

EN BANC

G.R. No. 227363 – PEOPLE OF THE PHILIPPINES, Plaintiff-Appellee  
v. SALVADOR TULAGAN, Accused-Appellant.

Promulgated:  
March 12, 2019

*Annexed to R. R. Reyes Jones*

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SEPARATE CONCURRING OPINION

LEONEN, J.:

I concur in the result.

This case involves a nine (9)-year-old minor who was raped and subjected to sexual assault. The majority and the various separate opinions appear to have used this case as an opportunity to interpret Republic Act No. 7610,<sup>1</sup> Article III, Section 5(b)<sup>2</sup> in relation to the sexual abuse of minors aged 12 to below 18 years old.

It is a unanimous Court that will agree that the rape and sexual abuse of a child below 12 years old deserves the full enforcement of the provisions under Article 266-A<sup>3</sup> of the Revised Penal Code and Republic Act No. 7610.

Several permutations of the penalties have been suggested. Various tables, charts, and diagrams have been submitted to discuss penalties relating to the crime—which Associate Justice Estela Perlas-Bernabe (Associate

<sup>1</sup> The Special Protection of Children Against Abuse, Exploitation and Discrimination Act (1992).

<sup>2</sup> Rep. Act No. 7610, art. III, sec. 5 provides:

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

.....

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

<sup>3</sup> REV. PEN. CODE, art. 266-A provides:

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

1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

- a) Through force, threat, or intimidation;
- b) When the offended party is deprived of reason or otherwise unconscious;
- c) By means of fraudulent machination or grave abuse of authority; and

d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

Justice Perlas-Bernabe) refers to as EPSOSA (or children exploited in prostitution or subject to other sexual abuse)<sup>4</sup>—committed against victims aged 12 to below 18 years old. Considering, however, that the victim here was below 12 years old, every discussion on victims aged 12 to below 18 years old will be mere *obiter dictum*.

I wish, however, to offer a few points.

I agree with the majority that the insertion of a finger into a minor's vagina deserves a higher penalty than *prision mayor* under Article 266-A, Paragraph 2<sup>5</sup> (sexual assault) in relation to Article 266-B<sup>6</sup> of the Revised Penal Code. Republic Act No. 7610<sup>7</sup> was enacted not only to protect children from prostitution, but also to protect them from *any* sexual abuse due to the coercion or influence of any adult.

I must, however, reiterate my opinion in *People v. Caoili*.<sup>8</sup>

The nonconsensual insertion of a finger in another's genitals is rape by carnal knowledge under Article 266-A, Paragraph 1<sup>9</sup> of the Revised Penal Code.

The finger, when used in a sexual act, is not an instrument or an object. It is as much a part of the human body as a penis. When consensual, it can be used to give sexual pleasure. When forced, it can be used to defile another's body. Equating the finger to a separate instrument or object misunderstands the gravity of the offense.

Likewise, I reiterate my view in *Quimvel v. people*<sup>10</sup> on the doubtful

<sup>4</sup> See *Dissenting Opinion of J. Perlas-Bernabe*, p. 2.

<sup>5</sup> REV. PEN. CODE, Article 266-A provides:

Article 266-A. Rape; When And How Committed. — Rape is committed —

.....

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

<sup>6</sup> REV. PEN. CODE, Article 266-B. Penalty. —

.....

Rape under paragraph 2 of the next preceding article shall be punished by *prision mayor*.

<sup>7</sup> The Special Protection of Children Against Abuse, Exploitation and Discrimination Act.

<sup>8</sup> See J. Leonen, *Dissenting Opinion in People v. Caoili*, G.R. No. 196342, August 8, 2017, <[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342_leonen.pdf)> [Per J. Tijam, En Banc].

<sup>9</sup> REV. PEN. CODE, Article 266-A provides:

Article 266-A. Rape; When And How Committed. — Rape is committed —

1) By a man who shall have carnal knowledge of a woman under any of the following circumstances:

a) Through force, threat, or intimidation;

b) When the offended party is deprived of reason or otherwise unconscious;

c) By means of fraudulent machination or grave abuse of authority; and

d) When the offended party is under twelve (12) years of age or is demented, even though none of the circumstances mentioned above be present.

<sup>10</sup> See J. Leonen, *Dissenting Opinion in Quimvel v. People*, G.R. No. 214497, April 18, 2017,

effectivity of Article 336 of the Revised Penal Code. Article 336 has already been rendered ineffective with the passage of Republic Act No. 8353, or the Anti-Rape Law of 1997.

The present case involves an appeal from the August 17, 2015 Decision of the Court of Appeals, finding accused-appellant Salvador Tulagan guilty beyond reasonable doubt of sexual assault under Article 266-A, paragraph 2 and statutory rape under Article 266-A, paragraph 1(d) of the Revised Penal Code.<sup>11</sup>

Accused-appellant was charged in two (2) separate Informations. In Criminal Case No. SCC-6210:

That sometime in the month of September 2011, at . . . , and within the jurisdiction of this Honorable Court, the above-named accused, by means of force, intimidation and with abuse of superior strength forcibly laid complainant AAA, a 9-year-old minor in a cemented pavement, and did then and there, willfully, unlawfully and feloniously inserted his finger into the vagina of the said AAA, against her will and consent.

In Criminal Case No. SCC-6211:

That on or about October 8, 2011 at . . . , and within the jurisdiction of this Honorable Court, the above-named accused, by means of force, intimidation and with abuse of superior strength, did then and there, willfully, unlawfully and feloniously have sexual intercourse with complainant AAA, a 9-year-old minor against her will and consent to the damage and prejudice of said AAA, against her will and consent.<sup>12</sup>

According to the majority's narration of facts, sometime in September 2011, AAA was peeling corn with her cousin when accused-appellant, a neighbor of AAA's grandmother, approached her, opened her legs, and inserted his finger in her vagina.<sup>13</sup>

On another occasion, at around 11:00 a.m. on October 8, 2011, AAA was playing with her cousin in front of accused-appellant's house. Accused-appellant brought her inside his house. He ordered her to keep quiet and lie on the floor while he removed her short pants and underwear. He then undressed himself, kissed her cheeks, and inserted his penis into her vagina. AAA felt pain and cried but accused-appellant held her down. AAA kept quiet about the incident until her aunt examined her and found her genitals

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<[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/april2017/214497\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/april2017/214497_leonen.pdf)> [Per J. Velasco, En Banc].

<sup>11</sup> Ponencia, pp. 1-2.

<sup>12</sup> Ponencia, p. 2.

<sup>13</sup> Ponencia, p. 3.

swollen.<sup>14</sup>

Upon examination by Dr. Brenda Tumacder, it was found that AAA had a healed laceration at the 6 o'clock position in her hymen and a dilated and enlarged vaginal opening.<sup>15</sup>

Both the Regional Trial Court and the Court of Appeals found accused-appellant guilty beyond reasonable doubt of sexual assault and statutory rape.

The majority affirms the convictions but modified the disposition, as follows:

WHEREFORE, PREMISES CONSIDERED, the appeal is DENIED. The Joint Decision dated February 10, 2014 of the Regional Trial Court in Criminal Case Nos. SCC-6210 and SCC-6211, as affirmed by the Court of Appeals Decision dated August 17, 2015 in CA-G.R. CR-HC No. 06679, is AFFIRMED with MODIFICATIONS. We find the accused-appellant Salvador Tulagan:

1. Guilty beyond reasonable doubt of Sexual Assault under paragraph 2, Article 266-A of the Revised Penal Code, in relation to Section 5(b) of Republic Act No. 7610, in Criminal Case No. SCC-6210, and is sentenced to suffer the indeterminate penalty of twelve (12) years, ten (10) months and twenty-one (21) days of *reclusion temporal*, as minimum, to fifteen (15) years, six (6) months and twenty (20) days of *reclusion temporal*, as maximum. Appellant is ORDERED to PAY AAA the amounts of ₱50,000.00 as civil indemnity, ₱50,000.00 as moral damages, and ₱50,000.00 as exemplary damages.
2. Guilty beyond reasonable doubt of Statutory Rape under Article 266-A(1)(d) and penalized in Article 266-B of the Revised Penal Code, in Criminal Case No. SCC-6211, and is sentenced to suffer the penalty of *reclusion perpetua* with modification as to the award of damages. Appellant is ORDERED to PAY AAA the amounts of ₱75,000.00 as civil indemnity, ₱75,000.00 as moral damages, and ₱75,000.00 as exemplary damages[.]

Legal interest of six percent (6%) per annum is imposed on all damages awarded from the date of finality of this Decision until fully paid.

Let a copy of this Decision be furnished the Department of Justice, the Office of the Prosecutor General, the Office of the Court Administrator, and the Presiding Justice of the Court of Appeals, for their guidance and information, as well as the House of Representatives and the Senate of the Philippines, as reference for possible statutory amendments in light of the foregoing observations.

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<sup>14</sup> Id.

<sup>15</sup> Ponencia, p. 3.

SO ORDERED.<sup>16</sup> (Emphasis supplied)

I take no issue with the majority's findings of fact or conclusion that accused-appellant is guilty of statutory rape. I do, however, wish to address a few points in the Decision and the opinions submitted by Associate Justice Alfredo Benjamin S. Caguioa (Associate Justice Caguioa) and Associate Justice Perlas-Bernabe.

## I

Much of the debate here centers on the proper interpretation of Article III, Section 5(b) of Republic Act No. 7610.

Article III, Section 5 reads:

### ARTICLE III

#### *Child Prostitution and Other Sexual Abuse*

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

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

- (a) Those who engage in or promote, facilitate or induce child prostitution which include, but are not limited to, the following:
  - (1) Acting as a procurer of a child prostitute;
  - (2) Inducing a person to be a client of a child prostitute by means of written or oral advertisements or other similar means;
  - (3) Taking advantage of influence or relationship to procure a child as prostitute;
  - (4) Threatening or using violence towards a child to engage him as a prostitute; or
  - (5) Giving monetary consideration goods or other pecuniary benefit to a child with intent to engage such child in prostitution.
- (b) Those who commit the act of sexual intercourse or lascivious conduct with a child exploited in prostitution or

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<sup>16</sup> Ponencia, pp. 66-67.

subjected to other sexual abuse; *Provided*, That when the victims is under twelve (12) years of age, the perpetrators shall be prosecuted under Article 335, paragraph 3, for rape and Article 336 of Act No. 3815, as amended, the Revised Penal Code, for rape or lascivious conduct, as the case may be: *Provided*, That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be *reclusion temporal* in its medium period; and

(c) Those who derive profit or advantage therefrom, whether as manager or owner of the establishment where the prostitution takes place, or of the sauna, disco, bar, resort, place of entertainment or establishment serving as a cover or which engages in prostitution in addition to the activity for which the license has been issued to said establishment. (Emphasis in the original)

I cannot subscribe to Associate Justice Caguioa's interpretation that Section 5 only refers to children subjected to prostitution. A plain reading of this provision shows two (2) offenses: (1) child prostitution and (2) other sexual abuse.

Children subjected to prostitution are those "who for money, profit, or any other consideration . . . indulge in sexual intercourse or lascivious conduct[.]" Children subjected to other sexual abuse are those who "due to the coercion or influence of any adult, syndicate or group, indulge in sexual intercourse or lascivious conduct[.]"

Under the law, the State must "provide special protection to children from all forms of abuse, neglect, cruelty exploitation and discrimination."<sup>17</sup> Children do not willingly indulge in sexual intercourse or lascivious conduct with an adult. There is always an element of intimidation or coercion involved. Thus, the crime is not merely punishable under the Revised Penal Code, but also under Republic Act No. 7610.

As Associate Justice Diosdado M. Peralta eloquently explained in *Dimakuta v. People*:<sup>18</sup>

Article 226-A, paragraph 2 of the RPC, punishes inserting of the penis into another person's mouth or anal orifice, or any instrument or object, into the genital or anal orifice of another person if the victim did not consent either it was done through force, threat or intimidation; or when the victim is deprived of reason or is otherwise unconscious; or by means of fraudulent machination or grave abuse of authority as sexual assault as a form of rape. However, in instances where the lascivious conduct is covered by the definition under R.A. No. 7610, where the penalty is reclusion temporal medium, and the act is likewise covered by sexual assault under Article 266-A, paragraph 2 of the RPC, which is punishable by prision mayor, the offender should be liable for violation of

<sup>17</sup> Rep. Act No. 7610 (1992), art. I, sec. 2.

<sup>18</sup> 771 Phil. 641 (2015) [Per J. Peralta, En Banc].

Section 5(b), Article III of R.A. No. 7610, where the law provides for the higher penalty of reclusion temporal medium, if the offended party is a child victim. But if the victim is at least eighteen (18) years of age, the offender should be liable under Art. 266-A, par. 2 of the RPC and not R.A. No. 7610, unless the victim is at least eighteen (18) years and she is unable to fully take care of herself or protect herself from abuse, neglect, cruelty, exploitation or discrimination because of a physical or mental disability or condition, in which case, the offender may still be held liable for sexual abuse under R.A. No. 7610.

There could be no other conclusion, a child is presumed by law to be incapable of giving rational consent to any lascivious act, taking into account the constitutionally enshrined State policy to promote the physical, moral, spiritual, intellectual and social well-being of the youth, as well as, in harmony with the foremost consideration of the child's best interests in all actions concerning him or her. This is equally consistent with the declared policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation, and discrimination. Besides, if it was the intention of the framers of the law to make child offenders liable only of Article 266-A of the RPC, which provides for a lower penalty than R.A. No. 7610, the law could have expressly made such statements.<sup>19</sup>

Consent, within the context of sexual relations, is structured around questions of patriarchy and sexual maturity.

Girls may believe themselves to have consented to sexual intercourse if they thought themselves powerless to refuse. Marital rape is difficult to prosecute if the woman believes that it is her "wifely duty" to always give in to the husband's sexual demands.

The age of sexual consent in the Philippines is 12 years old.<sup>20</sup> According to United Nations International Children's Emergency Fund, this is "one [1] of the lowest globally and the lowest in the Asia-Pacific region."<sup>21</sup> The average age of consent is 16 years old.<sup>22</sup>

The age of majority, however, is 18 years old.<sup>23</sup> Minors, or those

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<sup>19</sup> Id. at 670–671 citing *Malto v. People*, 560 Phil. 119, 139–142 (2007) [Per J. Corona, First Division] and Rep. Act No. 7610 (1992), art. I, sec. 2.

<sup>20</sup> See REV. PEN. CODE, art. 266-A (d), as amended.

<sup>21</sup> UNIVERSITY OF THE PHILIPPINES MANILA, THE UNIVERSITY OF EDINBURGH, CHILD PROTECTION NETWORK FOUNDATION AND UNICEF PHILIPPINES, *A SYSTEMATIC REVIEW OF THE DRIVERS OF VIOLENCE AFFECTING CHILDREN IN THE PHILIPPINES*. MANILA: UNICEF PHILIPPINES (2016). available at <[https://resourcecentre.savethechildren.net/sites/default/files/documents/a\\_systematic\\_literature\\_review\\_of\\_the\\_drivers\\_of\\_vac.pdf](https://resourcecentre.savethechildren.net/sites/default/files/documents/a_systematic_literature_review_of_the_drivers_of_vac.pdf)> 71 (last accessed on March 11, 2019).

<sup>22</sup> Id.

<sup>23</sup> FAMILY CODE, art. 234, as amended.

below 18, have no capacity to enter into *any* contracts<sup>24</sup> or marriage.<sup>25</sup> Yet, strictly reading the provisions of the Revised Penal Code, any minor above 12 years old may validly consent to sexual intercourse and lascivious conduct with an adult.

This may have found support in science. According to neurologists, the prefrontal cortex and the parietal cortex develop at puberty or around 12 years old.<sup>26</sup> At this age, children may already be cognitively aware of the concept of consent. Among the policies espoused by Republic Act No. 7610, however, is that the “best interests of children shall be the paramount consideration in all actions concerning them[.]”<sup>27</sup> This means that despite victims reaching the age where they could have reasonable discernment, courts still need to determine how consent to sexual conduct was obtained.

Article III, Section 5(b) *generally* applies to those who engage in sexual intercourse or are subjected to other sexual abuse. However, reference must be made to the law’s chapeau:

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

The law itself requires that children in EPSOSA must have either consented due to money, profit, or other consideration, or must have consented due to the “coercion or influence of any adult[.]”

The difference in age, by itself, is indicative of coercion and intimidation. In *People v. Errojo*:<sup>28</sup>

At a tender age of fourteen, innocent of the ways of the world, complainant is no match to the accused-appellant, a forty-one year old married individual who sexually assaulted her. The sheer force and strength of the accused-appellant would have easily overcome any resistance that complainant could have put up. What more if the assault was committed with a deadly knife, the sight of which would have necessarily evoked fear in complainant. Thus, it is understandable if she easily succumbed to the sexual intrusion.<sup>29</sup>

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<sup>24</sup> CIVIL CODE, art. 1327(1).

<sup>25</sup> FAMILY CODE, art. 35.

<sup>26</sup> Suparna Choudhury, Sarah-Jayne Blakemore, Tony Charman, *Social cognitive development during adolescence*, 1 SOCIAL COGNITIVE AND AFFECTIVE NEUROSCIENCE 165–174 (2006). *available at* <<https://doi.org/10.1093/scan/nsl024>> (last visited on March 11, 2019).

<sup>27</sup> Rep. Act No. 7610 (1992), art. I, sec. 2.

<sup>28</sup> 299 Phil. 51 (1994) [Per J. Nocon, Second Division].

<sup>29</sup> *Id.* at 60.

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Similarly, in *People v. Clado*:<sup>30</sup>

This Court has noted in several cases that minors could be easily intimidated and cowed into silence even by the mildest threat against their lives. At the time of the commission of the crimes, Salve was a fifteen-year old girl who had just arrived in town to tend the beauty parlor of her sister. She was left all alone that night and intimidation would explain why she did not put up a determined resistance against her defiler.<sup>31</sup> (Citation omitted)

In these cases, this Court determined that the minor's age played a major part in whether he or she could rationally give consent to any sexual act with an adult. This Court had to consider that the vast difference in age between the victim and the offender could be indicative of coercion and intimidation. For this reason, Republic Act No. 7610 penalizes sexual offenses against children not covered by the statutory age of consent.

However, there are simply factual situations that cannot be fully encompassed by the permutations suggested.

For example, it is unclear whether a 19-year-old person can be prosecuted for this crime if he or she had sexual intercourse with a minor aged 17 and a half years old. It cannot be determined if that minor was under the "coercion or influence" of the adult if it appears that it was a consensual sexual relationship.

It also cannot be fathomed if a 12-year-old child will *willingly* engage in sexual conduct with a 25-year-old adult. With age disparity and the moral ascendancy the adult exercises over the child, there may be some form of coercion or intimidation against the child for the child to succumb to the adult's sexual advances.

Hence, this is not the proper time to discuss the permutations of the different penalties to be imposed under Republic Act No. 7610. Any suggested permutations of the penalties should be discussed when the proper factual situations appear before this Court.

## II

The majority notes that "[Republic Act] No. 8353 did not expressly repeal Article 336 of the [Revised Penal Code], as amended."<sup>32</sup>

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<sup>30</sup> 397 Phil. 813 (2000) [Per J. Gonzaga-Reyes, Third Division].

<sup>31</sup> *Id.* at 826.

<sup>32</sup> Ponencia, p. 59.



I disagree.

Republic Act No. 8353<sup>33</sup> has rendered ineffective the provision on acts of lasciviousness in the Revised Penal Code.

Article 336 defines acts of lasciviousness as:

ARTICLE 336. Acts of lasciviousness. — Any person who shall commit any act of lasciviousness upon other persons of either sex, *under any of the circumstances mentioned in the preceding article*, shall be punished by *prision correccional*. (Emphasis supplied)

Under this provision, a lascivious act is punishable if it is committed under the circumstances mentioned in Article 335 of the Revised Penal Code, which provides:

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

1. By using force or intimidation;
2. When the woman is deprived of reason or otherwise unconscious; and
3. When the woman is under twelve years of age or is demented.

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

Whenever the crime of rape is committed with the use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death.

When by reason or on occasion of the rape, the victim has become insane, the penalty shall be death.

When the rape is attempted or frustrated and a homicide is committed by reason or on occasion thereof, the penalty shall be *reclusion perpetua* to death.

The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances:

1. when the victim is under eighteen (18) years of age and the offender is a parent, ascendant, step-parent, guardian, relative by consanguinity or affinity within the third civil degree, or the common-law spouse of the parent of the victim.

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<sup>33</sup> The Anti-Rape Law of 1997.

2. when the victim is under the custody of the police or military authorities.
3. when the rape is committed in full view of the husband, parent, any of the children or other relatives within the third degree of consanguinity.
4. when the victim is a religious or a child below seven (7) years old.
5. when the offender knows that he is afflicted with Acquired Immune Deficiency Syndrome (AIDS) disease.
6. when committed by any member of the Armed Forces of the Philippines or the Philippine National Police or any law enforcement agency.
7. when by reason or on the occasion of the rape, the victim has suffered permanent physical mutilation. (*As amended by R.A. No. 7659.*) (Emphasis in the original)

Article 335, however, has already been repealed by Republic Act No. 8353.<sup>34</sup> The provisions on rape were transferred from Title Eleven to Title Eight of the Revised Penal Code, reflecting its reconceptualization from being a crime against chastity to being a crime against persons.

In effect, acts of lasciviousness cease to be a crime under Article 336 of the Revised Penal Code. This provision is rendered incomplete and ineffective since its elements can no longer be completed. The acts constituting it no longer exist in the Revised Penal Code.

In any case, the ineffectivity of Article 336 does not preclude acts of lasciviousness from being punishable under different laws such as Republic Act No. 7610 or Republic Act No. 9262.<sup>35</sup> These laws, likewise, carry more severe penalties<sup>36</sup> than Article 336,<sup>37</sup> providing better protection for victims of lascivious acts not constituting rape.

<sup>34</sup> Rep. Act No. 8353, sec. 4 provides:

SECTION 4. Repealing Clause. — Article 335 of Act No. 3815, as amended, and all laws, acts, presidential decrees, executive orders, administrative orders, rules and regulations inconsistent with or contrary to the provisions of this Act are deemed amended, modified or repealed accordingly.

<sup>35</sup> Anti-Violence Against Women and Their Children Act of 2004.

<sup>36</sup> Rep. Act No. 7610 (1992), art. III, sec. 5 provides:

Section 5. (b) . . . That the penalty for lascivious conduct when the victim is under twelve (12) years of age shall be reclusion temporal in its medium period[.]

Rep. Act No. 9262, sec. 5 and 6 provides:

SECTION 5. Acts of Violence Against Women and Their Children. - The crime of violence against women and their children is committed through any of the following acts:

....

(g) Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family[.]

SECTION 6. Penalties. — The crime of violence against women and their children, under Section 5 hereof shall be punished according to the following rules:

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(e) Acts falling under Section 5(g) shall be punished by prision mayor[.]

<sup>37</sup> This crime is punishable by *prision correccional*.

### III

I stated in *Caoili* that “[t]he persistence of an archaic understanding of rape relates to our failure to disabuse ourselves of the notion that carnal knowledge or sexual intercourse is merely a reproductive activity.”<sup>38</sup> That pattern continues here, where the majority states:

[T]he term “rape by sexual assault” is a misnomer, as it goes against the traditional concept of rape, which is carnal knowledge of a woman without her consent or against her will. In contrast to sexual assault which is a broader term that includes acts that gratify sexual desire (such as cunnilingus, felatio, sodomy or even rape), the classic rape is particular and its commission involves only the reproductive organs of a woman and a man. *Compared to sexual assault, rape is severely penalized because it may lead to unwanted procreation; or to paraphrase the words of the legislators, it will put an outsider into the woman who would bear a child, or to the family, if she is married.*<sup>39</sup> (Emphasis supplied)

This explanation, however, defies reality. A woman who was raped through insertion of a finger does not suffer less than a woman who was raped by penile penetration. One (1) crime is not less heinous than the other. In *People v. Quintos*:<sup>40</sup>

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

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

Imposing different penalties for different manners of committing rape creates a message that one experience of rape is relatively trivial or less serious than another. It attaches different levels of wrongfulness to equally degrading acts. Rape, in whatever manner, is a desecration of a person’s will and body. In terms of penalties, treating one manner of committing rape as greater or less in heinousness than another may be of doubtful constitutionality.<sup>41</sup> (Citations omitted)

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<sup>38</sup> J. Leonen, Dissenting Opinion in *People v. Caoili*, G.R. No. 196342, August 8, 2017, <[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342_leonen.pdf)> 12 [Per J. Tijam, En Banc].

<sup>39</sup> Ponencia, p. 9.

<sup>40</sup> 746 Phil. 809 (2014) [Per J. Leonen, Second Division].

<sup>41</sup> Id. at 832–833.

The idea that one (1) kind of rape is punished more severely than the other because of “unwanted procreation” only serves to undermine the law’s reconceptualization of rape as a crime against persons. It reduces a woman to an untouched hymen that must be protected by the man who will eventually claim her—or worse, as a mere womb for the propagation of that man’s seed.

The worth of a woman’s dignity is not measured solely by her virtue. This Court cannot continue to convict rapists on the basis that women need to be kept chaste and virginal. Rape is a crime against the victim. It is not a crime against her father’s or husband’s honor.

This Court has already taken strides to address our prudish views on women’s sexuality. *People v. Amarela*<sup>42</sup> recognized that the stereotype of a demure and reserved Filipina has no place in a modern society. A Filipina can either be as demure or as promiscuous as she desires. Her sexual proclivities, or lack thereof, has no bearing on whether she can be a victim of rape. The commission of the crime is solely attributable to the rapist, not the victim. Thus:

The “women’s honor” doctrine surfaced in our jurisprudence sometime in 1960. In the case of *People v. Taño*, the Court affirmed the conviction of three (3) armed robbers who took turns raping a person named Herminigilda Domingo. The Court, speaking through Justice Alejo Labrador, said:

It is a well-known fact that women, especially Filipinos, would not admit that they have been abused unless that abuse had actually happened. This is due to their natural instinct to protect their honor. We cannot believe that the offended party would have positively stated that intercourse took place unless it did actually take place.

This opinion borders on the fallacy of *non sequit[ur]*. And while the factual setting back then would have been appropriate to say it is natural for a woman to be reluctant in disclosing a sexual assault; today, we simply cannot be stuck to the Maria Clara stereotype of a demure and reserved Filipino woman. We, should stay away from such mindset and accept the realities of a woman’s dynamic role in society today; she who has over the years transformed into a strong and confidently intelligent and beautiful person, willing to fight for her rights.<sup>43</sup>

This Court explained further in *Perez v. People*<sup>44</sup> that we must be

<sup>42</sup> G.R. No. 225642-43, January 17, 2018, <<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2018/january2018/225642-43.pdf>> [Per J. Martires, Third Division].

<sup>43</sup> Id. at 7 citing *People v. Taño*, 109 Phil. 912 (1960) [Per J. Labrador, En Banc].

<sup>44</sup> G.R. No. 201414, April 18, 2018, <

careful in correcting gender stereotypes in rape cases. Despite strides to change long-held misconceptions, we cannot deny the continued existence of a patriarchal dominance in social relationships. We must acknowledge that due to this pervasive cultural norm, it will still take courage for women to come forward and testify against the men who dominate them:

This Court in *Amarela*, however, did not go as far as denying the existence of patriarchal dominance in many social relationships. Courts must continue to be sensitive to the power relations that come clothed in gender roles. In many instances, it does take courage for girls or women to come forward and testify against the boys or men in their lives who, perhaps due to cultural roles, dominate them. Courts must continue to acknowledge that the dastardly illicit and lustful acts of men are often veiled in either the power of coercive threat or the inconvenience inherent in patriarchy as a culture.

Even if it were true that AAA was infatuated with the accused, it did not justify the indignity done to her. At the tender age of 12, adolescents will normally be misled by their hormones and mistake regard or adoration for love. The aggressive expression of infatuation from a 12-year-old girl is never an invitation for sexual indignities. Certainly, it does not deserve the accused's mashing of her breasts or the insertion of his finger into her vagina.

Consistent with our pronouncement in *Amarela*, AAA was no *Maria Clara*. Not being the fictitious and generalized demure girl, it does not make her testimony less credible especially when supported by the other pieces of evidence presented in this case.<sup>45</sup> (Emphasis in the original)

Thus, providing a lesser punishment for the forceful insertion of a finger into the vagina, solely because it will not result in an unwanted pregnancy, is a step backwards.

Sexual intercourse is more than a means of procreation. It is a powerful expression of intimacy between human beings. It "requires the shedding of all inhibitions and defenses to allow humans to explore each other in their most basic nakedness."<sup>46</sup> Sexual intercourse may involve penile penetration, or a whole other spectrum of sexual acts that do not require penetration at all. Ultimately, it is the human being's choice whom to be intimate with and what that intimacy may involve.

Rape is the violation of this choice. It is not punished simply because a penis forcefully penetrated a vagina. The crime is vile and heinous

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<http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2018/april2018/201414.pdf> [Per J. Leonen, Third Division].

<sup>45</sup> Id. at 11–12.

<sup>46</sup> J. Leonen, Dissenting Opinion in *People v. Caoili*, G.R. No. 196342, August 8, 2017, <[http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2017/august2017/196342_leonen.pdf)> 11 [Per J. Tijam, En Banc].

because it takes away a victim’s fundamental autonomy to choose with whom she would share intimacy. It violates a victim’s autonomy over her own body.

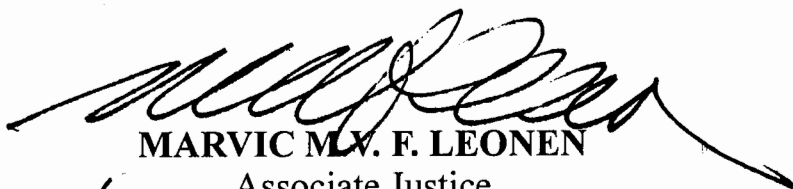
This Court’s continued refusal to recognize the forceful insertion of a finger into a woman’s vagina as rape by sexual intercourse only shows that rape, at least in the eyes of this Court, has remained a crime against chastity. Severe punishment is still reserved only for acts that could potentially embarrass the husband by introducing “an outsider” to his wife’s womb. Lesser punishment is meted to acts that do not involve male ejaculation, but nonetheless defile the woman and damage her dignity.

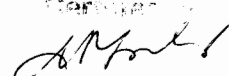
Laws punishing rape should be read from the point of view of the victim. The finger is as much a weapon of forced sexual penetration as the penis. All victims of forced sexual acts suffer the same indignity. Thus, the offender must be charged with the same crime.

Nonetheless, I reiterate that this case is not the right vehicle to fully discuss the permutations of the law for victims aged 12 to below 18 years old. Any discussion will only amount to hypotheticals and an almost advisory opinion on the matter, considering that the victim here is not between those ages. I propose that this Court await the proper case to deal with the factual situations that will arise in the application of the law when the victim is aged 12 to below 18 years old.

Hence, I can only concur in the result.

Accordingly, I vote to **DISMISS** the appeal. The Regional Trial Court February 10, 2014 Joint Decision, in Criminal Case Nos. SCC-6210 and SCC-6211, and the Court of Appeals August 17, 2015 Decision, in CA-G.R. CR-HC No. 06679, should be **AFFIRMED** with the necessary modifications.

  
**MARVIC M.V. F. LEONEN**  
Associate Justice

  
**ANNA-LI R. PATA-GOMEZ**  
Deputy Clerk of Court En Banc  
CCC En Banc, Supreme Court