EN BANC

G.R. No. 247348 – CHRISTIAN CADAJAS y CABIAS, *petitioner*, ***versus*** **PEOPLE OF THE PHILIPPINES,** *respondent.*

Promulgated:

November 16, 2021

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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 patriea*, 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

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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.

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]

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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.

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:

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[18] *See* Sponsorship Speech of and Deliberations of House Bill 0644, August 11, 2009, pp. 93-106.
[19] Id. at 95.

> 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.
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> 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.
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> x x x x
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> 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.
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> 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
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> x x x x
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> 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:

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[20] Id at 96-99.

> 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.
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> x x x x
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> 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."
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> 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 13th 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

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21 Id. at 102-105

22 *See* RA 9775, Sec. 4.

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.
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> x 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 a child engaged or involved in real or simulated explicit sexual activities.
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> (c) "Explicit Sexual Activity" includes actual or simulated —
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> x x x x
>
> (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

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

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**

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24 Exhibit "C" to "C-9." Records (Crim. Case No. 215-V-17), pp. 9-18.
25 BLACK'S LAW DICTIONARY (9th ed.), p. 294.
26 See *Fianza v. People*, 815 Phil. 379, 391 (2017).
27 *See* BLACK'S LAW DICTIONARY (9th 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.

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.

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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

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.

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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.

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

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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.

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*

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40 823 Phil. 1188 (2018).

41 *Perez v. People*, 830 Phil. 162, 179. Emphasis supplied.

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.

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[42] Concurring Opinion of Justice Lazaro-Javier, p. 4. Emphasis omitted.

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[43] 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."[44] 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."[45]

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

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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.

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:
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> > 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**

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46 Supra note 37, at 661.
47 Id.
48 Id. at 662-663.

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

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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.

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 Sasketchawan 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

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[56] It is a ***trial*** court for Sasketchawan, a Canadian province. Decisions of this ***trial*** court may be appealed to the Court of Appeal of Sasketchawan, 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.

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*,[64] 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

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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.

> wanting to marry her daughter. These statements were never objected to nor refuted by the prosecution.[65]

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."[66] 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.[67] 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

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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.

> 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

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[68] Concurring Opinion of Justice Lazaro-Javier, p. 9.
[69] *Ponencia* (modified version), p. 23.

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.

ALFREDO BENJAMIN S. CAGUIOA
Associate Justice

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