

MUSTAPHA DIMAKUTA Y MARUHOM, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 206513. October 20, 2015

Ponente: PERALTA, J.

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PERALTA, J.:

The Court is now faced with one of the predicaments I discussed in my Dissenting and Concurring Opinion in *Colinares v. People*.^[1] The question regarding the application of the Probation Law is again inescapably intertwined with the present petition. Consequently, I must reiterate my assertions and arguments in *Colinares* to the case at bar.

In the present controversy, petitioner Mustapha Dimakuta y Maruhom alias Boyet was indicted for Violation of Section 5 Paragraph (b), Article III of Republic Act (R.A.) No. 7610 or the Special Protection of Children Against Abuse, Exploitation and Discriminatory Act. The Information reads:

That on or about the 24th day of September 2005, in the City of Las Piñas, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd designs, did then and there willfully, unlawfully and feloniously commit a lascivious conduct upon the person of one AAA, who was then a sixteen (16) year old minor, by then and there embracing her, touching her breast and private part against her will and without her consent and the act complained of is prejudicial to the physical and psychological development of the complainant.^[2]

After trial, the RTC promulgated its Decision^[3] which convicted petitioner of the crime charged and sentenced him to suffer an indeterminate penalty of imprisonment ranging from ten (10) years of prision mayor, as minimum, to seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum, with the accessory penalty of perpetual absolute disqualification. In addition, he was directed to pay a fine of P20,000.00, civil indemnity of P25,000.00, and moral damages of P25,000.00.^[4]

Feeling aggrieved, petitioner elevated the case to the Court of Appeals (CA) arguing, among other things, that even assuming he committed the acts imputed, still there is no evidence showing that the same were done without the victim's consent or through force, duress, intimidation or violence upon her. Surprisingly, when asked to comment on the appeal, the Office of the Solicitor General (OSG), relying heavily on *People v. Abello*,^[5] opined that petitioner should have been convicted only of Acts of Lasciviousness under Article 336 of the Revised Penal Code (RPC) in view of the prosecution's failure to establish that the lascivious acts were attended by force or coercion because the victim was asleep at the time the alleged acts were committed.

On June 28, 2012, the CA rendered a Decision^[6] adopting the recommendation of the OSG. In modifying the RTC Decision, petitioner was found guilty of Acts of Lasciviousness under Article 336 of the RPC and was sentenced to suffer the indeterminate penalty of six (6) months of arresto mayor, as minimum, to four (4) years and two (2) months of prision correctional, as maximum. Likewise, he was ordered to pay P20,000.00 as civil indemnity and P30,000.00 as moral damages.

Petitioner received a copy of CA Decision on July 6, 2012.[7] Instead of further appealing the case, he filed on July 23, 2012 before the CA a manifestation with motion to allow him to apply for probation upon remand of the case to the RTC.[8] Petitioner invoked the case of *Colinares v. People*[9] which allowed petitioner therein to apply for probation after his sentence was later reduced on appeal by the Supreme Court.

The CA issued a Resolution on September 3, 2012 denying petitioner's manifestation with motion.[10] It was ruled that *Colinares* is inapplicable since petitioner therein raised as sole issue the correctness of the penalty imposed and claimed that the evidence presented warranted only a conviction for the lesser offense. Instead, the appellate court viewed as appropriate the case of *Lagrosa v. People*,[11] wherein the application for probation was denied because petitioners therein put in issue on appeal the merits of their conviction and did not simply assail the propriety of the penalties imposed.

Petitioner filed a motion for reconsideration,[12] but it was denied in a Resolution[13] dated March 13, 2013; hence, this petition.

The petition should be denied.

At the outset, tracing the evolution of the present Probation Law is warranted in order to better understand and apply the wisdom of its framers to cases invoking its application.

In this jurisdiction, the concept of probation was introduced during the American colonial period.[14] For juvenile delinquents, Act No. 3203[15] was enacted on December 3, 1924. It was later amended by Act Nos. 3309,[16] 3559,[17] and 3725.[18] As to offenders who are eighteen years old and above, Act No. 4221[19] was passed by the legislature and took effect on August 7, 1935. Said Act allowed defendants who are convicted and sentenced by a Court of First Instance or by the Supreme Court on appeal, except those who are convicted of offenses enumerated in Section 8 thereof,[20] to be placed on probation upon application after the sentence has become final and before its service has begun.[21] However, We declared in *People v. Vera*[22] that Act No. 4221 is unconstitutional and void as it constitutes an improper and unlawful delegation of legislative authority to the provincial boards.

During the martial law period, then President Ferdinand E. Marcos issued Presidential Decree (P.D.) No. 968[23] on July 24, 1976. Originally, P.D. No. 968 allowed the filing of an application for probation at any time after the defendant had been convicted and sentenced. Section 4 of which provides:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. An order granting or denying probation shall not be appealable.[24]

Later, the filing of an application for probation pending appeal was still allowed when Section 4 of P.D. No. 968 was amended by P.D. No. 1257[25] on December 1, 1977 by providing that such application may be made after the defendant had been convicted and sentenced but before he begins to serve his sentence. Thus:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application,

suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

The prosecuting officer concerned shall be notified by the court of the filing of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case, however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.

An order granting or denying probation shall not be appealable.[26]

On October 5, 1985, Section 4 was subsequently amended by P.D. No. 1990.[27] Henceforth, the policy has been to allow convicted and sentenced defendant to apply for probation within the 15-day period for perfecting an appeal. As modified, Section 4 of the Probation Law now reads:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable.[28]

The reason for the disallowance may be inferred from the preamble of P.D. No. 1990, thus:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

WHEREAS, probation was not intended as an escape hatch and should not be used to obstruct and delay the administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated;

WHEREAS, it becomes imperative to remedy the problems abovementioned confronting our probation system[.]

Observing the developments in our Probation Law, the Court settled in *Llamado v. Court of Appeals*:[29]

Examination of Section 4, after its amendment by P.D. No. 1257, reveals that it had established a prolonged but definite period during which an application for probation may be granted by the trial court. That period

was: "After [the trial court] shall have convicted and sentenced a defendant but before he begins to serve his sentence." Clearly, the cut-off time - commencement of service of sentence - takes place not only after an appeal has been taken from the sentence of conviction, but even after judgment has been rendered by the appellate court and after judgment has become final. Indeed, in this last situation, Section 4, as amended by P.D. No. 1257 provides that "the application [for probation] shall be acted upon by the trial court on the basis of the judgment of the appellate court"; for the appellate court might have increased or reduced the original penalty imposed by the trial court, x x x

x x x x

In sharp contrast with Section 4 as amended by PD No. 1257, in its present form, Section 4 establishes a much narrower period during which an application for probation may be filed with the trial court: "after [the trial court] shall have convicted and sentenced a defendant and - within the period for perfecting an appeal -." As if to provide emphasis, a new proviso was appended to the first paragraph of Section 4 that expressly prohibits the grant of an application for probation "if the defendant has perfected an appeal from the judgment of conviction." It is worthy of note too that Section 4 in its present form has dropped the phrase which said that the filing of an application for probation means "the automatic withdrawal of a pending appeal." The deletion is quite logical since an application for probation can no longer be filed once an appeal is perfected; there can, therefore, be no pending appeal that would have to be withdrawn.

x x x x

We find ourselves unable to accept the eloquently stated arguments of petitioner's counsel and the dissenting opinion. We are unable to persuade ourselves that Section 4 as it now stands, in authorizing the trial court to grant probation "upon application by [the] defendant within the period for perfecting an appeal" and in reiterating in the proviso that

"no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction."

did not really mean to refer to the fifteen-day period established, as indicated above, by B.P. Big. 129, the Interim Rules and Guidelines Implementing B.P. Big. 129 and the 1985 Rules on Criminal Procedure, but rather to some vague and undefined time, i.e., "the earliest opportunity" to withdraw the defendant's appeal. The whereas clauses invoked by petitioner did not, of course, refer to the fifteen-day period. There was absolutely no reason why they should have so referred to that period for the operative words of Section 4 already do refer, in our view, to such fifteen-day period. Whereas clauses do not form part of a statute, strictly speaking; they are not part of the operative language of the statute. Nonetheless, whereas clauses may be helpful to the extent they articulate the general purpose or reason underlying a new enactment, in the present case, an enactment which drastically but clearly changed the substantive content of Section 4 existing before the promulgation of P.D. No. 1990. Whereas clauses, however, cannot control the specific terms of the statute; in the instant case, the whereas clauses of P.D. No. 1990 do not purport to control or modify the terms of Section 4 as amended. Upon the other hand, the term "period for perfecting an appeal" used in Section 4 may be seen to furnish specification for the loose language "first opportunity" employed in the fourth whereas clause. "Perfection of an appeal" is, of course, a term of art but it is a term of art widely understood by lawyers and judges and Section 4 of the Probation Law addresses itself essentially to judges and lawyers. "Perfecting an appeal" has no sensible meaning apart from the meaning given to those words in our procedural law and so the law-making agency could only have intended to refer to the meaning of those words in the context of procedural law.[30]

In *Sable v. People, et al.*, [31] this Court stated that Section 4 of the Probation Law was amended precisely to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid.[32] The

Probation Law "expressly requires that an accused must not have appealed his conviction before he can avail himself of probation. This outlaws the element of speculation on the part of the accused - to wager on the result of his appeal -that when his conviction is finally affirmed on appeal, the moment of truth well nigh at hand and the service of his sentence inevitable, he now applies for probation as an 'escape hatch,' thus rendering nugatory the appellate court's affirmance of his conviction." [33]

Verily, Section 4 of the Probation Law provides that the application for probation must be filed with the trial court within the 15-day period for perfecting an appeal. The need to file it within such period is intended to encourage offenders, who are willing to be reformed and rehabilitated, to avail themselves of probation at the first opportunity.[34] If the application for probation is filed beyond the 15-day period, then the judgment becomes final and executory and the lower court can no longer act on the application for probation. On the other hand, if a notice of appeal is perfected, the trial court that rendered the judgment of conviction is divested of any jurisdiction to act on the case, except the execution of the judgment when it has become final and executory.

In view of the latest amendment to Section 4 of the Probation Law that "no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction," prevailing jurisprudence[35] treats appeal and probation as mutually exclusive remedies because the law is unmistakable about it.[36] Indeed, the law is very clear and a contrary interpretation would counter its envisioned mandate. Courts have no authority to invoke "liberal interpretation" or "the spirit of the law" where the words of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation.[37] To be sure, the remedy of convicted felons who want to avail of the benefits of probation even after the remedy of an appeal is to go to the Congress and ask for the amendment of the law. To surmise a converse construal of the provision would be dangerously encroaching on the power of the legislature to enact laws and is tantamount to judicial legislation.

With due respect, however, to the ponente and the majority opinion in *Colinares*[38] the application of the Probation Law in the said case deserves a second hard look so as to correct the mistake in the application of the law in that particular case and in similar cases which will be filed before the courts and inevitably elevated to Us like this petition.

To refresh, *Colinares* concluded that since the trial court imposed a penalty beyond what is allowed by the Probation Law, albeit erroneously, the accused was deprived of his choice to apply for probation and instead was compelled to appeal the case. The reprehensible practice intended to be avoided by the law was, therefore, not present when he appealed the trial court's decision. Taking into account that the accused argued in his appeal that the evidence presented against him warranted his conviction only for attempted, not frustrated, homicide, the majority of the Court opined that the accused had purposely sought to bring down the impossible penalty in order to allow him to apply for probation.

It was obvious then, as it is now, that the accused in *Colinares* should not have been allowed the benefit of probation. As I have previously stated and insisted upon, probation is not a right granted to a convicted offender; it is a special privilege granted by the State to a penitent qualified offender,[39] who does not possess the disqualifications under Section 9 of P.D. No. 968, as amended.[40] Likewise, the Probation Law is not a penal law for it to be liberally construed to favor the accused.[41]

In the American law paradigm, probation is considered as an act of clemency and grace, not a matter of right.[42] It is a privilege granted by the State, not a right to which a criminal defendant is entitled.[43] In *City of Aberdeen v. Regan*,[44] it was pronounced that:

The granting of a deferred sentence and probation, following a plea or verdict of guilty, is a rehabilitative

measure and, as such, is not a matter of right but is a matter of grace, privilege, or clemency granted to the deserving.

As such, even in the American criminal justice model, probation should be granted only to the deserving or, in our system, only to qualified "penitent offenders" who are willing to be reformed and rehabilitated. Corollarily, in this jurisdiction, the wisdom behind the Probation Law is outlined in its stated purposes, to wit:

- (a) promote the correction and rehabilitation of an offender by providing him with individualized treatment;
- (b) provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and
- (c) prevent the commission of offenses.[45]

As I have previously indicated in *Colinares*, if this Court will adopt as jurisprudential doctrine the opinion that an accused may still be allowed to apply for probation even if he has filed a notice of appeal, it must be categorically stated that such appeal must be limited to the following grounds:

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

In both instances, the penalty imposed by the trial court for the crime committed by the accused is more than six years; hence, the sentence disqualifies the accused from applying for probation. The accused should then be allowed to file an appeal under the afore-stated grounds to seek a review of the crime and/or penalty imposed by the trial court. If, on appeal, the appellate court finds it proper to modify the crime and/or the penalty imposed, and the penalty finally imposed is within the probationable period, the accused should still be allowed to apply for probation.

In addition, before an appeal is filed based on the grounds enumerated above, the accused should first file a motion for reconsideration of the decision of the trial court anchored on the above-stated grounds and manifest his intent to apply for probation if the motion is granted. The motion for reconsideration will give the trial court an opportunity to review and rectify any errors in its judgment, while the manifestation of the accused will immediately show that he is agreeable to the judgment of conviction and does not intend to appeal from it, but he only seeks a review of the crime and/or penalty imposed, so that in the event that the penalty will be modified within the probationable limit, he will immediately apply for probation. Without such motion for reconsideration, the notice of appeal should be denied outright.

The notice of appeal should contain the following averments:

- (1) that an earlier motion for reconsideration was filed but was denied by the trial court;
- (2) that the appeal is only for reviewing the penalty imposed by the lower court or the conviction should only be for a lesser crime necessarily included in the crime charged in the information; and
- (3) that the accused-appellant is not seeking acquittal of the conviction.

To note, what Section 4 of the Probation Law prohibits is an appeal from the judgment of conviction, which involves a review of the merits of the case and the determination of whether the accused is entitled to acquittal. However, under the recommended grounds for appeal which were enumerated earlier, the purpose of the appeal is not to assail the judgment of conviction but to question only the propriety of the sentence, particularly the penalty

imposed or the crime for which the accused was convicted, as the accused intends to apply for probation upon correction of the penalty or conviction for the lesser offense. If the CA finds it proper to modify the sentence, and the penalty finally imposed by the appellate court is within the probationable period, or the crime for which the accused is eventually convicted imposes a probationable penalty, application for probation after the case is remanded to the trial court for execution should be allowed.

It is believed that the recommended grounds for appeal do not contravene Section 4 of the Probation Law, which expressly prohibits only an appeal from the judgment of conviction. In such instances, the ultimate reason of the accused for filing the appeal based on the afore-stated grounds is to determine whether he may avail of probation based on the review by the appellate court of the crime and/or penalty imposed by the trial court. Allowing the afore-stated grounds for appeal would give an accused the opportunity to apply for probation if his ground for appeal is found to be meritorious by the appellate court, thus, serving the purpose of the Probation Law to promote the reformation of a penitent offender outside of prison.

On the other hand, probation should not be granted to the accused in the following instances:

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

Both instances violate the spirit and letter of the law, as Section 4 of the Probation Law prohibits granting an application for probation if an appeal from the sentence of conviction has been perfected by the accused.

In this case, petitioner appealed the trial court's judgment of conviction before the CA alleging that it was error on the part of the RTC to have found him guilty of violating Section 5(b), Article III of R.A. No. 7610. He argued that the RTC should not have given much faith and credence to the testimony of the victim because it was tainted with inconsistencies. Moreover, he went on to assert that even assuming he committed the acts imputed on him, still there was no evidence showing that the lascivious acts were committed without consent or through force, duress, intimidation or violence because the victim at that time was in deep slumber. It is apparent that petitioner anchored his appeal on a claim of innocence and/or lack of sufficient evidence to support his conviction of the offense charged, which is clearly inconsistent with the tenor of the Probation Law that only qualified penitent offender are allowed to apply for probation. The CA, therefore, did not err in applying the similar case of *Lagrosa v. People*[46] wherein the protestations of petitioners therein did not simply assail the propriety of the penalties imposed but meant a profession of guiltlessness, if not complete innocence.

To be sure, if petitioner intended in the first instance to be entitled to apply for probation he should have admitted his guilt and buttressed his appeal on a claim that the penalty imposed by the RTC was erroneous or that he is only guilty of a lesser offense necessarily included in the crime for which he was originally convicted. Unfortunately for him, he already perfected his appeal and it is late in the day to avail the benefits of probation despite the imposition of the CA of a probationable penalty.

As regards the CA Decision convicting petitioner of the crime of Acts of Lasciviousness under Article 336 of the RPC, such conclusion clearly contravenes the law and existing jurisprudence.

Petitioner was charged and convicted by the trial court with violation of Section 5(b), Article III of R.A. No. 7610 based on the complaint of a sixteen (16)-year-old girl for allegedly molesting her by touching her breast and

vagina while she was sleeping. The provision 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:

x x x x

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

The elements of sexual abuse 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 sexual abuse.
3. The child, whether male or female, is below 18 years of age.[47]

Under Section 5, Article III of R.A. No. 7610, a child is deemed subjected to other sexual abuse when he or she indulges in lascivious conduct under the coercion or influence of any adult.[48] This statutory provision must be distinguished from Acts of Lasciviousness under Articles 336 and 339 of the RPC. As defined in Article 336 of the RPC, Acts of Lasciviousness has the following elements:

- (1) That the offender commits any act of lasciviousness or lewdness;
- (2) That it is done under any of the following circumstances:
 - By using force or intimidation; or
 - When the offended party is deprived of reason or otherwise unconscious; or
 - When the offended party is under 12 years of age; and
- (3) That the offended party is another person of either sex.[49]

Article 339 of the RPC likewise punishes acts of lasciviousness committed with the consent of the offended party if done by the same persons and under the same circumstances mentioned in Articles 337 and 338 of the RPC, to wit:

1. if committed against a virgin over twelve years and under eighteen years of age 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; or
2. if committed by means of deceit against a woman who is single or a widow of good reputation, over twelve but under eighteen years of age.

Therefore, if the victim of the lascivious acts or conduct is over 12 years of age and under eighteen (18) years of age, the accused shall be liable for:

1. Other acts of lasciviousness under Art. 339 of the RPC, where the victim is a virgin and consents to the

lascivious acts through abuse of confidence or when the victim is single or a widow of good reputation and consents to the lascivious acts through deceit, or;

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

3. Section 5(b), Article III of R.A. No. 7610, where there was no consent on the part of the victim to the lascivious conduct, which was done through the employment of coercion or influence. The offender may likewise be liable for sexual abuse under R.A. No. 7610 if the victim is at least eighteen (18) years and she is unable to fully take care of herself or protect herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.[50]

Article 226-A, paragraph 2 of the RPC, punishes inserting of the penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person if the victim did not consent either it was done through force, threat or intimidation; or when the victim is deprived of reason or is otherwise unconscious; or by means of fraudulent machination or grave abuse of authority as sexual assault as a form of rape. However, in instances where the lascivious conduct is covered by the definition under R.A. No. 7610, where the penalty is reclusion temporal medium, and the 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. No. 7610, where the law provides for the higher penalty of reclusion temporal medium, if the offended party is a child victim. But if the victim is at least eighteen (18) years of age, the offender should be liable under Art. 266-A, par. 2 of the RPC and not R.A. No. 7610, unless the victim is at least eighteen (18) years and she is unable to fully take care of herself or protect 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 for sexual abuse under R.A. No. 7610.

There could be no other conclusion, a child is presumed by law to be incapable of giving rational consent to any lascivious act, taking into account the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual and social well-being of the youth, as well as, in harmony with the foremost consideration of the child's best interests in all actions concerning him or her.[51] This is equally consistent with the with the declared policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation, and discrimination.[52] Besides, if it was the intention of the framers of the law to make child offenders liable only of Article 266-A of the RPC, which provides for a lower penalty than R.A. No. 7610, the law could have expressly made such statements.

As correctly found by the trial court, all the elements of sexual abuse under Section 5(b), Article III of R.A. No. 7610 are present in the case at bar.

First, petitioner's lewd advances of touching the breasts and vagina of his hapless victim constitute lascivious conduct as defined in Section 32, Article XIII of the Implementing Rules and Regulations (IRR) of R.A. No. 7610:

[T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with 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.[53]

Second, petitioner clearly has moral ascendancy over the minor victim not just because of his relative seniority but more importantly due to the presumed presence of mutual trust and confidence between them by virtue of an existing employment relationship, AAA being a domestic helper in petitioner's household. Notably, a child is considered as sexually abused under Section 5(b) of R.A. No. 7610 when he or she is subjected to lascivious conduct under the coercion or influence of any adult. 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.[54] The law does not require physical violence on the person of the victim; moral coercion or ascendancy is sufficient.[55] On this point, *Caballo v. People*[56] explicated:

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 x x x power to compel another to submit to the wishes of one who wields it." [57]

Finally, the victim is 16 years of age 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."

The decision of the trial court finding the petitioner guilty of Violation of Section 5(b), Article III R.A. No. 7610 should have been upheld by the CA instead of erroneously adopting the recommendation of the OSG, which inaccurately relied on *People v. Abello*. [58] In said case, the decisive factor for the acquittal of the accused was not the absence of coercion or intimidation on the offended party, who was then sleeping at the time the lascivious act was committed, but the fact that the victim could not be considered as a "child" under R.A. No. 7610. This Court held that while the twenty-one year old woman has polio as a physical disability that rendered her incapable of normal function, the prosecution did not present any testimonial or documentary evidence - any medical evaluation or finding from a qualified physician, psychologist or psychiatrist - attesting that the physical condition rendered her incapable of fully taking care of herself or of protecting herself against sexual abuse.

Thus, it is clear that petitioner could not have been entitled to apply for probation in the first place. Regrettably, since neither the accused nor the OSG questioned the CA Decision, it has attained finality and to correct the error at this stage is already barred by the right of the accused against double jeopardy.

Based on the above disquisitions, the petitioner should be denied the benefit of the Probation Law and that the Court should adopt the recommendations above-stated in situations where an accused files an appeal for the sole

purpose of correcting the penalty imposed to qualify him for probation or where he files an appeal specifically claiming that he should be found guilty of a lesser offense necessarily included with the crime originally filed with a prescribed penalty which is probationable.

SO ORDERED.

Sereno, C.J., Brion, Bersamin, Villarama, Jr., Reyes, and Perlas-Bernabe, JJ., concur.

Leonen, J., see concurring opinion.

Velasco, Jr., and Leonardo-De Castro, JJ., they join the dissenting opinion of Justice Mendoza.

Mendoza, J., see dissenting opinion.

Jardeleza, J., no part.

Carpio, Del Castillo, and Perez, JJ., on official leave.

NOTICE OF JUDGMENT

Sirs/Mesdames:

Please take notice that on October 20, 2015 a Decision/Resolution, copy attached herewith, was rendered by the Supreme Court in the above-entitled case, the original of which was received by this Office on November 24, 2015 at 3:35 p.m.

Very truly yours,

(SGD)

FELIPA G. BORLONGAN-ANAMA

Clerk of Court

[1] 678 Phil. 482(2011).

[2] Rollo, p. 33.

[3] Penned by Presiding Judge Joselito dj. Vibandor (Id. at 33-43).

[4] Id. at 42-43.

[5] 601 Phil. 373(2009).

[6] Penned by Associate Justice Myra V. Garcia-Fernandez, with Associate Justices Vicente S.E. Veloso and Stephen C. Cruz concurring (Rollo, pp. 117-130).

[7] Id. at 132.

[8] Id. at 132-144.

[9] 678 Phil. 482 (2011).

[10] Rollo, pp. 26-29.

[11] 453 Phil. 270 (2003).

[12] Rollo, pp. 146-155.

[13] Id. at 31.

[14] 1898-1945.

[15] AN ACT RELATING TO THE CARE AND CUSTODY OF NEGLECTED AND DELINQUENT CHILDREN; PROVIDING PROBATION OFFICERS THEREFOR; IMPOSING PENALTIES FOR VIOLATIONS OF ITS PROVISIONS AND FOR OTHER PURPOSES.

[16] Effective on December 2, 1926.

[17] Effective on November 26, 1929.

[18] Effective on November 21, 1930.

[19] AN ACT ESTABLISHING PROBATION FOR PERSONS, EIGHTEEN YEARS OF AGE OR ABOVE, CONVICTED OF CERTAIN CRIMES BY THE COURTS OF THE PHILIPPINE ISLANDS; PROVIDING PROBATION OFFICERS THEREFOR; AND FOR OTHER PURPOSES, Dated August 7, 1935.

SEC. 8. This Act shall not apply to persons convicted of offenses punishable by death or life imprisonment; to those convicted of homicide, treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, sedition or espionage; to those convicted of piracy, brigandage, arson, or robbery in band; to those convicted of robbery with violence on persons when it is found that they displayed a deadly weapon; to those convicted of corruption of minors; to those who are habitual delinquents; to those who have been once on probation; and to those already-sentenced by final judgment at the time of the approval of this Act.

[21] See 1.

[22] 65 Phil. 56(1937).

[23] ESTABLISHING A PROBATION SYSTEM, APPROPRIATING FUNDS THEREFOR AND OTHER PURPOSES.

[24] Emphasis supplied.

[25] AMENDING CERTAIN SECTIONS OF PRESIDENTIAL DECREE NUMBERED NINE HUNDRED AND SIXTY-EIGHT, OTHERWISE KNOWN AS THE PROBATION LAW OF 1976, Effective on December 1, 1977.

[26] Emphasis supplied.

[27] AMENDING PRESIDENTIAL DECREE NO. 968, OTHERWISE KNOWN AS THE PROBATION LAW OF 1976, Issued on October 5, 1985.

[28] Emphasis supplied 29.

[29] 256 Phil. 328 (1989).

[30] Llamado v. Court of Appeals, *supra*, at 335-339.

[31] 602 Phil. 989 (2009).

[32] Sable v. People, et al., *supra*, at 997.

[33] Id.

[34] *Id.* at 996.

[35] *Sable v. People, et al.*, supra note 31; *Francisco v. Court of Appeals*, 313 Phil. 241 (1995); and *Llamado v. Court of Appeals*, supra note 29.

[36] *Sable v. People, et al.*, supra note 31.

[37] *Llamado v. Court of Appeals*, supra note 29, at 339-340.

[38] The Court En Banc voted 9-6 in favor of Justice Roberto A. Abad, ponente.

Corona (then C.J.), Carpio, Velasco, Jr., Leonardo-De Castro, Del Castillo, Perez, Mendoza, and Reyes, JJ., concur.

Brion, J., joining J. Peralta's Concurring and Dissenting Opinion.

Peralta, J., Concurring and Dissenting Opinion.

Bersamin, J., joining J. Peralta's Concurring and Dissenting Opinion.

Villarama, Jr., Concurring and Dissenting Opinion.

Sereno, J. (now C.J.), joining Justices Peralta and Villarama.

Perlas-Bernabe, J., joining J. Villarama.

[39] *Sable v. People, et al.*, supra note 31, at 995.

[40] SEC. 9. Disqualified Offenders. - The benefits of this Decree shall not be extended to those:

- a. sentenced to serve a maximum term of imprisonment of more than six years;
- b. convicted of subversion or any crime against the national security or the public order;
- c. who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
- d. who have been once on probation under the provisions of this Decree; and
- e. who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.

[41] *Pablo v. Castillo*, 391 Phil. 873, 878 (2000); *Llamado v. Court of Appeals*, supra note 28, at 338.

[42] *People v. Anderson*, 50 Cal. 4th 19, 235 P.3d 11 (2010).

[43] *Dean v. State*, 57 So.3d 169 (2010)

[44] 170 Wash. 2d 103, 239 P.3d 1102 (2010). (Emphasis supplied)

[45] P.D. No. 968, Sec. 2. (Emphasis supplied)

[46] 453 Phil. 270 (2003).

[47] *People v. Larin*, 357 Phil. 987, 997 (1998). See also *Imbo v. People*, G.R. No. 197712, April 20, 2015; *People v. Gaduyon*, G.R. No. 181473, November 11, 2013, 709 SCRA 129, 149; *Caballo v. People*, G.R. No. 198732, June 10, 2013, 698 SCRA 227, 238; *Navarrete v. People*, 542 Phil. 496, 510 (2007); and *Amployo v. People*, 496 Phil. 747, 758 (2005).

[48] *Olivarez v. Court of Appeals*, 503 Phil. 421, 432 (2005), citing *People v. Larin*, supra, and *Amployo v. People*, supra.

[49] *People v. Bonaagua*, G.R. No. 188897, June 6, 2011, 650 SCRA 620, 638; *Flordeliz v. People*, 628 Phil. 124, 140-141 (2010); *Navarrete v. People*, supra note 47, at 506; and *Amployo v. People*, supra note 47, at 755.

[50] R.A. No. 7610, Sec. 3(a).

[51] See *Malto v. People*, 560 Phil. 119, 139-142 (2007)

[52] R.A. No. 7610, Art. 1, Sec. 2.

[53] *People v. Larin*, supra note 47, at 1005-1006. See also *Imbo v. People*, G.R. No. 197712, April 20, 2015; *People v. Gaduyon*, supra note 47, at 148; *Navarrete v. People*, supra note 47, at 511; and *Amployo v. People*, supra note 47, at 759.

[54] *People v. Gerandoy*, G.R. No. 202838, September 17, 2014, 735 SCRA 520, 540; *Caballo v. People*, supra note 47, at 242-243; *Garingarao v. People*, 669 Phil. 512, 524 (2011); *People v. Rellota*, 640 Phil. 471 (2010); *People v. Abello*, supra note 5, at 393; and *Amployo v. People*, supra note 47, at 759.

[55] *People v. Larin*, supra note 47, at 1008.

[56] Supra note 47.

[57] *Caballo v. People*, supra note 47, at 242-243.

[58] Supra note 5.

CONCURRING OPINION

LEONEN, J.:

Fiat justitia mat caelum.[1]

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

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

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

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

I submit that *Colinares v. People*[4] should not be made to apply to this case for two reasons. First, *Colinares* has not yet become established doctrine, and the dissents of the case offer a sound and logical approach to the issue. *Colinares* read an outcome, which is not supported by the text of law. Second, even assuming that the ratio in *Colinares* is good law, it finds no application to this case since the Court of Appeals erred in modifying the judgment of the trial court.

I

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

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

SECTION 4. Grant of Probation. — Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal.

An order granting or denying probation shall not be appealable. (Emphasis supplied)

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

SECTION 9. Disqualified Offenders. — The benefits of this Decree shall not be extended to those:

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

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

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

Section 1. Section 4 of Presidential Decree No. 968, otherwise known as the Probation Law of 1976, is hereby amended to read as follows:

"Sec. 4. Grant of Probation. Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

The prosecuting officer concerned shall be notified by the court of the filling [sic] of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.

Probation may be granted whether the sentence impose a term of imprisonment or a fine with subsidiary

imprisonment in case of insolvency. An application for probation shall be filed with trial court, with notice to appellate court if an appeal has been taken from the sentence of conviction. The filing [sic] of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case[,] however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.

An order granting or denying probation shall not be appealable." (Emphasis supplied)

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

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

WHEREAS, probation was not intended as an escape hatch and should not be used to obstruct and delay the administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated;

WHEREAS, it becomes imperative to remedy the problems above-mentioned confronting our probation system;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the by Constitution, do hereby decree:

SECTION 1. Section 4 of Presidential Decree No. 968 is hereby amended to read as follows:

"SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

"Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

"An order granting or denying probation shall not be appealable."[11] (Emphasis supplied)

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

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

- The Probation Law is not a penal statute that may be interpreted liberally in favor of the accused; and
- Section 4 of the Probation Law clearly mandates that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

The first of these cases applied Section 4 as it is stated in the law, effectively ruling that the law does not admit exceptions. In *Llamado v. Court of Appeals*,^[12] Ricardo A. Llamado (Llamado) was convicted by the trial court of violation of Batas Pambansa Bilang 22 and sentenced to imprisonment of one (1) year of prison correccional.^[13]

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

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

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

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

Turning to petitioner's invocation of "liberal interpretation" of penal statutes, we note at the outset that the Probation Law is not a penal statute. We, however, understand petitioner's argument to be really that any statutory language that appears to favor the accused in a criminal case should be given a "liberal interpretation." Courts, however, have no authority to invoke "liberal interpretation" or "the spirit of the law" where the words, of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation. We do not believe that "the spirit of law" may legitimately be invoked to set at naught words which have a clear and definite meaning imparted to them by our procedural law. The "true legislative intent" must obviously be given effect by judges and all others who are charged with the application and implementation of a statute. It is absolutely essential to bear in mind, however, that the spirit of the law and the intent that is to be given effect are to be derived from the words actually used by the law-maker, and not from some external, mystical or metajudicial source independent of and transcending the words of the legislature.

The Court is not here to be understood as giving a "strict" interpretation" rather than a "liberal" one to Section 4 of the Probation Law of 1976 as amended by P.D. No. 1990. "Strict" and "liberal" are adjectives which too frequently impede a disciplined and principled search for the meaning which the law-making authority projected when it promulgated the language which we must apply. That meaning is clearly visible in the text of Section 4, as plain and unmistakable as the nose on a man's face. The Court is simply reading Section 4 as it is in fact written. There is no need for the involved process of construction that petitioner invites us to engage in,

a process made necessary only because petitioner rejects the conclusion or meaning which shines through the words of the statute. The first duty of a judge is to take and apply a statute as he finds it, not as he would like it to be. Otherwise, as this Court in *Yangco v. Court of First Instance of Manila* warned, confusion and uncertainty in application will surely follow, making, we might add, stability and continuity in the law much more difficult to achieve[.][24] (Emphasis supplied)

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

In *Francisco*, Pablo C. Francisco (Francisco) was convicted by the Metropolitan Trial Court of four (4) counts of grave oral defamation and sentenced to imprisonment of "one (1) year and one (1) day to one (1) year and eight (8) months of prision correccional 'in each crime committed on each date of each case[.]'" [26] On appeal before the Regional Trial Court, the trial court affirmed his conviction but appreciated a mitigating circumstance in his favor. His penalty was reduced to a straight penalty of eight (8) months of imprisonment. This Decision became final and executory upon his failure to file an appeal. Before the Decision could be executed, however, he applied for probation before the Metropolitan Trial Court. His application was denied, as was his subsequent Petition for Certiorari before the Court of Appeals. [27]

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

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

Probation is a mere privilege, not a right. Its benefits cannot extend to those not expressly included. Probation is not a right of an accused, but rather an act of grace and clemency or immunity conferred by the state which may be granted by the court to a seemingly deserving defendant who thereby escapes the extreme rigors of the penalty imposed by law for the offense of which he stands convicted. It is a special prerogative granted by law to a person or group of persons not enjoyed by others or by all. Accordingly, the grant of probation rests solely upon the discretion of the court which is to be exercised primarily for the benefit of organized society, and only incidentally for the benefit of the accused. The Probation Law should not therefore be permitted to divest the state or its government of any of the latter's prerogatives, rights or remedies, unless the intention of the legislature to this end is clearly expressed, and no person should benefit from the terms of the law who is not clearly within them.

Neither Sec. 4 of the Probation Law, as amended, which clearly mandates that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction," nor *Llamado v. Court of Appeals* which interprets the quoted provision, offers any ambiguity or qualification. As such, the application of the law should not be subjected to any to suit the case of petitioner. While the proposition that an appeal should not bar the accused from applying for probation if the appeal is solely to reduce the penalty to within the probationable limit may be equitable, we are not yet prepared to accept this interpretation under existing law and jurisprudence. [31] (Emphasis supplied)

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

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

[I]f under the sentence given to him an accused is not qualified for probation, as when the penalty imposed on him by the court singly or in their totality exceeds six (6) years but on appeal the sentence is modified so that he becomes qualified, I believe that the accused should not be denied the benefit of probation.

Before its amendment by P.D. No. 1990, the law allowed — even encouraged — speculation on the outcome of appeals by permitting the accused to apply for probation after he had appealed and failed to obtain an acquittal. It was to change this that Sec. 4 was amended by P.D. No. 1990 by expressly providing that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." For an accused, despite the fact that he is eligible for probation, may be tempted to appeal in the hope of obtaining an acquittal if he knows he can any way apply for probation in the event his conviction is affirmed.

There is, however, nothing in the amendatory Decree to suggest that in limiting the accused to the choice of either appealing from the decision of the trial court or applying for probation, the purpose is to deny him the right to probation in cases like the one at bar where he becomes eligible for probation only because on appeal his sentence is reduced. The purpose of the amendment, it bears repeating, is simply to prevent speculation or opportunism on the part of an accused who, although eligible for probation, does not at once apply for probation, doing so only after failing in his appeal.[35] (Emphasis supplied, citations omitted)

Justice V. V. Mendoza also submitted that the original sentence imposed on Francisco should be taken in its totality to determine whether he was qualified for probation.[36] In his opinion, the policy of the law treats "multiple sentences imposed in cases which are jointly tried and decided[37] as only one sentence.

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

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

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

II

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

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

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

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

. . . Arnel did not appeal from a judgment that would have allowed him to apply for probation. He did not have a choice between appeal and probation. He was not in a position to say, "By taking this appeal, I choose not to apply for probation. " The stiff penalty that the trial court imposed on him denied him that choice. Thus, a ruling that would allow Arnel to now seek probation under this Court's greatly diminished penalty will not dilute the sound ruling in *Francisco*. It remains that those who will appeal from judgments of conviction, when they have the option to try for probation, forfeit their right to apply for that privilege.

Besides, in appealing his case, Arnel raised the issue of correctness of the penalty imposed on him. He claimed that the evidence at best warranted his conviction only for attempted, not frustrated, homicide, which crime called for a probationable penalty. In a way, therefore, Arnel sought from the beginning to bring down the penalty to the level where the law would allow him to apply for probation.

In a real sense, the Court's finding that Arnel was guilty, not of frustrated homicide, but only of attempted homicide, is an original conviction that for the first time imposes on him a probationable penalty. Had the RTC done him right from the start, it would have found him guilty of the correct offense and imposed on him the right penalty of two years and four months maximum. This would have afforded Arnel the right to apply for probation.

The Probation Law never intended to deny an accused his right to probation through no fault of his. The underlying philosophy of probation is one of liberality towards the accused. Such philosophy is not served by a harsh and stringent interpretation of the statutory provisions. As Justice Vicente V. Mendoza said in his dissent in *Francisco*, the Probation Law must not be regarded as a mere privilege to be given to the accused only where it clearly appears he comes within its letter; to do so would be to disregard the teaching in many cases that the Probation Law should be applied in favor of the accused not because it is a criminal law but to achieve its beneficent purpose.[46] (Emphasis supplied)

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

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

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

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

Section 2. Purpose. This Decree shall be interpreted so as to:

- (a) promote the correction and rehabilitation of an offender by providing him with individualized treatment;
- (b) provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and

(c) prevent the commission of offenses.

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

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

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

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

The law expressly requires that an accused must not have appealed his conviction before he can avail himself of probation. This outlaws the element of speculation on the part of the accused — to wager on the result of his appeal — that when his conviction is finally affirmed on appeal, the moment of truth well nigh at hand and the service of his sentence inevitable, he now applies for probation as an "escape hatch," thus rendering nugatory the appellate court's affirmance of his conviction. Consequently, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated; who manifest spontaneity, contrition and remorse.

This was the reason why the Probation Law was amended, precisely to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid.[53] (Emphasis supplied)

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

It must be stressed that in foreclosing the right to appeal his conviction once the accused files an application for probation, the State proceeds from the reasonable assumption that the accused's submission to rehabilitation and reform is indicative of remorse. And in prohibiting the trial court from entertaining an application for probation if the accused has perfected his appeal, the State ensures that the accused takes seriously the privilege or clemency extended to him, that at the very least he disavows criminal tendencies. Consequently, this Court's grant of relief to herein accused whose sentence was reduced by this Court to within the probationable limit, with a declaration that accused may now apply for probation, would diminish the seriousness of that privilege because in questioning his conviction accused never admitted his guilt. It is of no moment that the trial court's conviction of petitioner for frustrated homicide is now corrected by this Court to only attempted homicide. Petitioner's physical assault on the victim with intent to kill is unlawful or criminal regardless of whether the stage of commission was frustrated or attempted only. Allowing the petitioner the right to apply for probation under the reduced penalty glosses over the fact that accused's availing of appeal with such expectation amounts to the same thing: speculation and opportunism on the part of the accused in violation of the rule that appeal and probation are mutually exclusive remedies.[54] (Emphasis supplied)

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

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

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

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

1. When the accused is convicted by the trial court of a crime where the penalty imposed is within the probationable period or a fine, and the accused files a notice of appeal; and
2. When the accused files a notice of appeal which puts the merits of his conviction in issue, even if there is an alternative prayer for the correction of the penalty imposed by the trial court or for a conviction to a lesser crime, which is necessarily included in the crime in which he was convicted where the penalty is within the probationable period.[58] (Emphasis and underscoring in the original)

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

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

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

The first appeal determines whether he comes under the exception.

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

III

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

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

Section 5. Child Prostitution and Other Sexual Abuse. Children, whether male or female, who for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct, are deemed to be children exploited in prostitution and other sexual abuse.

The penalty of reclusion temporal in its medium period to reclusion perpetua shall be imposed upon the following:

.....

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

In *Garingarao v. People*,^[60] the elements of this offense are as follows:

1. The accused commits the act of sexual intercourse or lascivious conduct;
2. The said act is performed with a child exploited in prostitution or subjected to other sexual abuse; and
3. The child, whether male or female, is below 18 years of age.^[61]

Lascivious conduct is defined as:

[T]he intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks, or the introduction of any object into the genitalia, anus or mouth, of any person, whether of the same or opposite sex, with the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person, bestiality, masturbation, lascivious exhibition of the genitals or pubic area of a person.^[62]

Here, petitioner is accused of touching the breast and vagina of a 16-year-old girl.^[63] On appeal, however, the Court of Appeals modified the offense, finding that the prosecution failed to prove that the lascivious conduct was done with coercion or intimidation.^[64] It found petitioner to be guilty only of acts of lasciviousness under Article 336 of the Revised Penal Code.^[65] The provision states:

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

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

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

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

The Court has ruled that a child is deemed subject to other sexual abuse when the child is the victim of lascivious conduct under the coercion or influence of any adult. In lascivious conduct under the coercion or

influence of any adult, there must be some form of compulsion equivalent to intimidation which subdues the free exercise of the offended party's free will.[68] (Emphasis supplied)

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

Accordingly, I concur with the ponencia.

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

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

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

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

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

[6] Act No. 4221 (1935), sec. 8 provides:

SECTION 8. This Act shall not apply to persons convicted of offenses punishable by death or life imprisonment; to those convicted of homicide, treason, conspiracy or proposal to commit treason; to those convicted of misprision of treason, sedition or espionage; to those convicted of piracy, brigandage, arson, or robbery in band; to those convicted of robbery with violence on persons when it is found that they displayed a deadly weapon; to those convicted of corruption of minors; to those who are habitual delinquents; to those who have been once on probation; and to those already sentenced by final judgment at the time of the approval of this Act.

[7] Act No. 4221 (1935), sec. 1 provides:

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

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

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

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

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

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

[13] Id. at 332.

[14] Id.

[15] Id.

[16] Id. at 332-333.

[17] Id. at 333.

[18] Id.

[19] Id.

[20] Id. at 333-334.

[21] Id. at 337.

[22] Id. at 337-339.

[23] Id. at 339.

[24] Id. at 339-340.

[25] 313 Phil. 241 (1995) [Per J. Bellosillo, En Banc].

[26] Id. at 251.

[27] Id. at 252.

[28] Id. at 254.

[29] Id.

[30] Id.

[31] Id. at 254-255, citing *Baclaron v. Hon. Mutia, etc., et al*, 214 Phil. 126, 131 (1984) [Per J. Teehankee, First Division], *Amandy v. People*, 244 Phil. 457, 465 (1988) [Per J. Gutierrez, Jr., Third Division], 34 Words and Phrases 111, *Bala v. Judge Martinez*, 260 Phil. 488, 498⁹⁹ (1990) [Per J. Sarmiento, Second Division], and *Llamado v. Court of Appeals*, 256 Phil. 328, 334-337 (1989) [Per J. Feliciano, Third Division].

[32] Id. at 258.

[33] Id. at 262.

[34] J. Mendoza, Dissenting Opinion in *Francisco v. Court of Appeals*, 313 Phil. 241, 267 (1995) [Per J. Bellosillo, En Banc].

[35] Id. at 268-272.

[36] Id. at 275-276.

[37] Id. at 276.

[38] J. Vitug, Separate Opinion in *Francisco v. Court of Appeals*, 313 Phil. 241, 277-278 (1995) [Per J. Bellosillo, En Banc].

[39] Id. at 278.

[40] Colinares v. People, 678 Phil. 482, 491 (2011) [Per J. Abad, En Banc]

[41] Id.

[42] Id. at 492.

[43] Id.

[44] Id. at 501.

[45] Id.

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

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

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

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

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

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

[52] 52602 Phil. 989 (2009) [Per J. Chico-Nazario, Third Division].

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

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

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

[56] Id. at 507.

[57] Id. at 508.

[58] Id. at 509.

[59] Ponencia, p. 12.

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

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

Division].

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

[63] *Ponencia*, p. 2.

[64] *Id.*

[63] *Id.* at 2-3.

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

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

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

DISSENTING OPINION

VELASCO, JR., J.:

When the law does not qualify, We should not qualify.[1]

For resolution is the recurring question of whether an appellate court's downgrading of a convict's offense or penalty - from a non-probationable to a probationable one - subsequently entitles the accused to apply for the privilege of probation in spite of his prior perfection of an appeal. Ultimately, this issue boils down to the interpretation of Section 4 of Presidential Decree (PD) No. 968, otherwise known as the Probation Law of 1976, as amended by PD No. 1990.[2] The provision pertinently reads:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant perfected the appeal from the judgment of conviction, (emphasis ours)

Initially, the Court strictly interpreted the provision as barring the convicted felon from applying for probation if he opted to resort to filing an appeal.[3] The rationale behind the disqualification was enunciated by the Court in *Francisco v. Court of Appeals*, thus:

Probation is a special privilege granted by the state to a penitent qualified offender. It essentially rejects appeals and encourages an otherwise eligible convict to immediately admit his liability and save the state of time, effort and expenses to jettison an appeal. The law expressly requires that an accused must not have appealed his conviction before he can avail of probation. This outlaws the element of speculation on the part of the accused — to wager on the result of his appeal — that when his conviction is finally affirmed on appeal, the moment of truth well-nigh at hand, and the service of his sentence inevitable, he now applies for probation as an "escape hatch" thus rendering nugatory the appellate court's affirmance of his conviction. Consequently, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated, who manifest spontaneity, contrition and remorse.[4] (emphasis ours)

So it was held that perfecting an appeal automatically disqualifies a convicted offender from availing of the

benefits of the Probation Law, regardless of the grounds invoked in the appeal lodged, and of whether or not the appeal resulted in the downward modification of the offense or the penalty imposed from a non-probationable to a probationable one.

This reading of the afore-quoted proviso, however, has repeatedly been debated upon in various cases of differing factual settings.[5] And in these cases, the Court constantly entertained the prospect of abandoning, if not substantially modifying, this rigid interpretation to allow a penitent offender to apply for probation if he only became qualified to apply for the benefits under the law after an appellate court downgraded his offense or the penalty meted.

It will not be until December of 2011, in *Colinares v. People*,[6] when the Court would take a different posture in interpreting Sec. 4 of PD No. 968, as amended.

In *Colinares*, the Court was emphatic in its position that the error of a lower court should not deprive the offender of the opportunity to seek the privilege of probation. In the words of the ponencia therein, "[a]ng kabayo ang nagkasala, ang hagupit ay sa kalabaw (The horse errs, the carabao gets the whip)."[7] Thus, in the face of strong dissent, the majority rejected the traditional interpretation of Sec. 4 and refused to read the provision as prohibiting the offender from applying for the benefit of probation if the appeal was made when the privilege of probation is not yet available.[8]

As held in *Colinares*, the appellate court's downward modification of the penalty meted, from a non-probationable to a probationable one, amounted to an original conviction for a probationable penalty. Under such circumstance, the Court held that the offender should still be allowed to apply for the privilege of probation in spite of his prior perfection of an appeal because the appeal was made at a time when he was not yet a qualified offender. In other words, therein offender has not yet lodged an appeal from the original judgment of conviction of a probationable penalty, qualifying him to apply for probation under Sec. 4.

Regrettably, several members of the Court remain reluctant in adopting this novel interpretation in *Colinares*, continually reasoning that the wording of the proviso is clear and leaves no room for interpretation, and arguing that the Probation Law is not a penal statute that must be construed liberally in favor of the accused.[9] As in the case at bar, instead of applying squarely the teaching in *Colinares*, the majority deviated therefrom and needlessly imposed additional restrictions before one could avail of the benefits under the Probation Law.

The ponencia ruled herein that for the accused to be allowed to apply for probation even if he has filed an appeal, the appeal should be anchored only on the following grounds:

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

The majority is, in effect, affirming *Colinares* in making the grant of probation allowable even after appeal, to which I agree. The similarity between the interpretations of Sec. 4 in *Colinares* and in the disposition of this case, however, ends here. Meanwhile, divergence arises from the varying analysis of the phrase "appeal from the judgment of conviction," which is a basis for disqualification under Sec. 4. Here, the majority puts premium on the grounds invoked in the "appeal" adverted to, in that the appeal should not question the finding of guilt and should not insist on the defendant's acquittal, regardless of the penalty imposed and the crime the offender is convicted of. In contrast, *Colinares* deems more significant the "judgment of conviction," rendering the grounds

the appeal was anchored on immaterial. Instead, what is of primordial consideration in Colinares was whether or not the defendant was convicted of a probationable offense or was meted a probationable penalty. If not, the defendant will still be allowed to appeal his conviction on any ground, without losing the right to apply for probation in the event that the appellate court reclassifies his offense or downgrades his sentence to a probationable one.

Of the two interpretations, I respectfully submit that the Court's holding in Colinares should be sustained. Therefore, I register my vote to GRANT the instant petition.

With all due respect to my colleagues, allow me to express my reservations on the Court's imposition of prerequisites before an offender may avail of the benefits of the Probation Law.

Firstly, the conditions imposed by the majority run counter to the spirit of the Probation Law.

Recall the wording of the provision:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant perfected the appeal from the judgment of conviction.

Sec. 4 clearly commands that "no application for probation shall be entertained or granted if the defendant perfected the appeal from the judgment of conviction." At first blush, there is nothing vague in the provision that calls for judicial interpretation. The provision, as couched, mandates that the perfection of an appeal disqualifies an otherwise qualified offender from applying for probation.

Nevertheless, I fully concur with the Court's ruling in Colinares that the bar must be applied only to offenders who were already qualified to apply for probation but opted to file an appeal instead. An otherwise rigid application of the rule would defeat the very purpose of the Probation Law, which is giving a qualified penitent offender the opportunity to be placed on probation instead of being incarcerated. The preambulatory clause of PD No. 1990 says as much:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed; xxx. (emphasis ours)

Verily, the clause uses the conjunctive word "and" in qualifying the type of offenders to whom the amendment applies. Unmistakably, it refers not simply to convicted offenders in general, but more specifically to qualified convicted offenders. What PD No. 1990 then contemplates and seeks to address is the situation where qualified convicted offenders showed lack of repentance by appealing their conviction instead of admitting their guilt and asking for the State's graciousness and liberality by applying for the privilege of probation.

This supports the majority opinion in Colinares that the disqualification under Sec. 4 does not cover a formerly disqualified convicted offender who later on becomes qualified to apply for probation by reason of a partially meritorious appeal, sustaining the conviction but for a lesser offense or penalty. To reiterate, the reduction of the penalty imposed in Colinares, from a non-probationable to a probationable one, amounted to an original conviction from which no appeal has yet been taken, and thereby qualifies the convicted felon to apply for probation under the law.

Unlike this modification in the interpretation of Sec. 4 of PD No. 968 that was introduced in Colinares, the ponencia's, imposition of additional restrictions for availing of the benefits under the Probation Law is not in

keeping with the spirit of the law. To recall, the ponencia intimates that the added restrictions are based on the argument that what is prohibited under the Probation Law is challenging the judgment of conviction, which, in the majority's posture, is the finding of guilt, without distinction on whether the penalty imposed is probationable or not. According to the majority, the accused may still lodge an appeal and qualify for probation if the appeal is limited to praying for the reduction of the penalty imposed or downgrading the crime he is convicted of, and should in no way insist on his innocence. With these requirements in place, the majority effectively would want the accused to change his theory of the case and belatedly plead guilty on appeal to a lesser offense, akin to a last minute plea-bargain.

The problem here is that the ponencia's interpretation is tantamount to forcing the accused to already forego appealing for his acquittal at a time that probation is not yet available. This goes against the rationale of the law, which seeks to discourage from appealing only those who are, in the first place, already qualified to apply for probation, but waste the opportunity by insisting on their innocence. What is more, the ponencia's restrictive proposition would lead to a baffling result - the very appeal that would have qualified the convicted felon to apply for probation (i.e., the appeal that resulted in the downgrading of the offense or the reduction of the penalty to a probationable one) would also be the very same appeal that would disqualify him from availing thereof.

More on this first point, recall that the Probation Law was enacted for the following reasons:

WHEREAS, one of the major goals of the government is to establish a more enlightened and humane correctional system that will promote the reformation of offenders and thereby reduce the incidence of recidivism;

WHEREAS, the confinement of all offenders in prisons and other institutions with rehabilitation programs constitutes an onerous drain on the financial resources of the country; and

WHEREAS, there is a need to provide a less costly alternative to the imprisonment of offenders who are likely to respond to individualized, community-based treatment programs;

On the basis thereof, PD No. 968 commands that it shall be interpreted as to:

- (a) Promote the correction and rehabilitation of an offender by providing him with individualized treatment;
- (b) Provide an opportunity for the reformation of a penitent offender which might be less probable if he were to serve a prison sentence; and
- (c) Prevent the commission of offenses.[10]

Now, relate the legislature's above-stated rationale of the Probation Law to the preambulatory clauses of PD No. 1990, which introduced the amendment removing the allowance of probation after the already qualified offender appealed his conviction, to wit:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

WHEREAS, probation was not intended as an escape hatch and should not be used to obstruct and delay the

administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated;

WHEREAS, it becomes imperative to remedy the problems above-mentioned confronting our probation system;[11] (emphasis ours)

As can be gleaned, the declared purposes of the Probation Law and its amendatory law all echo the State's inclination towards a rehabilitative, as opposed to a punitive, system. In fact, the proviso that the perfection of an appeal disqualifies the offender from applying for probation is to ensure that the privilege of probation is extended only to penitent qualified offenders, those the state deems to have the potential to be rehabilitated.

In ascertaining an offender's penitence, the Court has repeatedly held that the qualified offender's perfection of an appeal questioning his conviction, instead of beseeching the State's generosity through an application for probation at the first opportunity, is antithetical to remorse and penitence. Bear in mind, though, that the amendment was prompted by the State's past experience where qualified offenders "wager" their chances and still seek an acquittal, only to invoke the privilege of probation when it is almost certain that they would not be found innocent. It would, therefore, be erroneous to apply the same principle to offenders who are not qualified, those who had no opportunity, to seek the privilege in the first place. We cannot expect them to immediately show remorse via applying for probation, putting their right to appeal on the line in so doing, when they are not even qualified for the privilege under the law. In their case, there is no wager and no "first opportunity" to apply for probation to speak of, but a clear lack of option on the part of the offenders. They had no other choice but to appeal.

Secondly, the majority's imposition of said conditions is in violation of the constitutionally-mandated separation of powers underlying the very existence of the government.

Well-entrenched is the rule that the primordial duty of the Court is merely to apply the law in such a way that it does not usurp legislative powers by judicial legislation.[12] Thus, in the course of such application or construction, it should not make or supervise legislation, or under the guise of interpretation, modify, revise, amend, distort, remodel, or rewrite the law, or give the law a construction which is repugnant to its terms.[13] The Court should shy away from encroaching upon the primary function of a co-equal branch of the Government; otherwise, this would lead to an inexcusable breach of the doctrine of separation of powers by means of judicial legislation.[14]

To hold, in the case at bar, that a formerly disqualified offender who only became qualified for probation after judgment by an appellate court is still disqualified from applying for the privilege is tantamount to amending the law via judicial interpretation. With the Court's disposition of the instant petition, the majority is effectively placing additional qualifications and grounds for disqualification that not only cannot be found anywhere in the four corners of the statute, but, worse, defeat the very purpose for which the Probation Law was enacted.

Had the Probation Law intended the exclusion of formerly disqualified offenders from those who may avail of the privilege, then it would have included such exclusion in the list of disqualified offenders under Sec. 9 of PD No. 968, as amended, which, in its entirety, reads:

Sec. 9. Disqualified Offenders. - The benefits of this Decree shall not be extended to those:

- (a) sentenced to serve a maximum term of imprisonment of more than six years;
- (b) convicted of subversion or any crime against the national security or the public order;
- (c) who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos.
- (d) who have been once on probation under the provisions of this Decree; and

(e) who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.

These disqualifications listed under Sec. 9 should be differentiated from the disqualification under Sec. 4. Sec. 9 enumerates the legal bars from acquiring the eligibility to apply for probation. Meanwhile, the Sec. 4 proviso states the manner on how one loses the eligibility to apply for probation which he already possesses. To interpret here then that an offender who is not yet qualified to apply for probation may be prejudiced by the grounds he would raise in his appeal would mean amending Sec. 9 so as to include those who have raised their guilt as an issue on appeal.

This unwarranted judicial amendment to the law violates the fundamental maxim "expressio unius est exclusio alterius." The express mention of one person, thing, act, or consequence excludes all others. Thus, where a statute, by its terms, is expressly limited to certain matters, it may not, by interpretation or construction, be extended to others. This rule is based on the premise that the legislature would not have made specified enumerations in a statute had the intention been not to restrict its meaning and to confine its terms to those expressly mentioned.[15]

Moreover, the ponencia, in its postulation, basically legislates the timeframe for an offender's penitence. The ponencia is virtually sending a message to convicted felons that they should already be penitent even before they are qualified to apply for probation to be allowed to avail of the privilege in the off-chance that the penalty meted on them is reduced or the crime they are convicted of is downgraded on appeal.

We have to consider though that it is only natural for a person charged with a crime, subjected to a highly adversarial process, and going up against the "People of the Philippines" in litigation, to be on the defensive and insist on his innocence rather than readily sacrifice his liberty in gambling for a mere probability of becoming eligible for, not necessarily entitled to, probation. This does not mean, however, that he who is guilty but denies the commission of the crime even after having been convicted by the trial court will never ever regret having committed the offense. For his perceived lack of option, a litigant may be compelled to appeal his conviction, without necessarily making him any less repentant later on. It would not come as a surprise if it will only be after his appeal is heard, after the penalty imposed upon him is lessened or after his crime was downgraded, after a window of opportunity to receive a second lease in life opens, would his penitence be manifest in his pleadings, would he apply for probation, and would he no longer pursue the case or push his luck.

As explained, insisting on proving one's innocence is an understandable natural human behavior. It is not, at all times and in all cases, proof of depravity. In the same way, the observance of the proposed restrictions, which are supposedly intended to ensure that only penitent offenders are allowed to apply for the privilege of probation, cannot guarantee that the person invoking the limited grounds on appeal is, in fact, remorseful. Furthermore, one cannot expect an offender to be, in all cases, impelled by remorse in applying for the probation instead of appealing, for it may be that he sacrificed his right to fight for his innocence out of fear of losing the privilege if he makes any further attempt thereat.

Fortunately, the grant of the privilege is entirely different from the right to apply for its grant.[16] Consider, too, that the grant is discretionary upon the trial court, hence the use of the word "may." [17] Thus, there are other means by which the courts may determine whether the qualified offender is indeed penitent or not, other than looking to the grounds on which his appeal was hinged. The grounds raised in the appeal should then be immaterial. And instead of restraining an erstwhile disqualified offender's right to appeal, the Court should adopt an effective system for weeding out those who abuse the State's generosity. This way, we can assist in the administration of the restorative justice that the Probation Law seeks to enforce without sacrificing civil liberties or encroaching upon the power of the Legislative Branch. To impose such restrictions on the filing of an appeal by the disqualified convicted offender would, more often than not, result in injustice, rather than promote the

laudable purpose of the Probation Law.

Thirdly, following Colinares, the "judgment of conviction" referred to in Sec. 4 from which no appeal should be taken should, as earlier stressed, be understood to be the original conviction for a probationable penalty or offense, and not simply to the trial court's first finding of guilt.

It may be tempting to interpret the phrase "judgment of conviction" to refer to the trial court's finding of guilt since "trial court" was specifically mentioned in Sec. 4, without any reference to appellate courts. This, however, does not come as a shock. The trial court's mention, after all, comes naturally since, as the court of origin,[18] the suspension of the execution of the sentence and the placing of the defendant on probation are just a few of its functions. The first part of Sec. 4, thus, merely echoes the rule that the execution of judgments[19] and the resolution of an application for probation[20] are the duties of the trial courts, nothing more. It should not be construed in such a way that the appeal being referred to in said Sec. 4 is that taken only from the trial court to an appellate court as this is an entirely different matter.

To be clear, nowhere in the Probation Law does it provide that the "appeal" from the judgment of conviction should be that made from the trial court to the appellate court. Hence, the "appeal" could very well refer to any of the three (3) opportunities to seek a review of a judgment of conviction in criminal procedure: (a) questioning the judgments of the Municipal Trial Court, Metropolitan Trial Court, Municipal Circuit Trial Court, and of the Municipal Trial Court in Cities before the Regional Trial Court; (b) elevating the case from the Regional Trial Court to the Court of Appeals; and (c) by assailing the unfavorable Decision of the Court of Appeals to this Court — the court of last resort.[21]

Corollarily, it is submitted that the "judgment of conviction" should not be taken to mean the initial finding of guilt, since, as maintained by the majority in Colinares, an original judgment of conviction may also be handed down by the appellate courts, especially when it involves the annulment or modification of the trial court's decision. As discussed, the appellate court's judgment convicting therein defendant, for the first time, of a probationable crime or imposing upon him a probationable penalty should be treated as an original conviction, entitling him to apply for probation in spite of perfecting an appeal.[22] The appeal lodged by the offender, which reduced his conviction to a probationable one, in no way adversely affected his later-acquired eligibility.

In line with the teachings in Colinares, the Court should view the appellate court's judgment which effectively qualified the offender for probation as the conviction from which the defendant should not appeal from if he wishes to apply for the privilege of probation. This should be the case for the simple reason that he has not yet questioned this second original conviction which qualifies him for probation. To reiterate, what the law proscribes is the application for probation by a defendant who has appealed his conviction for a probationable crime or with a probationable penalty. This proscription should, therefore, come in only when the offender has already been convicted of a probationable crime or imposed a probationable penalty, not when he was still disqualified for probation.

Fourthly, the adoption of the conditions set by the majority in the instant case will result in a situation where We would be requiring from the defense lawyer a degree of diligence that is less than that expected of him under our Rules, at his client's expense.

To elucidate, We are all very much aware of a defense lawyer's duty to his client in that:

xxx A lawyer engaged to represent a client bears the responsibility of protecting the latter's interest with utmost diligence. It is his duty to serve his client with competence and diligence, and he should exert his best efforts to protect, within the bounds of the law, the interests of his client. A lawyer's diligence and vigilance is more imperative in criminal cases, where the life and liberty of an accused is at stake.[23]

Simply put, a defense lawyer is expected to advocate his client's innocence in line with the principle deeply embedded in our legal system that an accused is presumed innocent until proven guilty beyond reasonable doubt. The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from the latter, save by the rules of law, legally applied.[24] Thus, unless and until his client has been convicted with finality, we cannot expect his counsel to detract, or even require him to detract from this duty, and convince his client to simply admit guilt and either seek a reduction of the penalty imposed or the downgrading of the crime he has been convicted of just so the client may have a window of opportunity to apply for the privilege of probation if and only if the appeal is granted. Instead, the client, in the judicial forum, should be afforded the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.[25]

Lastly, in rejecting the petitioner's plea that the Probation Law be liberally construed in his favor, the Court ruled that PD 968 is not a penal law that would warrant the application of the pro reo doctrine. The ruling was premised on the instruction of the Court in *Llamado v. Court of Appeals*, viz:

Turning to petitioner's invocation of "liberal interpretation" of penal statutes, we note at the outset that the Probation Law is not a penal statute. We, however, understand petitioner's argument to be really that any statutory language that appears to favor the accused in a criminal case should be given a "liberal interpretation." Courts, however, have no authority to invoke "liberal interpretation" or "the spirit of the law" where the words of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation. We do not believe that "the spirit of law" may legitimately be invoked to set at naught words which have a clear and definite meaning imparted to them by our procedural law. The "true legislative intent" must obviously be given effect by judges and all others who are charged with the application and implementation of a statute. It is absolutely essential to bear in mind, however, that the spirit of the law and the intent that is to be given effect are to be derived from the words actually used by the law-maker, and not from some external, mystical or metajudicial source independent of and transcending the words of the legislature.

The Court is not here to be understood as giving a "strict interpretation" rather than a "liberal" one to Section 4 of the Probation Law of 1976 as amended by P.D. No. 1990. "Strict" and "liberal" are adjectives which too frequently impede a disciplined and principled search for the meaning which the law-making authority projected when it promulgated the language which we must apply. That meaning is clearly visible in the text of Section 4, as plain and unmistakable as the nose on a man's face. The Court is simply reading Section 4 as it is in fact written. There is no need for the involved process of construction that petitioner invites us to engage in, a process made necessary only because petitioner rejects the conclusion or meaning which shines through the words of the statute. The first duty of a judge is to take and apply a statute as he finds it, not as he would like it to be.[26]

This oft-cited ratio in supporting the continued refusal to reject the proposed application of Sec. 4, however, must also be reconsidered since this cited pronouncement of the Court actually deals with a different issue, albeit pertaining to the same provision.

It bears noting that *Llamado* dealt with the issue of whether or not petitioner's application for probation, which was filed after a notice of appeal had been filed with the trial court, after the records of the case had been forwarded to the Court of Appeals, after the Court of Appeals had issued the notice to file Appellant's Brief, after several extensions of time to file Appellant's Brief had been sought from and granted by the Court of Appeals, but before actual filing of such brief, is barred under PD No. 968, as amended.[27] In essence, it dealt with the alleged establishment by the amendment of a narrower period during which an application for probation may be filed with the trial court. As the Court clarified:

In applying Section 4 in the form it exists today (and at the time petitioner Llamado was convicted by the trial court), to the instant case, we must then inquire whether petitioner Llamado had submitted his application for probation "within the period for perfecting an appeal." Put a little differently, the question is whether by the time petitioner Llamado's application was filed, he had already "perfected an appeal" from the judgment of conviction of the Regional Trial Court of Manila.[28] (emphasis ours)

A reading of Llamado reveals that the Court's refusal to liberally interpret Sec. 4 actually referred to the phrase "period for perfecting an appeal" and not the proviso being discussed in the present case. It was therein petitioner's argument that:

xxx the phrase "period for perfecting an appeal" and the clause "if the defendant has perfected an appeal from the judgment of conviction" found in Section 4 in its current form, should not be interpreted to refer to Rule 122 of the Revised Rules of Court; and that the "whereas" or preambulatory clauses of P.D. No. 1990 did not specify a period of fifteen (15) days for perfecting an appeal.[3] It is also urged that "the true legislative intent of the amendment (P.D. No. 1990) should not apply to petitioner who filed his Petition for probation at the earliest opportunity then prevailing and withdrew his appeal." [29]

which the Court flatly rejected for the ensuing reason:

We find ourselves unable to accept the eloquently stated arguments of petitioner's counsel and the dissenting opinion. We are unable to persuade ourselves that Section 4 as it now stands, in authorizing the trial court to grant probation "upon application by [the] defendant within the period for perfecting an appeal" and in reiterating in the proviso that

no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction.

did not really mean to refer to the fifteen-day period established, as indicated above, by B.P. Big. 129, the Interim Rules and Guidelines Implementing B.P. Blg. 129 and the 1985 Rules on Criminal Procedure, but rather to some vague and undefined time, i.e., "the earliest opportunity" to withdraw the defendant's appeal. The whereas clauses invoked by petitioner did not, of course, refer to the fifteen-day period. There was absolutely no reason why they should have so referred to that period for the operative words of Section 4 already do refer, in our view, to such fifteen-day period, xxxx Upon the other hand, the term "period for perfecting an appeal" used in Section 4 may be seen to furnish specification for the loose language "first opportunity" employed in the fourth whereas clause. "Perfection of an appeal" is, of course, a term of art but it is a term of art widely understood by lawyers and judges and Section 4 of the Probation Law addresses itself essentially to judges and lawyers. "Perfecting an appeal" has no sensible meaning apart from the meaning given to those words in our procedural law and so the law-making agency could only have intended to refer to the meaning of those words in the context of procedural law.[30] (emphasis ours)

With the above, it is evident that when this Court pronounced in Llamado its refusal to liberally apply Sec. 4 of the Probation Law, as amended, it was doing so within the context of interpreting the phrase "period for perfecting an appeal," which, as we all know, has a definite meaning in procedural law. It is therefore, understandable why the Court, in Llamado, rejected therein petitioner's request for a liberal interpretation of the phrase.

In conclusion, it is simply incorrect for the Court to interpret Sec. 4 as prohibiting the defendant from arguing for his acquittal at a time that the privilege of probation is not yet available to him. To follow the ponencia's interpretation would lead to a scenario wherein the Court would be subjecting disqualified offenders to the requirements of applying for probation in spite of their patent ineligibility (by reason of the penalty imposed or the categorization of the offense).

The more precise interpretation, therefore, would be to grant this opportunity to apply for probation when the accused is originally convicted for a probationable offense or sentenced to suffer a probationable penalty, without distinction on whether the said "original conviction" was issued by the trial court or appellate court. What is material is that the application for the privilege of probation be made at the first opportunity, which is the period to appeal from when the offender first became qualified for the privilege. For how can we say that the convicted offender wavered for an acquittal on appeal instead of applying for probation when he is not qualified to avail of the benefits of the Probation Law in the first place? He simply had no other option at that point.

As in *Colinares*, petitioner in this case became qualified for probation only after the appellate court modified the trial court's ruling. If, notwithstanding this downward modification of the penalty imposed or the crime the accused is convicted of, the now qualified defendant still appeals his new conviction on whatever ground, then, this would be the time when his appeal would bar him from applying for the privilege under Sec. 4.

While it is true that there is a risk that the abuse of the State's generosity by convicted offenders may still persist because of *Colinares*, we should not, however, deprive all accused persons, whether guilty or not, the opportunity to defend themselves and their liberty and to prove their case, lest we run the risk of forcing innocent persons to forego their liberty simply because applying for probation is easier than proving their innocence. To me, this might, more often than not, result in a failure of justice rather than its administration.

In view of the foregoing disquisitions, I reiterate my vote to GRANT the instant petition.

[1] *Corpuz v. People*, G.R. No. 180016, April 29, 2014, 724 SCRA 1, 33, citing *Asejo v. People*, 555 Phil. 106.

[2] AMENDING PRESIDENTIAL DECREE No. 968, OTHERWISE KNOWN AS THE PROBATION LAW of 1976.

[3] See *Almero v. People*, G.R. No. 188191, March 12, 2014, 718 SCRA 698; *Colinares v. People*, G.R. No. 182748, December 13, 2011, 662 SCRA 266; *Sable v. People*, G. R. No. 177961, April 7, 2009, 584 SCRA 619; *Soriano v. Court of Appeals*, G.R. No. 123936, March 4, 1999, 304 SCRA 231.

[4] *Francisco v. Court of Appeals*, G.R. No. 108747, April 6, 1995, 243 SCRA 384, 386-387.

[5] See *Colinares v. People*, supra note 3; *Lagrosa v. People*, G.R. No. 152044, July 3, 2003, 405 SCRA 357; *Francisco v. Court of Appeals*, id.

[6] G.R. No. 182748, December 13, 2011, 662 SCRA 266.

[7] *Colinares v. People*, supra at 279.

[8] Id. at 280.

[9] *Francisco v. Court of Appeals*, supra note 3, at 390.

[10] PRESIDENTIAL DECREE NO. 968, Sec. 2.

[11] PRESIDENTIAL DECREE NO. 1990.

[12] *Corpuz v. People*, supra note 1, at 57.

[13] Id.

[14] Id.

[15] Romualdez v. Marcelo, G.R. Nos. 165510-33, July 28, 2006, 497 SCRA 89, 108.

[16] Colinares v. People, supra note 3, at 278.

[17] Section 4, PD No. 968, as amended, provides: "Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; xxx." (emphasis ours)

[18] Section 1. Execution upon judgments or final orders. - Execution shall issue as a matter of right, on motion, upon a judgment or order that disposes of the action or proceeding upon the expiration of the period to appeal therefrom if no appeal has been duly perfected.

If the appeal has been duly perfected and finally resolved, the execution may forthwith be applied for in the court of origin, on motion of the judgment obligee, submitting therewith certified true copies of the judgment or judgments or final order or orders sought to be enforced and of the entry thereof, with notice to the adverse party.

The appellate court may, on motion in the same case when, the interest of justice so requires, direct the court of origin to issue the writ of execution. (RULES OF COURT, Rule 39.)

[19] See RULES OF COURT, Rule 39, Sec. 1.

[20] See Section 3, PD 968. Meaning of Terms. - xxx

(a) "Probation" is a disposition under which a defendant, after conviction and sentence, is released subject to conditions imposed by the court and to the supervision of a probation officer, (emphasis ours)

[21] REVISED RULES OF CRIMINAL PROCEDURE, Rule 122, Section 2.

[22] Colinares v. People, supra note 3, at 280.

[23] Mattus v. Villaseca, A.C. No. 7922, October 1, 2013, 706 SCRA 477, 484.

[24] Regala v. Sandiganbayan, First Division, G.R. Nos. 105938 & 108113, September 20, 1996, 262 SCRA 122, 140.

[25] Id.

[26] Llamado v. Court of Appeals, G.R. No. 84850, June 29, 1989, 174 SCRA 566, 577-578.

[27] Id. at 576.

[28] Id. at 574.

[29] Id. at 575.

[30] Id. at 576-577.

DISSENTING OPINION

MENDOZA, J.:

In this petition for review on certiorari, petitioner Mustapha Dimakuta y Maruhon @ Boyet (Mustapha) seeks to reverse and set aside the September 3, 2012[1] and March 13, 2013[2] Resolutions of the Court of Appeals (CA), in CA-G.R. CR No. 31963, which denied his motion that he be entitled to probation.

In the decision of the majority, the petition reversed its ruling in *Colinares v. People*[3] and denied the subject petition.

With due respect to the learned ponente of the case, I dissent.

The Antecedents:

Petitioner Mustapha was charged with the offense of Violation of Section 5(b), Article III of Republic Act (R.A.) No. 7610, otherwise known as the Special Protection of Children against Child Abuse, Exploitation and Discrimination Act, filed before the Regional Trial Court, Branch 199, Las Piñas City, (RTC) docketed therein as Criminal Case No. 05-1098, for committing a lascivious conduct upon a 16-year old complainant.

To prove its accusation, the prosecution presented private complainant AAA, Department of Social Welfare and Development Social Worker (DSWD) Arleen Bibit, and PO1 Toledo I. Mauricio, Jr., as its witnesses. The defense, on the other hand, presented Mustapha and Allan Dimakuta to substantiate its claim of his innocence. Mustapha denied the accusation and claimed that AAA merely concocted the charge against him just so that she could have a reason to leave their house where she worked as a domestic helper and be reunited with her family in the province.

On September 3, 2008, the RTC rendered its Decision,[4] finding Mustapha guilty as charged, and meted out the penalty often (10) years of prision mayor, as minimum, to seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum, with the accessory penalty of perpetual absolute disqualification. Further, Mustapha was ordered to pay a fine of P25,000.00; civil indemnity of P25,000.00; and moral damages of P25,000.00.

Not satisfied, Mustapha appealed the RTC judgment of conviction before the CA claiming that the trial court egregiously erred in declaring him guilty of violating Section 5(b), Article III of R.A. No. 7610. He faulted the trial court for giving undue faith and credence to the testimony of AAA, contending that it was laced with inconsistencies and improbabilities, tainting the veracity of her charge. He argued that even assuming that he indeed touched the breasts and vagina of AAA, still there was no concrete prosecution evidence showing that the said lascivious act was committed through force, duress, intimidation or violence and, hence, his conviction under R.A. No. 7610 was erroneous. He added that he could not be convicted of Acts of Lasciviousness under Article 336 of the Revised Penal Code (RPC) either as the prosecution failed to establish the essential elements of the said crime.

In its Appellee's Brief,[5] the Office of the Solicitor General (OSG) averred that the RTC was correct in lending weight and credence to the testimony of AAA and that the alleged inconsistencies in her testimony pertained merely on minor details and did not negate the commission of the sexual molestation. The OSG, however, was of the view that Mustapha should have been convicted of Acts of Lasciviousness only under Article 336 of the RPC and not for Violation of Section 5(b), Article III of R.A. No. 7610 because the prosecution failed to prove that the lascivious conduct was committed through coercion or intimidation.[6]

In its June 28, 2012 Decision,[7] the CA agreed with the OSG and modified the judgment of the RTC and convicted Mustapha for Acts of Lasciviousness only under Article 336 of the RPC explaining that coercion or intimidation, the second element of the crime of violation of Section 5(b), Article III of R.A. No. 7610, was wanting in Criminal Case No. 05-1098. According to the CA, the evidence on record revealed that AAA was asleep at the time the sexual abuse happened and only awoke when she felt her breasts being mashed and her vagina being touched. The CA noted that after being roused from sleep, AAA immediately put on some clothes and rushed out of her room, leaving Mustapha behind, and locked herself in the stockroom.

The CA added that there was no showing that Mustapha compelled AAA, or cowed her into silence to bear his sexual assault. Neither was there evidence that she had the time to manifest conscious lack of consent or resistance to Mustapha's assault. It stressed that the lascivious acts imputed to him had taken place while private complainant was in deep slumber or unconscious, under almost the same factual circumstances as in the case of *People v. Abello*,^[8] where the accused was found guilty beyond reasonable doubt of the crime of Acts of Lasciviousness, defined and penalized under Article 336 of the RPC instead of the charge of violation of Section 5(b), Article III of R.A. No. 7610. The CA justified its ruling that Mustapha's conviction under Article 336 of the RPC was proper for the reasons that: 1) the recital of ultimate facts and circumstances in the Information constituted acts of lasciviousness; and 2) the evidence adduced by the prosecution established beyond reasonable doubt his guilt of the said crime. The dispositive portion of the CA decision reads:

WHEREFORE, the Decision appealed from is MODIFIED. Accused-appellant Mustapha Dimakuta y Maruhom alias "Boyet" is found GUILTY of acts of lasciviousness, defined and penalized under ARTICLE 336 of the REVISED PENAL CODE, as amended and he is sentenced to the indeterminate penalty of SIX (6) MONTHS of arresto mayor, as minimum, to FOUR (4) YEARS and TWO (2) MONTHS of prision correctional, as maximum. Accused-appellant is likewise ordered to pay the private complainant TWENTY THOUSAND PESOS (P20,000.00) as civil indemnity and THIRTY THOUSAND PESOS (P30,000.00) as moral damages.

SO ORDERED.^[9]

Instead of moving for reconsideration, Mustapha filed on July 23, 2012, a manifestation with motion^[10] before the CA praying that he be allowed to apply for probation under Presidential Decree (P.D.) No. 968 upon its remand to the trial court for execution. He placed reliance on the Court's ruling in *Colinares* where the accused was allowed to apply for probation under the reduced penalty imposed on appeal. Mustapha contended that he should not be prejudiced by the erroneous judgment of the RTC which convicted him with the wrong crime and sentenced him with a penalty beyond the coverage of the Probation Law. He submitted that the Probation Law must be liberally construed in favor of the accused.

In its first assailed Resolution, dated September 3, 2012, the CA denied due course to Mustapha's manifestation with motion, holding that the *Colinares* case was not on all fours with the present case. The CA explained that in *Colinares* case, the petitioner raised as sole issue the correctness of the penalty imposed and claimed that the evidence at best warranted a conviction for a lesser offense of attempted homicide; while Mustapha never assailed the propriety of the penalty meted out against him and, in fact, questioned the findings of facts and conclusions drawn by the RTC based on the evidence adduced by the prosecution. It held that the ruling in *Lagrosa v. People*^[11] is more at point. In said case, it was held that the petitioners therein were precluded from seeking probation after taking a guiltlessness stance and put in issue the merits of their conviction on appeal. The CA, thus, adjudged as follows:

WHEREFORE, the Manifestation with Motion to Allow Accused-Appellant to Apply for Probation under Presidential Decree No. 968 is DENIED.

SO ORDERED.^[12]

Mustapha moved for reconsideration, but his motion was denied in the second assailed Resolution, dated March 13, 2013.

Hence, this petition.

GROUND

THE COURT OF APPEALS' DENIAL OF THE PETITIONER'S RIGHT TO APPLY FOR PROBATION [AS IT DID] NOT QUESTION THE PROPRIETY OF THE PENALTY UPON APPEAL, IS CONTRARY TO THE DECIDED CASE OF ARNEL COLINARES VS. PEOPLE.[13]

The threshold issue that begs an answer from this Court is whether or not Mustapha has the right to apply for probation under the new penalty imposed by the CA which is within the probationable limit.

Mustapha posits that he can still avail of the benefits of probation under P.D. No. 968, as amended by P.D. No. 1990, despite having appealed the September 3, 2008 RTC decision because the opportunity to apply for probation came into being only upon his conviction by the CA of the crime of Acts of Lasciviousness and the imposition of a lesser penalty which fell within the probationable level.

By way of Comment[14] to the petition, the OSG counters that Mustapha's right to apply for probation was lost when he perfected his appeal from the RTC judgment of conviction. It argues that the perfection of an appeal is a relinquishment of the alternative remedy of availing the Probation Law because appeal and probation are mutually exclusive remedies which rest on diametrically opposed legal positions. The OSG submits that the Colinares case is not squarely applicable in the case at bench because Mustapha never admitted guilt and did not limit the issue on the correctness of the penalty meted out by the trial court.

I am of the view that the petition is impressed with merit.

Probation is not a right of an accused but a mere privilege, an act of grace and clemency or immunity conferred by the State, which is granted to a deserving defendant who thereby escapes the extreme rigors of the penalty imposed by law for the offense of which he was convicted.[15] In recent jurisprudence, it has been clarified that while the convicted offender has no right to such privilege, nevertheless, he has the right to apply for that privilege,[16] provided that he is not disqualified from availing the benefits of probation.

To properly understand the current application of the Probation Law, a brief review of its history is but appropriate. As originally promulgated on July 24, 1976, P.D. No. 968 allowed the filing of an application for probation even if an appeal had been perfected by the convicted offender. When the law was later amended by P.D. No. 1257 on December 1, 1977, the filing of an application for probation pending appeal was still allowed and, in fact, fixed the period to the point just "before he begins to serve his sentence." With the subsequent amendment of Section 4 of P.D. No. 968 by P.D. No. 1990, however, the application for probation is no longer allowed if the accused has perfected an appeal from the judgment of conviction. Section 4 of the Probation Law now reads:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant has perfected an appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable.

The reason underlying the amendment was amply articulated in the preambulatory clauses of P.D. No. 1990, thus:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate Court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

x x x x

In *Almero v. People*,^[17] the Court stated that the Probation Law was amended "precisely to put a stop to the practice of appealing from judgments of conviction - even if the sentence is probationable - for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid." In *Sable v. People*,^[18] the Court elucidated that the requirement that an accused must not have appealed his conviction before he can avail of probation, outlaws the element of speculation on the part of the accused - to wager on the result of his appeal - that when his conviction is finally affirmed on appeal, the moment of truth well-nigh at hand, and the service of his sentence inevitable, he now applies for probation as an "escape hatch," thus, rendering nugatory the appellate court's affirmance of his conviction.

Resultantly, under Section 4 of P.D. No. 968 as amended, the accused is given the choice of appealing his sentence or applying for probation. If he appeals, he cannot later apply for probation. If he opts for probation, he cannot appeal.

Going back to the case at bench, I am of the considered view that Mustapha can apply for probation. Mustapha, just like the petitioner in the *Colinares* case, did not have a choice between appeal and probation when the trial court convicted him of a wrong offense. The trial court's erroneous conviction of Mustapha for Violation of Section 5(b), Article III of R.A. No. 7610 and the imposition of a prison term often (10) years of prision mayor, as minimum, to seventeen (17) years, four (4) months and one (1) day of reclusion temporal, as maximum, deprived him of the choice to pursue an application for probation considering that the maximum probationable imprisonment under the Probation Law was only up to six (6) years.

In the *Colinares* case, the petitioner was convicted by the trial court of Frustrated Homicide and sentenced him to suffer imprisonment from two (2) years and four (4) months of prision correccional, as minimum, to six (6) years and one (1) day of prision mayor, as maximum, but later, on appeal, this Court found him guilty only of Attempted Homicide, and sentenced him to suffer an indeterminate penalty from four (4) months of arresto mayor, as minimum, to two (2) years and four (4) months of prision correccional, as maximum. Verily, because of the stiff penalties imposed against both Mustapha and Arnel Colinares by the trial courts, they had no way of obtaining relief except by appealing their respective judgments.

In the *Colinares* case, the Court resolved that it is but fair to allow the petitioner the right to apply for probation under the reduced penalty upon remand of the case to the RTC. I see no reason why the case of Mustapha should be treated differently considering that his sentence was reduced by the CA to an indeterminate penalty of six (6) months of arresto mayor, as minimum to four (4) years and two (2) months of prision correccional, as maximum. By appealing the merits of the case, together with the conformity of the OSG, the CA found Mustapha guilty only of the crime of Acts of Lasciviousness with a penalty well within the probationable period.

It bears stressing that the evil of speculation and opportunism on the part of the accused sought to be curbed by

the amendment in P.D. No. 1990 was not present in the case at bench inasmuch as the penalty imposed by the RTC against Mustapha was not probationable at the outset. Besides, nowhere in the amendatory decree does it state or even hint that in limiting the accused to the choice of either appealing from the decision of the trial court or applying for probation, the purpose is to deny him of the right to apply for probation in cases like the one at bench where he became eligible for probation only because his sentence was reduced on appeal. To repeat, the purpose of the amendment is simply to prevent speculation or opportunism on the part of the accused who, although already eligible for probation, does not at once apply for probation, but did so only after failing in his appeal.[19]

The CA explained that in the Colinares case, the petitioner therein raised as sole issue the correctness of the penalty imposed while the OSG contends that the Colinares case is not squarely applicable to present case because Mustapha never admitted guilt and did not limit the issue on appeal to the correctness of the penalty meted out by the trial court.

These arguments are specious.

Firstly, in the Colinares case, the accused therein did not only question the correctness of the penalty, but also the merits of the case by arguing that he should be exonerated due to the presence of the justifying circumstance of self-defense. The Court did not agree with his defense but nevertheless found him guilty of a lesser offense of attempted homicide with a probationable penalty. Just like in this case, Mustapha appealed the merits of the case by questioning the appreciation of evidence of the trial court.

Secondly, it cannot be said with absolute certainty that the sole and exclusive motivation of Mustapha for lodging the appeal was his desire to be acquitted. Proof of this is that after Mustapha was found guilty by the CA of acts of lasciviousness and sentenced to a lesser penalty which thereby qualified him for probation, he did not appeal further although he could have done so. What he did, instead, was to accept the new sentence and seek a declaration from the CA that he is entitled to apply for probation upon remand of the case to the RTC for execution. This shows that he is willing to accept the conviction of crime, albeit for a lower penalty.

Thirdly, regardless of the whether an accused appealed the merits of the case or simply the correctness of the penalty imposed, the Court should not distinguish insofar as the application of the Probation Law is concerned. The Court cannot expect Mustapha to forgo the remedy of appeal and admit guilt over a crime he did not commit due to an erroneous appreciation of the merits of the case. He should not accept the erroneous judgment of the RTC for, in truth, he only committed Acts of Lasciviousness with a maximum penalty of four (4) years and two (2) months. Mustapha should not be made to suffer through the forfeiture of the right to apply for probation simply because the RTC had blundered. In the Colinares case, it was written:

The Probation Law never intended to deny an accused his right to probation through no fault of his. The underlying philosophy of probation is one of liberality towards the accused. Such philosophy is not served by a harsh and stringent interpretation of the statutory provisions. As Justice Vicente V. Mendoza said in his dissent in Francisco, the Probation Law must not be regarded as a mere privilege to be given to the accused only where it clearly appears he comes within its letter; to do so would be to disregard the teaching in many cases that the Probation Law should be applied in favor of the accused not because it is a criminal law but to achieve its beneficent purpose.

There are views that Mustapha should not be allowed to apply for probation anchored on the following grounds:

- 1] the Colinares case should not be made to apply to this case because it is not yet an established doctrine and the pronouncements therein were not supported by the text of the Probation Law; and
- 2] even if the ratiocination in the Colinares case is sound, still, it finds no application in the case at bench

inasmuch as the CA erred in modifying the judgment of the RTC.

I disagree.

Adherence to the Colinares case is dictated by this Court's policy of securing and maintaining certainty and stability of judicial decisions in accordance with the legal maxim *stare decisis et non quieta movere* (or simply, *stare decisis* which means "follow past precedents and do not disturb what has been settled"). The principle, entrenched under Article 8[20] of the Civil Code, evokes the general rule that, for the sake of certainty, a conclusion reached in one case should be doctrinally applied to those that follow if the facts are substantially the same, even though the parties may be different.[21] Otherwise stated, once a point of law has been established by the Court, that point of law will, generally, be followed by the same court and by all courts of lower rank in subsequent cases where the same legal issue is raised.

Stare decisis proceeds from the first principle of justice that, absent powerful countervailing considerations, like cases ought to be decided alike.[22] Hence, where, as in this case, the same question relating to the same event have been put forward by parties similarly situated as in a previous case litigated and decided by a competent court, the rule of *stare decisis* is a bar to any attempt to relitigate the same issue.[23] Significantly, the respondent has not shown any strong and compelling reason to persuade the Court that the manner of disposition in *Colinares v. People* pertaining to the matter of probation should not be observed and adopted in the case at bench.

Anent the second ground, suffice it to state that the June 28, 2012 Decision of the CA convicting Mustapha for Acts of Lasciviousness became final and executory only upon the failure of either party to question the decision. On the other hand, after Mustapha received a copy of the aforesaid decision on July 6, 2012, he did not further appeal the same to this Court. Instead, he filed before the CA on July 23, 2012, a manifestation with motion to allow him to apply for probation upon remand of the case to the trial court for execution. To review the correctness of the final and executory June 28, 2012 Decision of the CA at this point is no longer permissible in the light of the constitutional interdict against double jeopardy.

Not surprisingly, the OSG did not question the decision anymore as it conformed to its own recommendation that the petitioner should be found guilty of Acts of Lasciviousness only.[24]

Let it be underscored that the primordial consideration of this Court in allowing the petitioner in the *Colinares* case to apply for probation was one of fairness. Here, considering that the sentence of the RTC against Mustapha was modified by the CA to a probationable range upon recommendation of the OSG, and that he is not one of those disqualified offenders under Section 9 of P.D. No. 968 as amended, he should not be denied his right to apply for probation in the spirit of fairness. To rule otherwise would send Mustapha straight to jail and, thus, robbing him of the chance to undergo reformation and rehabilitation as a penitent offender, defeating the avowed purpose and objective of the Probation Law.

IN VIEW OF ALL THE FOREGOING, I recommend that the petition be GRANTED; that the assailed September 3, 2012 and March 13, 2013 Resolutions of the Court of Appeals (CA) in CA-G.R. CR No. 31963 be REVERSED and SET ASIDE; and that petitioner Mustapha Dimakuta y Maruhon @ Boyet be declared as entitled to apply for probation within fifteen (15) days from notice that the record of the case has been remanded for execution to the Regional Trial Court of Las Pinas City, Branch 199, in Criminal Case No. 05-1098.

[1] Penned by Associate Justice Myrna V. Garcia-Fernandez with Associate Justice Vicente S.E. Veloso and Associate Justice Stephen C. Cruz, concurring; rollo, pp. 26-29.

[2] *Id.* at 31.

[3] 678 Phil. 482 (2011).

[4] Penned by Judge Joselito Vibandor; rollo, pp. 33-43.

[5] Id. at 77-1114.

[6] Id. at 102-107.

[7] Penned by Associate Justice Myra V. Garcia-Fernandez with Associate Vicente S.E. Veloso and Stephen C. Cruz, concurring; id. at 117-130.

[8] 601 Phil. 373 (2009).

[9] Rollo, pp. 129-130.

[10] Id. at 132-142.

[11] 453 Phil. 270 (2003).

[12] Rollo, p. 29.

[13] Id. at 14.

[14] Id. at 169-182.

[15] *Moreno v. Commission on Elections*, 530 Phil. 279, 290 (2006).

[16] *Colinares v. People*, supra note 3, at 497.

[17] G.R. No. 188191, March 12, 2014.

[18] 602 Phil. 989, 997 (2009).

[19] *Francisco v. Court of Appeals*, 313 Phil. 241, 264 (1995).

[20] Article 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines.

[21] *Belgica v. Ochoa, Jr.*, G.R. No. 208566, November 19, 2013, 710 SCRA 1, 101-102.

[22] *Ayala Corporation v. Rosa-Diana Realty and Development Corporation*, 400 Phil. 511, 521 (2000).

[23] *Chinese Young Men's Christian Association of the Philippine Islands v. Remington Steel Corporation*, 573 Phil. 320, 337 (2008).

[24] Rollo, p. 102.

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