A. 7610.[32]

In particular, Section 5, Article III of R.A. No. 7610 deals with sexual intercourse committed against a child exploited in prostitution and other sexual abuse:

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 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;[33]

Significantly, while Nazareno is silent on the application of the variance doctrine, I have discussed that applying the same doctrine in this case where the crime charged is rape by sexual intercourse, Caoili can still be convicted of sexual abuse committed against a child under Section 5(b), Article III of R.A. No. 7610. This is because the latter crime was proved during trial and is necessarily included in the crime of acts of lasciviousness under Article 336 of the RPC which, under settled jurisprudence, is necessarily included in a complaint for rape.

Since Caoili should be convicted of sexual abuse under R.A. No. 7610, the proper imposable penalty should be taken from reclusion temporal in its medium period to reclusion perpetua under Section 5(b), Article III thereof, and not prision correccional under Article 336 of the RPC, because the victim was alleged [15 years old] and proved [14 years old] to be a child.

It bears stressing that sexual abuse under Section 5(b), Article III of R.A. No. 7610 and acts of lasciviousness under Article 336 of the RPC are separate and distinct from each other. With due indulgence, may I refer to my Separate Concurring Opinion in Quimvel where I discussed the difference between the two crimes:

Violation of the first clause of Section 5(b), Article III of R.A. 7610 is separate and distinct from acts of lasciviousness under Article 336 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. On the one hand, the elements of violation of the first clause of Section 5(b) are: (1) accused commits the act of sexual intercourse or lascivious conduct; (2) the 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. On the other hand, the elements of acts of lasciviousness under Article 336 are: (1) that the offender commits any act of lasciviousness or lewdness; (2) that 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) that the offended party is another person of either sex. x x x

I likewise opined that the penalty for sexual abuse under Section 5(b), Article III of R.A. No. 7610 varies if the age of the child victim is either below 12 years of age or between 12 to 17 years of age, as well as 18 and above but under special circumstances:

Moreover, while the first clause of Section 5(b), Article III of R.A. 7610 is silent with respect to the age of the victim, Section 3, Article I thereof defines "children" as those below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability. Notably, two provisos succeeding the first clause of Section 5(b) explicitly state a qualification that when the victims of lascivious conduct is under 12 years of age, the perpetrator shall be (1) prosecuted under Article 336 of the RPC, and (2) the penalty shall be reclusion temporal in its medium period. It is a basic rule in statutory construction that the office of the proviso qualifies or modifies only the phrase immediately preceding it or restrains or limits the generality of the clause that it immediately follows. A proviso is to be construed with reference to the immediately preceding part of the provisions, to which it is attached, and not to the statute itself or the other sections thereof.[34]

In light of my foregoing, I found it necessary to restate in my Separate Concurring Opinion in Quimvel the applicable laws and imposable penalties for acts of lasciviousness committed against a child under Article 336 of the RPC, in relation to R.A. No. 7610:

1. Under 12 years old - Section 5(b), Article III of R.A. 7610, in relation to Article 336 of the RPC, as amended by R.A. 8353, applies and the imposable penalty is reclusion temporal in its medium period, instead of prision correccional. x x x

2. 12 years old and below 18, or 18 or older under special circumstances under Section 3(a) of R.A. 7610[35] - Section 5(b), Article III of R.A. 7610 in relation to Article 336 of the RPC, as amended, applies and the penalty is reclusion temporal in its medium period to reclusion perpetua. This is because the proviso under Section 5(b) apply only if the victim is under 12 years old, but silent as to those 12 years old and below 18; hence, the main clause thereof still applies in the absence of showing that the legislature intended a wider scope to include those belonging to the latter age bracket. xxx[36]

I further submit that the crime of acts of lasciviousness under Article 336 of the RPC, in relation to Section 5(b), Article III of R.A. No. 7610 can only be committed against a victim who is less than 12 years old or one who cannot give intelligent consent. This theory is supported by the provisions of Section 5(b), in relation to Article 335(3), on rape and Article 336 on acts of lasciviousness of the RPC, which deal with statutory rape and statutory acts of lasciviousness, thus:

Art. 336, RPC, Act No. 3815 (December 8, 1930)

R.A. 7610 (June 17, 1992)

Chapter Two

ARTICLE III

RAPE AND ACTS OF LASCIVIOUSNESS

Art. 335. When and how rape is committed. — Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

1. By using force or intimidation:
2. When the woman is deprived of reason or otherwise unconscious: and
3. When the woman is under twelve years of age, even though neither of the circumstances mentioned in the two next preceding paragraphs shall be present.

The crime of rape shall be punished by reclusion perpetua. xxx

Art. 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 prison correccional.

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 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: xxx

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

As can be gleaned from the foregoing provisions, if the victim of a lascivious conduct is from 12 to 17 years old,

like in the case at bar, the crime should not be considered as "in relation to Article 336 of the RPC" because the circumstances of absence of consent of the victim, her being deprived of reason or consciousness, and the use of force or intimidation, should already be established in order to hold the accused liable. Thus, if the victim is from 12 years old to 17, or 18 years old, or over but under special circumstances,[37] the crime is sexual abuse under Section 5(b), Article III of R.A. No. 7610, which carries the penalty of reclusion temporal medium to reclusion perpetua. Note that it is only when the victim is under 12 years old that the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape, and Article 336 of the RPC, for rape or lascivious conduct, as the case may be. Equally noteworthy is the fact that Article 335, paragraph 3 and Article 336 have been amended by R.A. No. 8353, thus:

Chapter Three

Rape

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.

xxx

Section 4. Repealing Clause. - Article 336 of Act No. 3815, as amended, and all laws, acts, presidential decrees, executive orders, administrative orders, rules and regulations inconsistent with or contrary to the provisions of this Act are deemed amended, modified or repealed accordingly.[38]

There being no mitigating circumstance to offset the alternative aggravating circumstance of (paternal) relationship[39] as alleged in the Information and proved during trial, I therefore concur that Caoili should be sentenced to suffer the maximum period of the penalty, i.e., reclusion perpetua.[40] I also agree with the ponencia that Caoili should also be ordered to pay the victim civil indemnity, moral damages and exemplary damages in the amount of P75,000.00 each, pursuant to *People v. Jugueta*,[41] and a fine in the amount of P15,000.00, pursuant to Section 31(f),[42] Article XII of R.A. No. 7610, with interest at the rate of six percent (6%) per annum from the date of finality of judgment until fully paid.

Needless to state, Caoili cannot be meted indeterminate sentence computed from the penalty of prison correccional under Article 336 of the RPC, as it would defeat the purpose of R.A. No. 7610 to provide for stronger deterrence and special protection against child abuse, exploitation and discrimination. First, the imposition of such penalty would erase the substantial distinction between acts of lasciviousness under Article 336 and acts of lasciviousness with consent of the offended party under Article 339,[43] which used to be punishable by arresto mayor, and now by prison correccional pursuant to Section 10, Article VI of R.A. 7610. Second, it would inordinately put on equal footing the acts of lasciviousness committed against a child and the same crime committed against an adult, because the imposable penalty for both would still be prison correccional, save for the aggravating circumstance of minority that may be considered against the perpetrator. Third, it would make acts of lasciviousness against a child an a probationable offense, pursuant to the Probation Law of 1976,[44] as amended by R.A. No. 10707.[45] Indeed, while the foregoing implications are favorable to the accused, they are contrary to the State policy and principles under R.A. No. 7610 and the Constitution on the special protection to children.

As reference for future corrective legislation and for guidance and information purposes, I find it necessary to reiterate the applicable laws and imposable penalties for acts of lasciviousness committed against a child under Article 336 of the RPC, in relation to R.A. No. 7610, as stated in my Separate Concurring Opinion in Quimvel:

1. Under 12 years old - Section 5(b), Article III of R.A. 7610, in relation to Article 336 of the RPC, as amended by R.A. 8353, applies and the imposable penalty is reclusion temporal in its medium period, instead of prision correccional. In *People v. Fragante*,^[46] *Nonito Imbo y Gamores v. People of the Philippines*,^[47] and *People of the Philippines v. Oscar Santos y Encinas*,^[48] the accused were convicted of acts of lasciviousness committed against victims under 12 years old, and were penalized under Section 5(b), Article III of R.A. 7610, and not under Article 336 of the RPC, as amended.

2. 12 years old and below 18, or 18 or older under special circumstances under Section 3(a) of R.A. 7610^[49] - Section 5(b), Article III of R.A. 7610 in relation to Article 336 of the RPC, as amended, applies and the penalty is reclusion temporal in its medium period to reclusion perpetua. This is because the proviso under Section 5(b) apply only if the victim is under 12 years old, but silent as to those 12 years old and below 18; hence, the main clause thereof still applies in the absence of showing that the legislature intended a wider scope to include those belonging to the latter age bracket. The said penalty was applied in *People of the Philippines v. Ricardo Bacus*^[50] and *People of the Philippines v. Rolando Baraga y Arcilla*^[51] where the accused were convicted of acts of lasciviousness committed against victims 12 years old and below 18, and were penalized under Section 5(b), Article III of R.A. 7610. But, if the acts of lasciviousness is not covered by lascivious conduct as defined in R.A. 7610, such as when the victim is 18 years old and above, acts of lasciviousness under Article 336 of the RPC applies and the penalty is prision correccional.

Curiously, despite the clear intent of R.A. 7610 to provide for stronger deterrence and special protection against child abuse, the penalty [reclusion temporal medium] when the victim is under 12 years old is lower compared to the penalty [reclusion temporal medium to reclusion perpetua] when the victim is 12 years old and below 18. The same holds true if the crime of acts of lasciviousness is attended by an aggravating circumstance or committed by persons under Section 31,^[52] Article XII of R.A. 7610, in which case, the imposable penalty is reclusion perpetua. In contrast, when no mitigating or aggravating circumstance attended the crime of acts of lasciviousness, the penalty therefor when committed against a child under 12 years old is aptly higher than the penalty when the child is 12 years old and below 18. This is because, applying the Indeterminate Sentence Law, the minimum term in the case of the younger victims shall be taken from reclusion temporal minimum,^[53] whereas as the minimum term in the case of the older victims shall be taken from prision mayor medium to reclusion temporal minimum.^[54] It is a basic rule in statutory construction that what courts may correct to reflect the real and apparent intention of the legislature are only those which are clearly clerical errors or obvious mistakes, omissions, and misprints,^[55] but not those due to oversight, as shown by a review of extraneous circumstances, where the law is clear, and to correct it would be to change the meaning of the law.^[56] To my mind, a corrective legislation is the proper remedy to address the noted incongruent penalties for acts of lasciviousness committed against a child.

Too, it bears emphasis that R.A. 8353 did not expressly repeal Article 336 of the RPC, as amended. Section 4 of R.A. 8353 only states that Article 336 of the RPC, as amended, and all laws, rules and regulations inconsistent with or contrary to the provisions thereof are deemed amended, modified or repealed, accordingly. There is nothing inconsistent between the provisions of Article 336 of the RPC, as amended, and R.A. 8353, except in sexual assault as a form of rape. Hence, when the lascivious act is not covered by R.A. 8353, then Article 336 of the RPC is applicable, except when the lascivious conduct is covered by R.A. 7610.

In fact, R.A. 8353 only modified Article. 336 of the RPC, as follows: (1) by carrying over to acts of lasciviousness the additional circumstances^[57] applicable to rape, viz.: threat and fraudulent machinations or grave abuse of authority; (2) by retaining the circumstance that the offended party is under 12 years old, and including dementia as another one, in order for acts of lasciviousness to be considered as statutory, wherein evidence of force or intimidation is immaterial because the offended party who is under 12 years old or

demented, is presumed incapable of giving rational consent; and (3) by removing from the scope of acts of lasciviousness and placing under the crime of rape by sexual assault the specific lewd act of inserting the offender's penis into another person's mouth or anal orifice, or any instrument or object into the genital or anal orifice of another person. In fine, Article 336 of the RPC, as amended, is still a good law despite the enactment of R.A. 8353 for there is no irreconcilable inconsistency between their provisions.

Meanwhile, the Court is also not unmindful of the fact that the accused who commits acts of lasciviousness under Article 336 of the RPC, in relation to Section 5 (b), Article III of R.A. 7610, suffers the more severe penalty of reclusion temporal in its medium period, than the one who commits Rape Through Sexual Assault, which is merely punishable by prision mayor. In *People v. Ching y Parcia*,^[58] the Court noted that the said fact is undeniably unfair to the child victim, and it was not the intention of the framers of R.A. 8353 to have disallowed the applicability of R.A. 7610 to sexual abuses committed to children. The Court held that despite the passage of R.A. 8353, R.A. 7610 is still good law, which must be applied when the victims are children or those "persons below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition."^[59]

Finally, as the Court stressed in *Mustapha Dimakuta Maruhom v. People*,^[60] where the lascivious conduct is covered by the definition under R.A. 7610 where the penalty is reclusion temporal medium and the said act is likewise covered by sexual assault under Article 266-A, paragraph 2 of the RPC, which is punishable by prision mayor, the offender should be liable for violation of Section 5(b), Article III of R.A. 7610, where the law provides the higher penalty of reclusion temporal medium, if the offended party is a child. But if the victim is at least eighteen (18) years of age, the offender should be liable under Article 266-A, par. 2 of the RPC and not R.A. 7610, unless the victim is at least 18 years old and she is unable to fully take care of herself or protect from herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition, in which case, the offender may still be held liable of sexual abuse under R.A. 7610. The reason for the foregoing is that, aside from the affording special protection and stronger deterrence against child abuse, R.A. 7610 is a special law which should clearly prevail over R.A. 8353, which is a mere general law amending the RPC.

Let a copy of this Decision and the Separate Opinions be furnished the President of the Republic of the Philippines, through the Department of Justice, pursuant to Article 5^[61] of the RPC, the President of the Senate of the Philippines and the Speaker of the House of Representatives, as reference for possible amendments in light of the foregoing observations.

[1] 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: xxx

(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 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; xxx

[2] Art. 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.

[3] 574 Phil. 175, 206 (2008).

[4] R.A. No. 7610, Section. 3. Definition of Terms. -

(a) "Children" refers to a person below eighteen (18) years of age or those over but are unable to themselves or protect from themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

[5] Records, p. 1.

[6] Penned by Presiding Judge Floripinas C. Buyser.

[7] Penned by Associate Justice Edgardo A. Camello, with Associate Justices Leoncia R. Dimagiba and Nina G. Antonio-Valenzuela, concurring.

[8] 724 Phil. 759 (2014).

[9] 557 Phil. 428 (2007).

[10] Supra note 9.

[11] Supra note 8.

[12] The differences between the two modes of committing rape are the following:

- (1) In the first mode, the offender is always a man, while in the second, the offended may be a man or a woman;
- (2) In the first mode, the offended party is always a woman, while in the second, the offended party may be a man or a woman;
- (3) In the first mode, rape is committed through penile penetration of the vagina, while the second is committed by inserting the penis into another person's mouth or anal orifice, or any instrument or object into the genital or anal orifice of another person; and
- (4) The penalty for rape under the first mode is higher than that under the second.

[13] *People v. Poras*, 626 Phil. 526 (2010); *People v. Rellota*, 640 Phil. 471 (2010); and *People v. Garcia*, 695 Phil. 576 (2012).

[14] SEC. 4. Judgment in case of variance between allegation and proof.— When there is variance between the offense charge in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.

SEC. 5. When an offense includes or is included in another.—An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter.

[15] Article III, Section 14 (2).

[16] *Parungao v. Sandiganbayan, et al.*, 274 Phil. 451, 459 (1991).

[17] *Patula v. People of the Philippines*, 685 Phil. 376, 388 (2012).

[18] Sec. 5, Rule 120, Rules of Court.

[19] Emphasis added.

[20] *Quimvel v. People*, G.R. No. 214497, April 18, 2017.

[21] SEC. 14. Amendment or substitution. — A complaint or information may be amended, in form or in substance, without leave of court, at any time before the accused enters his plea. After the plea and during the trial, a formal amendment may only be made with leave of court and when it can be done without causing prejudice to the rights of the accused.

xxxx

If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with section 19, Rule 119, provided the accused shall not be placed in double jeopardy. The court may require the witnesses to give bail for their appearance at the trial.

[22] SEC. 19. When mistake has been made in charging the proper offense. - When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper information.

[23] G.R. No. 206513, October 20, 2015, 773 SCRA 228.

[24] *Dimakuta v. People*, *supra*, at 264. (Emphasis added).

[25] *Quimvel v. People*, *supra* note 20.

[26] Emphasis added.

[27] 710 Phil. 792, 805-806 (2013).

[28] *Supra* note 20.

[29] Citations omitted.

[30] *Supra* note 3.

[31] Rule 110, SEC. 8. Designation of the offense.—The complaint or information shall state the designation of the offense given by the statute, aver the acts or omissions constituting the offense, and specify its qualifying and aggravating circumstances. If there is no designation of the offense, reference shall be made to the section or subsection of the statute punishing it.

SEC. 9. Cause of the accusation.—The acts or omissions complained of as constituting the offense and the qualifying and aggravating circumstances must be stated in ordinary and concise language and not necessarily in the language used in the statute, but in terms sufficient to enable a person of common understanding to know what offense is being charged as well as its qualifying and aggravating circumstances and for the court to pronounce judgment.

[32] Emphasis added.

[33] *Id.*

[34] *Id.*

[35] Section. 3. Definition of Terms.-

(a) "Children" refers to a person below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect from themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

[36] *Quimvel v. People*, supra note 20. (Emphasis added.)

[37] R.A. No. 7610, Section. 3. Definition of Terms.- (a) "Children" refers to a person below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect from themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

[38] Emphasis added on amended parts and underscoring added.

[39] Article 15 of the Revised Penal Code:

Art. 15. Their concept. — Alternative circumstances are those which must be taken into consideration as aggravating or mitigating according to the nature and effects of the crime and the other conditions attending its commission. They are the relationship, intoxication and the degree of instruction and education of the offender. The alternative circumstance of relationship shall be taken into consideration when the offended party in the spouse, ascendant, descendant, legitimate, natural, or adopted brother or sister, or relative by affinity in the same degrees of the offender.

x x x

[40] See *People v. Sumingwa*, 618 Phil. 650 (2009).

[41] G.R. No. 202124, April 5, 2016.

[42] Section. 31. Common Penal Provisions. -

x x x x

(f) A fine to be imposed by the court shall be imposed and administered as a cash fund by the Department of Social Welfare and Development and disbursed for the rehabilitation of each child victim, or any Immediate member of his family if the latter is the perpetrator of the offense.

[43] ARTICLE 339. Acts of Lasciviousness with the Consent of the Offended Party.- The penalty of arresto mayor shall be imposed to punish any other acts of lasciviousness committed by the same persons and the same circumstances as those provided in Articles 337 and 338.

ARTICLE 337. Qualified Seduction. - The seduction of a virgin over twelve years and under eighteen years of age, committed by any person in public authority, priest, house-servant, domestic, guardian, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman seduced, shall be punished by prision correccional in its minimum and medium periods.

The penalty next higher in degree shall be imposed upon any person who shall seduce his sister or descendant, whether or not she be a virgin or over eighteen years of age.

Under the provisions of this Chapter, seduction is committed when the offender has carnal knowledge of any of the persons and under the circumstances described herein.

ARTICLE 338. Simple Seduction. - The seduction of a woman who is single or a widow of good reputation, over twelve but under eighteen years of age, committed by means of deceit, shall be punished by arresto mayor.

[44] Presidential Decree No. 968.

[45] An Act Amending Presidential Decree No. 968, otherwise known as the "Probation Law of 1976", as amended. Approved on November 26, 2015. Section 9 of the Decree, as amended, provides that the benefits thereof shall not be extended to those "(a) sentenced to serve a maximum term of imprisonment of more than six

(6) years." Note: The duration of the penalty of prision correccional is 6 months and 1 day to 6 years.

[46] 657 Phil. 577, 601 (2011).

[47] G.R. No. 197712, April 20, 2015, 756 SCRA 196.

[48] 753 Phil. 637 (2015).

[49] Section. 3. Definition of Terms.-

(b) "Children" refers to a person below eighteen (18) years of age or those over but are unable to fully take care of themselves or protect from themselves from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

[50] G.R. No. 208354, August 26, 2015, 768 SCRA 318.

[51] 735 Phil. 466 (2014).

[52] Section 31. Common Penal Provisions. -

x x x x

(c) The penalty provided herein shall be imposed in its maximum period when the perpetrator is an ascendant, parent, guardian, stepparent or collateral relative within the second degree of consanguinity or affinity, or a manager or owner of an establishment which has no license to operate or its license has expired or has been revoked. (Emphasis added)

[53] Ranging from 12 years and 1 day to 14 years and 8 months.

[54] Ranging from 8 years 1 day to 14 years and 8 months.

[55] *Lamb v. Phipps*, 22 Phil. 456 (1912).

[56] *People v. De Guzman*, 90 Phil. 132 (1951).

[57] Aside from use force or intimidation, or when the woman is deprived of reason or otherwise unconscious.

[58] 661 Phil. 208, 224 (2011).

[59] Section 3 (a), Article 1 of R.A. 7610

[60] *Supra* note 23.

[61] ARTICLE 5. Duty of the Court in Connection with Acts Which Should Be Repressed but Which are Not Covered by the Law, and in Cases of Excessive Penalties. — Whenever a court has knowledge of any act which it may deem proper to repress and which is not punishable by law, it shall render the proper decision, and shall report to the Chief Executive, through the Department of Justice, the reasons which induce the court to believe that said act should be made the subject of penal legislation.

In the same way, the court shall submit to the Chief Executive, through the Department of Justice, such statement as may be deemed proper, without suspending the execution of the sentence, when a strict enforcement of the provisions of this Code would result in the imposition of a clearly excessive penalty, taking into consideration the degree of malice and the injury caused by the offense.

DISSENTING OPINION

LEONEN, J.:

Rape is no longer a crime simply against the chastity of a woman. It is a crime against her person. It is not simply a violation of a woman's moral preferences. It is a violation of her human dignity. Rape labels the violence done to her by another who inhumanely reduces her into an object of lust.

For his daughter, a father who kisses her, mashes her breasts, and then inserts his finger into her vagina not only betrays a sacred trust but burdens her life with coerced illicit sexual intercourse. For her, and our legal order as well, it will not make sense to narrowly define sexual intercourse without conceding the impotence of our law to understand what happened to her. The depravity is the same, whether it was her father's penis or her father's finger that was forced upon her vagina.

When his daughter sought succor from a relative, Noel Go Caoili (Caoili) dragged her home. In an act of rage and cowardice, as a way to hide his dastardly act, as a continuation of the violation of his own daughter, he punched and beat his daughter.

Caoili raped his own daughter.

I do not see any procedural misstep that should take precedence over the proper label for this criminal act. The evidence shows that Caoili raped his own daughter by sexual intercourse, as charged.

I dissent.

On July 7, 2006, an Information was filed charging accused Caoili, alias "Boy Tagalog," of forcefully having sexual intercourse with his 15-year-old daughter.[1] The Information read:

That, on or about the 23[rd]day of October 2005, at 7:00 o'clock in the evening, more or less, in Purok Masipag, Barangay Matin-ao, Mainit, Surigao del Norte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with full freedom and intelligence, with lewd design, did then and there, willfully, unlawfully and feloniously had sexual intercourse with one AAA, a minor, fifteen (15) years of age and the daughter of the herein accused, through force, threat and intimidation and against her will, to her damage and prejudice in the amount as may be allowed by law.

CONTRARY TO Article 266-A, in relation to Article 266-B of R.A. 8353, with the aggravating circumstance that the accused is the father of the victim and R.A. 7610.[2]

Upon arraignment, the accused pleaded not guilty.[3]

The accused's daughter testified that on October 23, 2005, at 7:00 p.m., the accused kissed her lips, touched and mashed her breast, and inserted his left forefinger into her vagina, making a push and pull movement for 30 minutes.[4] She went to her uncle's house located 20 meters away from their house.[5] The accused dragged his daughter home to be beaten and punched.[6]

The daughter reported the incident to her high school guidance counselor and to the police.[7] Later, she underwent a medical examination administered by Dr. Ramie Hipe, who issued a medical certificate on October 26, 2005 stating:

Pertinent Physical Findings/Physical Injuries:

. . . .

- Contusion, 5 inches in width, distal 3[rd], lateral aspect, left thigh.

- Contusion, 2 cms in width, distal 3[rd], lateral aspect, left forearm
- (+) tenderness, left parietal area, head
- (+) tenderness, over the upper periumbilical area of abdomen
- tenderness, over the hypogastric area

....

Genital Examination

....

Hymen

- fimbriated in shape
- with laceration on the following:
 - complete laceration - 12 o'clock position
 - partial laceration - 3 o'clock position
 - complete laceration - 6 o'clock position
 - partial laceration - 8 o'clock position
 - complete laceration - 9 o'clock position
 - partial laceration - 11 o'clock position[8]

The daughter of the accused was also examined by Dr. Lucila Clerino, who issued a supplementary medical certificate on October 28, 2005, stating:

Lacerations complete at 6 o'clock and 9 o'clock superficial laceration at 12 o'clock.[9]

The accused denied the charges against him. As a father, he was a disciplinarian. He claimed that his daughter resented his methods and became rebellious. His daughter talked back to him, lied, and exhibited bad temper when he forbade her from having a boyfriend.[10] The day he allegedly raped his daughter was the day he beat her with a piece of wood on her thigh because she lied to him about her whereabouts. She told him that she was at the house of her aunt, but he saw her in the dark under the cassava plants with a man.[11] Accused stopped beating his daughter when she cried. He asked her for forgiveness but she did not respond. Later, he went to sleep in a room with his son. His daughter slept in another room with her other siblings.[12]

The daughter's sister—accused's other daughter—testified that she was with her sister immediately before the time that the accused allegedly raped her sister. She manifested that she was there when accused beat her sister with a piece of wood. She later slept with her sister and her other siblings in a room. Her sister never told her that she was raped by their father.[13]

On June 17, 2008, the trial court found accused guilty of sexual assault under Article 266-A, paragraph 2 of the Revised Penal Code, thus:

WHEREFORE, finding the accused NOEL GO CAOILI alias "Boy Tagalog" guilty beyond reasonable doubt, as principal, of the crime of rape, defined and penalized in paragraph 2 of Article 266-A in relation to Article 266-B of the Revised Penal Code, as amended by R.A. No. 8353, and after considering the aggravating circumstance of being the parent of the complainant, who was fourteen (14) years, one (1) month and ten (10) days old at the time of the incident in question, there being no mitigating circumstance to off-set the same, this Court hereby sentences the said accused to suffer imprisonment for an indefinite period of TEN (10) YEARS and ONE (1) DAY of Prison Mayor in its maximum period, as minimum, to SEVENTEEN (17) YEARS,

FOUR (4) MONTHS and ONE (1) DAY of Reclusion Temporal in its maximum period, as maximum, and to pay the costs. Four-fifths (4/5) of the preventive detention of said accused shall be credited to his favor.

The same accused is hereby ordered to pay complainant ABC an indemnity ex delictu of P50,000.00; moral damages of P50,000.00; and exemplary damages of another P50,000.00.

SO ORDERED.[14]

The accused appealed the trial court's June 17, 2008 Decision finding him guilty of sexual assault. He argued that since the information charged him of rape by sexual intercourse, he could not be convicted of sexual assault.[15]

The Court of Appeals found that the accused was guilty of sexual assault. However, sexual assault was not charged in the Information. Thus, the case was remanded to the trial court in accordance with Rule 110, Section 14[16] and Rule 119, Section 19[17] of the Rules of Court, thus:

FOR THESE REASONS, the appealed Decision of Branch 30 of the Regional Trial Court of Surigao City, in Criminal Case Nos. 7363, is SET ASIDE. Let this case be as it is IMMEDIATELY REMANDED to the trial court for further proceedings consistent with this opinion. Costs de officio.

SO ORDERED.[18] (Emphasis in the original)

Both parties filed separate motions for reconsideration of the Court of Appeals' July 22, 2010 Decision. Both motions were denied in the Court of Appeals Resolution dated March 29, 2011.[19]

The accused and People of the Philippines filed their separate Petitions for Review on Certiorari under Rule 45 of the Rules of Court. The Accused argued that he was unjustly convicted of a crime that was not charged in the Information. This was a violation of his constitutional right to be informed of the nature and cause of the accusations against him.[20] In any case, the prosecution failed to prove his guilt beyond reasonable doubt of the allegations against him.[21]

The People of the Philippines argued that the accused was rightfully convicted of sexual assault, which was necessarily included in the offense charged in the information. The Court of Appeals may no longer remand the case to the trial court in accordance with Rule 110 and Rule 119 of the Rules of Court because a judgment had already been rendered in the case.[22]

The ponencia proposes that Caoili be convicted of the lesser crime of lascivious conduct under Article III, Section 5 (b) of Republic Act No. 7610. Although the Information accuses him of rape by sexual intercourse, the prosecution was able to prove rape by sexual assault, which, according to the ponencia, is materially different and substantially distinct from rape by sexual intercourse.[23]

I disagree.

I

The accused may be convicted of rape by sexual intercourse without violating his due process rights and his right to be informed of the nature and cause of the accusations against him as provided in Article III, Section 14 of the 1987 Constitution[24] and reproduced in Rule 115, Section 1(b) of our Rules of Procedure.[25] The importance and purpose of this rule has been explained by this Court in *People v. Quitlong*: [26]

First. To furnish the accused with such a description of the charge against him as will enable him to make his defense; and second, to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and third, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.[27]

The right to be informed of the nature and cause of the accusations against a person need not be alleged with the highest degree of particularity. It is satisfied as long as facts are alleged with sufficient clarity[28] that allows the accused to understand what acts he is being made liable for in order to enable him to make a defense.[29]

The ponencia insists that rape by sexual intercourse and sexual assault are so materially different and substantially distinct that an accused charged with one (1) mode cannot be convicted of the other mode without violating the accused's constitutional right to be informed of the nature and cause of the accusations against a person.[30] Since the accused cannot be convicted of sexual assault, the ponencia proposes that he instead be convicted of the lesser offense of acts of lasciviousness under lascivious conduct under Article III, Section 5 (b) of Republic Act No. 7610,[31] which provide:

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 subject 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[.]

The information substantially charged the accused with forced carnal knowledge or sexual intercourse. It is sufficiently clear to inform the accused what acts he is being made liable for. It is sufficient to enable him to form a defense.

Article 266-A(1) of the Revised Penal Code provides that carnal knowledge without valid consent constitutes rape:

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)

Evidence of lack of valid consent and carnal knowledge is, therefore, already sufficient to convict an accused of rape by sexual intercourse under Article 266-A(1) of the Revised Penal Code. The prosecution already established that the accused inserted his finger in his daughter's vagina. This already qualifies as carnal knowledge or sexual intercourse.

This Court's refusal to convict the accused of rape by sexual intercourse despite the proper allegation in the information and the sufficiency of the prosecution's evidence is based on this Court's restrictive definition of sexual intercourse.

Carnal knowledge or sexual intercourse has been inaccurately and restrictively used to denote an activity that must necessarily involve penetration, genitals, and opposite sexes. Carnal knowledge or sexual intercourse is currently understood as involving penile penetration of the vaginal orifice. In *People v. Opong*:^[32]

Carnal knowledge is synonymous with sexual intercourse. There is carnal knowledge if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male.^[33]

Earlier, in *People v. Alib*:^[34]

Carnal knowledge is defined as the act of a man having sexual bodily connections with a woman; sexual intercourse. Ordinarily, this would connote the complete penetration of the female sexual organ by the male sexual organ. In cases of rape, however, proof of the entrance of the male sexual organ into the labia of the pudendum, or lips of the female organ, is sufficient for conviction. Elsewise stated, the slightest penetration of the female's private organ is sufficient to consummate the crime of rape.^[35]

In *People v. Almaden*:^[36]

Carnal knowledge is, simply put, sexual intercourse between a man and a woman. With the slightest penetration, sexual intercourse is achieved, and the crime of rape is consummated.^[37]

In *People v. Miclat*:^[38]

Carnal knowledge is defined as the act of a man having sexual intercourse or sexual bodily connection with a woman.^[39]

These interpretations, however, are residues of the archaic concept of rape as a crime against chastity.

Chastity is a virtue. It denotes abstinence from sexual activity before marriage or the limitation of one's sexual contact to his or her spouse after marriage.

Crimes against chastity under our current law include, among others, adultery, concubinage, seduction, corruption of minors, and abduction.^[40] The criminalization of acts constituting these crimes is not only a declaration that chastity is something that must be protected by the State, but is also a revelation of the premium we put on abstinence before or outside marriage and our fixation on puritanical ideals.

The brunt of the effects of this fixation is suffered to a significantly greater degree by women more than men. Between the two (2) sexes, women are expected to live out this ideal. Their adherence to this virtue is taken as a given.

What acts constitute the crimes against chastity and how they are crafted in our law reflect these unequal expectations.

Under Title Eleven or Crimes Against Chastity of the Revised Penal Code, punishment is generally directed at acts that contradict this expectation of virtue or acts that tend to give an appearance of diminished virtue. Married women may be convicted of adultery for having sexual intercourse with any man not her husband, regardless of the validity of her marriage.^[41] On the other hand, sexual relations of a married man with a woman who is not his wife is not always a crime. It only becomes a crime if there is cohabitation, if it is committed under scandalous circumstances,^[42] or if the sexual relations were committed with a married woman, and he had knowledge of that fact.^[43]

Moreover, Title Eleven of the Revised Penal Code suggests that only females may be criminally seduced and abducted for lewd designs. Articles 337 and 343 emphasize virginity among their elements. Thus:

Article 337. Qualified seduction. - The seduction of a virgin over twelve years and under eighteen years of age,

committed by any person in public authority, priest, home-servant, domestic, guardian, teacher, or any person who, in any capacity, shall be entrusted with the education or custody of the woman seduced, shall be punished by prison correccional in its minimum and medium periods.

....

Article 343. Consented abduction. - The abduction of a virgin over twelve years and under eighteen years of age, carried out with her consent and with lewd designs, shall be punished by the penalty of prison correccional in its minimum and medium periods.

Meanwhile, the crime of simple seduction emphasizes good reputation among females of 12 to 18 years, thus:

Article 338. Simple seduction. - The seduction of a woman who is single or a widow of good reputation, over twelve but under eighteen years of age, committed by means of deceit, shall be punished by Arresto mayor.

These further highlight that the expectation to remain pure is real and that this expectation is not equal between sexes. It implies that while women necessarily adhere and must necessarily adhere to chastity as a virtue, men do not and have no need to. Hence, the State provides a means to protect that virtue presumably and expectedly held by all its women.

This underlying assumption exposes the real focal point of crimes against chastity. Unlike crimes against persons wherein acts are punished for the harm done to an individual person's being regardless of sex, crimes against chastity punishes persons for acts done against a virtue. Crimes against persons recognize that individuals are conscious beings who are sovereigns in their own right of their own bodies, thoughts, and lives.^[44] Crimes against chastity emphasize the virtue more than the person. The person is nothing more than a vessel of an independent abstract concept that must be protected.

Republic Act No. 8353 has already reconceptualized rape as a crime against persons. However, until present, virginity of a woman—as opposed to men's virginity—is important to men. This is one (1) of the manifestations of gender imbalance that is apparent in the current wordings of our crimes against chastity. Women are seen as objects. A woman's value depends on whether the man she will marry will be the person who will first conquer her—the man to whom she will yield and for whom she will be owned.

Thus, under the old concept, what matters was what men wanted: the woman is reduced into a vagina and it must be intact for him. He owns her when he is first to violate her. She is not as worthy otherwise. She is unchaste.

Carnal knowledge or sexual intercourse is a broad term that can be subject to several interpretations. Understandably, albeit without sensitivity to gendered meanings, past decisions even of this Court reduced this broad term to penile penetration. A more enlightened gender and culturally sensitive meaning expands this concept especially since rape is now no longer a crime against chastity but a crime against persons.

Having carnal knowledge or sexual intercourse is a powerful expression of intimacy. It is an act which requires the shedding of all inhibitions and defenses to allow humans to explore each other in their most basic nakedness. It is an act that brings out the best in humanity when it is neither required nor coerced but chosen by the partners. This autonomy that begets choice is what is protected by law. It is that choice that can complete expression and can define him or her who makes that choice. After all, as social beings, humans are defined by how they choose to be intimate, with whom, and how deeply.

It is the violation of this choice—this autonomy—that inspires the punishment for rape. Penile penetration was the traditional way to determine whether sexual intercourse has happened. But it should no longer be exclusively so. We should increasingly take the point of view of the victim. For her most fundamental autonomy to choose her intimate partner was violated when her father kissed her, mashed her breasts, inserted her finger into her vagina,

and satisfied his lust for her for 30 minutes. She is as much a victim of coerced sexual intercourse as any other woman would be if it was the penis that was inserted. Except that in this case, she is not simply a woman: she is the daughter of the accused.

The determination of whether chastity was violated, in past cases, may have required a clinical passing of the entire sexual act to privilege the penis and its entry into the vagina. Regardless of its doctrinal presentation in the past, our present, more gender sensitive law and legal lenses now require that we see the acts in sexual intercourse as a whole. To reduce them to their component parts would be to say that the violation of the human dignity of a person insofar as her sexuality is concerned can be understood as a matter of degree.

By maintaining fatuous classifications, this Court fails to recognize that we create, through our interpretation, a dissonance between the law and the actual scenarios to which they apply. In this case, we would be saying that this father did not rape his daughter as much as he would have raped another woman by forcing his penis in her vagina. We would then go back to the feudal concept of protecting the powerful and graduating his liabilities by traditional but irrational categories. Instead, we should look at the victim and read the law from her perspective as a human being.

Doing so means that we pronounce that the entirety of what this father did to his daughter was "sexual intercourse" as charged in the information equivalent to "carnal knowledge" in Article 266-A of the Revised Penal Code as amended.

In other words, we square the interpretation of the law with the victim's reality. She was raped by sexual intercourse.

The persistence of an archaic understanding of rape relates to our failure to disabuse ourselves of the notion that carnal knowledge or sexual intercourse is merely a reproductive activity. It is not. Sexual intercourse may be done for pleasure. It may be done for religious purposes. It may be a means to an end.

Hence, sexual intercourse encompasses a wide range of sexual activities not limited to those involving penetration, genitals, and opposite sexes. Sexual intercourse is a sexual activity that is participated in by at least two (2) individuals of the same or opposite sex for purposes of attaining erotic pleasure.[45] It may be penetrative or simply stimulative.[46] It may or may not involve persons of opposite sexes. When forced, sexual intercourse constitutes rape.

This understanding of sexual intercourse would prevent courts from unnecessarily and unjustly convicting persons of lesser crimes when they are undoubtedly guilty of rape.

II

Republic Act No. 8353's reconceptualization of rape as a crime against persons and the broadening of its definition to include its other forms point towards this understanding.

The reconceptualization of rape as a crime against persons is a recognition that rape may be committed to any person regardless of sex and gender. It is also a recognition that rape may be committed through various means. The diversity of means by which rape can be committed allowed our lawmakers to create gradations for purposes of determining the appropriate punishment.

However, the imposition of different punishments for different manners of committing rape or sexual assault should not be read as a reflection of the actual heinousness of the corresponding acts for the victim. In *People v. Quintos y Badilla*,[47] this Court said:

The classifications of rape in Article 266-A of the Revised Penal Code are relevant only insofar as these define the manners of commission of rape. However, it does not mean that one manner is less heinous or wrong than the other. Whether rape is committed by nonconsensual carnal knowledge of a woman or by insertion of the penis into the mouth of another person, the damage to the victim's dignity is incalculable ... [O]ne experience of sexual abuse should not be trivialized just because it was committed in a relatively unusual manner.

"The prime purpose of [a] criminal action is to punish the offender in order to deter him and others from committing the same or similar offense, to isolate him from society, reform and rehabilitate him or, in general, to maintain social order." Crimes are punished as retribution so that society would understand that the act punished was wrong.

Imposing different penalties for different manners of committing rape creates a message that one experience of rape is relatively trivial or less serious than another. It attaches different levels of wrongfulness to equally degrading acts. Rape, in whatever manner, is a desecration of a person's will and body. In terms of penalties, treating one manner of committing rape as greater or less in heinousness than another may be of doubtful constitutionality.[48] (Citations omitted)

By involving the finger only as a means to violate Article 266-A, paragraph 2,[49] thereby equating it to an "instrument or object," this Court misunderstands the gravity and the power used by those who want to defile the person of another through rape. It misunderstands the crime.

Rape is not an act of pleasure. It is an illicit expression of power. It is not an act that simply addresses the uncontrolled instincts of the perpetrator. It is an act which fulfills a depraved desire to impose one's will on another, reducing the other to the status of a subordinate.

The finger is as much part of the human body as the penis. It is not a separate instrument or object. It is an organ that can act as a conduit to give both pleasure as well as raw control upon the body of another. At a certain age, when men have difficulty with erections, his finger or any other similar organ becomes a handy tool of oppression. This Court cannot maintain an artificially prudish construction of sexual intercourse. When it does, it becomes blind to the many ways that women's bodies are defiled by the patriarchy. To legally constitute the finger as a separate object not used in "sexual intercourse" or "carnal knowledge" not only defies reality, it undermines the purpose of the punishment under Article 266-A, paragraph 2.

III

Even if there is any deficiency in the form of the information, the remedy is not to prejudice the punishment for the wrong done to the victim. Rather it is to call the attention of the prosecutor who drafted the charge. Too often, the mistake of the same leads to acquittal or downgrading of the appropriate punishment. Whether this is due to lack of competence, supervision, design or consideration, the effect is the same. The consequent inability of our institutions to do what is right and just due to trivial technicalities erodes the public's confidence in what we are supposed to do: courageously do what is right and just. When we allow our system to be eroded in this way, rapists would be able to rely on the illicit graciousness of misguided prosecutors. After all, using "sexual intercourse" in lieu of "carnal knowledge" or "sexual assault" is so obviously simple but fraught with a lot of opportunities for the accused.

Laws should not be read so as to obfuscate reality. Its words should be able to reflect the ability of the state to correctly categorize the evil that men do. Clearly, in this case, the offense committed was rape by sexual intercourse. It was not rape by sexual assault or a mere lascivious conduct.

Accordingly, the accused should be convicted of rape under Article 266-A(1) of the Revised Penal Code and

sentenced to suffer the penalty of reclusion perpetua.

[1] Rollo (G.R. No. 196342), pp. 52 and 68.

[2] Id.

[3] Id. at 68.

[4] Id. at 52 and 69.

[5] Id.

[6] Id. at 52-53 and 69.

[7] Id.

[8] Id. at 53.

[9] Id. at 53-54.

[10] Id. at 72.

[11] Id. at 73.

[12] Id. at 73-74.

[13] Id. at 75-76.

[14] Id. at 54 and 79.

[15] Id. at 55.

[16] RULES OF COURT, Rule 110, sec. 14 provides:

Section 14. Amendment or Substitution. - A complaint or information may be amended, in form or in substance, without leave of court, at any time before the accused enters his plea. After the plea and during the trial, a formal amendment may only be made with leave of court and when it can be done without causing prejudice to the rights of the accused.

....

If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with Section 19, Rule 119, provided the accused would not be placed in double jeopardy. The court may require the witnesses to give bail for their appearance at the trial.

[17] RULES OF COURT, Rule 119, sec. 19 provides:

Section 19. When mistake has been made in charging the proper offense. -

When it becomes manifest at any time before judgment that a mistake has been made in charging the proper offense and the accused cannot be convicted of the offense charged or any other offense necessarily included therein, the accused shall not be discharged if there appears good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper information.

[18] Rollo (G.R. No. 196342), p. 61.

[19] Id. at 62-67.

[20] Rollo (G.R. No. 196848), p. 26.

[21] Rollo (G.R. No. 196342), p. 28.

[22] *Id.* at 40.

[23] Ponencia, pp. 11-15.

[24] CONST., art. III, sec. 14 provides:

Section 14. (1) No person shall be held to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable. (Emphasis supplied).

[25] RULES OF COURT, Rule 115, sec. 1(b) provides:

Section 1. Rights of accused at the trial. - In all criminal prosecutions, the accused shall be entitled to the following rights:

....

(b) To be informed of the nature and cause of the accusation against him.

[26] 354 Phil. 372 (1998) [Per J. Vitug, First Division].

[27] *Id.* at 387 citing *US v. Karelsen*, 3 Phil. 223, 226 (1904) [Per J. Johnson, En Banc], cited in *Pecho vs. People*, 331 Phil. 1 (1996) [Per J. Davide, Jr., En Banc].

[28] See *Jurado v. Suy Yan*, 148 Phil. 677 (1971) [Per J. Makasiar, En Banc].

[29] *Id.* at 689.

[30] Ponencia, p. 11.

[31] *Id.*

[32] 577 Phil. 571 (2008) [Per J. Chico-Nazario, Third Division].

[33] *Id.* at 594 citing *People v. Almendral*, 477 Phil. 521 (2004) [Per J. Tinga, Second Division].

[34] 294 Phil. 509 (1993) [Per J. Davide, Jr., Third Division].

[35] *Id.* at 518.

[36] 364 Phil. 634 (1999) [Per J. Kapunan, First Division].

[37] *Id.* at 634-644.

[38] 435 Phil. 561 (2002) [Per J. Kapunan, En Banc].

[39] *Id.* at 575-576 citing *People v. Domantay*, 366 Phil. 459 (1999) [Per J. Mendoza, En Banc].

[40] REV. PEN. CODE, Title Eleven.

[41] REV. PEN.CODE , art. 333 provides:

Article 333. Who are guilty of adultery. - Adultery is committed by any married woman who shall have sexual

intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently declared void.

Adultery shall be punished by prision correccional in its medium and maximum periods.

If the person guilty of adultery committed this offense while being abandoned without justification by the offended spouse, the penalty next lower in degree than that provided in the next preceding paragraph shall be imposed.

[42] REV.PEN. CODE, art. 334 provides:

Article 334. Concubinage. - Any husband who shall keep a mistress in the conjugal dwelling, or, shall have sexual intercourse, under scandalous circumstances, with a woman who is not his wife, or shall cohabit with her in any other place, shall be punished by prision correccional in its minimum and medium periods.

The concubine shall suffer the penalty of destierro.

[43] REV. PEN. CODE, art. 333 provides:

Article 333. Who are guilty of adultery. - Adultery is committed by any married woman who shall have sexual intercourse with a man not her husband and by the man who has carnal knowledge of her, knowing her to be married, even if the marriage be subsequently declared void.

Adultery shall be punished by prision correccional in its medium and maximum periods.

If the person guilty of adultery committed this offense while being abandoned without justification by the offended spouse, the penalty next lower in degree than that provided in the next preceding paragraph shall be imposed.

[44] See JOHN STUART MILL, ON LIBERTY (1859).

[45] See also NIAL RICHARDSON, CLARISSA SMITH, AND ANGELA VERNDLY, STUDYING SEXUALITIES: THEORIES, REPRESENTATIONS, CULTURES 5 (2013).

[46] Id.

[47] 746 Phil. 809 (2014) [Per J. Leonen, Second Division].

[48] Id. at 832-833.

[49] REV. PEN. CODE, art. 266-A provides:

Article 266--A. Rape, When and How Committed. - Rape is committed -

....

2) By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

SEPARATE OPINION

CAGUIOA, J.:

Having found all the essential elements obtaining in this case, I concur in the result that the accused be convicted of Lascivious Conduct under Section 5(b) of RA 7610.

I differ from the ponencia only in the application of Section 5(b) to the facts of the case, specifically, in the requirement of the second element for a conviction under Section 5(b) (i.e., that the lascivious conduct is performed with a child exploited in prostitution or subjected to other sexual abuse).

Section 5(b) reads:

SEC. 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:

xxxx

(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 x x x.[1]

The essential elements of a violation of Section 5(b) are: (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.[2]

The phrase "a child exploited in prostitution or subjected to other sexual abuse" in the second element is defined by Section 5 of RA 7610 as "[a child], who (a) for money, profit or other consideration, or (b) due to coercion or influence by an adult, group, or syndicate, indulges in sexual intercourse or lascivious conduct.[3]

This is what distinguishes the "common" or "ordinary" acts of lasciviousness under Article 336 of the Revised Penal Code (RPC) from a violation of Section 5(b). In other words, it must be alleged and proved that:

- a) the child is exploited in prostitution; OR
- b) the child is subjected to other sexual abuse.

These should already be existing at the time of sexual intercourse or lascivious conduct complained of.

I have earlier stated in my dissent in *Quimvel v. People*[4] that a person can only be convicted of violation of Section 5(b), upon allegation and proof of the unique circumstances of the child — that he or she is exploited in prostitution or subject to other sexual abuse, drawing from Justice Carpio's dissenting opinion in *Olivarez v. Court of Appeals*[5] :

Section 5 of RA 7610 deals with a situation where the acts of lasciviousness are committed on a child already either exploited in prostitution or subjected to "other sexual abuse." Clearly, the acts of lasciviousness committed on the child are separate and distinct from the other circumstance — that the child is either exploited in prostitution or subjected to "other sexual abuse."

x x x x

Section 5 of RA 7610 penalizes those "who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse." The act of sexual intercourse or lascivious conduct may be committed on a child already exploited in prostitution, whether the child engages in prostitution for profit or someone coerces her into prostitution against her will. The element of profit or coercion refers to the practice of prostitution, not to the sexual intercourse or lascivious conduct committed by the accused. A person may commit acts of lasciviousness even on a prostitute, as when a person massages the private parts of a prostitute against her will.

The sexual intercourse or act of lasciviousness may be committed on a child already subjected to other sexual abuse. The child may be subjected to such other sexual abuse for profit or through coercion, as when the child is employed or coerced into pornography. A complete stranger, through force or intimidation, may commit acts of lasciviousness on such child in violation of Section 5 of RA 7610.

The phrase "other sexual abuse" plainly means that the child is already subjected to sexual abuse other than the crime for which the accused is charged under Section 5 of RA 7610. The "other sexual abuse" is an element separate and distinct from the acts of lasciviousness that the accused performs on the child. The majority opinion admits this when it enumerates the second element of the crime under Section 5 of RA 7610 — that the lascivious "act is performed with a child x x x subjected to other sexual abuse." [6]

The allegation of relationship and minority in the Information meets the element of coercion or influence under Section 5(b).

As I stated in *Quimvel*, the element of coercion or influence required by Section 5(b) is not met by the allegation in the Information of force and intimidation. I maintain this position. Several features distinguish this case from *Quimvel*, as the age of the child victim, the relationship of the offender and the child victim, and the manner of the commission of the lascivious conduct as supported by evidence on record.

The child victim in *Quimvel* is under twelve (12) years of age, falling within the first proviso of Section 5(b) — that the prosecution shall be under Article 336 of the Revised Penal Code. The child victim in this case was fifteen (15) years of age at the time complained of, such that the case falls within the general provision of Section 5(b). In this regard, I concur with Justice Peralta that the designation would properly be a violation of Section 5(b).

Here, the Information alleged the use of force, threat, or intimidation, along with the relationship and minority. The Information reads:

That on or about the 23[rd] day of October 2005, at 7:00 o'clock in the evening, more or less, in Purok [III], Barangay [JJJ], [KKK], [LLL], Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with full freedom and intelligence, with lewd design, did then and there, willfully, unlawfully and feloniously had sexual intercourse with one [AAA], a minor, fifteen (15) years of age and the daughter of the herein accused, through force, threat and intimidation and against her will, to her damage and prejudice in the amount as may be allowed by law.

CONTRARY to Article 266-A, in relation to Article 266-B of R.A. 8353, with the aggravating circumstance that the accused is the father of the victim and R.A. 7610. [7]

In *People v. Bayya*, [8] the Court explained the purpose of the right of the accused to be informed of the nature and cause of the accusation against him:

Elaborating on the defendant's right to be informed, the Court held in *Pecho vs. People* that the objectives of this right are:

1. To furnish the accused with such a description of the charge against him as will enable him to make the defense;
2. To avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and
3. To inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

It is thus imperative that the Information filed with the trial court be complete — to the end that the accused may

suitably prepare his defense. Corollary to this, an indictment must fully state the elements of the specific offense alleged to have been committed as it is the recital of the essentials of a crime which delineates the nature and cause of accusation against the accused.[9]

More concretely, the Court explained what the accused must be informed of in *United States v. Lim San*: [10]

From a legal point of view, and in a very real sense, it is of no concern to the accused what is the technical name of the crime of which he stands charged. It in no way aids him in a defense on the merits. x x x. That to which his attention should be directed, and in which he, above all things else, should be most interested, are the facts alleged. The real question is not did he commit a crime given in the law some technical and specific name, but did he perform the acts alleged in the body of the information in the manner therein set forth. If he did, it is of no consequence to him, either as a matter of procedure or of substantive right, how the law denominates the crime which those acts constitute. The designation of the crime by name in the caption of the information from the facts alleged in the body of that pleading is a conclusion of law made by the fiscal. In the designation of the crime the accused never has a real interest until the trial has ended. For his full and complete defense he need not know the name of the crime at all. It is of no consequence whatever for the protection of his substantial rights. The real and important question to him is, "Did you perform the acts alleged in the manner alleged?" not "Did you commit a crime named murder?" If he performed the acts alleged, in the manner stated, the law determines what the name of the crime is and fixes the penalty therefor. It is the province of the court alone to say what the crime is or what it is named. x x x [11]

The allegation of relationship and minority in the Information suffices to inform the accused of the nature and cause of the accusation against him and supports a conviction for Section 5(b) under the same Information because it meets the requirement of coercion and influence required to convert a child into one subjected to other sexual abuse as defined by Section 5. This, to me, forecloses any argument that the accused was not informed of the nature and cause of the accusation against him.

Neither does it offend against the variance doctrine to determine the existence of the elements of Section 5(b) in a charge of Article 336 or one wherein Article 336 is necessarily included, Section 5(b) being a subset of the universe of lascivious conduct covered by Article 336 of the RPC, is necessarily included in a charge of rape under Section 266-A(2) of the RPC if the specific circumstances required for Section 5(b) to operate can be fairly read into the allegations in the Information and thereafter proved.

There is sufficient showing that coercion or influence attended AAA's sexual abuse; otherwise, that AAA was a child subjected to other sexual abuse at the time of the lascivious conduct complained of.

The factual pattern of this case is analogous to that of *Larin v. People* [12] where the Court found the elements of Section 5(b) to be present. *Larin*, being an adult and the swimming trainer of his 14-year-old victim, had the influence and ascendancy to cow her into submission. Evidence was introduced to show that *Larin* employed psychological coercion upon his child victim by attacking her self-esteem and then pretending to be attentive to her needs and making himself out to be the only one who could accept her inadequacies.

To my mind, what was determinative of the existence of the second element of Section 5(b) in *Larin* was:

The independent proof given of psychological coercion, prior to the first lascivious conduct against the child victim, coupled with the fact that the lascivious conduct happened on two separate occasions indubitably proved the second element — that the child victim was coerced or influenced by *Larin* to engage in lascivious conduct at the first instance of lascivious conduct, or, to be sure, on the second instance of lascivious conduct (as the first was already sufficient to convert the child victim into a child exploited in prostitution or subjected to other sexual abuse). [13]

Verily, this factual milieu of *Larin* that places it within the ambit of Section 5(b) involving coercion and influence

is shared by this case. From the initial Sworn Statement filed by AAA, she already claimed that the abuse had begun as early as February 2003.[14] In fact, during AAA's direct testimony, she testified that she had told her mother about the sexual abuse as early as June 2005 but that her mother did not believe her.[15] Therefore, at the time the lascivious conduct was committed upon AAA on October 23, 2005, she was already a child subjected to other sexual abuse — meeting the second essential element.

Again, as I have said in *Quimvel*, this is not to say that in every instance, prior sexual affront upon the child must be shown to characterize the child as one "subjected to other sexual abuse". What is only necessary is to show that the child is already a child exploited in prostitution or subjected to other sexual abuse at the time the sexual intercourse or lascivious conduct complained of was committed or that circumstances obtained prior or during the first instance of abuse that constitutes such first instance of sexual intercourse or lascivious conduct as having converted the child into a child "exploited in prostitution or subjected to other sexual abuse." [16] Otherwise, it appears that without the circumstances of Section 5(a) or independent evidence of coercion or influence, a single instance of sexual intercourse or lascivious conduct may not be sufficient to meet the second element of Section 5(b).

Similarly, in *People v. Fragante*, [17] where the Court found the elements of Section 5(b) present in the several instances of sexual intercourse and lascivious conduct committed by the accused against his minor daughter, it was held that actual force or intimidation need not be employed in incestuous rape of a minor because the moral and physical dominion of the father is sufficient to cow the victim into submission. [18] The appreciation of how the sexual intercourse and lascivious conduct in this case fell within the ambit of Section 5(b) is cogently explained thus: appellant, as a father having moral ascendancy over his daughter, coerced AAA to engage in lascivious conduct, which is within the purview of sexual abuse. [19]

This is the same situation obtaining in this case, with evidence extant in the records that the child had already been subjected to sexual abuse under circumstances showing coercion and influence (otherwise termed "[a father's] moral and physical dominion" in *Fragante*) even prior to the act complained of.

As well, in *Malto v. People*, [20] the Court took pains to determine the existence of the second element, thus:

The second element was likewise present here. The following pronouncement in *People v. Larin* is significant:

A child is deemed exploited in prostitution or subjected to other sexual abuse, when the child indulges in sexual intercourse or lascivious conduct (a) for money, profit, or any other consideration; or (b) under the coercion or influence of any adult, syndicate or group. (emphasis supplied)

On November 19, 1997, due to the influence of petitioner, AAA indulged in lascivious acts with or allowed him to commit lascivious acts on her. This was repeated on November 26, 1997 on which date AAA also indulged in sexual intercourse with petitioner as a result of the latter's influence and moral ascendancy. Thus, she was deemed to be a "child subjected to other sexual abuse" as the concept is defined in the opening paragraph of Section 5, Article III of RA 7610 and in *Larin*. [21]

This is consistent with my position that to secure a conviction for violation of Section 5(b), coercion or influence (or otherwise, that the child indulged in sexual intercourse or lascivious conduct for money, profit or other consideration) is a textually-provided circumstance that must be shown. I find that this element of coercion or influence was shown in this case.

Still, RA 7610 was not intended to cover all sexual abuses against children.

This case does not detract from my position that RA 7610 does not cover all sexual abuses against children under its provisions to the exclusion of the RPC. RA 7610 affords protection to a special class of children without

subsuming any and all offenses against children that are already covered by other penal laws such as the RPC and the Child and Youth Welfare Code.

To reiterate, by both literal and purposive tests, I find nothing in the language of the law or in the Senate deliberations that necessarily leads to the conclusion that RA 7610 subsumes all instances of sexual abuse against children.[22]

Given the foregoing, I concur in the result. The accused is, as he should be, convicted of Lascivious Conduct under Section 5(b) of RA 7610.

[1] Underscoring supplied.

[2] *People v. Abello*, 601 Phil. 373, 392 (2009), as cited in J. Caguioa, Diss. Op. in *Quimvel v. People*, G.R. No. 214497, April 18, 2017, p. 6.

[3] SEC. 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.

[4] G.R. No. 214497, April 18, 2017.

[5] 503 Phil. 421 (2005).

[6] *Id.* at 445-447; italics omitted, emphasis supplied.

[7] Records, p. 1, as cited in the Decision, p. 2.

[8] 384 Phil. 519 (2000).

[9] *Id.* at 525-526; citations omitted.

[10] 17 Phil. 273 (1910).

[11] *Id.* at 278-279; emphasis and underscoring supplied.

[12] 357 Phil. 987 (1998).

[13] J. Caguioa, Diss. Op. in *Quimvel v. People*, *supra* note 2, at 14.

[14] Sworn Statement, Annex "A," records (not paginated).

[15] TSN, January 10, 2007 pp. 30, 35.

[16] A more extensive discussion on this point is in my dissenting opinion in *Quimvel v. People*, *supra* note 2, at 10.

[17] 657 Phil. 577 (2011).

[18] *Id.* at 592.

[19] *Id.* at 597.

[20] 560 Phil. 119 (2007).

[21] *Id.* at 137.

[22] My dissenting opinion in Quimvel extensively discusses this point.

DISSENTING OPINION

MARTIRES, J.:

Respectfully, I dissent from the majority opinion.

I am unable to accept that the act of "fingering," or the digital penetration of the vagina, should be appreciated as a mere act of lasciviousness. My refusal to accept this conclusion is grounded on the definition of carnal knowledge that this Court set forth in the 2011 case of *People vs. Butiong* [G.R. No. 168932, 19 October 2011]:

Carnal knowledge is defined as the act of a man having sexual bodily connections with a woman. This explains why the slightest penetration of the female genitalia consummates the rape. [emphasis supplied]

The crux of carnal knowledge, then, is sexual bodily connection.

The finger is a part of the body by which a sexual bodily connection may be attained. It is an organ that evokes sensations of pleasure, particularly in sexual situations; thus, it should not be deemed as an "object" within the contemplation of the second paragraph of Article 266-A. A man's use of his penis, the tongue, or his finger to penetrate a vagina for the purpose of sexual stimulation or sensation undeniably creates a sexual bodily connection with a woman; thus, carnal knowledge of the woman is achieved.

I submit that the concept of carnal knowledge should not be limited exclusively to the contact between the penis and the vagina. The word carnal, as defined, describes "in or of the flesh" or "having to do with or preoccupied with bodily or sexual pleasure, sensual or sexual." [1] A perpetrator's use of any of his or her organs, such as the tongue or the finger, in order to create bodily pleasure or to penetrate a vagina constitutes carnal knowledge. Consequently, when such carnal knowledge is attained under any of the circumstances in the first paragraph of Article 266-A, the perpetrator should be convicted of Rape under such, to wit:

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.

The use of a body organ in order to penetrate a vagina should be distinguished from the sexual insertion of an

instrument or object into the genital or anal orifice of another. This latter act is defined and punished under the second paragraph of Article 266-A, viz:

Article 266-A. Rape: When and How Committed. - Rape is committed:

xxxx

2)

By any person who, under any of the circumstances mentioned in paragraph 1 hereof, shall commit an act of sexual assault by inserting his penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person.

Thus, under the two categories of rape created by the twin paragraphs under Article 266-A, when a perpetrator inserts into the genital or anal orifice of another an instrument or object that does not form part of the perpetrator's body, the offense committed is punishable under the second paragraph of Article 266-A; when a perpetrator penetrates a vagina with the use of any of his or her own body parts, the offense committed is punishable under the first paragraph.

With this disquisition, I respectfully submit that the majority unduly confines the concept of carnal knowledge under the first paragraph of Article 266-A to penile penetration and, correspondingly, unduly restricts the law's coverage. Such limitation disregards a vital premise in our rape jurisprudence, namely, that carnal knowledge is achieved when a person has sexual bodily connection with a woman. To reiterate: the penetration of a vagina by means of any bodily part such as the finger or tongue is a sexual bodily connection.

To limit the concept of carnal knowledge solely to penile penetration is contrary to human experience. Carnal knowledge occurs on a wanton field, and is achieved in sundry ways: vaginal, oral, anal, and fingering. Which brings us back to the case at hand. The majority may take notice that the act of "fingering" a woman, as it has been said time and again, is an act from which women may, unwittingly or not, derive pleasure in varied degrees. Rapists exploit this biological imperative. Our rape jurisprudence is replete with grievous narratives where the perpetrators, before attaining carnal knowledge of their victims through penile means, had already attained carnal knowledge of their victims through the use of their finger on their victim's vagina in a bid to arouse and confuse her, and in the belief that this would facilitate the penile intercourse to follow. The fingering committed, in itself, is already carnal knowledge. In cases of rape, the forced penetration or entry into a woman's most private part by or with whatever means with the use of a bodily organ is carnal knowledge, and an outrage to the dignity of the victim. Fingering is no mere act of lasciviousness.

I humbly beg that the majority see and punish the crime committed in this case for what it is: Rape. The accused, having been found to have fingered his own daughter, should be convicted of Rape under the first paragraph of Article 266-A.

[1] Webster's Third New International Dictionary (Unabridged), p. 340; New World Dictionary of the American Language, p. 216.

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