

## CHRISTIAN CADAJAS Y CABIAS, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

*G.R. No. 247348. November 16, 2021*

Ponente: LOPEZ, J., J.

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### LOPEZ, J., J.:

Before this Court is a Petition for Review on Certiorari[1] under Rule 45 of the Revised Rules of Court assailing the Decision[2] dated September 17, 2018 and Resolution[3] dated May 9, 2019 rendered by the Court of Appeals (CA) in CA-G.R. CR No. 40298, which affirmed with modification the August 7, 2017 Joint Decision[4] of the Regional Trial Court of Valenzuela City, Branch 270 (RTC) in Criminal Case Nos. 215-V-17 and 216-V-17, finding Christian Cadajas y Carias (petitioner) guilty of violating Section 4(c)(2) of Republic Act (R.A.) No. 10175, in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775.

#### The Antecedents

Petitioner, who was then 24 years old, met the victim, AAA,[5] who was only 14 years old, in the canteen where he works. Their relationship started when the younger sibling of AAA told petitioner that AAA had a crush on him. Petitioner tried to evade AAA, but the latter started to stalk him. Later, AAA sent petitioner a request in his Facebook Messenger, which he accepted. The petitioner and AAA would then exchange messages on Facebook Messenger and after some time, petitioner courted AAA for two weeks, until they became sweethearts on April 2, 2016.[6]

Sometime in June 2016, BBB, the mother of AAA, learned of their relationship.[7] She discovered the relationship because AAA would borrow her cellphone to access the latter's Facebook account.[8] Her mother was thus able to read their messages whenever AAA would forget to log out her account. BBB disapproved of their relationship because AAA was still too young.[9] However, petitioner and AAA ignored her admonishment.

Sometime in October 2016, BBB was disheartened when she read that petitioner was sexually luring her daughter to meet with him in a motel. She confronted petitioner and told him to stay away because AAA was still a minor.[10]

At around 5:30 in the morning of November 18, 2016, BBB was shocked when she read the conversation between petitioner and AAA. She found that petitioner was coaxing her daughter to send him photos of the latter's breast and vagina. AAA relented and sent petitioner the photos he was asking. When AAA learned that her mother read their conversation, she rushed to a computer shop to delete her messages. BBB, however, was able to force her to open petitioner's Facebook messenger account to get a copy of their conversation.[11]

On the part of the petitioner, he admitted sending AAA the messages "oo ready ako sa ganyan" and "sige hubad." He, however, denied having sent AAA, photos of his private part. On November 17, 2016, AAA asked petitioner to delete their messages from his account. He even told her "bakit kasi hindi ka pa nagtitino, hayan tuloy nakita ng mama mo." On the same day, petitioner broke up with AAA because her mother did not like him.[12]

Petitioner later learned from his co-workers that two (2) criminal cases were filed against him.[13] He was charged for violation of Section 10(a) of R.A. No. 7610 and for child pornography as defined and penalized under Section 4(c)(2) of R.A. No. 10175 in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775. The two (2) informations that were filed against petitioner on December 27, 2016, read as follows:

Criminal Case No. 215-V-17

The undersigned Associate Prosecutor Attorney II accuses CHRISTIAN CADAJAS of "Violation of Section 10(a) of R.A. No. 7610" committed as follows:

That on or about November 16, 2016 in Valenzuela City and within the jurisdiction of the Honorable Court, the above-named accused, acting with lewd design, and abuse of minority, did, then and there, willfully, unlawfully and feloniously coerced. [AAA] (DOB: February 10, 2002) (POB: Valenzuela City), 14 years old, a minor, to send pictures of her breasts and vagina through Facebook Messenger, which circumstances debased, degraded and demeaned the intrinsic worth and dignity of the child as a human being, thereby endangering her youth, normal growth and development.

CONTRARY TO LAW.[14]

Criminal Case No. 216-V-17

The undersigned Associate Prosecution Attorney II accuses CHRISTIAN CADAJAS of Child Pornography Under Section 4(c)(2) of R.A. No. 10175 (Cybercrime Prevention of 2012, in Relation to Sections 4(a) and 3(b) and (c)(5) of R.A. No. 9775", committed as follows:

That on or about November 16, 2016 in Valenzuela City and within the jurisdiction of the Honorable Court, the accused, the above-named accused, acting with lewd design, did, then and there, willfully, unlawfully and feloniously coerced, induced [AAA], (DOB: February 10, 2002) (POB: Valenzuela City), 14 years old, to send him pictures of her vagina and breasts, through Facebook Messenger using a mobile phone.

CONTRARY TO LAW.[15]

Petitioner entered a plea of not guilty to both charges during arraignment.[16]

After trial, the RTC acquitted petitioner of the charge for violation of Section 10(a) of R.A. No. 7610, but found him guilty beyond reasonable doubt for violation of Section 4(c)(2) of R.A. No. 10175 in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775. As such, petitioner was sentenced to reclusion temporal and to pay a fine of P1,000,000.00.[17]

According to the RTC, petitioner was aware that AAA was still a minor when he obstinately prodded the latter to send him photos of her private parts. This is an explicit sexual activity, a lascivious conduct, which the minor victim, AAA, could not have done were it not for the persistent inducement of the petitioner.[18] Moreover, petitioner's violation of R.A. No. 9775 is a malum prohibitum.[19] As such, his claim that he was in a relationship with AAA finds no relevance.

On the other hand, the RTC dismissed the charge against petitioner for violation of Section 10(a) of R.A. No. 7610 holding that AAA is a city lass who was no longer innocent of the ways of the world. She herself attested that she was not affected by what happened. As such, the RTC ruled that the protective mantle of R.A. No. 7610 is wanting.[20] Thus, the RTC disposed the case as follows:

WHEREFORE, in the light of the foregoing, judgment is hereby rendered as follows:

In Criminal Case No. 215-V-17, finding accused CHRISTIAN CADAJAS y CABIAS NOT GUILTY and is hereby acquitted. The prosecution failed to prove beyond cavil of doubt all the elements of the offense as

charged.

In Criminal Case No. 216-V-17, finding accused CHRISTIAN CADAJAS y CABIAS GUILTY of violation of Sections 4(a) and 3(b) and (c)(5) of RA 9775 and he is hereby sentenced to suffer the penalty of reclusion temporal and to pay a FINE of One Million Pesos.

SO ORDERED.[21]

On appeal, the CA affirmed the RTC's judgment. The CA held that the minority of AAA was both established and was even admitted by the petitioner.[22] Furthermore, petitioner's conversation with AAA showed that he induced her to send him photos of her private parts.[23] These facts clearly evince that petitioner committed child pornography as defined and penalized under Section 4(c)(2) of R.A. No. 10175, in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775. The CA did not give credence to the sweetheart defense that was raised by petitioner as the violation committed by petitioner was a *malum prohibitum*. [24] As regards the penalty, the CA modified the same and sentenced petitioner to suffer the penalty of imprisonment for 14 years, eight months and one day, as minimum, to 18 years and three months, as maximum. The fine imposed was retained as it was within the range prescribed by law.[25] Thus, the CA disposed as follows:

WHEREFORE, in view of the foregoing, the appeal is hereby DISMISSED for lack of merit. The Joint Decision dated August 7, 2017 issued by the Regional Trial Court of Valenzuela City, Branch 270 in Criminal Case No. 216-V-17 finding Christian Cadajas y Cabias guilty beyond reasonable doubt of violation of Section 4(a) and 3(b) and (c)(5) of Republic Act 9775 is AFFIRMED with MODIFICATION in that appellant is sentenced to an indeterminate penalty of 14 years, 8 months and 1 day, as minimum, to 18 years and 3 months, as maximum.

SO ORDERED.[26]

Petitioner filed a Motion for Reconsideration, which the CA denied in its Resolution[27] dated May 9, 2019.

Undeterred, petitioner filed the instant Petition[28] before this Court.

#### Issues

##### I.

Whether the CA gravely erred in not finding that the evidence presented by the prosecution are inadmissible for violating petitioner's right to privacy.

##### II.

Whether the CA gravely erred in convicting petitioner of violation of Section 4(c)(2) of R.A. No. 10175 in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775 despite the fact that the alleged act complained of does not constitute an offense penalized under the said statute.

##### III.

Whether the CA gravely erred in the interpretation of the unlawful and punishable acts under Section 4(c)(2) of R.A. No. 10175 in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775.

##### IV.

Whether the CA gravely erred in convicting petitioner of violation of Section 4(c)(2) of R.A. No. 10175 in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775 despite the failure of the prosecution to prove his guilt beyond reasonable doubt.

#### Our Ruling

Upon a careful review of the records of this case, the Court finds the petition to be without merit.

On petitioner's right to privacy

One of the arguments raised by petitioner before this Court concerns the admissibility of the evidence presented by the prosecution, which was taken from his Facebook messenger account. He claims that the photos presented in evidence during the trial of the case were taken from his Facebook messenger account. According to him, this amounted to a violation of his right to privacy, and therefore, any evidence obtained in violation thereof amounts to a fruit of the poisonous tree.

We disagree.

The right to privacy is defined as "the right to be free from unwarranted exploitation of one's person or from intrusion into one's private activities in such a way as to cause humiliation to a person's ordinary sensibilities." It is the right of an individual "to be free from unwarranted publicity, or to live without unwarranted interference by the public in matters in which the public is not necessarily concerned." Simply put, the right to privacy is "the right to be let alone."<sup>[29]</sup> In his Separate Concurring Opinion, Associate Justice Marvic Mario Victor F. Leonen expounded on the concept of privacy, as it has developed throughout the digital age, thus:

Chief Justice Puno sparked judicial interest in the right to privacy. In his speech that I cited in my separate opinion in *Versosa v. People*,<sup>[30]</sup> he discussed the three strands of privacy in American Jurisprudence, namely, locational or situational privacy, informational privacy, and decisional privacy.

Locational privacy, also known as situational privacy, pertains to privacy that is felt in a physical space. It may be violated through an act of trespass or through an unlawful search. Meanwhile, informational privacy refers to one's right to control "the processing—i.e., acquisition, disclosure and use—of personal information."

Decisional privacy, regarded as the most controversial among the three, refers to one's right "to make certain kinds of fundamental choices with respect to their personal and reproductive autonomy."<sup>[31]</sup>

This speech has been influential in several of our jurisprudence.<sup>[32]</sup> To this day, we are still refining our concept of privacy, particularly the right to informational privacy.<sup>[33]</sup>

As early as *Morfe v. Mutuc*,<sup>[34]</sup> we have recognized the increasing importance of the protection of the right to privacy in the digital age. Such right is of particular importance given the nature of the internet and our inescapable dependence on it despite the possible disruption that it can bring. In my separate opinion in *Disini v. Secretary of Justice*,<sup>[35]</sup> I explained:

The internet or cyberspace is a complex phenomenon. It has pervasive effects and are, by now, ubiquitous in many communities. Its possibilities for reordering human relationships are limited only by the state of its constantly evolving technologies and the designs of various user interfaces. The internet contains exciting potentials as well as pernicious dangers.

The essential framework for governance of the parts of cyberspace that have reasonable connections with our territory and our people should find definite references in our Constitution. However, effective governance of cyberspace requires cooperation and harmonization with other approaches in other jurisdictions. Certainly, its scope and continuous evolution require that we calibrate our constitutional doctrines carefully: in concrete steps and with full and deeper understanding of incidents that involve various parts of this phenomenon. The internet is neither just one relationship nor is it a single technology. It is an interrelationship of many technologies and cultures.

....

While the Internet has engendered innovation and growth, it has also engendered new types of disruption. A

noted expert employs an "evolutionary metaphor" as he asserts:

[Generative technologies] encourage mutations, branchings away from the status quo — some that are curious dead ends, others that spread like wildfire. They invite disruption —along with the good things and bad things that can come with such disruption.

Addressing the implications of disruption, he adds:

Disruption benefits some while others lose, and the power of the generative Internet, available to anyone with a modicum of knowledge and a broadband connection, can be turned to network-destroying ends ... [T]he Internet's very generativity — combined with that of the PCs attached —sows the seeds for a "digital Pearl Harbor."

The Internet is an infrastructure that allows for a "network of networks." It is also a means for several purposes. As with all other "means enhancing capabilities of human interaction," it can be used to facilitate benefits as well as nefarious ends. The Internet can be a means for criminal activity.

Parallel to the unprecedented escalation of the use of the Internet and its various technologies is also an escalation in what has been termed as cybercrimes.[36]

Privacy scholars explain that the right to informational privacy, to a certain extent, requires "limitation on inspection, observation, and knowledge by others." [37] Thus, it has the following aspects: (1) to keep inalienable information to themselves; (2) to prevent first disclosure; and (3) to prevent further dissemination in case the information has already been disclosed. More recently, the European Union has paved the way for the fourth aspect —the right to be forgotten, or the right to prevent the storage of data.

As regards the first component of the right to informational privacy, a person has the right not to be exposed on the internet in matters involving one's private life, such as acts having no relation to public interest or concern. Closely related to the first component is the right to prevent first disclosure, allowing individuals to regulate the extent, time, and manner of disclosure, if at all, of their information. In case the data have been illegally disclosed, a person does not lose protection since they have the right to prevent their further dissemination. In some cases, one has the right to prevent the storage of their data, which gives one the right to be forgotten. Privacy scholars describe this right as "forced omission," or the process of making the information difficult to find on the internet.[38]

Under the 1987 Constitution, the right to privacy is expressly recognized under Article III, Sec. 3 thereof, which reads:

SECTION 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

While the above provision highlights the importance of the right to privacy and its consequent effect on the rules on admissibility of evidence, one must not lose sight of the fact that the Bill of Rights was intended to protect private individuals against government intrusions. Hence, its provisions are not applicable between and amongst private individuals. As explained in *People v. Marti*: [39]

That the Bill of Rights embodied in the Constitution is not meant to be invoked against acts of private individuals finds support in the deliberations of the Constitutional Commission. True, the liberties guaranteed by the fundamental law of the land must always be subject to protection. But protection against whom? Commissioner Bernas in his sponsorship speech in the Bill of Rights answers the query which he himself

posed, as follows:

First, the general reflections. The protection of fundamental liberties in the essence of constitutional democracy. Protection against whom? Protection against the state. The Bill of Rights governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the Bill of Rights does is to declare some forbidden zones in the private sphere inaccessible to any power holder. (Sponsorship Speech of Commissioner Bernas, Record of the Constitutional Commission, Vol. 1, p. 674; July 17, 1986; Emphasis supplied)[40]

While the case of *Zulueta v. Court of Appeals*[41] (*Zulueta*) may appear to carve out an exception to the abovementioned rule by recognizing the rule on inadmissibility of evidence between spouses when one obtains evidence in violation of his/her spouse's right to privacy, such a pronouncement is a mere obiter dictum that cannot be considered as a binding precedent. This is because the petition brought to the Court in *Zulueta* simply asked for the return of the documents seized by the wife and thus, pertained to the ownership of the documents therein. Moreover, documents were declared inadmissible because of the injunction order issued by the trial court and not on account of Art. III, Sec. 3 of the Constitution. At any rate, violation of the right to privacy between individuals is properly governed by the provisions of the Civil Code, the Data Privacy Act (DPA),[42] and other pertinent laws, while its admissibility shall be governed by the rules on relevance, materiality, authentication of documents, and the exclusionary rules under the Rules on Evidence.

In this case, the photographs and conversations in the Facebook Messenger account that were obtained and used as evidence against petitioner, which he considers as fruit of the poisonous tree, were not obtained through the efforts of the police officers or any agent of the State. Rather, these were obtained by a private individual. Indeed, the rule governing the admissibility of an evidence under Article III of the Constitution must affect only those pieces of evidence obtained by the State through its agents. It is these individuals who can flex government muscles and use government resources for a possible abuse. However, where private individuals are involved, for which their relationship is governed by the New Civil Code, the admissibility of an evidence cannot be determined by the provisions of the Bill of Rights.

Here, the pieces of evidence presented by the prosecution were properly authenticated when AAA identified them in open court. As further pointed out by Associate Justice Rodil V. Zalameda during the deliberations of this case, the DPA allows the processing of data and sensitive personal information where it relates to the determination of criminal liability of a data subject,[43] such as a violation of R.A. No. 10175 in relation to R.A. No. 9775 and when necessary for the protection of lawful rights and interests of persons in court proceedings,[44] as in this case where the communications and photos sought to be excluded were submitted in evidence to establish AAA's legal claims before the prosecutor's office and the courts.

Be that as it may, the act of AAA cannot be said to have violated petitioner's right to privacy. The test in ascertaining whether there is a violation of the right to privacy has been explained in the case of *Spouses Hing v. Choachuy, Sr.*[45] as follows:

In ascertaining whether there is a violation of the right to privacy, courts use the "reasonable expectation of privacy" test. This test determines whether a person has a reasonable expectation of privacy and whether the expectation has been violated. In *Ople v. Torres*, we enunciated that "the reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether, by his conduct, the individual has exhibited an expectation of privacy; and (2) this expectation is one that society recognizes as reasonable." Customs, community norms, and practices may, therefore, limit or extend an individual's "reasonable expectation of privacy." Hence, the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis since it depends on the factual circumstances surrounding the case.[46]

Here, petitioner's expectation of privacy emanates from the fact that his Facebook Messenger account is password

protected, such that no one can access the same except himself. Petitioner never asserted that his Facebook Messenger account was hacked or the photos were taken from his account through unauthorized means. Rather, the photos were obtained from his account because AAA, to whom he gave his password, had access to it. Considering that he voluntarily gave his password to AAA, he, in effect, has authorized AAA to access the same. He did not even take steps to exclude AAA from gaining access to his account. Having been given authority to access his Facebook Messenger account, petitioner's reasonable expectation of privacy, in so far as AAA is concerned, had been limited. Thus, there is no violation of privacy to speak of.

While the messages and photos were taken from the Facebook Messenger of petitioner because AAA was forced by BBB to do so, such does not deviate from the fact that petitioner allowed another person to access his account. When he gave his Facebook Messenger password to AAA, he made its contents available to AAA, and the latter would then have the latitude to show to other persons what she could access, whether she be forced to do so or not. The availability of accessing these photos limited the scope of his right to privacy, especially that these became essential in pursuing AAA's claims to protect her rights.

In any case, it bears pointing out that petitioner failed to raise his objection to the admissibility of the photos during the proceedings in the RTC. Basic is the rule that in order to exclude evidence, the objection to admissibility of evidence must be made at the proper time, and the grounds therefore be specified. Objection to evidence must be made at the time it is formally offered. In case of documentary evidence, offer is made after all the witnesses of the party making the offer have testified, specifying the purpose for which the evidence is being offered. It is only at this time, and not at any other, that objection to the documentary evidence may be made. When a party failed to interpose a timely objection to evidence at the time they were offered in evidence, such objection shall be considered as waived. This is true even if by its nature the evidence is inadmissible and would have surely been rejected if it had been challenged at the proper time.[47]

As a complimentary principle, it is well-settled that no question will be entertained on appeal unless it has been raised in the proceedings below. Points of law, theories, issues and arguments not brought to the attention of the lower court, administrative agency or quasi-judicial body, need not be considered by a reviewing court, as they cannot be raised for the first time at that late stage. Basic considerations of fairness and due process impel this rule. Any issue raised for the first time on appeal is barred by estoppel.[48]

By failing to timely raise his objection to the admissibility of the photos, petitioner is deemed to have already waived the same. Thus, the photos taken from his Facebook Messenger account are admissible in evidence.

On petitioner's liability

Petitioner was charged for violating Section 4(c)(2) of R.A. No. 10175[49] in relation to Sections 4(a) and 3(b) and (c)(5) of R.A. No. 9775,[50] which reads as follows:

x x x x

Section 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act: x x x

(c) Content-related Offenses: x x x

(2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

x x x x

Section 4. Unlawful or Prohibited Acts. - It shall be unlawful for any person:

(a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography

### Section 3. Definition of Terms. - x x x

(b) "Child pornography" refers to any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of child engaged or involved in real or simulated explicit sexual activities.

(c) "Explicit Sexual Activity" includes actual or simulated - x x x

(5) lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus.[51]

x x x x

From the foregoing, one can be convicted for committing child pornography upon proof of the following: (1) victim is a child; (2) victim was induced or coerced to perform in the creation or production of any form of child pornography; and (3) child pornography was performed through visual, audio or written combination thereof by electronic, mechanical, digital, optical, magnetic or any other means. This Court finds that the prosecution was able to prove these facts by proof beyond reasonable doubt.

Section 3(a) of R.A. No. 9775 defines a child to be as follows:

(a) "Child" refers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

For the purpose of this Act, a child shall also refer to:

(1) a person regardless of age who is presented, depicted or portrayed as a child as defined herein; and

(2) computer-generated, digitally or manually crafted images or graphics of a person who is represented or who is made to appear to be a child as defined herein.

The members of the Technical Working Group for the Pre-Bicameral Conference Committee on the Disagreeing Provisions of House Bill No. 6440 and Senate Bill No. 2317 (Anti-Child Pornography Act of 2009) explained the intent in defining "child" under the statute as follows:

MS. GIRONELLA. Sir, in addition to that, I would just like to quote what Senator Defensor-Santiago said on the floor because she fully agreed with the expanded definition as seen in the House version, numbers (1) and (2). She said that she fully agrees to the extended definition of the term "child" so that adult website that display explicit images of legal-aged models in pigtailed with the balloon or lollipop while surrounded by stuffed animals could be prosecuted under the measure. While the law seeks to protect children, the extended definition punishes the depravity of the viewer. So, what we are after here talaga is the perpetrator. We don't care what age the child or the person is. What we're trying to penalize, what we're trying to prohibit is the pedophile from gravitating towards that kind of material.

Yes, Mr. Del Prado.

MR. DEL PRADO. We support that view. That's why it is specific here a person regardless of age. It is the representation that is deemed reprehensible and I think the public policy expression here is really to prohibit promoting the child as a sexual object and, therefore, it covers both the adult and children being subject of sexually explicit activity.[52]

Here, it was uncontroverted that AAA was only 14 years old at the time of the incident. This was established from the copy of her Certificate of Live Birth[53] that was presented in evidence. Moreover, petitioner was aware of this fact. It was undisputed that BBB confronted petitioner and told him to stay away because her daughter was

still a minor.

It is likewise clear from the records of this case that petitioner induced AAA to send him photos of her private parts through Facebook Messenger. This is evident from their conversation, which the CA quoted as follows:

AAA (K): Hahaha gusto ko siya pagtripan e di mo kasi ako pinagtritripan (sic) e.

Cadajas (C): Gsto (sic) muh (sic) pagtrepan (sic) kita ngayon

K:

Oo

Ready ako sa ganyan

C:

Sge (sic) hubad

K:

Nakahubad na hahaha

C:

Tangalin (sic) uh (sic) panti (sic) muh (sic) haha

K:

Baliw hubad na lahat

C:

Picturan uh (sic) pasa muh (sic) xkin (sic) bi

K:

Lah gagi bi wag

Ayoko

C:

Uh ayaw muh (sic) pala sa mga treep (sic) KO (sic) ei (sic)

x x x

C:

Tayo lang naman makakakita ie (sic)

K:

Hahahaha baka pagkalat mo

Dede lang

C:

Ako din bi PSA (sic) mna (sic)

HahAt (sic) bi

K:

Magpasa ka din hahaha

Lah (sic) bat lahat

x x x

C:

Hahaha hnde (sic) aman (sic) bi

Lahat bi gusto ko

Uo nga nkKaumay (sic) bi nslibugan (sic) ako

K:

Gagi ayoko nga yung pepe

x x x

C:

Buka muh (sic) nga kunti (sic) bi kunti (sic) lang tutok muh (sic)

Hah (sic)

K:

Ayoko na.

Haha Christian haha OK nay an

C:

She (sic) nah (sic) gsto (sic) KO (sic) mkita (sic) bi[54]

x x x

It is evident from the above-quoted conversation that petitioner induced AAA to engage in the lascivious exhibition of her breasts and vagina through Facebook Messenger. Notably, it was petitioner who was the one giving specific orders to AAA. He even asked AAA to send to him nude photos of her and for the latter to further spread her legs near the camera, so that petitioner can see her vagina. In her testimony, AAA further explained that it was because of the continuous prodding of petitioner, that forced her to send her nude photos to the latter, thus:

Q:

What about those pictures? Can you tell us about those pictures that you are referring to?

A:

Because he instructed me to send a picture to him of my breast and vagina, so I send him pictures, Sir.

Q:

Okay, you send pictures of your breast and you [sic] vagina. What did you use in order to send him those

pictures?

A:

Cell phone, Sir.

Q:

How did the accused convince you to do that?

A:

He said magsend daw po ako ng picture.

Q:

Was there a promise?

A:

None, Sir.

Q:

Just the accused merely telling you or commanding you to produce or take pictures of your private parts?

A:

Yes, Sir.

Q:

Why did you allow yourself to do that?

A:

Napilitan lang po akong magsend ng ganun.

xx x xx x xxx

Q:

Paanong napilitan kung hindi ka pinuwersa or hindi ka tinakot? Paano mo nasabing napilitan lang? Alam mong mali iyon at hindi naman pinapayagan na ganun, bakit mo sinend parin kung hindi ka naman niya pinilit o tinakot? Ano talaga ang nagtulak sayong magsend ng ganun? Ano ba ang pumasok sa isip mo, pumasok sa katawan mo nung ginawa mo iyon? Just be candid.

A:

Hindi ko po alam.

Q:

Hindi mo alam kasi?

A:

Naaano lang po ako sa sinabi niya, sa message po niya sakín na puro please magsend kana sige na puro ganun po.

Q:

Sa pagkukumbinsi niya? Panay ang please?

A:

Hindi po niya ako tinigilan nun e.

Q:

Hindi siya tumitigil?

A:

Hindi po.[55]

Further, while the conversation in the Facebook Messenger appears to show that AAA was already undressed while she was conversing with petitioner, it should be pointed out that they were merely exchanging messages on a mobile application. It is probable that AAA was merely bluffing to maintain petitioner's interest. In her testimony, AAA explained that she was not even serious when she sent some of her messages, thus:

Q:

In fact, there is in this statement that you even type these words kuya nalilibugan ako hahaha is it true that? Did you type this?

A:

Yes Sir, I typed that but that is not true, it is just a trip lang sa kanya.

Q:

In that trip, in line with it is a four (4) smiley crying while laughing, smiley with tears meaning you are laughing?

Court:

You are just joking ganun ba?

Witness:

Yes, your Honor.[56]

Likewise, when AAA said "Nakahubad na," the same cannot be said to be voluntary on her part as it was preceded by an order from petitioner to take her clothes off. Thus, it was clear from the wordings of the messages that petitioner induced AAA to send him photos of her private parts. Without petitioner's inducement, she would not have been compelled to actually undress and send petitioner, photos of her private parts.

Thus, contrary to petitioner's contention, his act of inducing AAA to send photos of her breasts and vagina constitutes child pornography and explicit sexual activity under Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775. While there was no showing that petitioner intended to sell AAA's photos to other people, this did not exonerate him from liability under the said provision. During the Pre-Bicameral Conference Committee meeting that led to the enactment of R.A. No. 9775 the members of the Technical Working Group made a distinction between the act of merely possessing child pornography materials from the act of making a profit out of it, to wit:

MR. DESCALLAR. Madam Chair, I think x x x kasi doon sa House version amy (sic) distinction between producer, distributor x x x

(MS. THELMA M. RETUBA TOOK OVER)

MR. DESCALLAR. (Continuing) x x x distributor and user, client. So, pag ni-level natin siya on the same level, the producer, distributor can say "I'm just a client. I just possess with no intention to sell." So, I think, we should differentiate mere possession and with the other x x x with the intention to distribute or benefit, profit from pornography.

COMMITTEE SECRETARY MANALIGOD. Madam Chair, may I just explain because this was a specific amendment of Senator Santiago. In the deliberations on the floor she stated that on Section 4(d), Senator Santiago noted that the possession of child pornography was not qualified by the adverb "knowingly". She explained that knowledge of child pornography does not attach to possession but only to access. Therefore, she believed that mere possession of child pornography is punishable and not subject to the defense that the possessor was not aware of the materials in his or her possession.

MR. DESCALLAR. Papaano 'yun? Saan?

MR. GIRONELLA. Earlier Madam Chair, I think there was a proposal to include the word "knowingly" before the word "possess". So, it would be "to knowingly possess" or "knowingly access". Chair Madrigal supports the position of Senator Defensor-Santiago that knowing possession of a pornographic material cannot be made a defense by the perpetrator. So, for us, the fact that he or she possesses a child pornography material is subject to the penalties of this law.

And on the second point, on the point raised by Mr. Descallar, I think we also should separate a provision from the possessor's point of view as opposed to that producer's point of view. So, we cannot include reproduce.

MR. DESCALLAR. With or without the intent to publish.

MS. GIRONELLA. For the possessor.

MR. DESCALLAR. Yes. Oo. Kasi in the House version, letter (f)...

MR. MARALIT. Ihiwalay na lang natin.

COMMITTEE SECRETARY GUEVARRA. Letter (f).

MR. DESCALLAR. x x x In the house version, "to knowingly possess, download, purchase, blah blah x x x "so, it's mere possession, separate x x x distinct from producing, distributing, selling or profiting from child pornography.

MS. GIRONELLA. So, Sir, I think, what we can do...

MR. MARALIT. Yeah, mere possession.

MS. GIRONELLA. x x x it would be x x x so, let's adopt x x x the proposal is to adopt section (d) of the Senate version with the following amendments: "To possess or knowingly access, download, purchase x x x or purchase with reasonable knowledge, any form of child pornography with or without the intent to publish, sell, distribute and broadcast;"

MR. DESCALLAR. I think we delete "or without". So, it will be "with the intent to publish" and you provide another provision for possession as, like for example in letter (f) of the House version which is mere possession. Letter (d) of the House is for possession, downloading, or distribution." So, separate x x x ano siya, separate siya, 'yung intent to publish or to distribute.

MS. GIRONELLA. Sir, can you please word the provision you're proposing.

COMMITTEE SECRETARY GUEVARRA. Okay. May we recognize Atty. Del Prado first.

MR. DEL PRADO. Na-discuss din po naming ito doon sa x x x first, we support x x x including the word "knowingly" before "possess". Iyong discussions po ditto, halimbawa po may nagpadala sa inyo ng e-mail with an attachment of child pornography na kung hindi natsi-check ng e-mail, it's been there for several months, hindi pa rin po 'yun dapat "knowing possession". So, pero kapag binuksan mo 'yan na x x x na-access mon a, alam mo na and then you keep it, so 'yun po 'yung sinasabi na "knowing possession".

And then doon naman po sa point of "with intent to sell, distribute," ang concern po ng law enforcement agents you are x x x we are adding another x x x the burden again of proving this intent kasi 'yung sinasabi nila we can x x x some jurisdictions, some countries do provide for the x x x parang sa drugs po iyong how many kilobytes. Pero sinasabi rin po naming, mahirap din pong mag term kasi po pagka ano 'yung personal and ano 'yung with intent to distribute. So, we really x x x it's either you possess and we punish that or you distribute and we punish that. Kasi kung hindi naman natin ma-prove 'yung kanyang distribution, then mayroon pa tayong fallback doon sa possession. So, ganoon na lang x x x 'yun po ang irerekomenda natin para hindi po additional burden 'yung to establish the intent.

COMMITTEE SECRETARY GUEVARRA. I think the reason why separate the two (2) to distinguish possession with the intent to sell and mere possession for personal use, mas grave ang penalty, 'no. Mas mabigat ang penalty for x x x pag may intent pa to sell. Pero kung hindi natin ma-prove 'yung intent to sell, pasok pa rin siya sa possession.

Now, we can just x x x alisin na lang natin 'yung "personal use", 'no, pero we retain the "intent to sell, 'no. Kasi if you prove "intent to sell," mas mabigat ang penalty.

MR. MARALIT. Tama.

COMMITTEE SECRETARY GUEVARRA. If you fail to prove "intent to sell," mas lighter kasi hindi mo naman dini-distribute, eh.

MR. DEL PRADO. I agree po doon sa graduation ng penalties. Ang sinasabi lang po natin if we include that phrase "with intent to sell" kailangan po nating i-prove 'yun. Whereas, kung nag-sell talaga siya, it's an objective culpable act that we can punish.

MS. GIRONELLA. Madam Chair, point of clarification. What are we talking about? Are we talking about section "b" of the Senate version, section (b) of the House version, section (f) of the House version? Parang naghalu-halo na, eh, kasi earlier we're talking about possession, 'di ba, tapos we went to production and then distribution.

COMMITTEE SECRETARY GUEVARRA. Oo.

MS. GIRONELLA. So, baka better nga talaga paghiwalayin natin 'yung "act of possession" which is punishable and then "act of production, distribution with the intent to sell" as a separate ano rin, 'di ba?

COMMITTEE SECRETARY GUEVARRA. But we already provide "to sell, offer, advertise" and "to produce, direct," 'di ba? We already provide for the unlawful acts, eh. It's different, eh. You produce, direct or to sell, it's different. Here, you possess, meaning, you are not the original owner.

MS. GIRONELLA. So, 'yung section (b) ng House version we're no longer considering it kasi I think that's the only provision with the phrase "with the intent of selling or distributing."

COMMITTEE SECRETARY GUEVARRA. That's why we are saying na x x x because you do not have provision on "knowingly possess" for personal use. Here in our version, we have. So, diniferentiate naming 'yung "with intent to sell" and "without intent to sell." So, 'yun siguro doon tayo nagkaiba.

In the Senate version, "possession, 'no, whatever x x x with or without intent to publish it" magkasama na lang together. In the House version, magkaiba because the intention is to penalize, to provide for stiffer penalties for

those who possess with the intent to distribute it as against those who possess without intent x x x and to reproduce this but for his personal use.

MS. GIRONELLA. In the Senate version po kasi, Madam Chair, for clarification, we intend to punish mere possession. So, we don't need to prove that the person who knowingly possess pornographic material x x x a child pornographic material. And then secondly, I think we did away with the intention to sell because that would be a very hard fact to prove that the person had intent to sell it, unless nagkaroon ng outright act of selling it.

COMMITTEE SECRETARY GUEVARRA. No, not really. Because if you, by circumstantial evidence, if you reproduce so many copies and you reproduce or send or distribute to so many e-mails, 'no, e- mail addresses, the intent is there already. It's already the act of distributing.

MR. MARALIT. What our colleague here is saying that in case there are many copies x x x

(MS. AGNES LUCIA V. TIBAY TOOK OVER)

MR. MARALIT (Continuing) x x x are many copies made, then it could give rise to a presumption, maybe a prima facie presumption that he has intent to sell, distribute. Yeah, we will have to put the presumption there because iyon nga, iyong intent medyo mahirap i-prove, although it could be x x x although the possession of so many could give rise to a prima facie presumption of intent to sell. In which case, if not controverted, then the intent to sell will be conclusively presumed, parang ganoon, siguro if you were to put that there.

COMMITTEE SECRETARY GUEVARRA. Kasi para sa akin, pagka may intent ka to distribute, to sell it, economic na ang reason mo, tapos at the expense of other people, mas dapat mas malaki ang penalty niya.

MR. MARALIT. I agree.

COMMITTEE SECRETARY GUEVARRA. Bahala na kasi, anyway naman kung hindi naman ma-prove iyong intent, punishable pa rin, hindi ba? Punishable pa rin siya.

MR. MARALIT. Yes, yes, mere possession. So the suggestion is siguro to differentiate the two. I think a clear differentiation of the two as well as iyong sa access, huwag natin isama ito, in my view, kasi mag-iiba ang x x x

COMMITTEE SECRETARY GUEVARRA. Kasi parang unfair doon sa mere possession, wala siyang intent to sell. Kasi unfair iyong penalty kung pareho. If we lump it together in one provision, it will be unfair.

MR. MARALIT. I agree.

COMMITTEE SECRETARY GUEVARRA. Because the other one has earned a lot or tiyak na mayroon siyang network para pagbigyan at kikita siya.

MR. MARALIT. Yeah like Hayden Kho

MR. DESCALLAR. I suggest that we adopt the House version na letter (d) and letter (f) with amendments, deleting the term "for personal use" in letter (f) so parang we distinguish distribution and with the intent to sell and for mere possession, deleting "for personal use", so mere possession is punishable.

COMMITTEE SECRETARY GUEVARRA. And in the case of letter (d) of the House version, knowledge of possession is not a requirement, basta ma-prove mo iyong intent to possess, download, with the intent. So there are two elements here - to possess or download or purchase or reproduce and then with intent. Kasi pagka wala siyang x x x so knowledge is immaterial ditto. Hindi kailangan ng knowledge kasi kapag mapu-prove mo iyong intent. Ngayon kung hindi mo ma-prove iyong intent, pasok naman siya sa "to knowingly possess".

MR. MARALIT. Iyong suggestion ng colleague naming is, sabi niya, no proof of intent is necessary if we will

provide here that there would rise a presumption of intent to sell, distribute, in case there are a number of copies, puwede natin i-craft na lang siguro maya-maya. Ngayon na. we will x x x

MR. DESCALLAR. I move to adopt the House version, letter (d) and letter (f) with some amendments removing or deleting the term "for personal use" in letter (f).

COMMITTEE SECRETARY GUEVARRA. Of course, with modifications siguro.

MR. MARALIT. Yeah, we will craft the provisions. Can we suspend the session.[57]

It can be gleaned from the lengthy discussion of the members of the Technical Working Group that the authors of this statute intended to penalize even the mere possession, for personal use or enjoyment, of child pornography. The law, as enacted, considers possession with intent to sell, distribute, or publish[58] to be distinct and separate from mere possession.[59] If proven, a stiffer penalty would be imposed on those who were found to have intended to distribute or profit from child pornography. Thus, the foregoing shows the intention of the legislature to include as much violation for acts committed that would further spread the proliferation of pornography in the country, including possession thereof. Necessarily, as those who merely possess child pornographic materials are also punished by law, then R.A. No. 9775 could not be said to have limited its application only to those who are engaged in the business of child pornography.

It also bears emphasis that petitioner obtained the child pornographic materials by inducing AAA to send him photos of the latter's private parts. He did not come into possession of these photos because it was sent by another person. Rather, he came into possession of AAA's photos because of inducing AAA to exhibit her private parts to him. As the inducement to send photos of AAA's private parts was committed with the use of a mobile phone through Facebook Messenger, petitioner's act also falls within the purview of Section 4(c)(2) of R.A. No. 10175, which penalizes child pornography through the use of a computer system. A mobile phone is considered as a computer system under Section 3(g)[60] of R.A. No. 10175.

On another matter, petitioner's heavy reliance on the sweetheart theory is misplaced. Invoking this defense would depend on the circumstances of each case. Jurisprudence explained that the said theory applies in felonies that were committed against or without the consent of the victim. This theory operates on the premise that the violation committed was consensual. Hence, the party invoking this theory bears the burden of proving that said party and the victim were lovers and that the latter consented to the commission of the act.[61]

In the recent case of *Bangayan v. People*,[62] the sweetheart theory was given serious consideration because the accused and the alleged victim were able to show that the alleged rape incident that happened between them was consensual, and a product of love. As noted by the court in that case, the accused and the alleged victim had two children and had lived together even after the filing of the rape charges.

As compared with the instant case, there was insufficiency of evidence to prove the application of the sweetheart theory. Lovers, when they are passionate with their feelings, engage in physical contact, as manifestations of their love towards one another. As they express their feelings towards one another, they express themselves and not just lust over the photos of private parts of their partners. While there may be instances of expressions of love in a virtual space, the same would usually be predicated by endearing words and not just advances of lust, as in this case.

Here, AAA was led to believe that she was in a relationship with petitioner. It was undisputed that it was AAA who relentlessly pursued the petitioner. Still, it can be gleaned from the facts that petitioner, who must be basking in her attention, took advantage of her innocence and vulnerability. The fact that AAA had three previous boyfriends should not even be taken against her for it is the rule under Section 54(a)(1), Rule 130 of the Revised

Rules of Court that "the character of the offended party may be proved if it tends to establish in any degree the probability or improbability of the offense charged." It has been held in rape case, that this argument may be raised only to show that there was consent in a rape case. This does not apply when the woman's consent is immaterial such as in statutory rape or rape with violence or intimidation.[63] It must be added that consent would also be immaterial if the victim was persuaded, coerced or induced to do a particular act, as in this case. In his Separate Concurring Opinion, Justice Leonen made reference to his Dissenting Opinion in *Bangayan v. People*,[64] ultimately concluding that the sweetheart defense should not be allowed in cases involving child pornography, thus:

x x x x

[S]exual intercourse is a complex act which is not only physical or sensual. Beyond that, it comes with the complexity of intimacy, relationship, and reproductive consequences.

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

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

Part and parcel of a valid consent is the ability to have the intellectual resources and capacity to make a choice that reflects [their] judgments and values. For someone to give sexual consent, [they] must have reached a certain level of maturity.

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

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

x x x x

It is for the same reason that we cannot allow the sweetheart defense in child pornography. The sweetheart defense is a common, distasteful, and much abused in acts of lasciviousness and rape, aiming to establish that fact that the sexual act was consensual. Under the pretense of a romantic relationship, it is not unimaginable that a child will be easily induced or coerced to engage in explicit sexual acts. Engaging in such a relationship does not remove the special protection of a child. This is especially true in the digital age and space, where a child's interaction with others easily evades supervision. Had AAA not been careless in logging out from her mother's device, the latter would not have found out about their relationship.[65]

It should be pointed out that AAA was only 14 years old at the time of the incident while petitioner was 24 years

old. Such huge age disparity placed petitioner in a stronger position over AAA, which enabled him to wield his will on the latter.[66] Judicial notice must also be taken of the fact that minors, especially those who are between the ages of 12 and 18 years, are curious about their sexuality. They are that stage in their lives when they are dealing with their raging hormones. Nonetheless, this should not be taken to mean that they are now capable of giving rational consent to engage in any sexual activity. In a society where birth control and sex education are taboo subjects, these sexually curious teenagers are left to their own devices. Unfortunately, the only source of information available to them are those from the internet or from their friends, who are also not knowledgeable on the subject. For this reason, minors have been acknowledged to be vulnerable to the cajolery and deception of adults, such as in this case.[67]

Unless and until these minors are given proper guidance and/or taught about sex and its consequences, and until it be shown that their actions arise from their feelings of love towards their partner, they cannot be considered to be truly capable of giving an educated and rational consent to engage in any form of sexual activity. Thus, to minimize the risk of harm to minors from the detrimental consequences of their attempts at adult sexual behavior, the State, as *parens patriae*, is under the obligation to intervene and protect them from sexual predators like petitioner in this case.[68] This must be so if We are to be true to the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual and social well-being of the youth.[69] This is also in harmony with the declared policy of the State in R.A. No. 9775, which provides:

x x x The State recognizes the vital role of the youth in nation building and shall promote and protect their physical, moral, spiritual, intellectual, emotional, psychological and social well-being. Towards this end, the State shall:

- (a) Guarantee the fundamental rights of every child from all forms of neglect, cruelty and other conditions prejudicial to his/her development;
- (b) Protect every child from all forms of exploitation and abuse including, but not limited to:
  - (1) the use of a child in pornographic performances and materials; and
  - (2) the inducement or coercion of a child to engage or be involved in pornography through whatever means; x x[70]

Article 3(1) of the United Nations Convention on the Rights of a Child of which the Philippines is a signatory is similarly emphatic that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, it is the best interests of the child that shall be the primary consideration.

Article 1 of Presidential Decree No. 603, otherwise known as, "The Child And Youth Welfare Code" is likewise clear and unequivocal that every effort should be exerted by the State to promote the welfare of children and enhance their opportunities for a useful and happy life.

This Court, however, concurs with petitioner's argument, and as pointed out by Associate Justice Alfredo Benjamin S. Caguioa in his Dissenting Opinion,[71] that a violation of Section 4(c)(2) of R.A. No. 10175, in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775 falls under the class of offenses known as *mala in se*, where criminal intent must be proven by proof beyond reasonable doubt. The difference between the concept of *mala in se* and *malum prohibitum* were succinctly explained as follows:

Criminal law has long divided crimes into acts wrong in themselves called acts *mala in se*; and acts which would not be wrong but for the fact that positive law forbids them, called acts *mala prohibita*. This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts *mala in se*, the intent governs; but in acts *mala prohibita*, the only inquiry is, has the law been violated? When an act is illegal, the intent of the offender is immaterial. When the doing of an act is prohibited by law, it is considered injurious to public welfare, and the doing of the prohibited act is the crime itself.

A common misconception is that all mala in se crimes are found in the Revised Penal Code (RPC), while all mala prohibita crimes are provided by special penal laws. In reality, however, there may be mala in se crimes under special laws, such as plunder under R.A. No. 7080, as amended.

Similarly, there may be mala prohibita crimes defined in the RPC, such as technical malversation.

The better approach to distinguish between mala in se and mala prohibita crimes is the determination of the inherent immorality or vileness of the penalized act. If the punishable act or omission is immoral in itself, then it is a crime mala in se; on the contrary, if it is not immoral in itself, but there is a statute prohibiting its commission by reasons of public policy, then it is mala prohibita. In the final analysis, whether or not a crime involves moral turpitude is ultimately a question of fact and frequently depends on all the circumstances surrounding the violation of the statute.[72]

In the ratification speech on Anti-Child Pornography Act of 2009, the principal author explained the need for the promulgation of this law, to wit:

This Bill is much awaited by all the sectors involved in the protection and promotion of the rights of children not only in the Philippines but also in the international community, and, I believe, by the children themselves whose voices resonate in the silence of their hearts and in the equanimity of their spirits. Knowing how this bill could be of great consequence to the building of their self-worth and the realization of their hope for a bright future, this representation takes pride in sponsoring this noble piece of legislation in support of their call to stop the menace of child pornography. Evidently, child pornography is such a disgusting crime which operates with surprising efficiency, swiftness and dispatch as it rides along with technologically advanced communication highways such as the internet.

What appalls us more is the fact that such meaningless violence against the honor and dignity of our children knows no boundaries: political or geographical. Child pornography transcends national and international boundaries even without actual physical movement of children from one place of victimization to another. Verily, while it could be done in the secrecy of her room and abode, its evil resounds in every corner of society.[73]

Even during the pre-bicameral conference committee hearing, the Technical Working Group had a lengthy discussion on the title of the statute to emphasize the depravity of the acts being penalized, to wit:

So, let's start with the title of the bill. So, we just put in the remarks column that the Senate version was adopted as the working draft. So, that's the first x x x that's the first remarks, first remark. So, okay, let us go to the title of the bill. So, which of the provision x x x which of the title would you think will aptly or will cover, will cover the purpose, the intent of the bill? So, I suggest that we adopt the House version because there's still no crime defining child pornography and if we are not just prohibiting. When you say crime, it's really punishable. Unlike when you just prohibit, a prohibition may only take x x x the penalty may not be penalty at all but just a warning or form of fines. But when it says crime, it attaches criminal liability. It attaches punishment, fines and even other liabilities.

MS. GIRONELLA. Conferring with Atty. Maralit, 'no, most of our special laws penalizing or defining a crime is usually called penalizing or punishing the specific act. You only use the term "defining" when it refers to specific rights that you're granting an individual. For example, Presidential Decree No. 133, which is x x x I'm sorry, Presidential Decree 704 which is a decree punishing illegal fishing. So, that's the usual term that they used. That's why we adopted the word "prohibiting child pornography and imposing penalties, thereof."

COMMITTEE SECRETARY GUEVARRA. Although kasi sa legislative... this is a legislative enactment unlike those mentioned by our counterpart that those provisions x x x those are executive issuances, promulgations.

MR. MARALIT. Yes, but we have also examples of statutes titled this way. "An Act Prohibiting the Demand of Deposits or Advanced Payments For the Confinement or For Treatment of Patients in Hospitals and Medical Clinics in Certain Cases." That is BP Bilang 702 which is a statute. Usually, the word "defining" is used in defining rights like this statute, Republic Act No. 7438, "An Act Defining Certain Rights of Person Arrested, Detained or Under Custodial Investigation." So in our view, it's either prohibiting or punishing, or penalizing, to make a strong message to the violators, would be violators of this law that Congress is serious with these violations of law.

That is our positions.

COMMITTEE SECRETARY GUEVARRA. Okay. Although we also, we already passed several legislations defining crimes, new crimes, 'yung mga bago pa na hindi pa talaga legislated, walang specific law na x x x (interrupted)

MR. MARALIT. Let's just have a compromise. Why don't we say, "prohibiting and defining?" that would be fine with us, if it's okay with you, "defining and prohibiting and imposing penalties thereof."

COMMITTEE SECRETARY GUEVARRA. We use imposing or prescribing? We prescribe the penalties for the crime.

MR. MARALIT. "Prescribe." "Prescribe" is better.

COMMITTEE SECRETARY GUEVARRA. So, for record purposes, the title of the reconciled bill shall be, "An Act Defining and Prohibiting the Crime" x x x "Defining and Prohibiting Child Pornography, Prescribing Penalties Therefor and For Other Purposes."

MR. MARALIT. Can we make "penalizing" rather than "prohibiting"?

COMMITTEE SECRETARY GUEVARRA. Okay, yeah. That's x x x I was about to suggest because penalizing is more ano x x x

MR. MARALIT. Yes, more forceful.

COMMITTEE SECRETARY GUEVARRA. x x x more forceful than in prohibiting.

MR. MARALIT. Yeah. Thank you.

COMMITTEE SECRETARY GUEVARRA. Okay, So, that the title of the reconciled bill shall be "An Act Defining and Penalizing Child Pornography x x x

MR. MARALIT. The crime, the crime.

COMMITTEE SECRETARY GUEVARRA. x x x the Crime of Child Pornography, Prescribing Penalties Therefor and For Other Purposes. I repeat, "An Act Defining and Penalizing the Crime of Child Pornography, Prescribing Penalties therefor and For Other Purposes."

MR. MARALIT. Okay.[74]

From the foregoing, it is decisively clear that the crime of child pornography as defined and penalized under R.A. No. 9775 should be classified as a crime mala in se. As parens patriae, this act of grooming minors for sexual abuse should not be tolerated. We should not be complicit in reinforcing this belief upon the minors that sex with children is acceptable and thereby fuel a pedophile's fantasies prior to committing sexual abuse, which clearly happened in the instant case. Contrary to the appreciation of evidence of the other members of this Court, the circumstances of this case showed the intent of petitioner to abuse AAA and engage in acts of child pornography by inducing the latter to exhibit her private parts to him. Petitioner, being the one with mental maturity, should

have known that it was not just legally, but inherently wrong for AAA, a minor, to show her private parts, particularly, through a mobile device. If indeed, petitioner loved AAA, he should have protected her dignity, being a minor. However, as the exchanges of petitioner and AAA would show, it was through petitioner's prodding that led to AAA's act of exhibiting her private parts. Thus, this Court concurs with the findings of the courts a quo that the prosecution was able to establish beyond reasonable doubt that petitioner induced or coerced the minor victim to perform in the creation of child pornography and that the same was done through a computer system.

All told, the courts a quo did not err in finding petitioner guilty beyond reasonable doubt for violation of Section 4(c)(2) of R.A. No. 10175, in relation to Sections 4(a), 3(b) and (c)(5) of R.A. No. 9775.

As regards the proper penalty to be imposed, Sections 4 and 8[75] of R.A. No. 10175 both explicitly provide that the proper penalty to be imposed for child pornography committed through a computer system should be one degree higher than that provided for in R.A. No. 9775. Under Section 15(b)[76] of R.A. No. 9775, the penalty to be imposed is reclusion temporal in its maximum period and a fine of not less than P1,000,000.00 but not more than P2,000,000.00. The rationale for this rule was succinctly explained in the case of *Disini Jr. v. The Secretary of Justice*,[77] to wit:

It seems that the above merely expands the scope of the Anti-Child Pornography Act of 2009[31] (ACPA) to cover identical activities in cyberspace. In theory, nothing prevents the government from invoking the ACPA when prosecuting persons who commit child pornography using a computer system. Actually, ACPA's definition of child pornography already embraces the use of "electronic, mechanical, digital, optical, magnetic or any other means." Notably, no one has questioned this ACPA provision.

Of course, the law makes the penalty higher by one degree when the crime is committed in cyberspace. But no one can complain since the intensity or duration of penalty is a legislative prerogative and there is rational basis for such higher penalty. The potential for uncontrolled proliferation of a particular piece of child pornography when uploaded in the cyberspace is incalculable.[78]

One degree higher than the penalty of reclusion temporal is the indivisible penalty of reclusion perpetua. Accordingly, the penalty imposed by the CA should be modified to reclusion perpetua as it is in accordance with the provisions and intent of R.A. No. 10175.

Finally, the Court finds no compelling reason to modify the fine imposed by the courts a quo as it is within the allowable range imposed by law.

WHEREFORE, the petition is DENIED. Consequently, The Decision dated September 27, 2018 and Resolution dated May 9, 2019 both rendered by the Court of Appeals in CA-G.R. CR No. 40298 are AFFIRMED with MODIFICATION. Petitioner Christian Cadajas y Cabias is guilty beyond reasonable doubt of the crime of child pornography under Section 4(c)(2) of R.A. No. 10175, in relation to Sections 4(a) and 3(b) and (c)(5) of R.A. No. 9775. He is sentenced to reclusion perpetua, with all its accessory penalties and to pay a fine in the amount of One Million Pesos (P1,000,000.00).

### **SO ORDERED.**

Gesmundo, C.J., Hernando, Carandang, Rosario, and Dimaampao, JJ., concur.

Perlas-Bernabe, J., on official leave.

Leonen, J., see separate concurring opinion.

Caguioa, J., See Dissenting Opinion.

Lazaro-Javier, J., See Separate Opinion.

Inting, J., I join the Dissent of Justice Caguioa.  
Zalameda, J., with Separate Concurring Opinion.  
M. Lopez, J., on leave.  
Gaerlan, J., See Dissenting Opinion.

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[1] Rollo, pp. 11-32.

[2] Penned by Associate Justice Ramon A. Cruz, with the concurrence of Associate Justices Ramon M. Bato, Jr. and Germano Francisco D. Legaspi, id. at 34-45.

[3] Id. at 47.

[4] Penned by Presiding Judge Evangeline M. Francisco, id. at 68-75.

[5] The identity of the victim or any information to establish or compromise her identity, as well as those of her immediate family or household members, shall be withheld pursuant to Republic Act No. 7610, "An Act Providing for Stronger Deterrence and Special Protection Against Child Abuse, Exploitation and Discrimination, and for Other Purposes"; Republic Act No. 9262, "An Act Defining Violence Against Women and Their Children, Providing for Protective Measures for Victims, Prescribing Penalties Therefor, and for Other Purposes"; Section 40 of A.M. No. 04-10-11-SC, known as the "Rule on Violence Against Women and Their Children," effective November 15, 2004; People v. Cabalquinto, 533 Phil. 703 (2006); and Amended Administrative Circular No. 83-2015 dated September 5, 2017, Subject: Protocols and Procedures in the promulgation, Publication, and Posting on the Websites of Decisions, Final Resolutions, and Final Orders Using Fictitious Names/Personal Circumstances.

[6] Rollo, p. 37.

[7] Id. at 36.

[8] Id. at 108.

[9] Id. at 36.

[10] Id.

[11] Id.

[12] Id. at 37-38.

[13] Id. at 16.

[14] Records, p. 1 (Criminal Case No. 215-V-17).

[15] Id. at p. 1 (Criminal Case No. 216-V-17).

[16] Rollo, p. 36.

[17] Id. at 75.

[18] Id. at 72-73.

[19] Id. at 73.

[20] Id. at 71-72.

[21] Records, p. 138 (Criminal Case No. 216-V-17).

[22] Rollo, p. 40.

[23] Id. at 42.

[24] Id.

[25] Id. at 42-43.

[26] Id. at 43.

[27] Id. at 47.

[28] Id. at 11-32.

[29] Spouses Hing v. Choachuy, Sr., 712 Phil. 337, 348 (2013).

[30] G.R. No. 184535, September 03, 2019.

[31] J. Leonen, Separate Opinion in Versoza v. People, G.R. No. 184535, September 03, 2019. The speech entitled The Common Right to Privacy was delivered during the Forum on the Writ of Habeas Data and Human Rights, sponsored by the National Union of Peoples' Lawyers on March 12, 2008 at the Innotech Seminar Hall, Commonwealth Ave., Quezon City. It was also cited in Footnote 20 of Vivares v. St. Theresa's College, 744 Phil. 451 (2014) [Per J. Velasco, Third Division].

[32] See Vivares v. St. Theresa's College, 744 Phil. 451 (2014) [Per J. Velasco, Third Division] and De Lima v. Duterte, G.R. No. 227635, October 15, 2019 [Per J. Bersamin, En Banc].

[33] Gamboa v. P/Suppt. Chan, 691 Phil. 602 (2012) [Per J. Sereno, En banc].

[34] 130 Phil. 415 (1968) [Per J. Fernando, En Banc].

[35] 727 Phil. 28 (2014) [Per J. Abad, En Banc].

[36] J. Leonen, Dissenting and Concurring Opinion in Disini v. Secretary of Justice, 727 Phil. 28, 308-320 (2014) [Per J. Abad, En Banc].

[37] C. Edwin Baker, Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment, in 21 FREEDOM OF SPEECH 216 (Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul eds., 2004).

[38] Separate Concurring Opinion, Associate Justice Marvic M.V.F. Leonen, pp. 3-6, Citations omitted.

[39] 271 Phil. 51 (1991).

[40] Id. at 61.

[41] 324 Phil. 63 (1996).

[42] Republic Act No. 10173, Data Privacy Act of 2012.

[43] SEC. 19. Non-Applicability. - x x x Likewise, the immediately preceding sections are not applicable to processing of personal information gathered for the purpose of investigations in relation to any criminal, administrative or tax liabilities of a data subject.

[44] SEC. 13. Sensitive Personal Information and Privileged Information. - The processing of sensitive personal

information and privileged information shall be prohibited, except in the following cases:

xxxx

(f) The processing concerns such personal information as is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or the establishment, exercise or defense of legal claims, or when provided to government or public authority.

[45] Supra note 29 at 350.

[46] Id. at 350.

[47] Spouses Tapayan v. Martinez, 804 Phil. 523, 534-535 (2017).

[48] S.C. Megaworld Construction and Development Corporation v. Parada, 717 Phil. 752, 760 (2013).

[49] An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [CYBER CRIME PREVENTION ACT OF 2012].

[50] An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes [ANTI-CHILD PORNOGRAPHY ACT OF 2009].

[51] Emphasis supplied.

[52] JOURNAL, HOUSE 14[TH] CONGRESS 3[RD] SESSION 18 (September 10, 2009).

[53] Records, p. 40.

[54] Records, pp. 9-18 (Criminal Case No. 215-V-17).

[55] TSN, April 10, 2017, pp. 5-7.

[56] TSN, April 10, 2017, pp. 16-17.

[57] JOURNAL, HOUSE 14[TH] CONGRESS 3[RD] SESSION 44-50 (September 10, 2009).

[58] Section 4(d) of R.A. No. 9975

[59] Section 4(l) of R.A. No. 9975

[60] Section 3(g) of R.A. No. 10175 reads as follows:

Section 3. Definition of Terms. x x x

(g) Computer system refers to any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automated processing of data. It covers any type of device with data processing capabilities including, but not limited to, computers and mobile phones. The device consisting of hardware and software may include input, output and storage components which may stand alone or be connected in a network or other similar devices. It also includes computer data storage devices or media.

[61] Malto v. People, 560 Phil. 119, 140-141 (2007), citing People v. Delantar, 543 Phil. 107 (2007).

[62] G.R. No. 235610, September 16, 2020.

[63] People v. Lee, 432 Phil. 338, 362 (2002).

[64] Supra note 54.

[65] Supra note 30.

[66] See *Fianza v. People*, 815 Phil. 379, 391-392 (2017), citing *Caballo v. People*, 710 Phil. 792 (2013).

[67] *Fianza v. People*, id. at 392, citing *Malto v. People*, supra note 61.

[68] See *Fianza v. People*, supra note 66, citing *Malto v. People*, supra note 61, at 139-141.

[69] *People v. Malto*, supra note 61, at 141.

[70] R.A. No. 9775, Section 2.

[71] Dissenting Opinion, Associate Justice Alfredo Benjamin S. Caguioa.

[72] *Dungo v. People*, 762 Phil. 630, 658-659 (2015), (Emphasis supplied), citing *LUIS B. REYES, THE REVISED PENAL CODE CRIMINAL LAW-BOOK ONE* 56 (17th ed. 2008), *Estrada v. Sandiganbayan*, 421 Phil. 290 (2001), *Tan v. Ballena*, 519 Phil. 503, 527-528 (2008), *Garcia v. CA*, 319 Phil. 591 (2008), Art. 220 of the Revised Penal Code, *Ysidoro v. People*, 698 Phil. 813 (2012), and *Teves v. COMELEC*, 604 Phil. 717, 729 (2009).

[73] Bicameral Conference Committee Report, on S. No. 2317 and H. No. 6440 (Anti-Child Pornography Act of 2009) pp. 267-268.

[74] JOURNAL, HOUSE 14[TH] CONGRESS 3[RD] SESSION 134-136 (September 10, 2009).

[75] Section 8 of R.A. No. 10175 partly reads as follows:

Section 8. Penalties. — x x x.

Any person found guilty of any of the punishable acts enumerated in Section 4(c)(2) of this Act shall be punished with the penalties as enumerated in Republic Act No. 9775 or the "Anti-Child Pornography Act of 2009": Provided, That the penalty to be imposed shall be one (1) degree higher than that provided for in Republic Act No. 9775, if committed through a computer system. (Emphasis supplied)

[76] Section 15(b) of R.A. No. 9775 reads as follows:

Section 15. Penalties and Sanctions. - The following penalties and sanctions are hereby established for offenses enumerated in this Act: x x x

(b) Any person found guilty of violating Section 4(a), (b) and (c) of this Act shall suffer the penalty of reclusion temporal in its maximum period and a fine of not less than One million pesos (P1,000,000.00) but not more than Two million (P2,000,000.00).

[77] 727 Phil. 28 (2014).

[78] Id. at 107. (Emphasis supplied)

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## SEPARATE CONCURRING AND DISSENTING OPINION

**LEONEN, J.:**

I agree with the ponente that Christian Cadajas's (Cadajas) conviction for violation of Section 4(c)(2) of Republic Act No. 10175 in relation to Sections 4(a), 3(b) and 3(c)(5) of Republic Act No. 9775 should be upheld. In my view, the inherent immorality of child pornography does not prohibit us from characterizing the offense as *malum*

prohibitum. This characterization is more consistent with the constitutional mandate of giving special protection to children against all forms of abuse. Especially in cyberspace, we need to be vigilant and uphold our ruling that a child cannot give consent to a lascivious act. We should not permit the sweetheart theory as a defense against child pornography. In this digital era, we should recalibrate how we view the right to informational privacy and how we give primacy to the best interests of a child.

## I

Right to privacy is a fundamental right under the Constitution. In essence, it is the "right to be let alone."<sup>[1]</sup> It "is an essential condition to the dignity and happiness and to the peace and security of every individual, whether it be of home or of persons and correspondence."<sup>[2]</sup> It is equally fundamental yet distinct as the right to liberty itself:

Liberty in the constitutional sense not only means freedom from unlawful government restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is the beginning of all freedom — it is the most comprehensive of rights and the right most valued by civilized [humans].

The concept of liberty compels respect for the individual whose claim to privacy and interference demands respect. As the case of *Morfe v. Mutuc*, borrowing the words of Laski, so very aptly stated:

[Human] is one among many, obstinately refusing reduction to unity. [Their] separateness, [their] isolation, are indefeasible; indeed, they are so fundamental that they are the basis on which [their] civic obligations are built. [They] cannot abandon the consequences of [their] isolation, which are, broadly speaking, that [their] experience is private, and the will built out of that experience personal to [themselves]. If [they surrender their] will to others, [they surrender themselves]. If [their] will is set by the will of others, [they cease] to be a master of [themselves]. I cannot believe that a [human] no longer a master of [themselves] is in any real sense free.<sup>[3]</sup>

The right to privacy has many facets protected under the Constitution and our laws:

Indeed, if we extend our judicial gaze[,] we will find that the right of privacy is recognized and enshrined in several provisions of our Constitution. It is expressly recognized in Section 3(1) of the Bill of Rights:

Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

Other facets of the right to privacy are protected in various provisions of the Bill of Rights, viz:

Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.

[...]

Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.

[...]

Sec. 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.

Sec. 17. No person shall be compelled to be a witness against himself.

Zones of privacy are likewise recognized and protected in our laws. The Civil Code provides that "[e]very person shall respect the dignity, personality, privacy and peace of mind of [their] neighbors and other persons" and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The Revised Penal Code makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in special laws like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act and the Intellectual Property Code. The Rules of Court on privileged communication likewise recognize the privacy of certain information.[4] (Citations omitted)

Aside from these, the Judiciary and the Congress have strengthened the protection of the right to privacy. In 2008, the Supreme Court promulgated the Rules on the Writ of Habeas Data through the initiative of then Chief Justice Reynato Puno.[5] The writ aims to "protect a person's right to control information regarding oneself, particularly in instances where such information is being collected through unlawful means in order to achieve unlawful ends." [6] Similarly, Congress enacted two important pieces of legislation in 2012. These are the Data Privacy Act [7] and the Cybercrime Prevention Act of 2012. [8] The Data Privacy Act aims to ensure that personal information processed by the government and private sector are secured and protected. [9] Meanwhile, the Cybercrime Prevention Act of 2012 punishes all forms of misuse, abuse, and illegal access "of computer, computer and communications systems, networks, and databases, and the confidentiality, integrity, and availability of information and data stored therein." [10]

Chief Justice Puno sparked judicial interest in the right to privacy. In his speech that I cited in my separate opinion in *Versozza v. People*, [11] he discussed the three strands of privacy in American Jurisprudence, namely, locational or situational privacy, informational privacy, and decisional privacy:

Locational privacy, also known as situational privacy, pertains to privacy that is felt in a physical space. It may be violated through an act of trespass or through an unlawful search. Meanwhile, informational privacy refers to one's right to control "the processing—i.e., acquisition, disclosure, and use—of personal information."

Decisional privacy, regarded as the most controversial among the three, refers to one's right "to make certain kinds of fundamental choices with respect to their personal and reproductive autonomy." [12] (Citations omitted)

This speech has been influential in several of our jurisprudence. [13] To this day, we are still refining our concept of privacy, particularly the right to informational privacy. [14]

As early as *Morfe v. Mutuc*, [15] we have recognized the increasing importance of the protection of the right to privacy in the digital age. Such right is of particular importance given the nature of the internet and our inescapable dependence on it despite the possible disruption that it can bring. In my separate opinion in *Disini v. Secretary of Justice*, [16] I explained:

The internet or cyberspace is a complex phenomenon. It has pervasive effects and are, by now, ubiquitous in many communities. Its possibilities for reordering human relationships are limited only by the state of its constantly evolving technologies and the designs of various user interfaces. The internet contains exciting potentials as well as pernicious dangers.

The essential framework for governance of the parts of cyberspace that have reasonable connections with our territory and our people should find definite references in our Constitution. However, effective governance of cyberspace requires cooperation and harmonization with other approaches in other jurisdictions. Certainly, its

scope and continuous evolution require that we calibrate our constitutional doctrines carefully: in concrete steps and with full and deeper understanding of incidents that involve various parts of this phenomenon. The internet is neither just one relationship nor is it a single technology. It is an interrelationship of many technologies and cultures.

....

While the Internet has engendered innovation and growth, it has also engendered new types of disruption. A noted expert employs an "evolutionary metaphor" as he asserts:

[Generative technologies] encourage mutations, branchings away from the status quo — some that are curious dead ends, others that spread like wildfire. They invite disruption — along with the good things and bad things that can come with such disruption.

Addressing the implications of disruption, he adds:

Disruption benefits some while others lose, and the power of the generative Internet, available to anyone with a modicum of knowledge and a broadband connection, can be turned to network-destroying ends. . . [T]he Internet's very generativity — combined with that of the PCs attached — sows the seeds for a "digital Pearl Harbor."

The Internet is an infrastructure that allows for a "network of networks." It is also a means for several purposes. As with all other "means enhancing capabilities of human interaction," it can be used to facilitate benefits as well as nefarious ends. The Internet can be a means for criminal activity.

Parallel to the unprecedented escalation of the use of the Internet and its various technologies is also an escalation in what has been termed as cybercrimes.[17]

Privacy scholars explain that the right to informational privacy, to a certain extent, requires "limitation on inspection, observation, and knowledge by others." [18] Thus, it has the following aspects: (1) to keep inalienable information to themselves; (2) to prevent first disclosure; and (3) to prevent further dissemination in case the information has already been disclosed.[19] More recently, the European Union has paved the way for the fourth aspect—the right to be forgotten, or the right to prevent the storage of data.[20]

As regards the first component of the right to informational privacy, a person has the right not to be exposed on the internet in matters involving one's private life, such as acts having no relation to public interest or concern.[21] Closely related to the first component is the right to prevent first disclosure, allowing individuals to regulate the extent, time, and manner of disclosure, if at all, of their information. In case the data have been illegally disclosed, a person does not lose protection since they have the right to prevent their further dissemination.[22] In some cases, one has the right to prevent the storage of their data, which gives one the right to be forgotten. Privacy scholars describe this right as "forced omission," or the process of making the information difficult to find on the internet.[23]

Undue disclosure of digital information can already do damage even if deleted at a later time. Anyone who gains access to such information can use it for their own purpose. They can take it out of context and use it for a purpose contrary to what the person originally intended. For instance, intimate photos of lovers shared through private chats can be weaponized by a disgruntled lover. Applications that do not have end-to-end encryption can also be intercepted by unscrupulous third persons.

Even an innocent posting of photos on social media can be dangerous and consequential to a person's life. Take *Vivares v. St. Theresa's College*. [24] Swimsuit photos of graduating high school students were taken during a birthday party and uploaded on Facebook. This seemingly inconsequential act gave cause for St. Theresa's

College to conduct disciplinary procedure, which in turn prevented these students from graduating with their class.

Given the ease for which we can lose control of our information online, this Court's warning on the vigilance in exposing oneself in cyberspace is relevant:

[Online social network] users should be aware of the risks that they expose themselves to whenever they engage in cyberspace activities. Accordingly, they should be cautious enough to control their privacy and to exercise sound discretion regarding how much information about themselves they are willing to give up. Internet consumers ought to be aware that, by entering or uploading any kind of data or information online, they are automatically and inevitably making it permanently available online, the perpetuation of which is outside the ambit of their control. Furthermore, and more importantly, information, otherwise private, voluntarily surrendered by them can be opened, read, or copied by third parties who may or may not be allowed access to such.

It is, thus, incumbent upon internet users to exercise due diligence in their online dealings and activities and must not be negligent in protecting their rights. Equity serves the vigilant. Demanding relief from the courts, as here, requires that claimants themselves take utmost care in safeguarding a right which they allege to have been violated. These are indispensable. We cannot afford protection to persons if they themselves did nothing to place the matter within the confines of their private zone. [Online social network] users must be mindful enough to learn the use of privacy tools, to use them if they desire to keep the information private, and to keep track of changes in the available privacy settings, such as those of Facebook, especially because Facebook is notorious for changing these settings and the site's layout often.[25]

While the ponente cited the *Spouses Hing v. Choachuy*[26] framework in assessing violations of the right to privacy vis-a-vis one's expectation of privacy, the current technological developments require us to reexamine our doctrine. Thus, in *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*,[27] I cautioned the majority against the vulnerability of data and the necessity of redefining legitimate expectation of privacy in this digital age:

The truth is that most of today's digital data is vulnerable to one who is curious enough, exceedingly determined, skillful, and willing to deploy the necessary time and resources to make discovery of our most private information. Ubiquitous surveillance systems that ensure the integrity as well as increase confidence in the security of the data kept in a system are ever present. Copying or transferring digital data occurs likewise with phenomenal speed. Data shared in cyberspace also tends to be resilient and difficult to completely delete. Users of various digital platforms, including bank accounts, are not necessarily aware of these vulnerabilities.

Therefore, the concept of "legitimate expectation of privacy" as the framework for assessing whether personal information fall within the constitutionally protected penumbra need to be carefully reconsidered. In my view, the protected spheres of privacy will make better sense when our jurisprudence in the appropriate cases make clear how specific types of information relate to personal identity and why this is valuable to assure human dignity and a robust democracy in the context of a constitutional order.[28]

The need to protect this fundamental right is more imperative given the rise of surveillance capitalism. Digital infrastructures and technological advancements are being used to aggregate people and their choices as data objects.[29] This is made possible with the indiscriminate buying and selling of our personal data and other sensitive information without regard to the informational aspect of privacy. Big technology companies and small startup businesses have been optimizing this model to predict and clandestinely manipulate human behavior for monetary and other purposes.[30] This impels us to recalibrate how we view the right to privacy in cyberspace and how we can protect the vulnerable.

## II

While the Bill of Rights considers the right to privacy as inviolable, this guarantee can be invoked only against the State. The Constitution limits the power of the State to intrude on one's privacy when required by law, a lawful court order, or when it is necessitated by public safety or order.[31] The unjustified intrusion of the State to the right to privacy results in the exclusion of any evidence obtained in violation of this right.[32]

The purpose of this rule is three-fold, namely, to deter unreasonable searches and seizure; to uphold judicial integrity; and to assure the public that the government will not benefit from its unlawful conduct.[33] The exclusionary rule ensures the right to due process of citizens in making sure that they will be protected against unwarranted State encroachment on their fundamental constitutional rights.[34]

We clarified in *People v. Marti*[35] that one's constitutional right to privacy cannot be invoked against acts of private individual:

[T]he constitution, in laying down the principles of the government and fundamental liberties of the people, does not govern relationships between individuals. Moreover, it must be emphasized that the modifications introduced in the 1987 Constitution. . . relate to the issuance of either a search warrant or warrant of arrest vis-a-vis the responsibility of the judge in the issuance thereof. . . The modifications introduced deviate in no manner as to whom the restriction or inhibition against unreasonable search and seizure is directed against. The restraint stayed with the State and did not shift to anyone else.

Corollarily, alleged violations against unreasonable search and seizure may only be invoked against the State by an individual unjustly traduced by the exercise of sovereign authority. To agree with appellant that an act of a private individual in violation of the Bill of Rights should also be construed as an act of the State would result in serious legal complications and an absurd interpretation of the constitution.

Similarly, the admissibility of the evidence procured by an individual effected through private seizure equally applies, in *pari passu*, to the alleged violation, non-governmental as it is, of appellant's constitutional rights to privacy and communication.[36]

In his separate opinion, Associate Justice Samuel Gaerlan opines that *Zulueta v. Court of Appeals*[37] created an exception to *People v. Marti*. [38] I do not agree given Zulueta's different factual context. In *Zulueta*, the husband's right to privacy was asserted in an appropriate proceeding through a civil action for recovery of documents and damages. The exclusionary rule was also invoked and eventually applied against his wife, the intruder to his privacy, and not against the State. This context should be read in light of Zulueta's pronouncement:

Indeed the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring "the privacy of communication and correspondence [to be] inviolable" is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a "lawful order [from a] court or when public safety or order requires otherwise, as prescribed by law." Any violation of this provision renders the evidence obtained inadmissible "for any purpose in any proceeding." [39]

In this case, the right to privacy comes to the fore since Cadajas invokes the exclusion of evidence allegedly taken in violation of his right to privacy. I agree in the result of ponente's analysis that the exclusionary rule will not apply in favor of Cadajas. However, I take exception from the finding that there is no violation of Cadajas' right to informational privacy. His recourse, if any, should be to institute a complaint in a proper proceeding.

Zulueta is not applicable because the proceeding here does not involve a private dispute, but a criminal case where the State is the offended party.[40] In effect, Cadajas invokes the exclusionary rule against the State

although the latter was not responsible for the violation of his right. The facts of this case are more consistent with *People v. Marti*, where the exclusionary rule was not applied since the illegal intrusion was done by a private person.

Here, it is not disputed that AAA used to be Cadajas' girlfriend when she was only 14 years old. AAA's mother discovered their secret relationship upon browsing her daughter's Facebook Messenger not logged out from her cellphone. Lascivious messages and photos were sent through Facebook Messenger. While AAA deleted these exchanges from her personal account, her mother forced her to open Cadajas' account to secure a copy of their conversation.[41] For the first time, Cadajas invokes the exclusionary rule, alleging that his right to privacy has been violated.

I disagree with the ponente that Cadajas abandoned his right to privacy in Facebook by giving his password to AAA.[42] The act of giving his password to his girlfriend, by itself, is not permission to access his account without his consent. In entering a romantic relationship, one does not abandon their right to privacy. Zulueta is instructive on the integrity of such right. Even married couples do not lose the protection of such right and they can defend their constitutional right against the other in an appropriate proceeding.[43]

Here, while Cadajas' relationship has already been exposed to AAA's mother, he has a right to prevent further dissemination of personal information, especially those coming from his private account. His relationship with AAA and his act of giving his password to her do not give AAA license to access his account and secure a copy of their conversation from his account. There is already a violation of his right to privacy even if Cadajas enabled AAA to access his account.

Despite the violation to his right to privacy, I am not convinced that Cadajas valued his right to privacy and that he intended to enforce it. First, he did not have any obligation to give his password to AAA. Second, he did not question the authority of AAA to access his account. Finally, he did not question the admissibility of the chat messages before the trial court. These circumstances show that he had very little regard for his right to privacy. His belated invocation of the violation of such right cannot benefit him at the expense of the State. Thus, the ponente is correct in ruling that petitioner waived his objection to the admissibility of the transcript of their chat on Facebook Messenger.[44]

It can also be said that the mother violated AAA's right to informational privacy. Nonetheless, parental guidance is crucial especially in the digital age, where innocent minors can easily be manipulated in exposing themselves. With the ease of sharing information, children can easily take photographs of their private parts and unwittingly share these online without fully understanding the consequences of their actions.

### III

I do not agree with the ponente that the cybercrime of child pornography is *mala in se* just because it is immoral and disgusting.[45] Instead of relying on the inherent vileness of a crime in determining the character of the offense as either *mala in se* or *mala prohibitum*, we should characterize a crime based on the language of the law and the rationale behind its enactment. We should classify a crime that will give the greatest effect to what the law seeks to protect. Our characterization of a crime is relevant because of the importance of intent in *mala in se* crimes.

Contrary to Justice Alfredo Benjamin Caguioa's understanding, it is not the inherent immorality or vileness of an act that distinguishes *mala in se* from *mala prohibitum* crimes.[46] Rather, the distinction lies in the necessity of proving criminal intent in the prosecution of these crimes. In *ABS CBN v. Gozon*: [47]

The general rule is that acts punished under a special law are *malum prohibitum*. "An act which is declared

malum prohibitum, malice or criminal intent is completely immaterial."

In contrast, crimes mala in se concern inherently immoral acts:

Not every criminal act, however, involves moral turpitude. It is for this reason that "as to what crime involves moral turpitude, is for the Supreme Court to determine". In resolving the foregoing question, the Court is guided by one of the general rules that crimes mala in se involve moral turpitude, while crimes mala prohibita do not, the rationale of which was set forth in "Zari v. Flores," to wit:

It (moral turpitude) implies something immoral in itself, regardless of the fact that it is punishable by law or not. It must not be merely mala prohibita, but the act itself must be inherently immoral. The doing of the act itself, and not its prohibition by statute fixes the moral turpitude. Moral turpitude does not, however, include such acts as are not of themselves immoral but whose illegality lies in their being positively prohibited.

[These] guidelines nonetheless proved short of providing a clear-cut solution, for in *International Rice Research Institute v. NLRC*, the Court admitted that it cannot always be ascertained whether moral turpitude does or does not exist by merely classifying a crime as malum in se or as malum prohibitum. There are crimes which are mala in se and yet but rarely involve moral turpitude and there are crimes which involve moral turpitude and are mala prohibita only. In the final analysis, whether or not a crime involves moral turpitude is ultimately a question of fact and frequently depends on all the circumstances surrounding the violation of the statute.

"Implicit in the concept of mala in se is that of mens rea." Mens rea is defined as "the nonphysical element which, combined with the act of the accused, makes up the crime charged. Most frequently it is the criminal intent, or the guilty mind[.]"

Crimes mala in se presuppose that the person who did the felonious act had criminal intent to do so, while crimes mala prohibita do not require knowledge or criminal intent:

In the case of mala in se it is necessary, to constitute a punishable offense, for the person doing the act to have knowledge of the nature of [their] act and to have a criminal intent; in the case of mala prohibita, unless such words as "knowingly" and "willfully" are contained in the statute, neither knowledge nor criminal intent is necessary. In other words, a person morally quite innocent and with every intention of being a law-abiding citizen becomes a criminal, and liable to criminal penalties, if [they do] an act prohibited by these statutes.

Hence, "[i]ntent to commit the crime and intent to perpetrate the act must be distinguished. A person may not have consciously intended to commit a crime; but [they] did intend to commit an act, and that act is, by the very nature of things, the crime itself[.]" When an act is prohibited by a special law, it is considered injurious to public welfare, and the performance of the prohibited act is the crime itself.

Volition, or intent to commit the act, is different from criminal intent. Volition or voluntariness refers to knowledge of the act being done. On the other hand, criminal intent—which is different from motive, or the moving power for the commission of the crime—refers to the state of mind beyond voluntariness. It is this intent that is being punished by crimes mala in se.[48]

On the other hand, intent to commit the crime is not required in mala prohibitum crimes. Thus, good faith is not a defense since intent is not necessary to sustain a conviction.[49] We defer to the Congress in enacting criminal laws that do not require criminal intent as an element of the offense:

The law is clear. Inasmuch as there is wisdom in prioritizing the flow and exchange of ideas as opposed to rewarding the creator, it is the plain reading of the law in conjunction with the actions of the legislature to which we defer. We have continuously "recognized the power of the legislature . . . to forbid certain acts in a limited class of cases and to make their commission criminal without regard to the intent of the doer. Such legislative enactments are based on the experience that repressive measures which depend for their efficiency upon proof of the dealer's knowledge or of [their] intent are of little use and rarely accomplish their

purposes."[50]

Traditionally, we distinguish mala prohibitum and mala in se based on where they are found, whether in special penal laws or in the Revised Penal Code.[51] This view was updated in *Estrada v. Sandiganbayan*,[52] where plunder, criminalized under a special law, was considered a mala in se based on this Court's reading of legislative declaration from the text of the law.

Aside from the inherent immorality of crimes, immoral and vile acts are penalized for public policy considerations. It is possible that Congress removed the intent requirement in criminalizing such inherently vile acts. In my view, it is not our personal notions of morality that should govern in classifying crimes as either mala in se or mala prohibitum. Whether criminal intent is required to be proven should be discerned from the text of the law. Our classification of an offense must be consistent with our duty to interpret laws in accordance with their spirit or intent.[53] Thus, our reading of whether a law should be mala in se or mala prohibitum should not defeat what the law is trying to protect. In my view, classifying the cybercrime of child pornography as malum prohibitum is most consistent with the language of the law and its rationale.

Here, Cadajas is convicted of the cybercrime of child pornography in relation to Section 4(a) of Republic Act No. 9775. Under this section, the criminal act is to "hire, employ, use, persuade, induce[,] or coerce a child to perform in the creation or production of any form of child pornography." [54] Child pornography is defined as "any representation, whether visual, audio[,] or written combination thereof, by electronic, mechanical, digital, optical, magnetic[,] or any other means, of a child engaged or involved in real or simulated explicit sexual activities." [55] Explicit sexual activity includes actual or simulated "lascivious exhibition of the genitals, buttocks, breasts, pubic area[,] and/or anus." [56] When a computer system is used to commit child pornography, it is a cybercrime offense and punishable under Section 4(c)(2) of Republic Act No. 10175.[57]

Based on the foregoing, the cybercrime of inducement or coercion to create or produce child pornography is committed when all the following elements are present, namely, (1) the victim is a child below 18 years of age; (2) there is a representation of a child engaged in or involved in explicit sexual activity; (3) there was inducement or coercion of a child to create or produce such representation; and (4) the act is committed through a computer system.

While there is no question that child pornography is inherently immoral, it is not the only controlling factor. Aside from being injurious to public welfare, child pornography is criminalized based on the constitutional imperative for the State to afford special protection against "all forms of neglect, abuse, cruelty, exploitation[,] and other conditions prejudicial to their development." [58] In addition, the best interest of a child should be the primary consideration in all actions concerning them.[59] These state policies are enacted in Republic Act No. 9775 in criminalizing child pornography.[60] Eventually, Republic Act No. 10175 has expanded this protection to cover cyberspace.[61]

In classifying the cybercrime of child pornography as a mala in se offense, the ponente is in effect requiring the prosecution to prove an additional element of intent. However, intent is not an element of the offense. Thus, such characterization defeats the declaration of policy in Republic Act No. 9775 and the special protection of a child.

More than classifying the cybercrime of child pornography as malum prohibitum, we should be vigilant in our duty to ensure the primacy of the interest of a child and be conscious of how we can afford special protection to them. Here, we should protect children from engaging in romantic relationships with adults who try to abuse their innocence. Children are easily susceptible to coercion of adults. Thus, a child is incapable of giving consent to any lascivious act or sexual intercourse:

The sweetheart theory applies in acts of lasciviousness and rape, felonies committed against or without the

consent of the victim. It operates on the theory that the sexual act was consensual. It requires proof that the accused and the victim were lovers and that she consented to the sexual relations.

For purposes of sexual intercourse and lascivious conduct in child abuse cases under RA 7610, the sweetheart defense is unacceptable. A child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse with another person.

The language of the law is clear: it seeks to punish [t]hose who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or subjected to other sexual abuse.

Unlike rape, therefore, consent is immaterial in cases involving violation of Section 5, Article III of RA 7610. The mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense. It is a *malum prohibitum*, an evil that is proscribed.

A child cannot give consent to a contract under our civil laws. This is on the rationale that [they] can easily be the victim of fraud as [they are] not capable of fully understanding or knowing the nature or import of [their] actions. The State, as *parens patriae*, is under the obligation to minimize the risk of harm to those who, because of their minority, are as yet unable to take care of themselves fully. Those of tender years deserve its protection.

The harm which results from a child's bad decision in a sexual encounter may be infinitely more damaging to [them] than a bad business deal. Thus, the law should protect [them] from the harmful consequences of [their] attempts at adult sexual behavior. For this reason, a child should not be deemed to have validly consented to adult sexual activity and to surrender [themselves] in the act of ultimate physical intimacy under a law which seeks to afford [them] special protection against abuse, exploitation and discrimination. (Otherwise, sexual predators like petitioner will be justified, or even unwittingly tempted by the law, to view her as fair game and vulnerable prey.) In other words, a child is presumed by law to be incapable of giving rational consent to any lascivious act or sexual intercourse.

This must be so if we are to be true to the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual[,] and social wellbeing of the youth. This is consistent with the declared policy of the State

[t]o 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.

as well as

to intervene on behalf of the child when the parents, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation, and discrimination or when such acts against the child are committed by the said parent, guardian, teacher[,] or person having care and custody of the same.

This is also in harmony with the foremost consideration of the child's best interests in all actions concerning [them].

The best interest of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principles of First Call for Children as enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.[62] (Emphasis supplied, citations omitted)

In his dissenting opinion, Justice Caguioa is of the view that Christian should have been acquitted because there was no evidence that AAA was induced in sending lascivious photos. He is of the view that these were sent in the context of "a candid, intimate[,] and private conversation between two people in a relationship." [63] In effect, he agrees that the sweetheart defense is available in child pornography. Justice Gaerlan shares this view, finding no evidence of inducement. He concludes that the exchange between Cadajas and AAA is "akin to the banter employed by couples before undertaking the highest expression of human intimacy and passion." [64]

I vehemently disagree.

In *Bangayan v. People*, [65] the majority was wrong in its determination of the capacity of a mere 12-year-old to consent to sexual relations with her brother-in-law, who was fifteen years her senior. Both Justice Caguioa and Justice Gaerlan forget that the victim here is a child. While they offer progressive views on women's sexual choices, such cannot easily be concluded for a child in a romantic relationship. Like the majority in *Bangayan*, they fail to consider the complexities of consenting to a sexual act and the capacity of a child to understand the implications of a sexual act:

[S]exual intercourse is a complex act which is not only physical or sensual. Beyond that, it comes with the complexity of intimacy, relationship, and reproductive consequences.

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

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

Part and parcel of a valid consent is the ability to have the intellectual resources and capacity to make a choice that reflects [their] judgments and values. For someone to give sexual consent, [their] must have reached a certain level of maturity.

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

Nevertheless, voluntariness or informed sexual consent of a child must be determined cautiously. Cases involving younger victims must be resolved through more stringent criteria. Several factors, such as the age of the child, [their] psychological state, intellectual capability, relationship with the accused, their age difference, and other signs of coercion or manipulation must be taken into account in order to protect the child. [66]

Contrary to Justice Caguioa's conclusion, *Bangayan* did not reverse the pronouncement in *Malto v. People*. [67] Engaging in a romantic relationship does not remove the special protection of a child. This is especially true in the digital age and space, where a child's interaction with others easily evades supervision. We must remain wary of adult relationships. We should not be careless in concluding that the same dynamics apply between an adult and a child. This is what Justice Caguioa missed in his dissent. In this day and age, we must remain vigilant in our duty

as parens patriae to protect a child from any form of abuse.

It is for this reason that we cannot allow the sweetheart defense in child pornography. It is common, distasteful, and much abused in cases of acts of lasciviousness and rape, aiming to establish that fact that the sexual act was consensual.[68] Under the pretense of a romantic relationship, it is not unimaginable that a child will be easily induced or coerced to engage in explicit sexual acts. Inducement requires some exertion of influence defined as "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective." [69] A reading of the transcript of their chat messages reeks of how Cadajas induced AAA to send intimate photos under the guise of their relationship:

K:

Baliw hubad na lahat

C:

Picturan uh (sic) pasa muh (sic) xkin (sic) bi

K:

Lah gagi bi wag

Ayoko

C:

Uh ayaw muh (sic) pala sa mga treep (sic) KO (sic) ei (sic)

....

C:

Tayo lang naman makakakita ie (sic)

K:

Hahahaha baka pagkalat mo

Dede lang

C:

Ako din bi PSA (sic) mna (sic)

HahAt (sic) bi

K:

Magpasa ka din hahaha

Lah (sic) bat lahat

....

C:

Hahaha hnde (sic) aman (sic) bi

Lahat bi gusto ko

Uo nga nkKaumay (sic) bi nslibugan (sic) ako

K:

Gagi ayoko nga yung pepe

... ..

C:

Buka muh (sic) nga kunti (sic) bi kunti (sic) lang tutok muh (sic)

Hah (sic)

K:

Ayoko na.

Haha Christian haha OK nay an

C:

She (sic) nah (sic) gsto (sic) KO (sic) mkita (sic) bi (Emphasis supplied)[70]

Justice Caguioa points out that AAA was already naked and even asked for nude photos from Cadajas. From these, he concludes that AAA was willing to send her nude photos to Cadajas sans inducement or coercion.[71] A holistic reading of the transcript shows AAA' s reluctance in what Cadajas was asking her to do. She refused several times and even tried to establish boundaries. Cadajas wanted more but AAA was not comfortable with that. This is confirmed in AAA's testimony, which the ponente quoted as follows:

Q:

What about those pictures? Can you tell us about those pictures that you are referring to?

A:

Because he instructed me to send a picture to him of my breast and vagina, so I send him pictures, Sir.

Q:

Okay, you send pictures of your breast and you [sic] vagina. What did you use in order to send him those pictures?

A:

Cell phone, Sir.

Q:

How did the accused convince you to do that?

A:

He said magsend daw po ako ng picture.

Q:

Was there a promise?

A:

None, Sir.

Q:

Just the accused merely telling you or commanding you to produce or take pictures of your private parts?

A:

Yes, Sir.

Q:

Why did you allow yourself to do that?

A:

Napilitan lang po akong magsend ng ganun.

[. . .]

Q:

Paanong napilitan kung hindi ka pinuwera or hindi ka tinakot? Paano mo nasabing napilitan lang? Alam mong mali iyon at hindi naman pinayagan na ganun, bakit mo sinned (sic) pa rin kung hindi ka naman niya pinilit o tinakot? Ano talgal (sic) ang nagtulak sayong magsend ng ganun? Ano ba ang pumasok sa isip mo, pumasok sa katawan mo nung ginawa mo iyon? Just be candid.

A:

Hindi ko po alam.

Q:

Hindi moa lam (sic) kasi?

A:

Naaano lang po ako sa sinabi niya, sa message po niya sakín na puro please magsend kana sige na puro ganun po.

Q:

Sa pagkukumbinsi niya? Panay ang please?

A:

Hindi po niya ako tinigilan nun e.

Q:

Hindi siya tumitigil?

A:

Hindi po.[72]

From the foregoing, we cannot conclude this conversation as "a candid, intimate[,] and private conversation between two people in a relationship." [73] We cannot turn a blind eye to the numerous objections of AAA. Through continued inducement, Cadajas took advantage of her vulnerability to send more photos exposing herself to him. From a mere transcript, Justice Caguioa was quick to ignore the possibility that the child was forced to

give in to what Cadajas wanted in the context of a romantic relationship.

As the ponente quoted:

Q:

In fact, there is in this statement that you even type these words kuya nalilibugan ako hahaha is it true that? Did you type this?

A:

Yes Sir, I typed that but that is not true, it is just a trip lang sa kanya.

Q:

In that trip, in line with it is a four (4) smiley crying while laughing, smiley with tears meaning you are laughing?

Court:

You are just joking ganun ba?

Witness:

Yes, your Honor.[74]

Being older with more than 10 years' worth of experience than AAA places Cadajas in a stronger and more dominant position.[75] He had intimate needs that a child is not capable of understanding. He even insinuated that AAA did not have the same interests that he had and could not keep up with him in their relationship. All these factors allowed him to induce AAA to engage in explicit sexual activity using her mother's mobile phone.

While it is not disputed that Cadajas was AAA's boyfriend at the time of the incident, this Court cannot sanction their romantic relationship and excuse Cadajas' criminal act. This is especially true since the lascivious photos were taken in the context of such relationship, where Cadajas abused AAA's affection and trust to satisfy his lust.

All the elements of the cybercrime of child pornography under Republic Act No. 10175 have been established beyond reasonable doubt. Thus, I agree with the ponente that Christian's guilt must be sustained.

ACCORDINGY, I vote to DENY the Petition.

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[1] Ople v. Torres, 354 Phil. 948, 970 (1998) [Per J. Puno, En Banc].

[2] People v. Court of First Instance of Rizal, 189 Phil. 75, 92 (1980) [Per J. Guerrero, First Division].

[3] City of Manila v. Laguio, 495 Phil. 289, 318 (2005) [Per J. Tinga, En Banc].

[4] Ople v. Torres, 354 Phil. 948, 972-974 (1998) [Per J. Puno, En Banc].

[5] Public Information Office Supreme Court, Completing the Circle of Human Rights: The Puno Initiative, available at <http://www.ombudsman.gov.ph/UNDP4/wp-content/uploads/2013/02/CCHR-01-FINAL-03SEPT2010-BB.pdf> (last accessed on November 29, 2021).

[6] In re Rodriguez, 676 Phil. 84, 103 (2011) [Per J. Sereno, En Banc].

[7] Republic Act No. 10173 (2012).

[8] Republic Act No. 10175 (2012).

[9] Republic Act No. 10173 (2012), sec. 2.

[10] Republic Act No. 10175 (2012), sec. 2.

[11] Versoza v. People, G.R. No. 184535, September 03, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65765>> [Per Curiam, En Banc].

[12] J. Leonen, Separate Opinion in Versoza v. People, G.R. No. 184535, September 03, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65765>> [Per Curiam, En Banc]. The speech entitled The Common Right to Privacy was delivered during the Forum on The Writ of Habeas Data and Human Rights, sponsored by the National Union of Peoples' Lawyers on March 12, 2008 at the Innotech Seminar Hall, Commonwealth Ave., Quezon City. It was also cited in Footnote 20 of Vivares v. St. Theresa's College, 744 Phil. 451 (2014) [Per J. Velasco, Third Division].

[13] See Vivares v. St. Theresa's College, 744 Phil. 451 (2014) [Per J. Velasco, Third Division] and De Lima v. Duterte, G.R. No. 227635, October 15, 2019, <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/65820>> [Per J. Bersamin, En Banc].

[14] Gamboa v. P/Suppt. Chan, 691 Phil. 602 (2012) [Per J. Sereno, En Banc].

[15] 130 Phil. 415, (1968) [Per J. Fernando, En Banc].

[16] 727 Phil. 28, (2014) [Per J. Abad, En Banc].

[17] J. Leonen, Dissenting and Concurring Opinion in Disini v. Secretary of Justice, 727 Phil. 28, 308-320 (2014) [Per J. Abad, En Banc].

[18] C. Edwin Baker, Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment, in 21 FREEDOM OF SPEECH 216 (Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul eds., 2004).

[19] Id.

[20] The right to be forgotten gained international prominence after the European Union's decision on Google Spain SL v. Agencia Espanola de Proteccion de Datos (AEPD), E.C.R. Case C-131/12 (2014). See Michael J. Kelly and David Satola, The Right to be Forgotten, 1 U. ILL. L. REV. 1 (2017).

[21] C. Edwin Baker, Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment, in 21 FREEDOM OF SPEECH 216 (Ellen Frankel Paul, Fred D. Miller, and Jeffrey Paul eds., 2004).

[22] Id.

[23] Michael J. Kelly and David Satola, The Right to be Forgotten, 1 U. ILL. L. REV. 1, 4 (2017).

[24] 744 Phil. 451 (2014) [Per J. Velasco, Third Division].

[25] Id. at 479-480.

[26] See ponencia, p. 7-9; Spouses Hing v. Choachuy, 712 Phil. 337 (2013) [Per J. Del Castillo, Second Division].

[27] 802 Phil. 314 (2016) [Per J. Perez, En Banc].

[28] J. Leonen, Dissenting and Concurring Opinion in *Subido Pagente Certeza Mendoza and Binay Law Offices v. Court of Appeals*, 802 Phil. 314, 386 (2016) [Per J. Perez, En Banc].

[29] Shoshana Zuboff, "We Make Them Dance": Surveillance Capitalism, the Rise of Instrumentarian Power, and the Threat to Human Rights, in *HUMAN RIGHTS IN THE AGE OF PLATFORMS* 13-15 (Rikke Frank Jørgensen ed., 2019), available at <<http://library.oapen.org/handle/20.500.12657/24492>> (last accessed on March 24, 2022).

[30] *Id.* at 19-20.

[31] CONST. art. 3, sec. 3 (1). It provides that:

SECTION 3 (1). The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

[32] CONST., art. 3, sec. 3, subpar. 2 states that "[a]ny evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding."

[33] J. Puno, Separate Opinion in *Republic v. Sandiganbayan*, 454 Phil. 504 (2003) [Per J. Carpio, En Banc].

[34] *Atienza v. Commission on Elections*, 626 Phil. 654, 673 (2010) [Per J. Abad, En Banc], citing *City of Manila v. Hon. Laguio, Jr.*, 495 Phil. 289 (2005) [Per J. Tinga, En Banc].

[35] 271 Phil. 51 (1991) [Per J. Bidin, Third Division].

[36] *Id.* at 62-63.

[37] 324 Phil. 63 (1996) [Per J. Mendoza, Second Division].

[38] Dissenting Opinion of J. Gaerlan, pp. 2-3.

[39] *Zulueta v. Court of Appeals*, 324 Phil. 63, 68 (1996) [Per J. Mendoza, Second Division].

[40] *People v. Court of Appeals*, 755 Phil. 80, 98 (2015) [Per J. Peralta, Third Division], citing *People v. Santiago*, 255 Phil. 851 (1989) [Per J. Gancayco, First Division].

[41] *Ponencia*, p. 2.

[42] *Id.* at 10.

[43] *Zulueta v. Court of Appeals*, 324 Phil. 63, 68 (1996) [Per J. Mendoza, Second Division].

[44] *Ponencia*, p. 10.

[45] *Id.* at 26-28.

[46] Dissenting Opinion of Justice Caguioa, p. 18.

[47] 755 Phil. 709 (2015) [Per J. Leonen, Second Division].

[48] *Id.* at 763-765.

[49] *Tan v. Ballena*, 579 Phil. 503 (2008) [Per J. Chico-Nazario, Third Division].

[50] *ABS CBN v. Gozon*, 755 Phil. 709, 770 (2015) [Per J. Leonen, Second Division].

[51] *Garcia v. Court of Appeals*, 519 Phil. 591, 596 (2006) [Per J. Quisumbing, Third Division].

[52] 421 Phil. 290 (2001) [Per J. Bellosillo, En Banc].

[53] *Alonzo v. Intermediate Appellate Court*, 234 Phil. 267 (1987) [Per J. Cruz, En Banc].

[54] Republic Act No. 9775 (2009), sec. 4(a).

[55] Republic Act No. 9775 (2009), sec. 3(b).

[56] Republic Act No. 9775 (2009), sec. 3(c)(5).

[57] Republic Act No. 10175 (2012), sec. 4(c)(2) states:

SECTION 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act:

....

(c) Content-related Offenses:

....

(2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

[58] CONST., art. 15, sec. 3 (2).

[59] Convention on the Rights of the Child, January 26, 1990 (entered into force on September 2, 1990).

Article 3 of the Convention provides:

ARTICLE 3. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

[60] Republic Act No. 9775 (2009), sec. 2 provides:

SECTION 2. Declaration of Policy. — The State recognizes the vital role of the youth in nation building and shall promote and protect their physical, moral, spiritual, intellectual, emotional, psychological and social well-being. Towards this end, the State shall:

(a) Guarantee the fundamental rights of every child from all forms of neglect, cruelty and other conditions prejudicial to his/her development;

(b) Protect every child from all forms of exploitation and abuse including, but not limited to:

(1) the use of a child in pornographic performances and materials; and

(2) the inducement or coercion of a child to engage or be involved in pornography through whatever means; and

(c) Comply with international treaties to which the Philippines is a signatory or a State party concerning the rights of children which include, but not limited to, the Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, the International Labor Organization (ILO) Convention No. 182 on the Elimination of the Worst Forms of Child Labor and the Convention Against Transnational Organized Crime.

[61] *Disini v. Secretary of Justice*, 727 Phil. 28 (2014) [Per J. Abad, En Banc].

[62] *People v. Udang*, 823 Phil. 411, 431-433 (2018) [Per J. Leonen, Third Division], citing *Malto v. People*, 560

Phil. 119 (2007) [Per J. Corona, First Division].

[63] Dissenting Opinion of Justice Caguioa, p. 7.

[64] Separate Opinion of Justice Gaerlan, p. 6.

[65] G.R. No. 235610, September 16, 2020 <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66612>> [Per J. Carandang, Third Division].

[66] J. Leonen, Dissenting Opinion in *Bangayan v. People*, G.R. No. 235610, September 16, 2020 <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66612>> [Per J. Carandang, Third Division].

[67] *Malto v. People*, 560 Phil. 119 (2007) [Per J. Corona, First Division]. See Justice Caguioa Dissenting Opinion, p. 14.

[68] *Id.* at 411.

[69] *Caballo v. People*, 710 Phil. 792, 805 (2013) [Per J. Perlas-Bernabe, Second Division].

[70] Ponencia, pp. 10-11.

[71] Dissenting Opinion of Associate Justice Caguioa, p. 7.

[72] Ponencia, p. 15.

[73] Dissenting Opinion of Justice Caguioa, p. 7.

[74] Ponencia, p. 15.

[75] *Fianza v. People*, 815 Phil. 379 (2017) [Per J. Perlas-Bernabe, First Division].

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## DISSENTING OPINION

### CAGUIOA, J.:

The ponencia in the instant case affirms the conviction of petitioner Christian Cadajas y Cabias (petitioner) for the crime of child pornography under Section 4(c)(2) of Republic Act No. (RA) 10175,[1] in relation to Sections 4(a) and 3(b) and (c)(5) of RA 9775[2] and sentences him to reclusion perpetua.[3] The ponencia anchors petitioner's conviction on the finding that the conversation between petitioner and AAA[4] through Facebook Messenger (FB) clearly showed that AAA was induced by petitioner to send him pictures of her private parts.[5] The ponencia also finds unmeritorious petitioner's sweetheart defense for insufficiency of evidence and the claim that AAA consented to the commission of the act as immaterial given the proof of inducement on the part of petitioner.[6] The ponencia further explains that minors are vulnerable to the cajolery of adults; thus, while minors, especially between ages 12 and 18, are curious about their sexuality, this does not mean that they are capable of giving rational consent to engage in any sexual activity.[7] Thus, the ponencia concludes that, as *parens patriae*, the duty of the Court is to protect minors, like AAA, from abuse and exploitation of sexual predators.[8]

I dissent and vote to acquit petitioner. Affirming petitioner's conviction is in utter disregard of the Court's duty to uphold the constitutional presumption of innocence when, as in this case, the totality of the prosecution's evidence, as applied to the language and intent of the law defining and penalizing child pornography, fails to prove petitioner's guilt beyond reasonable doubt.

To be clear, a vote to acquit is not necessarily a vote against the protection of children. The duty to protect minors

falls upon the State as a whole, not just the Judiciary, and a conviction is not synonymous with the protection of minors. Incarcerating otherwise innocent individuals is not the way to achieve a laudable government objective. Expand the coverage of penal provisions in pursuit of broad policy objectives may not always further the Court's duty to render justice and promote the rule of law.

## I.

The starting point in every criminal prosecution, and in every review of any decision in criminal cases, is that the accused has the constitutional right to be presumed innocent.[9] This constitutionally guaranteed presumption assures the accused a fair, just and impartial trial. In the words of Justice Cruz in *People v. De Guzman*,[10] "[t]he constitutional presumption of innocence is not an empty platitude meant only to embellish the Bill of Rights. Its purpose is to balance the scales in what would otherwise be an uneven contest between the lone individual pitted against the People of the Philippines and all the resources at their command." [11] Thus, the presumption of innocence is overturned only when the prosecution, based on the strength of its own evidence, has proven beyond reasonable doubt the guilt of the accused with each and every element of the crime charged in the information.[12]

The requirement of proof beyond reasonable doubt necessarily means that mere suspicion of the guilt of the accused, no matter how strong, should not sway judgment against him or her.[13] It also entails the court to study keenly every evidence on record, the applicable statute and jurisprudence, such that where two conflicting probabilities arise from the evidence and the law, the one compatible with the presumption of innocence will be adopted.[14] This is because the fact that the evidence gave rise to conflicting explanations means that the evidence did not pass the test of moral certainty and would not suffice to support a conviction.[15] To be sure, conviction must be upheld only when the conscience is satisfied, with moral certainty, "that on the defendant could be laid the responsibility for the offense charged; that not only did he [or she] perpetrate the act but that it amounted to a crime." [16] Anything short of this, it is the right of the accused to be freed and the duty of the court to acquit him or her.[17]

Based on the foregoing principles, and considering the dearth of evidence to support a conviction, I find that the prosecution in this case failed to overcome petitioner's presumption of innocence.

Petitioner was charged with child pornography defined and penalized by RA 9775, as amended by RA 10175.

RA 9775 was enacted to combat the growing number of commercial and online sexual abuse and exploitation cases around the world, including the Philippines, particularly the creation, selling and distribution of pornographic images of children.[18] RA 9775 was also the country's response to its commitment, under various international agreements, to protect the child from all forms of sexual exploitation, abuse and violence. Thus, the guiding principle of RA 9775 reads:

SECTION 2. Declaration of Policy. — The State recognizes the vital role of the youth in nation building and shall promote and protect their physical, moral, spiritual, intellectual, emotional, psychological and social well-being. Towards this end, the State shall:

(a)

Guarantee the fundamental rights of every child from all forms of neglect, cruelty and other conditions prejudicial to his/her development;

(b)

Protect every child from all forms of exploitation and abuse including, but not limited to: (1) the use of a child

in pornographic performances and materials; and (2) the inducement or coercion of a child to engage or be involved in pornography through whatever means. (Emphasis, italics and underscoring supplied)

In his sponsorship speech during the deliberations of House Bill No. 06440, Representative Matias Defensor (Rep. Defensor) described the evils of child pornography as follows:

Child pornography is a menace that hounds societies around the world, regardless of their political or economic state. It violates the right of our children in the most gruesome way. Child pornography wields its violent sword and cuts through the several levels of the child's psyche, robbing them of their innocence, and forcibly exposing them to a life that no living person should ever be subjected to — a life of repeated violation and immeasurable suffering. It violates their right to be free and shatters their hopes for a better future. In so doing, child pornography is a crime against the future of our very own nation.[19]

Rep. Defensor then proceeded to describe how the "menace" of child pornography has invaded the world through the internet; and that the proposed bill, now RA 9775, would equip our law enforcers to stop this threat:

To date the number of cases of child pornography all over the world has yet to be determined. But partial results are alarming. Overseas, recent investigations on child pornography include Operation Cathedral that resulted in multi-national arrest and seven convictions as well as uncovering 750,000 images with 1,200 unique identifiable faces being distributed over the web; Operation Avalanche was a Garce Siochana (police) operation targeting child pornography in the Republic of Ireland. Involving simultaneous searches on May 25, 2002 of over a hundred individuals suspected of downloading child pornograph (sic), it was one of the largest police operations in Ireland's history.

Operation Auxin in Australia was an Australian police operation in September 2004, leading to the arrest of about almost 200 people on charges of child pornography. These people were all accused of purchasing child pornography over the Internet, using their credit cards, from Belarusian crime syndicates, the credit card payments having been processed by a company named 'Landslide.com' in Fort Lauderdale, Florida.

x x x x

The new information highway is both a blessing and a curse. When we turn on our computer, Google the word "children" and I dare you to check the listing. Somewhere in the list will be a site shamelessly and callously broadcasting Child Pornography. The US DOJ has reported that at any time there are estimated to be more than one million pornographic images of children on the Internet, with 200 new images posted daily. A single offender arrested in the United Kingdom possessed 450,000 child pornography images and that a single child, pornography site, received a million hits in a month. Further, that much of the trade in child pornography takes place at hidden levels of the internet and that it has been estimated that there are between 50,000 and 100,000 pedophiles involved in organized pornography rings around the world, and that one-third of these operate from the United States.

The menace is with us at all times. With the created evolution of child pornography, our cellular phones, these gadgets we all cannot live without has become a tool for child pornography. "Sexting", a term used to describe the use of the cellular phone to broadcast child pornography materials, oftentimes to solicit an audience, is used by sexual predators and peddlers alike. x x x

x x x x

x x x This bill will guarantee that our children will not be a part of the harrowing statistics of child pornography. With proper implementation, this will protect our children against child pornography and its devastating effects. This bill will equip our enforcers with a legal basis to help stop this menace and to bring to justice the perpetrators and predators.[20]

Representative Darlene Antonino-Custodio, in her sponsorship, also recognized the proliferation of the "business"

of child pornography in our country and how it has victimized and abused children:

Mr. Speaker, child pornography is one of the fastest growing businesses on the Internet. According to the report submitted by the National Center for Missing and Exploited Children, around 20% of all the Internet pornography is children-based. It has been estimated that around 83% of the images are those children aged six to 12 years old and 39% of the images are the ones in the age group of three to five. [H]indi pa po pumapasok ng eskwelahan.

x x x x

Mr. Speaker, hindi po bago itong istoryang ito sa ating bansa. Let me quote from the published book of Child Pornography in the Philippines in the introduction: "In the early part of 2004, the Philippines was racked by the news of 17 children being sexually abused by three foreign nationals. Aside from sexually abusing them, the foreigners photographed and took video footage of these children in various stages of undress (sic) and in sexually suggestive poses. Some of the photographs and videos also documented the sexual abuse of these children.["]

"A few months later, another story came into focus. This time the news involved an operation staged by the NBI and a Manila-based NGO to capture an Asian national who was said to be producing child pornographic material using Filipino children as models. The foreigner was apprehended together with his Filipino cohorts in the act of taking a video footage of a girl as he made her undress. Aside from the female victim, the foreigner also brought along with him 70 children, whom the law enforcement agency suspected would be used for his production."

Mr. Speaker, 2004 was not the first story. This actually was a long line of several stories of children being abused, children being victimized. I filed this bill. Ms. Speaker, during the 13[th] Congress and I am thankful that the Speaker has chosen to actually prioritize this bill this time around.[21]

From the very words spoken by the authors of RA 9775, it is clear that the passage of the law was intended to address child abuse and exploitation committed through the proliferation of online pornography in the country. Proponents of the law expressed great concern on how the internet has been used to lure children into the "business" of creating and producing pornographic materials and then subjecting them to abuse and exploitation by sexual perpetrators and predators. The use of internet technology made child pornography more pervasive and more difficult for government to investigate, monitor, and prosecute, given the lack of specific legislation at that time. Thus, to fill in gaps in legislation, Section 4 of RA 9775 defines a wide array of child exploitation and abuse by penalizing the entire "production process" of child pornography — from the luring, grooming and employing of a child to perform or create pornographic materials, to the production, distribution, and sale thereof and finally to willfully accessing and possessing the same.[22] RA 9775 also punishes those who promote and assist in the creation and distribution of these pornographic materials, including the child's parent or legal guardian, film distributors, telecommunications companies and owners of malls, cinema houses and establishments.[23]

The thrust of RA 9775, therefore, is really to protect children from abuse and exploitation committed through child pornography by punishing pedophiles, sexual predators and those who provide assistance to them. Seen through this lens, it cannot reasonably be said that the act committed by petitioner in this case falls within the definition of the offense for which he is charged. Differently stated, the prosecution in this case failed to establish with moral certainty that petitioner abused and exploited AAA by inducing or coercing her to produce or create pornographic materials.

To recall, petitioner was charged with violation of Section 4(a) in relation to Sections 3(b) and (c)(5) of RA 9775, defined as follows:

SECTION 4. Unlawful or Prohibited Acts. — It shall be unlawful for any person:

(a)

To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography;

### SECTION 3. Definition of Terms. —

(a)

"Child" refers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself or protect himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition.

xxxx

(b)

"Child Pornography" refers to any representation, whether visual, audio or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities.

(c)

"Explicit Sexual Activity" includes actual or simulated —

xxxx

(5)

lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus;

xxx

Proceeding from the foregoing, for petitioner to be liable for child pornography under Sec. 4(a), the prosecution must be able to prove the following elements: (1) that the victim is a child; and (2) that the victim was induced or coerced by petitioner to perform in the creation of explicit sexual activity.

The minority of AAA is undisputed in this case. However, as to the second element of the crime, the evidence of the prosecution undeniably falls short of proving that AAA was coerced or induced by petitioner.

To prove the second element of the crime, the prosecution presented the FB conversation between petitioner and AAA.[24] Having read the entirety of the FB conversation, I find that petitioner neither coerced nor induced AAA into sending him photos of her private parts.

To coerce means to compel by force or threat.[25] There is coercion when there is improper use of power that compels another to submit to the wishes of one who wields it.[26] On the other hand, induce means to entice or persuade another to take a certain course of action[27] or to influence someone to do something that person otherwise would not have done or to not do something that person otherwise would have done.[28] In other words, there is inducement when the words or pleas of the accused is the sole determining factor that moved the woman to engage in sexual activities with the accused.

In my reading of the FB conversation, I do not see any coercion or inducement done by petitioner. AAA was not coerced into sending the photos because, clearly, no threat or force was employed by petitioner that compelled AAA to do the same against her will. Moreover, in their respective testimonies, both AAA and her mother

admitted that petitioner did not force or threaten AAA into sending the nude pictures.[29]

Neither was AAA induced by petitioner because it can easily be inferred from their FB conversation that AAA would nonetheless have wanted to send the photos even without petitioner prodding her. The following portions of the conversation between them are quite telling:

[AAA]:

Hahaha gagi gusto ko sya pagtripan e di mo naman ako pinagtrtripan e

C [(Cadajas)]:

Gsto muh pagtrepan kita ngayon

[AAA]:

Oo

Ready ako sa ganyan.

C:

Sge hubad

[AAA]:

Nakahubad na hahaha

C:

Tanggalin uh panti muh haha

[AAA]:

Baliw hubad na lahat

x x x x

C:

Kala ko ba rdy ka sa ganyan

[AAA]:

Lah mukha akong tanga nun k[u]ng pipicturan ko

Pero hahaha

Kuya nalilibugan ako hahaha

x x x x

[AAA]:

Magpasa ka din hahaha

Lah bat lahat

Bi personal gusto ko kapag ganyan e

x x x x

C:

Ako lang naman makakita saka ikaw bi

Tayong dalawa

[AAA]:

Flash ko camera ko para makita whahaha nakakahiya.

x x x x

C:

Nakaktampo k nman yan.

[AAA]:

Bukas bi papakita ko.[30]

If AAA did not want to send petitioner the pictures, why did she tell petitioner that she was already nude before petitioner even asked for the pictures? Why did she also ask petitioner to send nude photos of himself, or why did she invite petitioner to meet the next day to show him in person her private parts? It is also quite telling why AAA would send pictures four consecutive times even if she kept telling petitioner that she did not want to.[31] Clearly, the FB conversation raises too many questions and doubts on whether AAA was indeed induced or coerced by petitioner, or was she in fact willing to send the nude photos of her private parts. As such, there is reasonable doubt as to petitioner's guilt.

Furthermore, the Court must take into account that AAA herself admitted that petitioner was her boyfriend at the time of the incident and that she only broke up with him because her mother learned about it and was against their relationship.[32] To my mind, this fact provides context to the afore-quoted conversation between petitioner and AAA — that the same was a candid, intimate and private conversation between two people in a relationship and not a conversation characterized by coercion or inducement to exploit or abuse AAA to engage in explicit sexual acts against her will.

Again, to emphasize, the overarching principle of RA 9775 is the protection of children from sexual abuse and exploitation committed through pornography. To achieve this purpose, RA 9775 penalizes pedophiles and sexual predators, including persons and institutions that facilitate the creation and production of pornographic materials. Here, based on the evidence presented by the prosecution, by no stretch of imagination can it be said that AAA was exploited or abused by petitioner into creating pornographic materials as contemplated by law. Clearly, the prosecution's evidence fell short of proving that the act committed by petitioner amounted to the offense charged against him.

In further justifying that petitioner's acts are punished by law, the ponencia alludes to the provision of RA 9775 that penalizes mere possession of pornographic materials for personal use or enjoyment.[33]

I disagree with this reasoning.

At the outset, I find that possession per se of pornographic materials does not automatically make a person liable under RA 9775. Such possession must be coupled with circumstances showing the requisite criminal intent to possess pornographic materials. Otherwise, persons who had inadvertently received nude photos in their social media accounts, emails or messenger applications, would already be liable under the law, which the law cannot be interpreted as having been its intent.

More importantly, petitioner is not charged with possession of pornographic materials. The Information filed against petitioner clearly charges him with violating Section 4(a) of RA 9775 for inducing or coercing AAA to send him pictures of her vagina and breasts, through Facebook Messenger using a mobile phone.[34] It is a fundamental rule in criminal prosecutions that an accused may only be convicted of the crime with which he or she is charged. This proceeds from the accused's constitutional right to be informed of the nature and cause of accusation against him or her.[35] Therefore, to hold petitioner liable just because his act appears to be covered by a different provision of the law is a blatant violation of this constitutional right

## II.

As I had earlier pointed out during the deliberations of this case, and now accepted by the ponencia, offenses under RA 9775 are crimes *mala in se* and not *mala prohibita*. Thus, proof of intent to abuse and exploit a child through the creation of pornographic materials is indispensable to hold petitioner liable for the crime charged.

What distinguishes a crime *mala in se* from an offense *malum prohibitum* is the inherent immorality or vileness of the act itself. Thus, while generally, *mala in se* felonies are defined and penalized in the Revised Penal Code, acts that are inherently immoral are deemed *mala in se* even if they are punished by a special law.[36]

As any other form of child exploitation and abuse, child pornography as defined and penalized under RA 9775, is inherently wrong. It corrupts the innocence of a child and damages him or her physically, mentally and emotionally. In fact, child pornography is doubly vicious because it provides an avenue for and promotes the commission of sexual abuses against children.

That child abuse and exploitation penalized under special law are crimes *mala in se* is not a new proposition. In violations of RA 7610, the Court had previously held that they are offenses *mala prohibita*, hence, intent is not material.[37] However, this ruling was overturned by the Court in *People v. Bangayan*[38] (Bangayan). In other cases involving the physical abuse of a child under RA 7610, the Court also found such offense *mala in se* for being inherently wrong. The Court then ruled that "criminal intent must be clearly established with the other elements of the crime; otherwise no crime is committed." [39]

Proceeding from the foregoing, it was erroneous for the courts *a quo* to conclude that the crime petitioner is charged with is *malum prohibitum* just because a special law prohibits the same. The inherent vileness of abusing and exploiting a child by hiring, employing, inducing or coercing him or her to engage in the production of pornographic materials is beyond question. As such, while it is penalized by a special law, child pornography is deemed an offense *mala in se*. Accordingly, the criminal intent to abuse or exploit a child to produce pornographic materials must be present and proven by the prosecution. Unfortunately, in this case, contrary to the ponencia's finding, no iota of evidence was presented by the prosecution to prove that petitioner abused or exploited AAA into creating pornographic materials of herself. Again, to reiterate, what the evidence simply and explicitly showed, especially the FB conversation between AAA and petitioner, is that AAA and petitioner, as lovers, had a private conversation and shared intimate photos of themselves.

## III.

The arguments above espoused are not mere "opinions and ruminations" on my end, nor are they "daubed with perhaps unconscious biases about gender roles;" to the contrary, they are products of "making inferences." Making inferences is what courts do (1) when it reaches conclusions when all the court has are circumstantial evidence, or (2) when it allows disputable presumptions to take the place of requiring the establishment of certain facts, because certain things may be inferred from what was already established. The Court is no stranger to making inferences in cases involving sexual activities. In *People v. Amarela*[40] (Amarela), for instance, the

Court "found the alleged victim's statement as less credible than the inferences from the other established evidence and proceeded to acquit the accused." [41] The foregoing are inferences from the evidence at hand, and are not mere assumptions or "what-could-have-beens."

In fact, my arguments are drawn from a purely legal standpoint.

Let me illustrate.

The approach I take in this case is similar to the perspective I take in every criminal case. I decide — from the viewpoint of presumption of innocence. The evidence the prosecution presented must necessarily hurdle this presumption beyond a reasonable doubt. For this case, the prosecution was charged with the duty of establishing beyond a reasonable doubt that petitioner induced AAA to make and send nude photos of herself. To my mind, therefore, there must necessarily be an unmistakable showing that petitioner's words were the ones that impelled AAA to do what she did. As the threshold is proof beyond reasonable doubt, there must necessarily be strong causation — not mere correlation — between petitioner's words and AAA's ultimate actions.

This is where the majority and I differ.

To them, the conversation is enough to prove beyond reasonable doubt the causation between petitioner's words and AAA's actions. But in my view the conversation only shows correlation but not causation. Bringing up the fact that AAA mentioned that she was already nude prior to petitioner asking for her pictures, that she asked petitioner to send nudes of himself, and that she herself invited petitioner to meet the next day to show him in person her private parts are not meant to "slut-shame" AAA. These were relevant facts culled from the very conversation on which the conviction is being hinged, and the conclusion reached from the inference is that petitioner's words were not the moving factor as to why AAA did what she did.

I do not discount the power imbalance in a relationship between a minor and someone with whom he or she has a considerable age gap that Associate Justice Amy C. Lazaro-Javier (Justice Lazaro-Javier), for instance, talks about in her Concurring Opinion. The use and abuse of this power is precisely the kind of inducement which the law punishes. It is not the one involved in this case where, in the conversation itself, it is already apparent that, to reiterate, it was the woman herself who was already hinting at sexual signals prior to petitioner's act of asking for nude pictures. In my view, these circumstances surrounding the conversation dilutes the claim that there was "inducement" such that petitioner must be sent to languish in prison for years to come.

Meanwhile, for the majority, the conversation was enough to prove beyond reasonable doubt that there was "inducement" in this case. During the deliberations, it was opined:

For one, it would really be both off and odd for the 14-year[-]old girl to just undress and exhibit her private parts to petitioner and in the process memorialize her "explicit sexual activity" as defined in RA 9775 through the internet for nothing and out-of-the-blue. No reasonable person would believe that she was doing so for reasons other than and independent of petitioner's words, deeds, and other circumstances. [42]

I disagree.

We may not fully understand why but there are people who, for one reason or another, do in fact memorialize their sexual activities online without someone else's prodding. The internet and the age of social media has brought a world — no matter how strange or unusual it may appear to our generation — where some people, especially young ones, post whatever they want, even those with explicit sexual content, on their social media accounts. The Court cannot thus make the logical jump that when AAA sent her picture to her boyfriend, it must necessarily have been because of the latter's words and actions. To make that jump is a hasty generalization. More importantly, from the perspective of law and the dispensation of justice, it would be violative of the presumption

of innocence.

It is not for the Court to make that jump in the absence of evidence. If the conversation were clear that the idea of engaging in sexual activity online was initiated by and came from petitioner alone, then that would be an argument for conviction. That is not, however, what is before us in this case.

These are the reasons why I personally take exception to the quip that my position is an "articulation of the macho versus the virgin paradigms for binary gender roles" or that my perspective is "aggressively male." It was even opined that, "[t]he unstated argument raised by this claim is the myth that this victim is 'unworthy.' It is akin to the rape myth that 'a slut cannot be raped.'"

In this generation's language, my Opinion is being branded in two ways: "slut-shaming" and "victim-blaming." This could not be further from the truth.

As illustrated above, the inferences gathered from the facts established were relevant to the case as the Court is tasked to determine if there was "inducement" in this case. Some of the members of the Court, however, effectively suggest that we turn a blind eye to these facts that are already apparent before us, or else we would be guilty of "slut-shaming." The facts surrounding the conversation — to reiterate, (1) that AAA mentioned that she was already nude prior to petitioner asking for her pictures, (2) that she asked petitioner to send nudes of himself, and (3) that she herself invited petitioner to meet the next day to show him in person her private parts — were not for the purpose of "slut-shaming" or "victim-blaming" her. The fallacy of the rape myth lies in the Olympic leap in logic being made between consent to sex, on the one hand, and other irrelevant things, on the other, such as what she was wearing at the time or if she was drinking alcohol. My Opinion did not make any logical jump; instead, it discusses the circumstances by which the Court can assess the consent of AAA to the sexual activity, en route to determining whether there was, in fact, inducement in this case.

The parallelisms between my Opinion and the rape myth are, therefore, not only fallacious but frankly, egregiously unfair.

It is important to be clear that pointing out that a woman wanted to engage in sexual activity is not being misogynistic. On the contrary, what is misogynistic is to perpetuate the idea that it is not possible for a woman to have sexual desires and to express such desires. Not too long ago, in *Amarela*, the Court finally corrected its long-standing stereotype<sup>[43]</sup> of a Filipina that has been used by the Court for decades. The Court said that it "cannot be stuck to the Maria Clara stereotype of a demure and reserved Filipino woman."<sup>[44]</sup> The Court even went as far as calling the doctrine — which provides that "no young Filipina of decent repute would publicly admit that she has been sexually abused, unless that is the truth, for it is her natural instinct to protect her honor" — a "misconception," and opined that it "puts the accused at an unfair disadvantage" and "creates a travesty of justice."<sup>[45]</sup>

This is not to say that the modern Filipina is promiscuous. This is to say, rather, that the Court is done making generalizations about women. This is to also say that the modern Filipina is free to determine who she is, free from the shackles of any of the preconceived notions our society had in the past as to who she should be and how she should deport herself. We can therefore say, matter-of-factly, that a woman, based on the evidence presented in a case, wanted to engage in sexual activity. We can do so without automatically making, at the same time, a value judgment on her choice.

I have not lost sight of the fact that the woman involved here is a 14-year-old girl. I do not discount that, in hindsight, she may have regretted her choices. Legally speaking, however, her consent was one that was validly given. The fact that we, as adults, see the clear error in her judgment right at that moment that she sent her nude

pictures does not, legally speaking as well, entitle us adults to incarcerate the other person in that conversation between two consenting persons.

#### IV.

Petitioner's conviction was also anchored on the ponencia's ruling that the sweetheart theory is not a valid and meritorious defense because consent of the minor is immaterial in violations of special penal laws such as RA 9775.

While the sweetheart theory is generally a weak defense in sexual abuse cases, the Court should not sweepingly ignore petitioner's claim that the act committed was consensual for the simple reason that the victim, being a 14-year-old minor, is incapable of giving consent.

To recall, in the case of *Malto v. People*[46] (*Malto*), the Court held that "in child abuse cases under RA 7610, the sweetheart defense is unacceptable" because "[a] child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse with another person." The Court went on to explain that "consent is immaterial in cases involving violation of Section 5, Article III of RA 7610" because "[t]he mere act of having sexual intercourse or committing lascivious conduct with a child who is exploited in prostitution or subjected to sexual abuse constitutes the offense. It is an offense *malum prohibitum*." [47] In arriving at such ruling, the Court considered the inability of a child to give consent to a contract under our civil laws and the State's role to afford protection to the youth.[48]

However, in the more recent case of *Bangayan*, the Court, overturned its ruling in *Malto* and held:

The sweeping and confusing conclusions in the case of *Malto v. People* and the application of contract law in determining the relevance of consent in cases under R.A. 7610 is not proper. We had the opportunity to shed light on this matter in *People v. Tulagan* where We observed that:

We take exception, however, to the sweeping conclusions in *Malto* (1) that "a child is presumed by law to be incapable of giving rational consent to any lascivious conduct or sexual intercourse" and (2) that "consent of the child is immaterial in criminal cases involving violation of Section 5, Article III of RA 7610" because they would virtually eradicate the concepts of statutory rape and statutory acts of lasciviousness, and trample upon the express provisions of the said law.

Accordingly, the Court deems it prudent to rectify the difference between the concept of consent under contract law and sexual consent in criminal law which determines the guilt of an individual engaging in a sexual relationship with one who is between 12 years old or below 18 years of age. These are concepts that are distinct from each other and have differing legal implications.

The law limits, to varying degrees, the capacity of an individual to give consent. While in general, under the civil law concept of consent, in relation to capacity to act, all individuals under 18 years of age have no capacity to act, the same concept cannot be applied to consent within the context of sexual predation. Under civil law, the concept of "capacity to act" or "the power to do acts with legal effects" limits the capacity to give a valid consent which generally refers to "the meeting of the offer and the acceptance upon the thing and the case which are to constitute the contract." To apply consent as a concept in civil law to criminal cases is to digress from the essence of sexual consent as contemplated by the Revised Penal Code and R.A. 7610. Capacity to act under civil law cannot be equated to capacity to give sexual consent for individuals between 12 years old and below 18 years of age. Sexual consent does not involve any obligation within the context of civil law and instead refers to a private act or sexual activity that may be covered by the Revised Penal Code and R.A. 7610.

More importantly, Our earlier pronouncement regarding consent in *Malto* failed to reflect teenage psychology and

predisposition. We recognize that the sweeping conclusions of the Court in *Malto* failed to consider a juvenile's maturity and to reflect teenagers' attitude towards sex in this day and age. There is a need to distinguish the difference between a child under 12 years of age and one who is between 12 years old and below 18 years of age due to the incongruent mental capacities and emotional maturity of each age group. It is settled that a victim under 12 years old or is demented "does not and cannot have a will of her own on account of her tender years or dementia; thus, a child or a demented person's consent is immaterial because of her presumed incapacity to discern good from evil." As such, regardless of the willingness of a victim under 12 years old to engage in any sexual activity, the Revised Penal Code punishes statutory rape and statutory acts of lasciviousness. On the other hand, considering teenage psychology and predisposition in this day and age, We cannot completely rule out the capacity of a child between 12 years old and below 18 years of age to give sexual consent.

Consequently, although We declared in *Malto* that the Sweetheart Theory is unacceptable in violations of R.A. 7610 since "a child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse with another person," We deem it judicious to review the Decision of the court a quo and reiterate Our recent pronouncements in *Tulagan* and *Monroy* and clarify the ambiguity created in the *Malto* case in resolving the case at bar.

Where the age of the child is close to the threshold age of 12 years old, as in the case of AAA who was only 12 years and one month old at the time of the incident, evidence must be strictly scrutinized to determine the presence of sexual consent. The emotional maturity and predisposition of a juvenile, whose age is close to the threshold age of 12, may significantly differ from a child aged between 15-18 who may be expected to be more mature and to act with consciousness of the consequences of sexual intercourse.[49] (Emphasis supplied)

The principles that guided the Court to reverse its ruling in *Malto* and consider in *Bangayan* that, in this day and age, minors above 12 years old and below 18 years old are capable of giving consent to sexual activities with another person, conscious as they are of their consequences, should also guide the Court in deciding the present case.

That *Malto* and *Bangayan* involved violations of RA 7610[50] is of no moment. To be sure, RA 9775 and RA 7610 are both animated by the same purpose — to protect the child against all forms of sexual abuse, neglect and exploitation.[51] Thus, in *Bangayan*, upon finding that the victim had freely given her consent to the sexual congress and was not subjected to any form of abuse, the Court acquitted the accused because there was no crime committed.[52] This should also be the case here. Petitioner should be acquitted because he did not commit the crime charged. AAA freely gave her consent into sending petitioner nude photos of herself.

Despite the clear language and ruling in *Bangayan*, however, Justice Lazaro-Javier insists on a qualified reading of the Court's pronouncements. According to her:

It is clear that our criminal statutes and the current trend of our jurisprudence on the sexual activities of children endeavor to strike a balance between protecting children from the harms associated with sexual activities with adults (i.e., to protect young people from sexual exploitation) while allowing teenagers to engage in sexual experimentation and relationships with close-in-age peers and only in very exceptional cases with adults of considerable age gap (i.e., to preserve their ability to have non-exploitative sexual contact). The important thing to remember, though, is that by default, the inherent power imbalance between adults and children vitiates consensual sexual relations between them.[53]

It is unclear what Justice Lazaro-Javier's legal bases are in claiming the foregoing. The language used by the Court in *Bangayan* was to categorically and unequivocally rule that "[w]hile difference in age may be an indication of coercion and intimidation and negates the presence of sexual consent, this should not be blindly

applied to all instances of alleged sexual abuse cases." [54] The very facts of *Bangayan* involved a 15-year age difference between the accused and the complainant. In *Monroy v. People* [55] (*Monroy*), itself cited in *Bangayan*, the parties involved had a 14-year age difference — the girl being 14 years old, just like AAA in this case, and the accused being 28 years old. In neither of these cases did the Court say that "the inherent power imbalance between adults and children vitiates consensual sexual relations between them," nor did the Court say that our laws only allow sexual relationships between minors close-in-age. It is, at most, an indication of coercion, but it does not automatically supply such coercion.

Citing a ruling of Saskatchewan Court of Queen's Bench, [56] however, Justice Lazaro-Javier insists:

x x x A child who, we as a community, would accept to have validly consented to explicit sexual activity with a peer, however, cannot validly consent to explicit sexual activity with an adult. There is an inherent power imbalance between adults and young people, and adults are expected to decline explicit sexual activity, in fact even mere amorous relationships, as a result. [57]

Justice Lazaro-Javier, however, cannot insist on this "power imbalance" based analysis in the face of an express, categorical, and unequivocal ruling by the Supreme Court of the Philippines that: (1) those between ages 12 to 18 can validly give sexual consent, and (2) the validity of their consent must be determined on a case-to-case basis, with age gap being only one of the many things that a court should look at.

Thus, it is imperative for the Court to carefully scrutinize every piece of the prosecution's evidence and take into account those that indicate that AAA was never induced or coerced into sending petitioner her nude photos, or that AAA, in fact, freely and voluntarily took pictures of her private parts and sent them to petitioner.

Further, one material circumstance which the ponencia failed to consider that supports the finding that AAA was never induced nor subjected to any form exploitation and abuse on the part of the petitioner, are the following observations of Branch 270, Regional Trial Court of Valenzuela City:

However, from the testimonies of the minor-complainant and her mother, it was impressed upon this court that the minor-complainant while barely fourteen (14) years old is a city lass who is not innocent of the ways of the world. She admitted that she had three (3) boyfriends prior to the accused. And now, while the case she lodged against the accused is still pending before this court, again she has a new boyfriend. Notably, even her Facebook messenger conversation (Exhibit "C" - "C-8") with the accused reveals that the minor-complainant is sexually daring. Moreover, she testified that the incident subject of these cases did not affect her at all. [58]

Considering therefore AAA's sexual awareness, coupled with the entirety of the FB conversation and, finally, guided by the Court's ruling in *Bangayan*, I find that the ponencia erroneously disregarded petitioner's sweetheart defense.

In fact, contrary to the ponencia's finding, [59] the records abound with evidence supporting petitioner's sweetheart defense.

Jurisprudence teaches that the allegation of a love affair or relationship, as an affirmative defense, can only be given credence if it is supported by corroborative proof such as notes, gifts, pictures, mementos or tokens showing that such romantic relationship actually existed. [60]

In this case, it must be noted that both AAA and her mother admitted that petitioner and AAA have been in a romantic relationship for almost six months. Apart from this admission, the defense also presented in evidence a scrapbook [61] personally made by AAA, which the prosecution in fact admitted. [62] The scrapbook contains several pictures of petitioner and AAA together, screenshots of their chats in their social media accounts, and handwritten letters of AAA to petitioner expressing her love for him. [63] These pieces of evidence are more than

enough to support a finding that petitioner and AAA were actually lovers and that their FB conversation is nothing more than an intimate and private expression of their relationship.

Indeed, expressions of love, in person or in a virtual space, varies. The Court cannot therefore be too simplistic to conclude that the conversation and actuations of petitioner and AAA in the said FB conversation is not that of love but a sexual offense that will put petitioner in jail. The Court cannot ignore overwhelming evidence on record, which the prosecution failed to rebut or refute, that AAA and petitioner, at the time the incident happened, were in a relationship and that the FB conversation was spurred by their love and intimacy for each other. In this regard, the Court's pronouncement in *People v. Salem*,<sup>[64]</sup> lends credence:

The "sweetheart" defense put up by the accused merits serious consideration. While the theory does not often gain favor with the Court, such is not always the case if the hard fact is that the accused and the supposed victim are in fact intimately related except that, as is true in most cases, the relationship is either illicit or the parents are against it. In such instances, it is not improbable that when the relationship is uncovered, the victim's parents would take the risk of instituting a criminal action rather than admit to the indiscretion of their daughter. And this, as the records reveal, is what happened in this case. For, in his testimony Rico stated that he had a picture of Mirasol in his wallet but that his wallet was with the jail warden. He also mentioned that the complainant and her mother even visited him in jail although the mother confronted him on his temerity in wanting to marry her daughter. These statements were never objected to nor refuted by the prosecution.<sup>[65]</sup>

## Conclusion

Lest I be misunderstood, I share the sentiment of the ponencia that the State, including this Court, has the duty to afford our children the highest degree of protection. Equally true, however, is that "[t]he court's primary duty is to render or dispense justice."<sup>[66]</sup> Justice, in the context of criminal cases, entails fairness both to the complainant and the accused. Would it have been more prudent for petitioner to stop himself from asking for pictures? Absolutely. But is his mistake deserving of the punishment of imprisonment for 20 years? I do not think so. If the petitioner were proven to be engaged in the creation of child pornography or a member of a child pornography syndicate, then my answer would be different. Here, to emphasize again, the FB conversation only reveals a sexually charged conversation between a couple in a relationship. Considering that more and more teenagers are, in this day and age, exploring their sexuality at an early age, the Court might find itself sending hundreds or thousands of people — many of whom are also young — to be incarcerated for years if the current version of the ponencia is made the rule.

To illustrate the absurdity of the situation, if the facts were that the complainant and petitioner had sexual intercourse with full consent and without force or intimidation, there would be no crime committed.<sup>[67]</sup> Yet here, where the facts are simply that the girlfriend sent pictures to her boyfriend, also freely and with full consent and without force or intimidation, the Court is ruling that petitioner is guilty of a crime that will make him languish in jail for the years to come. Verily, convicting petitioner in this case would result in an absurd situation where the accused in *Bangayan and Monroy* - who both had consensual sexual intercourse with girls with whom they had more considerable age-gaps - are not guilty of any crime, but petitioner in this case would rot in jail for decades for doing much less: consensually engaging in a sexually charged conversation with his girlfriend that ultimately led to the sending of nude photographs. This is incongruous to current jurisprudence and simply ludicrous.

I wish to correct, as well, what I perceive to be a false dichotomy. In Justice Lazaro-Javier's Concurring Opinion, she concluded:

Defining child pornography this way is intended to better protect 12-year olds and below 18-year olds from coercion, influence, persuasion and manipulation by adults to engage in explicit sexual activities and from the inherent harm to children and society flowing from premature explicit sexual activities. This object includes as

a rule "protecting children from themselves, their own immaturity and premature sexual activity, regardless of whether they want to engage in sexual acts or think they do" because they have been persuaded or induced to be inclined to so act. This goal privileges as well the fact that "the important and potentially life-altering decision to engage in sexual activity with others must be the product of true consent by individuals capable of giving such consent."

Protecting this extremely vulnerable segment of our society from the harm of premature sexual relations remains a legitimate objective of Congress — there is no violation of due process and the right to equal protection to deny an adult the constitutionally protected right to have explicit sexual activities even with consenting children. Avoiding a criminal conviction for child pornography is not a right much less a constitutional right, but only a matter of defense which has to be proved on a case-to-case basis clearly and convincingly.[68]

Assuming arguendo that the goal is indeed to protect children from "their own immaturity and premature sexual activity," it does not necessarily mean that petitioner in this case should be convicted. Arguing for the acquittal of the accused because the factual circumstances of the case do not support his or her conviction does not equate, to any reasonable and reasoning mind, to being against children's welfare. By the same token, incarcerating an otherwise innocent person would not necessarily improve the protection of children. It is high time that the State, including the Court, does away with this mindset that every problem can and will be addressed by having a more punitive criminal justice system. Sending more people to jail is not the answer. If the goal were really to protect children "from the harm of premature sexual relations," there are much less restrictive measures, like a better national program for sex education for students, which the other branches may look at or implement. The aforementioned goal, lofty as it is, cannot be made a justification to deprive an innocent person of his or her liberty for years of his or her life.

In this connection, the ponencia wants the Court to take judicial notice of the reality that minors, between the age of 12 and 18 years, experience physical and hormonal changes, which lend them to explore, be curious and find answers from others or from the internet, making them susceptible to deception and cajolery.[69] However, the Court cannot also feign ignorance of the reality that minors today, in this day and age, are more mature and more vastly aware of their surroundings, are more than capable of knowing what is right and wrong and the consequences of their actions and decisions. The Court's duty, as *parens patriae*, is to protect children from crimes and offenses that exploit and abuse them; but not to blindly convict a person just because the victim is a child when no crime was even committed in the first place.

While the Court indeed has the duty to afford children the highest degree of protection, it is well to be reminded that this Court equally has the duty to uphold the presumption of innocence when there exists reasonable doubt on the guilt of the accused. In balancing these duties, the Court must carefully scrutinize the evidence of the prosecution, and if the evidence fails to establish the guilt of the accused with moral certainty, as the evidence itself give rise to reasonable doubt that the acts committed by the accused falls within the crime defined and penalized by law — as in this case — then the Court's only duty is to acquit the accused.

For the foregoing reasons, I vote to ACQUIT petitioner.

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[1] AN ACT DEFINING CYBERCRIME, PROVIDING FOR THE PREVENTION, INVESTIGATION, SUPPRESSION AND THE IMPOSITION OF PENALTIES THEREFOR AND FOR OTHER PURPOSES, or the Cybercrime Prevention Act of 2012, approved September 12, 2012.

[2] AN ACT DEFINING THE CRIME OF CHILD PORNOGRAPHY, PRESCRIBING PENALTIES THEREFOR AND FOR OTHER PURPOSES, or the Anti-Child Pornography Act of 2009, approved November

17, 2009.

[3] Ponencia (modified version), p. 29.

[4] The real name of the victim, her personal circumstances and other information which tend to establish or compromise her identity, as well as those of her immediate family, or household members, shall not be disclosed to protect her privacy, and fictitious initial shall, instead, be used, in accordance with *People v. Cabalquinto*, 533 Phil. 703 (2006), and Amended Administrative Circular No. 83-2015 dated September 5, 2017.

[5] Ponencia (modified version), pp. 13-15.

[6] *Id.* at 21-23.

[7] *Id.* at 23.

[8] *Id.*

[9] *People v. Solar*, G.R. No. 225595, August 6, 2019, 912 SCRA 271, citing CONSTITUTION, Art. III, Sec. 14 (2).

[10] G.R. No. 86172, March 4, 1991, 194 SCRA 601.

[11] *Id.* at 606.

[12] *People v. Rasos, Jr.*, G.R. No. 243639, September 18, 2019, 920 SCRA 420, 444-445.

[13] See *People v. Claro*, 808 Phil. 455, 468 (2017).

[14] *People v. Lagramada*, G.R. Nos. 146357 & 148170, August 29, 2002, 388 SCRA 173, 193.

[15] *Id.* at 193-194.

[16] See *People v. Gabilan*, G.R. No. L-45245, July 2, 1982, 115 SCRA 1, 8.

[17] *People v. Baulite*, G.R. No. 137599, October 8, 2001, 366 SCRA 732, 739.

[18] See Sponsorship Speech of and Deliberations of House Bill 0644, August 11, 2009, pp. 93-106.

[19] *Id.* at 95.

[20] *Id.* at 96-99.

[21] *Id.* at 102-105.

[22] See RA 9775, sec. 4.

[23] See RA 9775, Secs. 4, 9, and 10.

[24] Exhibit "C" to "C-9." Records (Crim. Case No. 215-V-17), pp. 9-18.

[25] BLACK'S LAW DICTIONARY (9[th] ed.), p. 294.

[26] See *Fianza v. People*, 815 Phil. 379, 391 (2017).

[27] See BLACK'S LAW DICTIONARY (9[th] ed.), p. 845.

[28] See "Induce," Law Insider Dictionary, accessed at <<https://www.lawinsider.com/dictionary/induce>>.

[29] See Records (Crim. Case No. 215-V-17), pp. 52 and 73.

- [30] See Exhibits "C" to "C-8." Records (Crim. Case No. 215-V-17), pp. 9-14.
- [31] See Exhibits "C-3," "C-4," "C-6" and "C-8." Records, (Crim. Case No. 215-V-17), pp. 12, 13, 15 and 17.
- [32] Rollo, pp. 70.
- [33] Ponencia (modified version), pp. 15-20.
- [34] Information dated December 27, 2016. Rollo, p. 49.
- [35] See *Parungao v. Sandiganbayan*, G.R. No. 96025, May 15, 1991, 197 SCRA 173, 178.
- [36] See *Cardona v. People*, G.R. No. 244544, July 6, 2020, accessed at <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66860>>.
- [37] See *Malto v. People*, G.R. No. 164733, September 21, 2007, 533 SCRA 643 and *Lucido v. People*, 815 Phil. 646 (2017).
- [38] G.R. No. 235610, September 16, 2020, accessed at <<https://elibrary.judiciary.gov.ph/thebookshelf/showdocs/1/66612>>.
- [39] *Mabunot v. People*, 795 Phil. 453, 464 (2016). See also *Patulot v. People*, G.R. No. 235071, January 7, 2019, 890 SCRA 143, 159.
- [40] 823 Phil. 1188 (2018).
- [41] *Perez v. People*, 830 Phil. 162, 179. Emphasis supplied.
- [42] Concurring Opinion of Justice Lazaro-Javier, p. 4. Emphasis omitted.
- [43] See the Court's ruling in *Perez v. People*, supra note 41, of what the Court corrected through *Amarela*.
- [44] *People v. Amarela*, supra note 40, at 1199.
- [45] *People v. Amarela*, supra note 40, at 1198-1199.
- [46] Supra note 37, at 661.
- [47] Id.
- [48] Id. at 662-663.
- [49] Id.
- [50] SPECIAL PROTECTION OF CHILDREN AGAINST CHILD ABUSE, EXPLOITATION AND DISCRIMINATION ACT, approved June 17, 1992.
- [51] See RA 7610, Art. 1, Sec. 2.
- [52] *Bangayan v. People*, supra note 38.
- [53] Concurring Opinion of Justice Lazaro-Javier, pp. 10-11.
- [54] *Bangayan v. People*, supra note 38.
- [55] G.R. No. 235799, July 29, 2019, 911 SCRA 333.
- [56] It is a trial court for Saskatchewan, a Canadian province. Decisions of this trial court may be appealed to the Court of Appeal of Saskatchewan, and further appeals may be taken to the Supreme Court of Canada.

- [57] Concurring Opinion of Justice Lazaro-Javier, p. 12.
- [58] Rollo, p. 71. Joint Decision dated August 7, 2017, penned by Presiding Judge Evangeline M. Francisco.
- [59] See Ponencia (modified version), p. 21.
- [60] *People v. Manallo*, G.R. No. 143704, March 28, 2003, 400 SCRA 129, 142.
- [61] See Exhibit "1."
- [62] See RTC Order dated April 24, 2017. Records (Crim. Case No. 215-V-17), pp. 32-33.
- [63] See Exhibit "1."
- [64] G.R. No. 118946, October 16, 1997, 280 SCRA 841; See also *People v. Godoy*, G.R. Nos. 115908-09, December 6, 1995, 250 SCRA 676, 716.
- [65] *People v. Salem*, *id.* at 851-852.
- [66] *Heirs of Zaulda v. Zaulda*, 729 Phil. 639, 651 (2014).
- [67] See *People v. Tulagan*, G.R. No. 227363, March 12, 2019, 896 SCRA 307.
- [68] Concurring Opinion of Justice Lazaro-Javier, p. 9.
- [69] Ponencia (modified version), p. 23.

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## CONCURRING OPINION

### LAZARO-JAVIER, J.:

#### Prefatory

The evidence proved beyond reasonable doubt that petitioner is guilty of child pornography as defined and penalized by Section 4(c)(2)[1] of Republic Act No. 10175[2] (RA 10175) in relation to Sections 4(a),[3] 3(b)[4] and (c)(5)[5] of Republic Act No. 9775 (RA 9775).[6]

RA 9775 criminalizes child pornography, or the creation of any visual and/or audio representation of a child lasciviously exhibiting the latter's genitals, buttocks, breasts, pubic area, and/or anus to prevent children from being hired, employed, used, persuaded, induced, or coerced to create or produce pornographic materials. It addresses the power imbalance between children and adults.

By using the words persuade and induce as criminal modes of perpetrating child pornography, RA 9775 speaks not only to the prevention of actual and explicit sexual exploitation or abuse of children, but also to their protection from "explicit sexual activities"[7] with adults, with or without evidence of exploitation or abuse. This is because the power imbalance and its consequences deem "explicit sexual activities" between an adult and a child to be always inherently harmful and always inherently exploitative. Our law treats children differently from adults precisely because they are immature, impulsive, and lack judgment. The Court must recognize and treat the crime of child pornography with these considerations in mind.

Thus, this crime involves not only child pornography as a business or practice but also child pornography as a result of coercion, persuasion, or inducement arising from romantic relationships though the pornographic material be only originally intended for the coercer's or inducer's private viewing. RA 9775 makes no distinction between them as regards their criminal nature - both are criminal child pornography.

This definition of child pornography and the intent behind its criminalization are reflected in the elements of this crime: (1) the complainant is a child; and (2) the complainant was victimized by persuading, inducing, or coercing them<sup>[8]</sup> to perform in the creation or production of any form of child pornography. Note that the second element is about persuasion, inducement, or coercion and not about consent per se. Where the consent is the effect of persuasion, inducement, or coercion, the consent is a mere ostensible consent that the law does not recognize and which does not exempt one from criminal liability.<sup>[9]</sup>

RA 9775 defines a child as someone regardless of gender affiliation or non-affiliation who is below 18 years of age. Indisputably, the complainant here was a child when the subject incident happened - she was then only 14 years old.

The contentious element is whether petitioner persuaded or induced the 14-year old girl to expose her private parts on Facebook Messenger. The issue is not whether she consented - she might have had, but as the prosecution evidence showed, the consent was brought about by petitioner's persuasion or inducement.

#### My Concurrence

I concur in the ponencia of Justice Jhosep Y. Lopez.

First. It is highly speculative that the 14-year old girl would have sent the pornographic photos to petitioner even without the conversation that took place between them. The fact is that the conversation took place. It is the window that elucidates on why the child pornographic materials were uploaded by the 14-year old girl and then viewed, downloaded and saved by petitioner.

What is further troubling about the assumption is it is daubed with perhaps unconscious biases about gender roles. The unarticulated but nonetheless evident thought process is that as the 14-year old carries the scarlet badge of promiscuity, she cannot credibly claim that she was induced to create pornographic photos of herself. This is the same as the antiquated and now rejected deeming belief that a slut or a woman spouse could never be raped because she is deemed to have consented anyway. There are no data to prove that women who are active in dating circuits do not require inducement or persuasion as they would automatically create pornographic materials of themselves. There is simply no evidence of this correlation.

Second. When we talk about the persuasion or inducement of a child to engage in sexually inappropriate behaviour, the degree of causation between the creation of the pornography and petitioner's words, deeds, and other circumstances allegedly constituting the inducement cannot be in terms of absolute causation. This is because proof beyond reasonable doubt has never been a standard of absolute certainty.<sup>[10]</sup> Rather, this standard only requires moral certainty.<sup>[11]</sup>

For me, the test of causation is if there is moral certainty that -

- petitioner's words, deeds and other circumstances played a part in the 14-year old girl's decision-making to exhibit her private parts to him on saved photographic platforms without which she would have decided otherwise, and,
- there were no proven circumstances other than and independent of petitioner's words, deeds, and other circumstances, which to a reasonable person would have otherwise actually led her to create the pornographic material.

Here, through petitioner's Facebook Messenger conversations with the 14-year old girl, the prosecution was able to prove beyond reasonable doubt the element of persuasion or inducement. Precisely, this means that it was -

- his words, deeds, and other circumstances which made the 14-year old girl decide to exhibit her private parts to

him on saved photographic, video, and audio platforms without which she would have not done so; and

- there were no proven circumstances other than and independent of petitioner's words, deeds, and other circumstances, which to a reasonable person would have otherwise actually led her to create the pornographic material.

For one, it would really be both off and odd for the 14-year old girl to just undress and exhibit her private parts to petitioner and in the process memorialize her "explicit sexual activity" as defined in RA 9775 through the internet for nothing and out-of-the-blue. No reasonable person would believe that she was doing so for reasons other than and independent of petitioner's words, deeds, and other circumstances.

The defense justifies that the 14-year old was not induced by the 24 year old petitioner to make pornographic materials of herself on account of her romantic relationship with him.

But this justification only begs the question. It assumes the absence of inducement by referring to the romantic relationship when this amorous connection was precisely the reason why she was persuaded or induced, in fact too easily seduced, to bare herself to the bone. She would not have been in that conversation with petitioner were it not for their romance. In that conversation, he urged her to show her private parts to him. She obliged him precisely because his words, deeds, and other circumstances, consisting of their relationship and conversation, lulled, persuaded, influenced, or induced her to consent to do as he told her.

As I have stressed, the issue is not about the 14-year old girl's consent. The real issue is how that consent came about - was there persuasion or inducement which RA 9775 mentions as the modes of committing child pornography? The prosecution's evidence answered this issue beyond reasonable doubt by pointing to petitioner's words, deeds, and other circumstances as the very consideration why she consented to make pornographic materials of herself.

The defense and the trial court as regards the charge under Republic Act No. 7610 (RA 7610) also attempted to insulate petitioner from what the 14-year old girl ended up doing by portraying her as a slut. The gist of this defense is that it was not petitioner's words, deeds, and other circumstances which persuaded or induced her to produce the pornographic material but her own lust that made her do so. We are being asked to believe that the devil in her drove her to create her own pornographic materials. This thinking can be summed up in four words: "she asked for it."

I object to the premise of these assertions that simply because the 14-year old girl already had 5 boyfriends, it was already automatic for her to create her own pornographic material to seduce and please further her reluctant boyfriend. The unstated argument raised by this claim is the myth that this victim is "unworthy." It is akin to the rape myth that "a slut cannot be raped." The argument here as the rape myth has no criminological data to support a correlation between the prior sexual activities of a victim and the impossible likelihood of becoming a victim of pornography or sexual assault. Prostitutes or women active in dating circles are no less likely to become victims of pornography (i.e., they need no inducement or persuasion as they would automatically and readily create pornography) or for that matter raped, than virgins.

This myth all the more rings true when the victim of pornography is a child. There are no data, much less, evidence that a curiously promiscuous child would lay herself bare to a male partner without any inducement or persuasion at all more than a virgin child would. Invariably, where there are incriminating sexual conversations between romantic partners where the female is a child and the male is an adult of considerable age gap, as in here, there will always be that originator and persuader behind every lewd or pornographic portrayal from the child to the adult. As explained elsewhere:

It is likely that exploitation will be present in every case of sexual interference EXCEPT, possibly, where the offence occurs in the context of a genuine relationship of mutual respect and affection between the complainant and the accused, where that relationship is of some considerable duration, and where the age difference between complainant and accused is not significantly greater than the five- year "close-in-age" defence created by s. 150.1(2.1) (a) (i) of the Criminal Code [of Canada].[12] [Emphasis supplied.]

Thus, there is logic as to why RA 9775 and RA 7610 have both included inducement and undue influence as criminal means to perpetrate crimes against children by adults, especially where the adult is considerably older. It is because children are easy prey for cunning adults and children's consent are not automatically accepted at face-value - their consent is actually mere ostensible consent that the law does not recognize as fully informed and knowing and freely exercised as in the case of adults. Their inability to make fully informed and knowing and freely exercised choices is what sets children apart from adults.

Third, *Bangayan v. People*[13] supports the ponencia and my discussion above on the irrelevance of consent when it is obtained through an adult's persuasion and inducement as in the present case.

*Bangayan* articulates a nuanced and contextual interpretation of consent when given by children 12 years old and below 18 years of age. Though the discussion pertains to crimes under Section 5 (b) of RA 7610 where consent could be raised as a defense (since the crimes under Section 5 (b) are mere variants of rape and acts of lasciviousness of the Revised Penal Code), I believe that *Bangayan's* lessons are in *pari materia*[14] with RA 9775, and therefore instructive toward a more meaningful understanding of its provisions, especially child pornography.

I will mention below the lessons on the contextual analysis of consent from *Bangayan*:

- Children 12 years old and below 18 years of age can legally consent to sexual activities.
- But consent is irrelevant where the child acted as a result of coercion, persuasion, or inducement.
- Difference and lack of difference in age may be an indication of coercion, persuasion, or inducement or the lack of it, and may negate or prove the presence of sexual consent.
- There is a need to distinguish between a child under 12 years of age and one who is between 12 years old and below 18 years of age due to the incongruent mental capacities and emotional maturity of each age group.
- We cannot completely rule out the capacity of a child between 12 years old and below 18 years of age to give consent to sexual activities.
- Scientific evidence of children's (especially teenagers') psychology and predisposition is relevant in establishing the presence or absence of their valid consent to their sexual activities.
- Where the age of the child is close to the threshold age of 12 years old, the evidence must be strictly scrutinized to determine the alleged presence of the child's consent to sexual activities.
- The emotional maturity and predisposition of a child, whose age is close to the threshold age of 12, may significantly differ from a child aged between 15-18 years who may be expected to be more mature and to act with consciousness of the consequences of sexual activities.
- The indubitable presence of a family set-up (i.e., having children of their own and the sexual contact is not incidental or not exploitative) in a community where its standards for marrying age is lower than the legal age under our statutes (i.e., but in no instance below 12 years old) and the inexplicable failure of the child to testify against her adult partner in the criminal case and the apparent support of the child for her adult partner, as in

Bangayan, could potentially establish valid consent of the child to the sexual activities between her and her adult partner.

It is clear that our criminal statutes and the current trend of our jurisprudence on the sexual activities of children endeavor to strike a balance between protecting children from the harms associated with sexual activities with adults (i.e., to protect young people from sexual exploitation) while allowing teenagers to engage in sexual experimentation and relationships with close-in-age peers and only in very exceptional cases with adults of considerable age gap (i.e., to preserve their ability to have non-exploitative sexual contact). The important thing to remember, though, is that by default, the inherent power imbalance between adults and children vitiates consensual sexual relations between them.

Of course, the ideal situation is for Congress itself to draw a bright-line age of protection of X years, say 16 years as some child rights advocates have long been pushing, but to carve out an X-year close-in--age exception, say 5-year close-in-age exception, for non-exploitative conduct, where the defense of consent would be available.

But until then, we must enforce our child protection laws like RA 7610 and RA 9775 without the binary gender role biases and with due consideration to scientific evidence that age sixteen (16) is a reasonable choice for the threshold age for strictly scrutinizing the evidence of valid consent in part because of evidence that 14 and 15-year old children were being targeted by on-line and international predators. This assertion is supported by the lessons we can draw from Bangayan. Similarly, as our jurisprudence had started to recognize that age difference is a factor in determining valid consent, we may already recognize also a close-in-age exception for non-exploitative sexual activity between teenagers and their peers, and draw a reasonable line of age difference for teenagers to have appropriate relationships, including sexual relationships, with other people including adults up to, in the case of a 15-year-old, age 20. These age-specific references can also be justified by the lessons imparted by Bangayan and the case law it was built on.

As I have said, the overarching framework is that the protection for children is not simply from sexual exploitation but also from explicit sexual activity or the invitation to explicit sexual activity with adults. This protection is necessary due to the inherent power imbalance that undermines consent, and because of the physical and psychological consequences of explicit sexual activity between a child and an adult stemming from that imbalance.

Once the object of RA 9775 and other child protection measures is correctly understood, it is clear that the explicit sexual activity in the present case between the 24-year-old petitioner and the 14-year-old complainant fell within the type of conduct that this statute intends to address.

This police power measure in criminal law is not unreasonable. The means is not overbroad or arbitrary in the sense that the means used is no longer reasonably connected to the end goal of addressing the harm of the power imbalance between adults and children engaged in sexual activities. After all, our statutes on the protection of children from inappropriate sexual activities already recognize categorically the norm that the capacity to consent to sexual activity is not merely inherent to the individual but also relational.[15] A child who, we as a community, would accept to have validly consented to explicit sexual activity with a peer, however, cannot validly consent to explicit sexual activity with an adult.[16] There is an inherent power imbalance between adults and young people, and adults are expected to decline explicit sexual activity, in fact even mere amorous relationships, as a result.[17]

Affirming petitioner's conviction is to firmly recognize the statutory purpose of correcting such power imbalance. This is important because it offers clearest protection to children who arguably need it the most - as expressed eloquently elsewhere, "those who have already been forced to grow up too fast by the operation of misfortune, neglect, or prior abuse. These are the young people for whom it will be hard to see the exploitation, especially

where they may have initiated the sexual activity, or otherwise appear to exercise agency as it occurs x x x." [18]

Clearly, as child pornography has been defined as a crime, Congress has evidently concluded that explicit sexual activities with a child 12 years old and under 18 years of age are inherently exploitative in their own right, unless as held in *Bangayan*, "in [the criminal case], there are [truly unique and] special circumstances that reveal the presence of [valid] consent of [the child]." Actual exploitation is not a requirement for this offense since Congress has already recognized that adult/youth explicit sexual activities are inherently exploitative.

Defining child pornography this way is intended to better protect 12-year olds and below 18-year olds from coercion, influence, persuasion, and manipulation by adults to engage in explicit sexual activities and from the inherent harm to children and society flowing from premature explicit sexual activities. [19] This object includes as a rule "protecting children from themselves, their own immaturity and premature sexual activity, regardless of whether they want to engage in sexual acts or think they do" [20] because they have been persuaded or induced to be inclined to so act. This goal privileges as well the fact that "the important and potentially life-altering decision to engage in sexual activity with others must be the product of true consent by individuals capable of giving such consent." [21]

Protecting this extremely vulnerable segment of our society from the harm of premature sexual relations remains a legitimate objective of Congress - there is no violation of due process and the right to equal protection to deny an adult the constitutionally protected right to have explicit sexual activities even with consenting children. Avoiding a criminal conviction for child pornography is not a right much less a constitutional right, but only a matter of defense which has to be proved on a case-by-case basis clearly and convincingly.

In the result, it is my respectful opinion that this case was correctly decided. It is not unfair to petitioner. The purpose of child pornography is to protect 12-year old and below 18-year old children from explicit sexual activities with adults because of the inherent power imbalance between them, and the harmful impact thereof. The definition of child pornography does not include any conduct that bears no relation to its purpose, and as such, is not arbitrary in any parts. On the contrary, there is a rational connection between the purpose of this criminal law and its elements.

My conclusion does not depend on any of petitioner's character, particularly, those which could have affected his willingness or ability to resist the 14-year old complainant's further reactions after he had successfully persuaded or induced her to exhibit her private parts. After all, his character weakness is not a mental challenge to exempt him from criminal responsibility. He cannot avoid criminal responsibility by his supposed naivete, weakness, and submissiveness.

In my view, the complainant was a victim of the very power imbalance ascribed by the law against child pornography. As a 24-year old dealing with a 14-year old girl, he should have known better. The explicit sexual activity of her exhibiting her private parts over the internet, in the manner that can be downloaded and saved for her children and grandchildren to see, as a result of petitioner's words and deeds to persuade or induce her to do so, was inherently exploitative. There were no truly unique and special circumstances to warrant the conclusion that she validly consented, that is, consented without petitioner's persuasion or inducement, and that there was no exploitation. There are now no truly unique and special circumstances to excuse him from the consequences of his acts. Just the same, we cannot now start excusing people from criminal liability just because they do not know what the law is on the matter.

Fourth. I commiserate with petitioner as to the stiff penalties he has to face. To my mind, the penalty of reclusion perpetua is grossly disproportionate to the crime he has committed. But there are no arguments against the constitutionality of these penalties. Hence, the Court cannot set aside or nullify them. It is also not within our

power to change the penalties to suit what we view as proportionate penalties. Surely though, it is incorrect to acquit petitioner simply because we do not agree with the penalties.

Perhaps, he and his lawyer could start a peoples' initiative to amend RA 9775 and RA 10175 citing the alleged incongruities that these statutes may have already engendered. We also can refer this matter to the Executive Branch and Congress for their appropriate remedial action.

Fifth. I agree with the ponencia that child pornography is mala in se. But this does not make petitioner less guilty.

He committed the acts constituting the crime's actus reus. The complainant is a 14-year old girl, a child. He persuaded or induced her to exhibit her private parts, which she did. The exhibition was done through their respective computers and over the internet. These are the actus reus of child pornography.

As regards the mens rea, the intent to abuse or exploit the child victim is not required to prove child pornography. As I have stated earlier, abuse or exploitation is inherent in child pornography when it has been shown that petitioner persuaded or induced the child to exhibit their[22] private parts. By using the words persuade and induce as criminal modes of perpetrating child pornography, RA 9775 speaks not only to the prevention of actual and explicit sexual exploitation or abuse of children, but also to their protection from "explicit sexual activities" with adults, with or without evidence of exploitation or abuse.

Thus, the mens rea required is merely the intent to do what petitioner precisely did - to persuade or induce the 14-year old girl to create the child pornography. It is the mens rea to do voluntarily the persuasion or inducement. By simply persuading or inducing the 14-year old complainant to exhibit her private parts over the internet, petitioner had the necessary mens rea to be convicted of child pornography.

#### Conclusion

ACCORDINGLY, I vote in favor of the ponencia. Consistent with my view that the penalty of reclusion perpetua is grossly disproportionate to his crime, I ask the Court to refer this matter at once to the Executive Branch and Congress for their remedial action.

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[1] Section 4. Cybercrime Offenses. — The following acts constitute the offense of cybercrime punishable under this Act x x x (c) Content-related Offenses x x x (2) Child Pornography. — The unlawful or prohibited acts defined and punishable by Republic Act No. 9775 or the Anti-Child Pornography Act of 2009, committed through a computer system: Provided, That the penalty to be imposed shall be (1) one degree higher than that provided for in Republic Act No. 9775.

[2] An Act Defining Cybercrime, Providing for the Prevention, Investigation, Suppression and the Imposition of Penalties Therefor and for Other Purposes [CYBER CRIME PREVENTION ACT OF 2012].

[3] Section 4. Unlawful or Prohibited Acts. - It shall be unlawful for any person: (a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography x x x.

[4] Section 3. Definition of Terms. - x x x (b) "Child pornography" refers to any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of child engaged or involved in real or simulated explicit sexual activities x x x.

[5] (c) "Explicit Sexual Activity" includes actual or simulated - x x x (5) lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus x x x.

[6] An Act Defining the Crime of Child Pornography, Prescribing Penalties Therefor and for Other Purposes [ANTI-CHILD PORNOGRAPHY ACT OF 2009].

[7] Supra note 5.

[8] I use "them" to indicate gender neutrality, non-binary identification, and also non-affiliation.

[9] *Bangayan v. People*, G.R. No. 235610, September 16, 2020: "In explicitly stating that children deemed to be exploited in prostitution and other sexual abuse under Section 5 of R.A. 7610, refer to those who engage in sexual intercourse with a child for money, profit, or any other consideration or due to the coercion or influence of any adult, syndicate or group," it is apparent that the intendment of the law is to consider the condition and capacity of the child to give consent. x x x. An individual who engages in sexual intercourse with a child, at least 12 and under 18 years of age, and not falling under any of these circumstances, cannot be held liable under the provisions of R.A. 7610. x x x. 'While Malto is correct that consent is immaterial in cases under R.A. No. 7610 where the offended party is below 12 years of age, We clarify that consent of the child is material and may even be a defense in criminal cases involving violation of Section 5, Article III of R.A. No. 7610 when the offended party is 12 years old or below 18, or above 18 under special circumstances. Such consent may be implied from the failure to prove that the said victim engaged in sexual intercourse either due to money, profit or any other consideration or due to the coercion or influence of any adult, syndicate or group.'

[10] *Locsin Jr. v. People*, G.R. Nos. 221787 and 221800-02, January 13, 2021, quoting *People v. Tadepa*, 314 Phil. 231, 236 (1995).

[11] *Id.*

[12] *R v. Hajar*, 2016 ABCA 222 (CanLII), <https://canlii.ca/t/gsn4w>, retrieved on 2021-11-01 (Alberta Court of Appeal, Canada).

[13] G.R. No. 235610, September 16, 2020.

[14] i.e., they relate to the same person or thing or to the same class of persons or things, or object, or cover the same specific or particular subject matter.

[15] *R v. T.A.S.*, 2017 SKQB 339 (CanLII) (Saskatchewan Court of Queen's Bench, Canada) <<https://canlii.ca/t/hnx2d>>, retrieved on 2021-11-01, quoting Professor Janine Benedet.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] I use "their" to indicate gender neutrality, non-binary identification, and also non-affiliation.

## SEPARATE CONCURRING OPINION

### ZALAMEDA, J.:

The ponencia affirms petitioner's conviction for the crime of child pornography under Section 4(c)(2) of Republic Act No. (RA) 10175[1] or the Cybercrime Prevention Act of 2012 (Cybercrime Prevention Act), in relation to Sections 4(a), 3(b) and 3(c)(5) of RA 9775[2] or the Anti-Child Pornography Act. It bases petitioner's conviction on the finding that the conversation between petitioner and AAA through Facebook Messenger (Messenger) clearly showed that AAA was induced by petitioner to send him pictures of her private parts. Without petitioner's inducement, the minor victim would not have been compelled to undress and send him pictures.[3] The said ponencia further rules that while the sweetheart defense can be seriously considered depending on the circumstances of the case, there is insufficiency of evidence to prove its application here.[4]

I concur with the ponencia's interpretation and application of Section 4(c)(2) of the Cybercrime Prevention Act of 2012, in relation to Sections 4(a) and 3(b) and (c)(5) of Anti-Child Pornography Act and consequently vote to affirm petitioner's conviction.

Petitioner's invocation of right to privacy is misplaced

"The individuals desire for privacy is never absolute, since participation in society is an equally powerful desire. Thus, each individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication of himself to others, in light of the environmental conditions and social norms set by the society in which he lives."

- Alan Westin, *Privacy and Freedom* (1967)

I agree with the ponencia's exposition on the Constitutional underpinnings of data privacy, and as pointed out, the provisions in the Bill of Rights pertaining to safeguards that can be invoked against the State and not against private individuals.[5] In addition to the Bill of Rights, it is also necessary to evaluate petitioner's rights as a data subject under RA 10173 or the Data Privacy Act of 2012 (DPA).

As a data subject, petitioner's rights include the right to be informed, right to access, right to erasure, right to suspend/withdraw/order the blocking, right to portability, right to rectify, and right to file complaint and demand for damages.[6] However, these rights are not absolute. One of the limitations to his right to suspend/withdraw/order the blocking of his data is when the personal information is gathered for the purpose of investigations related to any criminal, administrative, or tax liabilities of a data subject.[7] Thus, he may not validly question the collection and use of his personal information as these were made in light of the investigation and criminal cases against him for: (a) violation of Section 10(a) of RA 7610 or the Special Protection of Children Against Abuse, Exploitation and Discrimination Act; and (b) child pornography under Section(4)(c)(2) of RA 10175, in relation to Sections 4(a), 3(b), and (c)(5) of RA 9775.

Moreover, the disclosure of petitioner's sexually-explicit communications and AAA's photos showing her private parts falls within the recognized grounds for processing sensitive personal information. Under the DPA, these communications and photos are sensitive personal information[8] as these pertain to their sexual life. Considering the nature of sensitive personal information, the law only allows few grounds and stricter rules for their valid processing. The following is the applicable ground in this case:

(f) The processing concerns such personal information as is necessary for the protection of lawful rights and interests of natural or legal persons in court proceedings, or the establishment, exercise or defense of legal

claims, or when provided to government or public authority.[9] (Emphasis supplied)

The communications and photos were submitted as evidence before the proper prosecutor's office and courts for the protection of AAA's lawful rights and interests, as well as the establishment of her legal claims. This is clearly permitted under the DPA.

The ponencia also discussed that AAA's mother forced AAA to open petitioner's Facebook messenger account to get a copy of her conversation with petitioner.[10] AAA was able to do so as she knew of petitioner's password on account of their romantic relationship.[11] Password is one of the security and login controls in Facebook, and through its Terms of Service,[12] it reminds users not to share their password. In *Vivares v. St. Theresa's College*,[13] We held that:

"[A] Facebook user who opts to make use of a privacy tool to grant or deny access to his or her post or profile detail should not be denied the informational privacy right which necessarily accompanies said choice. Otherwise, using these privacy tools would be a feckless exercise, such that if, for instance, a user uploads a photo or any personal information to his or her Facebook page and sets its privacy level at "Only Me" or a custom list so that only the user or a chosen few can view it, said photo would still be deemed public by the courts as if the user never chose to limit the photo's visibility and accessibility. Such position, if adopted, will not only strip these privacy tools of their function but it would also disregard the very intention of the user to keep said photo or information within the confines of his or her private space.[14] (Emphasis supplied)

Consistent with Our ruling in *Vivares*, petitioner's right to informational privacy should be denied insofar as AAA is concerned because he has opted to share his password with her. Foregoing considered, whether under the 1987 Constitution, the DPA, and jurisprudence, there is no impediment to the disclosure and admissibility of the evidence submitted to support the conviction of petitioner.

Petitioner persuaded or induced AAA to perform in the creation or production of child pornography

The State recognizes the vital role of the youth in nation building and shall promote and protect their physical, moral, spiritual, intellectual, emotional, psychological and social well-being.[15] Towards this end, the policy of the Anti-Child Pornography Act is to: (a) guarantee the fundamental rights of every child from all forms of neglect, cruelty and other conditions prejudicial to his/her development; (b) protect every child from all forms of exploitation and abuse including, but not limited to: (1) the use of a child in pornographic performances and materials; and (2) the inducement or coercion of a child to engage or be involved in pornography through whatever means; and (c) comply with international treaties to which the Philippines is a signatory or a State party concerning the rights of children.[16]

Section 4(a) of the Anti-Child Pornography Act provides:

SECTION 4. Unlawful or Prohibited Acts. — It shall be unlawful for any person:

(a) To hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography [...].[17] (Emphasis supplied)

Child pornography means "[a]ny representation, whether visual, audio or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities."[18] In turn, explicit sexual activity includes "[a]ctual or simulated [...] lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus [...]"[19]

The elements for violation of Section 4 (b) are: [1] the victim is a child; and [2] the child was hired, employed, used, persuaded, induced, or coerced to perform in the creation or production of any form of child pornography.[20] A child "[r]efers to a person below eighteen (18) years of age or over, but is unable to fully take care of himself/herself or protect himself/herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition." [21]

As to the presence of the first element, it is uncontroverted that AAA was only fourteen (14) years old at the time of the incident. This was established from the copy of her Certificate of Live Birth that was presented in evidence. Moreover, petitioner was aware of this fact. It was undisputed that BBB confronted the petitioner and told him to stay away because her daughter was still a minor.[22]

Now, as to the presence of the second element, petitioner, at the very least, persuaded or induced AAA to take a photo of her private parts and send it to him through Messenger:

AAA (K): Hahaha gusto ko siya pagtripan e di mo kasi ako pinagtritripan (sic) e.

Cadajas (C): Gusto (sic) muh (sic) pagtrepan (sic) kita ngayon

K: Oo.

Ready ako sa ganyan

C: Sge (sic) hubad

K: Nakahubad na hahaha

C: Tangalin (sic) uh (sic) panti (sic) muh (sic) haha

K: Baliw hubad na lahat

C: Picturan uh (sic) pasa muh (sic) xkin (sic) bi

K: Lah gagi bi wag

Ayoko

C: Uh ayaw muh (sic) pala sa mga treep (sic) KO (sic) ei (sic)

[...]

C: Tayo lang naman makakakita ie (sic)

K: Hahahaha baka pagkalat mo

Dede lang

C: Ako din bi PSA (sic) mna (sic)

HahAt (sic) bi

K: Magpasa ka din hahaha

Lah (sic) bat lahat

[...]

C: Hahaha hnde (sic) aman (sic) bi

Lahat bi gusto ko

Uo nga nkKaumay (sic) bi nslibugan (sic) ako

K: Gagi ayoko nga yung pepe

[...]

C: Buka muh (sic) nga kunti (sic) bi kunti (sic) lang tutok muh (sic)

Hah (sic)

K: Ayoko na.

Haha Christian haha OK nay an

C: She (sic) nah (sic) gsto (sic) KO (sic) mkita (sic) bi[23] (Emphasis supplied)

Words used in a statute are to be understood in their natural, plain, and ordinary acceptance, and according to the signification that they have in common use. They are to be given their ordinary meaning, unless otherwise specifically provided.[24] In this case, the term persuade or induce is not specifically defined by the Anti-Child Pornography Act. Thus, given its ordinary meaning considering the context of the law, to persuade means the act of influencing another by arguments or reasons offered.[25] Meanwhile, the word "induce" is ordinarily defined as "[t]o bring on or about, to affect, cause, to influence to act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." [26] Here, as shown above, when initially asked by petitioner to send him her picture naked, AAA already refused. However, petitioner reasoned with AAA by claiming only the two (2) of them will see the photo. Thus, by petitioner's persuasion or inducement, AAA, a 14-year-old minor, sent the photo of her breast. Thereafter, petitioner again asked to see the entire body of AAA including her genitals. Again, AAA rejected her solicitation. However, petitioner persisted and even asked AAA to open her legs and point the camera to her vagina and to which, AAA eventually submitted.[27] It appears based on the evidence that without the prodding of petitioner, AAA would not have taken photo of her private parts and send it to petitioner.

The fact that AAA said she was already nude does not negate or even justify petitioner's act of persuading her to send her nude photos when she already refused to do so. Moreover, AAA, a 14-year-old minor, should not be blamed for eventually sending petitioner her nude photos by reason of the latter's persuasion. Further, the fact that AAA asked petitioner to also send nude photos and to meet the next day to show her private parts are irrelevant to the elements of the crime at hand.

As discussed above, the policy of Anti-Child Pornography Act is to protect every child from all forms of exploitation and abuse. As aptly pointed out in the ponencia, to minimize the risk of harm to minors from the detrimental consequences of their attempts at adult sexual behavior, the State, as *parens patriae*, is under the obligation to intervene and protect them from sexual predators like petitioner in this case.[28] Victim-blaming, which is so prevalent in abuse cases, is abhorrent and should not be used as defense and basis to make it appear that there is reasonable doubt.[29] Thus, in my mind, the prosecution clearly established beyond reasonable doubt the elements of violating Section 4(c)(2) of the Cybercrime Prevention Act of 2012, in relation to Sections 4(a) and 3(b) and (c)(5) of Anti-Child Pornography Act.

It is also well to point out that there is nothing in Section 4(a) of the Anti-Child Pornography Act that requires the element of hiring, employment, use, persuasion, inducement, or coercion to perform in the creation or production of any form of child pornography to be for "business" or commercial purpose. If such had been the intention of the Legislature, then, they could have included said qualifying words. In fact, the sale and distribution are punished as a different act altogether.[30] Thus, I concur with the ponente, that mere creation, whether for business or for personal use, of child pornography, may already subject a person to violation of Anti-Child Pornography Act.[31]

The sweetheart theory is inapplicable in child pornography cases

The ponencia rejected petitioner's invocation of the sweetheart theory stating that there was insufficiency of evidence to prove its application. The huge age disparity between the petitioner and the minor victim, which placed the former in a strong position to wield his will on the latter, was taken against the petitioner. Further, it was noted that minors are not capable of fully understanding or knowing the import of their actions and as such

are vulnerable to the cajolery and deception of adults.[32]

The romantic relationship between the accused and the victim or the "sweetheart defense" has often been raised in rape cases to negate the charge by establishing consent. For such defense to prosper, jurisprudence consistently ruled that there must be proof by compelling evidence that the accused and the victim were in fact lovers and that the victim consented to the alleged sexual relations.[33]

Relatedly, in *Malto v. People*[34] (Malto), the Court made the pronouncement that the sweetheart theory may not be invoked in cases of child prostitution and other sexual abuse prosecuted under Section 5, Article III of RA 7610. Noting that the sweetheart theory applies in acts of lasciviousness and rape (felonies committed against or without the consent of the victim), the defense is declared unacceptable in sexual abuse cases under RA 7610 since "[a] child exploited in prostitution or subjected to other sexual abuse cannot validly give consent to sexual intercourse with another person." [35]

However, the "sweeping conclusion" of the Court in *Malto* as to the incapacity of a minor to give sexual consent has been clarified in *Bangayan v. People*[36] (Bangayan):

Where the age of the child is close to the threshold age of 12 years old, as in the case of AAA who was only 12 years and one month old at the time of the incident, evidence must be strictly scrutinized to determine the presence of sexual consent. The emotional maturity and predisposition of a juvenile, whose age is close to the threshold age of 12, may significantly differ from a child aged between 15-18 who may be expected to be more mature and to act with consciousness of the consequences of sexual intercourse.

Indeed, *Bangayan* abandoned the pronouncement that the consent of a minor is immaterial in cases involving violation of Section 5, Article III of RA 7610. Consequently, the sweetheart defense may prosper in such cases depending on the factual circumstances established by evidence. This notwithstanding, it is submitted that the sweetheart defense is inapplicable in cases of child pornography under Section 4(c)(2) of the Cybercrime Prevention Act of 2012 in relation to Section 4(a) of the Anti-Child Pornography Act, as in this case.

It bears emphasizing that the sweetheart defense has been raised in cases where the absence of sexual consent is material in establishing the crime. In these cases, the romantic relationship between the accused and the victim negates the "use of force or intimidation" as an element of the rape or act of lasciviousness, or the "coercion or influence" as an element of child abuse under Section 5 of RA 7610. Markedly, in *Quimvel v. People*, [37] Court stated that such terms are used synonymously:

The term "coercion and influence" as appearing in the law is broad enough to cover "force and intimidation" as used in the Information. To be sure, Black's Law Dictionary defines "coercion" as "compulsion; force; duress" while "[undue] influence" is defined as "persuasion carried to the point of overpowering the will." On the other hand, "force" refers to "constraining power, compulsion; strength directed to an end" while jurisprudence defines "intimidation" as "unlawful coercion; extortion; duress; putting in fear." As can be gleaned, the terms are used almost synonymously. xxx[38]

Under Section 4 (a) of the Anti-Child Pornography Act, it is a crime to persuade or induce a child to perform in the creation or production of any form of child pornography. To my mind, the element of persuasion or inducement is not negated by the sweetheart theory. To reiterate, the term "persuade" means the act of influencing another by arguments or reasons offered.[39] Then, the word "induce" is defined as "[t]o bring on or about, to affect, cause, to influence to act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." [40] Thus, unlike "force or intimidation" and "coercion or influence", the word "persuade" or "induce" does not involve compulsion or duress. Verily, words uttered by a lover could undoubtedly move a person, especially a child, to do unimaginable acts.

The idea that consent is immaterial in child pornography cases is not a novel one. Even in other jurisdictions, such as in the United States, the age of consent for sexual activity is irrelevant as any depiction of a child or a person under eighteen (18) years of age is illegal. Hence, even if a minor willingly gives her consent on any creation of a visual image considered as child pornographic content, such consent does not affect the prosecution of those accused in proper cases.[41] The rationale for this is founded on the identification of the two (2) major harms caused by child pornography: the harm of creation and the harm of circulation.[42]

The harm of creation is the physical and psychological harm that a child experiences in creating child pornography. In this type of harm, it was recognized that the production of child pornography often involves the sexual exploitation and abuse of children. On the other hand, the harm of circulation, which is a continuing harm, is rooted on the fact that the materials produced are a permanent record of the child's participation in the sexual activity. The harm to the child is exacerbated by their circulation every time another individual views the material considered as child pornography. The child's privacy is violated each time the visualization is viewed by another, much as the publication of a defamatory statement causes harm each time it is published. This concept of harm also suggests that a child could suffer such harm even if the child suffered no abuse or exploitation in the creation of the image. In recognizing the gravity of the harm of circulation, closing the distribution network was given equal importance as preventing sexual abuse and exploitation during creation.[43]

In our jurisdiction, the notion that consent is immaterial in child pornography cases can be inferred from the definition provided by the law on child pornography as well as the various acts considered criminal in relation to said definition. To recall, child pornography is defined as "any representation, whether visual, audio or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of a child engaged or involved in real or simulated explicit sexual activities." [44] The definition is unconditional and does not in any way consider the consent of the child depicted therein or the purpose for which the material was created as a defense for any of the criminal acts under our law. The Legislature did not qualify its definition of child pornography to only apply to cases where a child was sexually abused, exploited, or molested in its creation. In other words, the definition is meant to be all-encompassing to likewise prevent the harm of circulation. Otherwise, a qualifying phrase such as "created through sexual abuse, exploitation or molestation" or a phrase of the same import would have been added to the definition of child pornography. In the absence of such qualifying phrase, the intent is to consider any visualization of a child engaged or involved in real or simulated explicit sexual activity, regardless of how it was created or whether the subject child therein gave consent, as child pornography and to punish those who involve themselves with such kind of material.

Again, the goal is to close the distribution network by targeting the roots since both creation and distribution of child pornography feeds the addiction and mental disease of its consumers. Indeed, the intent of the Legislature was to "curtail, if not totally eliminate" child pornography,[45] which arguably includes sexual depictions or exchanges between child-adult lovers, even if the exchanges are meant to be private, since these materials undoubtedly contribute to the database of these illicit paraphernalia. In fact, possession of a picture of a child lover who is engaged or involved in real or simulated explicit sexual activities is punishable at very least through Section 4(l) of the Anti-Child Pornography Act. Such act does not also consider the consent of the child as a defense for exculpation.

The difference in treatment of consent in RA 7610 cases, such as in *Bangayan*, and in cases of child pornography is rooted in the underlying evils sought to be prevented. For RA 7610 cases, the acts therein are a personal experience to the parties such that when a party gives consent, it only affects their own physical, mental, and emotional state. However, child pornography cases transcend the personal state of the parties since the explicit sexual activity is recorded in a visual, audio, or written combination thereof giving rise to the possible

consumption of the public. Abuse and exploitation may continually arise due to the existence of these materials thereby requiring the State's extended protection.

Given the foregoing reasons, any type of persuasion or inducement used against a child, as long as the words given are the triggering factor to commence the creation of child pornography and even if the child eventually relents or gives consent to the creation, will make the person liable under Section 4(a) of the Anti-Child Pornography Act, as in this case. Since the crime was committed through a computer system, petitioner was correctly convicted of child pornography under Section 4(c)(2) of the Cybercrime Prevention Act in relation to Sections 4(a), 3(b) and 3(c)(5) of the Anti-Child Pornography Act.

As to the proper penalty to be imposed for child pornography committed through computer system, the Cybercrime Prevention Act provides that it should be one degree higher than that provided for in Anti--Child Pornography Act. Under Section 15(b) of Anti-Child Pornography Act, the penalty to be imposed is reclusion temporal in its maximum period and a fine of not less than One Million Pesos (Php1,000,000.00) but not more than Two Million Pesos (Php2,000,000.00). Thus, the penalty to be imposed here is reclusion perpetua. As properly pointed out by the ponencia, this Court has explained the reason for this rule in *Disini, Jr. v. Secretary of Justice*:<sup>[46]</sup>

Of course, the law makes the penalty higher by one degree when the crime is committed in cyberspace. But no one can complain since the intensity or duration of penalty is a legislative prerogative and there is rational basis for such higher penalty. The potential for uncontrolled proliferation of a particular piece of child pornography when uploaded in the cyberspace is incalculable.<sup>[47]</sup>

I commiserate with petitioner as to the seeming harshness of the penalty for his act if it truly is just done out of thoughtlessness coupled with indecorous desire, without consideration to the harm it may cause to AAA. However, while the penalty may not seem commensurate to the act committed by petitioner in this case, it is what the law provides.

Notably, the Court has in many cases<sup>[48]</sup> ruled against challenges to the constitutionality of a penalty imposed by law based on its alleged cruelty and disproportionateness to the crime punished. Faced with the issue of whether a penalty imposed by the law constitutes Constitutionally proscribed "cruel and unusual punishment," the Court has consistently ruled that "a punishment authorized by statute is not cruel, degrading, or disproportionate to the nature of the offense unless it is flagrantly and plainly oppressive and wholly disproportionate to the nature of the offense as to shock the moral sense of the community. It takes more than merely being harsh, excessive, out of proportion or severe for a penalty to be obnoxious to the Constitution."<sup>[49]</sup>

Here, appearing as it is that the validity or constitutionality of the penalty was not even questioned by petitioner nor was reduction of penalty prayed, We simply cannot impose a penalty less than what is fixed by law without infringing on the sphere of power vested in the legislature. Neither can We acquit based on Our perception that the penalty provided by Congress is not commensurate to the act committed by an accused in a particular case.

The Court, however, is not without means to exercise leniency should circumstances warrant the same. In these regard, former Justice Pedro Tuason imparted these wise words:

The constitutionality of an act of the legislature is not to be judged in the light of exceptional cases. Small transgressors for which the heavy net was not spread are, like small fishes, bound to be caught, and it is to meet such a situation as this that courts are advised to make a recommendation to the Chief Executive for clemency or reduction of the penalty.<sup>[50]</sup> (Emphasis supplied)

All things considered, I join the ponencia in affirming petitioner's conviction. Nonetheless, in light of the foregoing, I respectfully request that this case be referred to the Legislative and Executive branches for

appropriate remedial action.

In view thereof, I vote to DENY the Petition and AFFIRM the assailed Decision of the Court of Appeals with MODIFICATION as to the penalty imposed.

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[1] Entitled "AN ACT DEFINING CYBERCRIME, PROVIDING FOR THE PREVENTION, INVESTIGATION, SUPPRESSION AND THE IMPOSITION OF PENALTIES THEREFOR AND FOR OTHER PURPOSES," approved on 12 September 2012.

[2] Entitled "AN ACT DEFINING THE CRIME OF CHILD PORNOGRAPHY, PRESCRIBING PENALTIES THEREFOR AND FOR OTHER PURPOSES," approved on 17 November 2009.

[3] Ponencia, pp. 10-12.

[4] Id. at 12.

[5] Id. at 7-8.

[6] Data Privacy Act of 2012, Sec. 16 and 18.

[7] Id. at Sec. 19.

[8] Id. at Sec. 3 (l).

Sensitive personal information refers to personal information:

(1) About an individual's race, ethnic origin, marital status, age, color, and religious, philosophical or political affiliations;

(2) About an individual's health, education, genetic or sexual life of a person, or to any proceeding for any offense committed or alleged to have been committed by such person, the disposal of such proceedings, or the sentence of any court in such proceedings;

(3) Issued by government agencies peculiar to an individual which includes, but not limited to, social security numbers, previous or current health records, licenses or its denials, suspension or revocation, and tax returns; and

(4) Specifically established by an executive order or an act of Congress to be kept classified. (Emphasis supplied)

[9] Id. at Section 13 (f).

[10] Ponencia, p. 2.

[11] Id. at 8.

[12] Terms of Service, 22 October 2020 <<https://www.facebook.com/legal/terms>> (last accessed 21 October 2021).

[13] 744 Phil. 451 (2014) [Per J. Velasco, Jr.].

[14] Id. at 472.

[15] Anti-Child Pornography Act, Sec. 2.

[16] Id.

[17] Id. at Sec. 4 (b).

[18] Id. at Sec. 3 (b).

[19] Id. at Sec. 3 (c) (5).

[20] See Ponencia, p. 10.

[21] Id. at Sec. 3 (b).

[22] Id.

[23] Id. at 10-11; Emphasis supplied.

[24] See Ocampo v. Enriquez, 815 Phil. 1175, 1261 (2017), 08 August 2017 [Per J. Peralta].

[25] Anti-Child Pornography Act, Sec. 4(b); See also Black's Law Dictionary (8[th] Edition), p. 1181.

[26] Black's Law Dictionary (5[th] Edition), p. 697.

[27] Ponencia, p. 2.

[28] Id. at 13.

[29] See People v. Villaros, G.R. No. 228779, 08 October 2018 [Per J. Caguioa].

[30] Anti-Child Pornography Act, Sec. 4 (c), (f); See Nilo v. Court of Appeals, 213 Phil. 460 (1984), 02 April 1984 [Per J. Gutierrez, Jr.].

[31] Letter of Associate Justice Jhosep Y. Lopez dated 12 October 2021, pp. 2-7.

[32] Ponencia, pp. 18-19.

[33] People v. Victoria, 763 Phil. 96 (2015) [Per J. Villarama]; People v. Martinez, 827 Phil. 410 (2018) [Per J. Reyes Jr.]; People v. Ramos, 838 Phil. 797 (2018) [Per J. A.B. Reyes Jr.]; People v. Briones, G.R. No. 240217, 23 June 2020 [Per J. Peralta]; People v. Fruelda, G.R. No. 242690, 03 September 2020 [Per J. Caguioa].

[34] 560 Phil. 119 (2007) [Per J. Corona].

[35] Id. at 139.

[36] G.R. No. 235610, 16 September 2020 [Per J. Carandang].

[37] 808 Phil. 889 (2017) [Per J. Velasco, Jr.].

[38] Id. at 919.

[39] Anti-Child Pornography Act. Sec. 4 (b); See also Black's Law Dictionary (8[th] Edition), p. 1181.

[40] Black's Law Dictionary (5[th] Edition), p. 697.

[41] The Limits of Child Pornography, Indiana Law Journal: Vol. 89: Iss. 4, <<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=11123&context=ilj>>; Citizen's Guide to U.S. Federal Law on Child Pornography, 28 May 2020 <<https://www.justice.gov/criminal--ceos/citizens-guide-us-federal-law-child-pornography>>.

[42] New York v. Ferber, 458 US 747 (1982); Osborn v. Ohio, 495 US 103 (1990).

[43] Refining Child Pornography Law: Crime, Language, and Social Consequences, 02 July 2016 <<https://ssrn.com/abstract=2802651>>; Emphasis supplied.

[44] Anti-Child Pornography Act of 2009, Sec. 3.

[45] Sponsorship Speech of Senator Madrigal, p. 850. SENATE JOURNAL Session 84, (02 June 2008).

[46] 727 Phil. 28 (2014) [Per J. Abad].

[47] *Id.* at 107; Emphasis supplied.

[48] See *Fuertes v. Senate of the Philippines*, G.R. No. 208162, 07 January 2020 [Per J. Leonen]; *People v. Alejandro y Mariano*, G.R. No. 94644, 17 August 1993 [Per J. Cruz]; *Agbanlog v. People*, G.R. No. 105907, 24 May 1993 [Per J. Quiason].

[49] *Spouses Lim v. People*, 438 Phil. 749, 754 (2002) [Per J. Corona].

[50] *People v. Estoista*, 93 Phil. 647, 654 (1953) [Per J. Tuason], citing *People v. De la Cruz*, 92 Phil. 906, 909 (1953) [Per J. Bengzon]; REVISED PENAL CODE, Art. 5; *People v. Melgar*, 100 Phil. 298, 301-302 (1956) [Per J. Montemayor].

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## DISSENTING OPINION

### GAERLAN, J.:

With due respect to the majority, I respectfully register my dissent from the Decision and vote for the reversal of the Court of Appeals' (CA) Decision dated September 17, 2018 and the Resolution dated May 9, 2019 in CA-G.R. No. 40298. To my mind, the records of the case casts a long shadow of doubt as to the guilt of the accused for the offenses charged.

To recall, both the Decision and Resolution of the CA had affirmed with modification the Joint Decision dated August 7, 2017 issued by the Regional Trial Court of Valenzuela City in Criminal Case Nos. 215-V-17 and 216-V-17 which found petitioner Christian Cadajas (Cadajas) guilty beyond reasonable doubt of the offense of child pornography under Section 4(c)(2) of Republic Act No. 10175, or the "Cybercrime Prevention Act of 2012" in relation to Sections 4(a) and 3(b) and (c)(5) of Republic Act No. 9775, or the "Anti-Child Pornography Act of 2009". The finding of guilt of Cadajas was anchored on three (3) key findings: first, that AAA, the purported victim, was a 14 year-old minor; second, that nude photographs of AAA were sent by her to her boyfriend, Cadajas, via the mobile application, Facebook Messenger, as was supposedly proven by a copy of the chat thread between AAA and Cadajas which was submitted as evidence; and third, that Cadajas supposedly induced AAA to send the aforementioned nude photographs.

A review of the circumstances of the case will, however, show that: (a) the chat thread between Cadajas and AAA should not have been admitted as evidence since the same was procured in violation of Cadajas' constitutionally guaranteed right to privacy; and (b) there exists reasonable doubt as to whether Cadajas did in fact induce AAA to send the aforementioned nude photographs or if the same were freely and voluntarily sent by her.

### I.

The Facebook Messenger Chat Between Cadajas and AAA Is Inadmissible as Evidence.

Central to the finding of guilt of Cadajas is the admission as evidence of the chat thread between him and AAA on

Facebook Messenger. The chat thread revealed an explicit conversation between the two (2) lovers, culminating with both sending nude photographs of themselves to each other. Cadajas, on appeal, argued that the chat thread was inadmissible in evidence considering that the same was "taken from his Facebook Messenger account,"[1] and was thus taken in violation of his right to privacy.[2] The Decision, however, rejected this contention and argued that: (a) Cadajas failed to raise the objection to admissibility in a timely manner, i.e., during trial, and had thus already waived the same;[3] (b) the right to privacy, provided for in the Bill of Rights in the Constitution, may not be invoked against private individuals;[4] and (c) that Cadajas had no reasonable expectation of privacy as against AAA, having voluntarily given the password of his account to the latter.[5] With due respect, such findings are unsupported by law and jurisprudence.

### A.

An Appeal in a Criminal Case Permits an Appellate Court to Review the Admissibility of Evidence Submitted Albeit not Assigned as an Error on Appeal.

It is hornbook doctrine that an appeal in a criminal case throws the entire case wide open and confer upon the reviewing tribunal "full jurisdiction over the case and renders such court competent to examine records, revise the judgment appealed from, increase the penalty, and cite the proper provision of the penal law." [6] In *Epifanio v. People*, [7] this Court exercised such expansive and encompassing jurisdiction by reviewing the admissibility of evidence despite the failure to object by the accused during trial. Simply put, this Court is not precluded from reviewing the admissibility of the chat thread despite the belated objection thereto by Cadajas.

### B.

The Admission as Evidence of the Facebook Messenger Chat Thread Between Cadajas and AAA Violates the Latter's Right to Privacy.

Jurisprudence provides that the right to privacy enshrined in our Constitution can be invoked and asserted against private individuals. Section 3, Article III of the Constitution provides:

SECTION 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.

(2) Any evidence obtained in violation of this or the preceding section shall be inadmissible for any purpose in any proceeding.

While it is true that in *People v. Marti*, [8] this Court held that an act of a private individual, allegedly in violation of appellant's constitutional rights, cannot be invoked against the State, the same is not absolute and this Court had, on various occasions, ruled to the contrary. [9] Relevantly, in *Zulueta v. Court of Appeals*, [10] this Court held that evidence, albeit obtained by private individuals, in violation of the right to privacy and correspondence "renders the evidence obtained inadmissible 'for any purpose in any proceeding;]" to wit:

Indeed[,] the documents and papers in question are inadmissible in evidence. The constitutional injunction declaring [']the privacy of communication and correspondence [to be] inviolable['] is no less applicable simply because it is the wife (who thinks herself aggrieved by her husband's infidelity) who is the party against whom

the constitutional provision is to be enforced. The only exception to the prohibition in the Constitution is if there is a [']lawful order [from a] court or when public safety or order requires otherwise, as prescribed by law.['] Any violation of this provision renders the evidence obtained inadmissible [']for any purpose in any proceeding.['] x x x[11] (Citations omitted, emphasis supplied.)

Thus, proceeding from the foregoing disquisition, I submit that Cadajas right to privacy was violated when his private social media account was accessed without his permission by BBB and a copy of his private conversation with AAA was made without his consent.

The ponencia argued, however, that the cited portion in Zulueta, case was mere obiter dictum and thus does not constitute a binding precedent that can be applied to the instant case. I respectfully disagree.

In *Delta Motors Corporation, v. Court of Appeals*,<sup>[12]</sup> this Court defined the term "obiter dictum" as "an opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it", to wit:

The Court of Appeals likewise did not commit reversible error in deleting the phrase SIHI protested as obiter dictum.

An obiter dictum has been defined as an opinion expressed by a court upon some question of law which is not necessary to the decision of the case before it. It is a remark made, or opinion expressed, by a judge, in his decision upon a cause, [']by the way,['] that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessarily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument. Such are not binding as precedent.

The assailed phrase was indeed obiter dictum as it touched upon a matter not raised by petitioner expressly in its petition assailing the dismissal of its notice of appeal. It was not a prerequisite in disposing of the aforementioned issue. The body of the resolution did not contain any discussion on such matter nor mention any principle of law to support such statement.<sup>[13]</sup> (Citations omitted, emphasis supplied.)

It must be noted that in the case of Zulueta, therein petitioner Zulueta raised as an argument that the CA erred when it affirmed the ruling of the trial court that: (a) she returned the documents owned by her husband, therein respondent Martin, and that, (b) the same documents cannot be used or submitted as evidence in a legal separation case and a case to disqualify respondent Martin from the practice of medicine, considering that supposedly, the same documents were already admitted as evidence in a separate disbarment case filed by respondent Martin against petitioner Zulueta's lawyer; to wit:

Petitioner Cecilia Zulueta is the wife of private respondent Alfredo Martin. On March 26, 1982, petitioner entered the clinic of her husband, a doctor of medicine, and in the presence of her mother, a driver and private respondent's secretary, forcibly opened the drawers and cabinet in her husband's clinic and took 157 documents consisting of private correspondence between Dr. Martin and his alleged paramours, greetings cards, cancelled checks, diaries, Dr. Martin's passport, and photographs. The documents and papers were seized for use in evidence in a case for legal separation and for disqualification from the practice of medicine which petitioner had filed against her husband.

Dr. Martin brought this action below for recovery of the documents and papers and for damages against petitioner. The case was filed with the Regional Trial Court of Manila, Branch X, which, after trial, rendered judgment for private respondent, Dr. Alfredo Martin, declaring him [']the capital/exclusive owner of the properties described in paragraph 3 of plaintiff's Complaint or those further described in the Motion to Return and Suppress['] and ordering Cecilia Zulueta and any person acting in her behalf to a immediately return the properties to Dr. Martin and to pay him P5,000.00, as nominal damages; P5,000.00, as moral damages and attorney's fees; and to pay the costs of the suit. The writ of preliminary injunction earlier issued was made final

and petitioner Cecilia Zulueta and her attorneys and representatives were enjoined from [']using or submitting/admitting as evidence['] the documents and papers in question. On appeal, the Court of Appeals affirmed the decision of the Regional Trial Court. Hence this petition.

There is no question that the documents and papers in question belong to private respondent, Dr. Alfredo Martin, and that they were taken by his wife, the herein petitioner, without his knowledge and consent. For that reason, the trial court declared the documents and papers to be properties of private respondent, ordered petitioner to return them to private respondent and enjoined her from using them in evidence. In appealing from the decision of the Court of Appeals affirming the trial court's decision, petitioner's only ground is that in *Alfredo Martin v. Alfonso Felix, Jr.*, this Court ruled that the documents and papers (marked as Annexes A-1 to J-7 of respondent's comment in that case) were admissible in evidence and, therefore, their use by petitioner's attorney, Alfonso Felix did not constitute malpractice or gross misconduct. For this reason it is contended that the Court of Appeals erred in affirming the decision of the trial court instead of dismissing private respondent's complaint.[14] (Citations omitted, emphasis supplied.)

From the foregoing, it is undeniable that the discussion of this Court in *Zulueta* as to the applicability of Section 3, Article III of the Constitution against private individuals cannot be considered as obiter dictum as it directly addresses the sole issue raised by petitioner *Zulueta* in the case, i.e., that the decision of the lower courts should be reversed considering that the documents in questions were already admitted as evidence in a separate case. Thus, in dismissing the petition and affirming the ruling of the lower courts, this Court held that the right to privacy can be invoked against a private individual, e.g., one's wife, and evidence acquired by a private party in violation of a person's right to privacy is inadmissible as evidence.

The majority also takes the position that Section 19 of Republic Act No. 10173, or the "Data Privacy Act of 2012" (DPA), provides that the rights enumerated in Sections 16, 17 and 18 of the DPA[15] are not applicable to "processing of personal information gathered for the purpose of investigations in relation to any criminal, administrative or tax liabilities of a data subject." Section 19 of the said Act, however, did not provide for a blanket waiver of an individual's right to object to the initial processing of his or her personal information to begin with. In any event, it can be argued that the provisions of the DPA cannot be made to apply in the instant case as BBB cannot be considered as a personal information controller, i.e., a person or organization who controls the collection, holding, processing or use of personal information, including a person or organization who instructs another person or organization to collect, hold, process, use, transfer or disclose personal information on his or her behalf,[16] or a personal information processor, i.e., any natural or juridical person qualified to act as such under the DPA to whom a personal information controller may outsource the processing of personal data pertaining to a data subject.[17]

### C.

Cadajas had a Reasonable Expectation of Privacy with Respect to His Communications with AAA.

Cadajas had a reasonable expectation of privacy as to his private communications with AAA. The test to determine the presence of "reasonable expectation of privacy" was laid out in *Ople v. Torres*,[18] as follows: "(1) whether by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable." In *Spouses Hing v. Coachuy, Sr., et al.*[19] the Court stressed that "the reasonableness of a person's expectation of privacy must be determined on a case-to-case basis[,]" taking into consideration the attendant factual circumstances and the prevailing "[c]ustoms, community norms, and practices." [20] Here, the factual circumstances peculiar to the instant case warrants the conclusion that Cadajas

had a reasonable expectation of privacy with respect to the chat thread despite having allegedly given his password thereto to AAA.

With one respect, the ponencia overlooked a crucial fact: it was BBB, not AAA, that violated Cadajas' right to privacy when the former secured a copy of the conversations therein without Cadajas' consent. Otherwise stated, as against BBB, Cadajas had a reasonable expectation of privacy.

To recall, the ponencia's own narration of facts indicated that Cadajas sought to exclude everyone from access, except AAA (with whom he had purportedly shared his password).[21] As recognized by the ponencia, the account itself was password protected,[22] and that BBB would only have such access whenever AAA "would forget to log out of her Facebook Messenger account[.]"[23] In fact, even AAA sought to exclude BBB from the chat thread as evidenced by the fact that she rushed to a computer shop to delete her messages after she found out that her mother knew about them.[24] Plainly, this points to no other conclusion than that Cadajas reasonably expected that BBB had no access to the chat thread or of the conversations found therein.

Accordingly, the chat thread should not have been admitted into evidence considering that Cadajas had a reasonable expectation of privacy as to who can access his social media account and that the chat thread came into possession of BBB in violation of Cadajas' constitutionally guaranteed right to privacy. On this score alone, Cadajas should be acquitted as the corpus delicti of the offense charged, the nude photographs in the chat thread, is inadmissible as evidence.

## II.

The Prosecution Failed to Establish Beyond Reasonable Doubt that Cadajas Induced AAA to Send Explicit Photographs.

Even assuming that the chat thread was admissible in evidence, the prosecution failed to prove beyond reasonable doubt that Cadajas induced AAA to send nude photographs.

Under Section 3(b) of the Anti-Child Pornography Act of 2009, "child pornography" pertains to "any representation, whether visual, audio, or written combination thereof, by electronic, mechanical, digital, optical, magnetic or any other means, of child engaged or involved in real or simulated explicit sexual activities." Section 3(c) defines "explicit sexual activities" as including, among others, the "lascivious exhibition of the genitals, buttocks, breasts, pubic area and/or anus[.]"

The aforementioned law makes unlawful any act "[t]o hire, employ, use, persuade, induce or coerce a child to perform in the creation or production of any form of child pornography[.]"[25] The proscription is echoed in Section 4(c)(2) of the Cybercrime Prevention Act of 2012.

From the foregoing, there are four (4) elements that must be proven beyond reasonable doubt in order for a conviction for a violation of Section 4(c)(2) of the Cybercrime Prevention Act of 2012 in relation to Sections 4(a) and 3(b) and (c)(5) of the Anti-Child Pornography Act of 2009 to be valid; viz.:

(1)

That the alleged victim is a child;

(2)

That the child performed an act of child pornography as defined under Section 3(b) in relation to Section 3(c) of the Anti-Child Pornography Act of 2009;

(3)

That the purported victim was hired, employed, used, persuaded, induced, or coerced to be part of the creation or production of child pornography; and

(4)

That the hiring, employing, using, persuading, inducing, or coercing of the victim was achieved with the use of a computer system.

A review of the evidence on record as well as the attendant circumstances of the instant case will show that Cadajas did not induce AAA to send the nude photographs.

Case law provides that inducement is present whenever "the influence of the inducer over the mind" of another forces him or her to pursue a certain course of action.[26] In legal parlance, it is near-synonymous to undue influence or the "improper use of power or trust in any way that deprives a person of free will and substitutes another's objective." [27] A person can be said to be induced when he or she pursues a certain course of action which did not emanate from his or her mind, but in the mind of the inducer. Indispensably, therefore, there must be a showing that the inducer employed language calculated to exert "great dominance and influence over the person who acts; [the words] ought to be direct and as efficacious, or powerful as physical or moral coercion or violation itself." [28]

The ponencia held that that inducement naturally follows from the ten (10) year age gap between Cadajas (then twenty-four (24) years old at the time of the alleged commission of the crime) and AAA (then fourteen (14) years old). Supposedly, the disparity in age placed Cadajas "in a stronger position over the minor victim which enabled him to wield his will on the latter[.]" especially considering that AAA, as a minor, is "not capable of giving rational consent to engage in any sexual activity." [29] With due respect, case law provides otherwise.

Can a 14 year-old give sexual consent to a lover many years older? This question has been resolved by this Court in *Bangayan v. People*, [30] where this Court held that a child between twelve (12) years old and below eighteen (18) years of age may have the capacity to give sexual consent even to an individual fifteen (15) years older. Two (2) things can be deduced: first, a child between 12 years old but below 18 years of age may give sexual consent, and second, the ability to give such sexual consent is not ipso facto eliminated by the fact that the sexual partner is over the age of eighteen (18) years of age and/or significantly older. Thus, in the said case, this Court directed trial courts that "evidence must be strictly scrutinized to determine the presence of sexual consent." Necessarily, this entails a careful understanding of the "emotional maturity and predisposition" [31] of AAA of sexual acts, and the impact of the relationship of AAA and Cadajas on such understanding.

A review of the conversation between Cadajas and AAA will show that the tenor thereof taken as a whole, does not evince inducement by the latter to the former. Rather, it is akin to the banter employed by couples before undertaking the highest expression of human intimacy and passion, to wit:

AAA (K): Hahaha gagi gusto ko sya pagtripan e di mo naman ako pinagtripan e

Cadajas (C): Gsto muh pagtrepan kita ngayon

K: Oo

Ready ako sa ganyan.

C: Sge [sic] hubad

K: Nakahubad na hahaha

C: Tanggalin [sic] uh [sic] panti [sic] muh [sic] haha

K: Baliw hubad na lahat

x x x x

C: Kala ko ba rdy

K: Lah mukha akong tanga nun k[u]ng pipicturan ko

Pero hahaha

Kuya nalilibugan ako hahaha

x x x x

K: Magpasa ka din hahaha

Lah bat lahat

Bi personal gusto ko kapag ganyan e

x x x x

C: Ako lang naman makakita saka ikaw bi

Tayong dalawa

K: Flash ko camera ko para makita whahaha nakakahiya.

x x x x

C: Nakaktampo k nman yan.

K: Bukas bi papakita ko[32]

Dissecting the conversation in the chat thread, it is readily apparent that Cadajas employed no language which would show great dominance and influence. The chat thread showed no language indicative of exploitation and abuse of a child—the policy consideration which undergirds the Anti-Child Pornography Act of 2009. In fact, the tenor of the conversation in the chat thread showed that AAA was not in any way induced to take and send the photographs. Notably, the entire conversation was prompted by AAA's sexually suggestive remark that she was ready to fool around with her then boyfriend Cadajas. Other factors to be considered as can be seen from the candid conversation between Cadajas and AAA were her: a) readiness to take off her clothes; b) request that Cadajas also send explicit photos of himself; c) offer to show Cadajas her private parts in person; and, d) act of sending four (4) nude photographs to Cadajas, which, when all taken together clearly militates against any conclusion that it was against AAA's will when she took and sent the photographs to Cadajas and that she was merely induced by Cadajas to do the same.

In resolving the instant case, the Court should have likewise considered the observations of the trial court:

However, from the testimonies of the minor-complainant and her mother, it was impressed upon this court that the minor-complainant while barely fourteen (14) years old is a city lass who is not innocent of the ways of the world. She admitted that she had three (3) boyfriends prior to the accused. And now, while the case she lodged against the accused is still pending before this court, again she has a new boyfriend. Notably, even her Facebook messenger conversation (Exhibit [']C['] - [']C-8['']) with the accused reveals that the

minor-complainant is sexually daring. Moreover, she testified that the incident subject of these cases did not affect her at all.[33]

All things considered, a careful scrutiny of the evidence on record shows that AAA is not some sheltered lass who can be persuaded by the constant repetition of "sige na" or "please" by Cadajas. AAA freely, willingly and consciously agreed to send the nude photographs of herself to Cadajas and not only requested that he reciprocate and also send nude pictures of himself to her but also promised that she will show him her private parts in person. Such representations clearly go against any finding of inducement on the part of Cadajas. Considering the foregoing, it is evident that Cadajas guilt in the instant case was not established by evidence beyond reasonable doubt.

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[1] Decision, p. 6.

[2] Id.

[3] Id. at 10-11.

[4] Id. at 6-9.

[5] Id. at 9-10.

[6] *People v. Alejandro, et al.*, 807 Phil. 221, 229 (2017).

[7] 552 Phil. 620, 628 (2007).

[8] 271 Phil. 51, 58 (1991).

[9] *Miguel v. People*, 814 Phil. 1073 (2017); *Dela Cruz v. People*, 776 Phil. 653 (2016); *People v. Lauga*, 629 Phil. 522 (2010); *People v. Malngan*, 534 Phil. 404, 440 (2006).

[10] 324 Phil. 63, 68 (1996).

[11] Id. at 68.

[12] 342 Phil. 173, 186 (1997).

[13] Id. at 186.

[14] *Supra* note 10 at 65-66.

[15] Republic Act No. 10173 (2012), §§ 16-18. Data Privacy Act of 2012 [hereinafter "DPA"] provide:

"SEC. 16. Rights of the Data Subject. - The data subject is entitled to:

(a) Be informed whether personal information pertaining to him or her shall be, are being or have been processed;

(b) Be furnished the information indicated hereunder before the entry of his or her personal information into the processing system of the personal information controller, or at the next practical opportunity:

(1) Description of the personal information to be entered into the system;

(2) Purposes for which they are being or are to be processed;

(3) Scope and method of the personal information processing;

(4) The recipients or classes of recipients to whom they are or may be disclosed;

(5) Methods utilized for automated access, if the same is allowed by the data subject, and the extent to which such access is authorized;

- (6) The identity and contact details of the personal information controller or its representative;
- (7) The period for which the information will be stored; and
- (8) The existence of their rights, i.e., to access, correction, as well as the right to lodge a complaint before the Commission.

Any information supplied or declaration made to the data subject on these matters shall not be amended without prior notification of data subject: Provided, That the notification under subsection (b) shall not apply should the personal information be needed pursuant to a subpoena or when the collection and processing are for obvious purposes, including when it is necessary for the performance of or in relation to a contract or service or when necessary or desirable in the context of an employer-employee relationship, between the collector and the data subject, or when the information is being collected and processed as a result of legal obligation;

(c) Reasonable access to, upon demand, the following:

- (1) Contents of his or her personal information that were processed;
- (2) Sources from which personal information were obtained;
- (3) Names and addresses of recipients of the personal information;
- (4) Manner by which such data were processed;
- (5) Reasons for the disclosure of the personal information to recipients;
- (6) Information on automated processes where the data will or likely to be made as the sole basis for any decision significantly affecting or will affect the data subject;
- (7) Date when his or her personal information concerning the data subject were last accessed and modified; and
- (8) The designation, or name or identity and address of the personal information controller;

(d) Dispute the inaccuracy or error in the personal information and have the personal information controller correct it immediately and accordingly, unless the request is vexatious or otherwise unreasonable. If the personal information have been corrected, the personal information controller shall ensure the accessibility of both the new and the retracted information and the simultaneous receipt of the new and the retracted information by recipients thereof: Provided, That the third parties who have previously received such processed personal information shall be informed of its inaccuracy and its rectification upon reasonable request of the data subject;

(e) Suspend, withdraw or order the blocking, removal or destruction of his or her personal information from the personal information controller's filing system upon discovery and substantial proof that the personal information are incomplete, outdated, false, unlawfully obtained, used for unauthorized purposes or are no longer necessary for the purposes for which they were collected. In this case, the personal information controller may notify third parties who have previously received such processed personal information; and

(f) Be indemnified for any damages sustained due to such inaccurate, incomplete, outdated, false, unlawfully obtained or unauthorized use of personal information.

SEC. 17. Transmissibility of Rights of the Data Subject. - The lawful heirs and assigns of the data subject may invoke the rights of the data subject for, which he or she is an heir or assignee at any time after the death of the data subject or when the data subject is incapacitated or incapable of exercising the rights as enumerated in the immediately preceding section.

SEC. 18. Right to Data Portability. - The data subject shall have the right, where personal information is processed by electronic means and in a structured and commonly used format, to obtain from the personal information controller a copy of data undergoing processing in an electronic or structured format, which is commonly used and allows for further use by the data subject. The Commission may specify the electronic format referred to above, as well as the technical standards, modalities and procedures for their transfer."

[16] DPA, § 3(h).

[17] See DPA, § 3(i).

[18] 354 Phil. 948, 980 (1998).

[19] 712 Phil. 337, 350 (2013).

[20] Id.

[21] Decision, p. 10.

[22] Id.

[23] Id. at 2.

[24] Id. at 3.

[25] Republic Act No. 9775, Section 4(a), Anti-Child Pornography Act of 2009.

[26] *People v. Bolivar*, 375 Phil. 1033, 1047 (1999).

[27] *Caballo v. People of the Philippines*, 710, 805 Phil. 792 (2013).

[28] Id.

[29] Decision, p. 23.

[30] G.R. No. 235610 (September 16, 2020).

[31] Id.

[32] See Exhibits "C" to "C-8".

[33] Reflections, Justice Alfredo Benjamin S. Caguioa dated October 12, 2021, p. 10.

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