

## SECOND DIVISION

G.R. No. 211002 (*Richard Ricalde vs. People of the Philippines*)

Promulgated:

JAN 21 2015

*[Signature]*

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### CONCURRING AND DISSENTING OPINION

VELASCO, JR., J.:

I fully agree with the *ponencia* in affirming the finding of guilt of the accused-petitioner Richard Ricalde (Ricalde) for rape through sexual assault. However, I also wish to express my disagreement over the *ponencia*'s holding regarding the penalty to be imposed on him, as well as its ruling on which law governs the conviction of the petitioner.

To recall, the accused was charged with an Information which reads:

That on or about January 31, 2002, in the Municipality of Sta. Rosa, Province of Laguna, Philippines, and within the jurisdiction of this Honorable Court, accused Richard Ricalde, prompted with lewd design, did then and there willfully, unlawfully, and feloniously inserting [sic] his penis into the anus of XXX who was then ten (10) years of age against his will and consent, to his damage and prejudice.

#### CONTRARY TO LAW<sup>1</sup>

An examination of the evidence presented by both prosecution and accused would show that, indeed, the trial court correctly convicted the petitioner of the offense charged. The *ponencia*'s application of Article III, Section 5(b) of Republic Act No. 7610 (R.A. No. 7610),<sup>2</sup> however, I believe, is misplaced. In the first place, such a charge is not embodied in the Information filed against the accused, and his conviction for such an offense would result in a violation of his right to due process and his right to be informed of the nature and cause of the accusations against him. The Information plainly alleges rape through sexual assault, which is a violation of Article 226-A (2) of the Revised Penal Code. Rightfully then, the petitioner can be convicted of rape, the following elements of which having been stated in the Information and proven during trial:

- (1) That the offender commits an act of sexual assault;
- (2) That the act of sexual assault is *committed by* any of the following means:
  - (a) By inserting his penis into another person's mouth or anal orifice; or

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<sup>1</sup> *Rollo*, pp. 32, 54.

<sup>2</sup> "Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act."

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(3) That the act of sexual assault is *accomplished* under any of the following circumstances:

- (a) By using force or intimidation;
- (b) When a woman is deprived of reason or otherwise unconscious.<sup>3</sup>

A violation of R.A. No. 7610, on the other hand, is not specifically stated in the Information. The Court had, in previous cases, stated the following elements of child abuse under Sec. 5(b) of R.A. No. 7610:

1. The accused commits the act of sexual intercourse or lascivious conduct.
2. The said act is performed with a child exploited in prostitution or subjected to other sexual abuse.
3. The child whether male or female, is below 18 years of age.<sup>4</sup>

While the Information stated that the petitioner “[inserted] his penis in the anus of XXX” and that the victim “was then 10 years of age,” which satisfies the first and third elements of child abuse under Sec. 5(b) of R.A. No. 7610, nowhere is it stated that the said act was performed with a child exploited in prostitution or subjected to other sexual abuse—the second element of the offense.

Therefore, even assuming that such element was proven during trial, the accused can nevertheless claim constitutional protection, and his conviction will not stand in light of the constitutionally protected rights of the accused to due process,<sup>5</sup> as well as his right to be informed of the nature and cause of the accusation against him.<sup>6</sup> This Court had long held that each and every element of the offense must be alleged in the Information. As the Court reasoned in *Noe S. Andaya v. People*:

It is fundamental that every element constituting the offense must be alleged in the information. The main purpose of requiring the various elements of a crime to be set out in the information is to enable the accused to suitably prepare his defense because he is presumed to have no independent knowledge of the facts that constitute the offense. The allegations of facts constituting the offense charged are substantial matters and an accused’s right to question his conviction based on facts not alleged in the information cannot be waived. No matter how conclusive and convincing the evidence of guilt may be, an accused cannot be convicted of any offense unless it is charged in the information on which he is tried or is necessarily included therein. To convict him of a ground not alleged while he is concentrating his defense against the ground alleged would plainly be unfair and underhanded. The rule is that a variance between the allegation in the information and proof adduced during trial shall be fatal to the

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<sup>3</sup> *People v. Heracleo Abello y Fortada*, G.R. No. 151952, March 25, 2009.

<sup>4</sup> *Id.*

<sup>5</sup> Sec. 1, Article III, 1987 Philippine Constitution.

<sup>6</sup> Sec. 14(2), Article III, 1987 Philippine Constitution.

criminal case if it is material and prejudicial to the accused so much so that it affects his substantial rights.<sup>7</sup>

I am fully aware that, in the past, the Court had upheld the convictions of those charged with similarly-worded Informations under Sec. 5(b) of R.A. No. 7610. In 2005, in the case of *Olivarez v. Court of Appeals*,<sup>8</sup> this Court said that “a child is deemed subjected to other sexual abuse when the child indulges in lascivious conduct under the coercion or influence of any adult.”

I believe, however, that the said interpretation is incorrect, and the Court must re-examine the same. What I find most enlightening regarding the controversy is the dissenting opinion offered by our colleague, Justice Antonio T. Carpio, in *Olivarez*, where he makes sense of the phrase “other sexual abuse” mentioned in Section 5 (b) of R.A. No. 7610. He discussed:

The majority opinion correctly enumerates the essential elements of the crimes of acts of lasciviousness under Section 5 of RA 7610. The majority opinion states:

The elements of sexual abuse under Section 5, Article III of R.A. 7610 are as follows:

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

The majority opinion correctly distinguishes the first element from the second element. The first element refers to acts of lasciviousness that the accused performs on the child. The second element refers to the special circumstance that the “child (is) exploited in prostitution or subjected to other sexual abuse.” This special circumstance already exists when the accused performs acts of lasciviousness on the child. In short, the acts of lasciviousness that the accused performs on the child are separate from the child’s exploitation in prostitution or subjection to “*other sexual abuse*. ”

Under Article 336 of the RPC, the accused performs the acts of lasciviousness on a child who is neither exploited in prostitution nor subjected to “*other sexual abuse*. ” In contrast, under Section 5 of RA 7610, the accused performs the acts of lasciviousness on a child who is either exploited in prostitution or subjected to “*other sexual abuse*. ”

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

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<sup>7</sup> G.R. No. 168486, June 27, 2006, 493 SCRA 539.

<sup>8</sup> G.R. No. 163866, July 29, 2005, 465 SCRA 465.


The phrase “other sexual abuse” refers to any sexual abuse other than the acts of lasciviousness complained of and other than exploitation in prostitution. Such “other sexual abuse” could fall under acts encompassing “[O]bscene publications and indecent shows” mentioned in Section 3(d)(3) of RA 7610.<sup>9</sup>

I fully subscribe to this reasoning and logic employed by Justice Carpio in *Olivarez*. While now, as then, his opinion remains to be in the minority, as the Court continues to uphold the convictions under R.A. No. 7610 whenever the victim is underage or below 18 years of age, I believe it is high time for the Court to re-examine this doctrine, and, perhaps, give way to a more level-headed interpretation of the law, as offered by Justice Carpio in *Olivarez*.

Given this doubtful interpretation of Sec. 5(b) of R.A. No. 7610, the Court must uphold the interpretation which is more beneficial to the accused. Thus, instead of imposing the higher penalty imposable under R.A. No. 7610, he must instead be made to suffer the penalty imposable under Art. 266-A of the Revised Penal Code.

A final note I wish to make is the fact that the *ponencia* did not discuss whether the issue of the applicability of R.A. No. 7610 was ever put in issue in the lower court before or during trial. It seems to me that it is only now, and only the Court, on its own initiative, deemed that R.A. No. 7610 is applicable to the case at bar. It appears to me that in the lower court, as well as in the Court of Appeals, the only main issue resolved is whether or not the petitioner is guilty of rape. Thus, the petitioner was never given the opportunity to defend himself against a charge of violation of R.A. No. 7610, because, in the first place, it was never put in issue. The Court cannot now suddenly determine that the proper offense is R.A. No. 7610 and not the Revised Penal Code, without giving the petitioner the chance to be heard and defend himself, especially considering that R.A. No. 7610 is not only a separate and distinct offense from rape under the Revised Penal Code, but also that the former imposes a stiffer penalty than the latter.

**WHEREFORE**, in view of the foregoing, I vote that the decision of the Court of Appeals dated August 8, 2013 be affirmed *in toto*, finding the petitioner guilty of rape punishable under Article 266-A, paragraph 2 of the Revised Penal Code.



**PRESBITERO J. VELASCO, JR.**  
Associate Justice

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<sup>9</sup> Id. at 487-488.