45 Phil. 352

[G.R. No. 20569. October 29, 1923]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. J. J. KOTTINGER, DEFENDANT AND APPELLANT.

D E C I S I O N

MALCOLM, J.:

The question to be here decided is whether or not pictures portraying the inhabitants of the country in native dress and as they appear and can be seen in the regions in which they live, are obscene or indecent. Surprising as it may seem, the question is one of first impression not alone in the Philippine Islands, but in the United States, Great Britain, and elsewhere. This will explain why a case which otherwise would be heard and voted in Division has been submitted to the court *in banc* for decision.

On November 24, 1922, detective Juan Tolentino raided the premises known as Camera Supply Co. at 110 Escolta, Manila. He found and confiscated the post-cards which subsequently were used as evidence against J. J. Kottinger, the manager of the company.

Out of these facts arose the criminal prosecution of J. J. Kottinger in the Court of First Instance of Manila. The information filed in court charged him with having kept for sale in the store of the Camera Supply Co., obscene and indecent pictures, in violation of section 12 of Act No. 277. To this information, the defendant interposed a demurrer based upon the ground that the facts alleged therein did not constitute an offense and were not contrary to law; but the trial court overruled the demurrer and the defendant duly excepted thereto. Following the presentation of evidence by the Government and the defense, judgment was rendered finding the defendant guilty of the offense charged and sentencing him to pay a fine of P50 with subsidiary imprisonment in

case of insolvency, and the costs.

The five errors assigned by defendant-appellant in this court divide themselves into two general issues. The first point sustained by counsel for the appellant is in nature a technical objection, growing out of the defendant's demurrer. The second point, in reality the decisive issue, is as suggested in the beginning of the decision. We will take up the assignments of errors as thus classified in order.

Act No. 277 is the Philippine Libel Law. But included therein is a section, No. 12, making obscene or indecent publications misdemeanors. Said section 12 which, it is contended by the Government, has here been violated, and which, appellant argues, does not apply to the information and the facts, reads as follows:

> "Any person who writes, composes, stereotypes, prints, publishes, sells, or keeps for sale, distributes, or exhibits any obscene or indecent writing, paper, book, or other matter, or who designs, copies, draws, engraves, paints, or otherwise prepares any obscene picture or print, or who moulds, cuts, casts, or otherwise makes any obscene or indecent figure, or who writes, composes, or prints any notice or advertisement of any such writing, paper, book, print, or figure shall be guilty of a misdemeanor and punished by a fine of not exceeding one thousand dollars or by imprisonment not exceeding one year, or both."

Counsel has gone to the trouble to make a careful analysis of section 12 of the Libel Law which is intended to bear out his thesis, first, that section 12 does not prohibit the taking, selling, and publishing of alleged obscene and indecent pictures and prints, and second, that the information in this case charges no offense prohibited by section 12. Recall, however, that the law provides punishment, among other things, for any person who keeps for sale or exhibits any obscene or indecent writing, paper, book, or other matter, and that the information charges the defendant, among other things, with having wilfully and feloniously kept for sale, distribution, or exhibition, obscene and indecent pictures.

The phrase in the law "or other matter," was apparently added as a sort of "catch-all." While limited to that which is of the same kind as its antecedent, it is intended to cover kindred subjects. The rule of *ejusdem generis* invoked by counsel is by no means a rule of universal application and should be made to carry out, not to defeat, the legislative intent. Even if the phrase "or other matter" be construed to mean "or other matter of like kind," pictures and post-cards are not so far unrelated to writings, papers, and books, as not to be covered by the general words (Commonwealth *vs*. Dejardin [1878], 126 Mass., 46; 30 Am. Rep., 652; Brown *vs*. Corbin [1889], 40 Minn., 508).

The line of argumentation is more refined than practical. Once conceded that section 12 of Act No. 277 does not cover the present case, there yet remain for application article 571, No. 2, of the Penal Code, and section 730 of the Revised Ordinances of the City of Manila. The section of the Revised Ordinances cited is most specific when it provides in part that no person shall "exhibit, circulate, distribute, sell, offer or expose for sale, or give or deliver to another, or cause the same to be done, any lewd, indecent, or obscene book, *picture*, pamphlet, card, print, paper, writing, mould, cast, figure, or any other thing."

While admittedly the information is lacking in precision and while the content of section 12 of the Libel Law is not as inclusive as it might be, we yet conclude that the information is not fatally defective, and that said section 12 covers the alleged facts.

We come now to decide the main issue. We repeat that our own researches have confirmed the statement of counsel that not one parallel case can be found. We must perforce reason from the general to the specific and from universal principle to actual fact.

The pictures which it is argued offend against the law on account of being obscene and indecent, disclose six different postures of non-Christian inhabitants of the Philippines. Exhibit A carries the legend "Philippines, Bontoc Woman." Exhibit A-1 is a picture of five young boys and carries the legend "Greetings from the Philippines." Exhibit A-2 has the legend "Ifugao Belle, Philippines. Greetings from the Philippines." Exhibit A-3 has the legend "Igorrot Girl, Rice Field Costume." Exhibit A-4 has the legend "Kalinga Girls,

Philippines." Exhibit A-5 has the legend "Moros, Philippines."

The prosecution produced no evidence proving the post-cards obscene and indecent because it thought the post-cards themselves the best evidence of that fact. The fiscal admitted in open court "that those pictures represented the natives (non-Christians) in their native dress." The defendant, on the other hand, attempted to show that the pictures are true to life. Dr. H. Otley Beyer, Professor in the University of the Philippines, corroborated by other witnesses, testified from his studies in various parts of the Islands, such as the Mountain Province, Abra, Palawan, and Mindanao and Sulu, that none of the pictures represented poses which he had not observed on various occasions, and that the costumes worn by the people in the pictures are the true costumes regularly worn by them. Are such pictures obscene or indecent?

The word "obscene" and the term "obscenity" may be defined as meaning something offensive to chastity, decency, or delicacy. "Indecency" is an act against good behaviour and a just delicacy. The test ordinarily followed by the courts in determining whether a particular publication or other thing is obscene within the meaning of the statutes, is whether the tendency of the matter charged as obscene, is to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall. Another test of obscenity is that which shocks the ordinary and common sense of men as an indecency. (29 Cyc., 1315; 8 R. C. L., 312.)

The Philippine statute does not attempt to define obscene or indecent pictures, writings, papers, or books. But the words "obscene or indecent" are themselves descriptive. They are words in common use and every person of average intelligence understands their meaning. Indeed, beyond the evidence furnished by the pictures themselves, there is but little scope for proof bearing on the issue of obscenity or indecency. Whether a picture is obscene or indecent must depend upon the circumstances of the case. (People *vs.* Muller [1884], 96 N. Y., 408; 48 Am. Rep., 635.)

Considerable light can be thrown on the subject by turning to the Federal Laws prohibiting the use of the mails for obscene matter and prohibiting the importation into the Philippine Islands of articles, etc., of obscene or

indecent character. (U. S. Rev. Stat., art. 3893; 36 Stat. at L., 135; 7 Fed. Stat. Ann., 1194, sec. 3[*b*].)

"Obscene," as used in the Federal Statutes making it a criminal offense to place in the mails any obscene, lewd, or lascivious publication, according to the United States Supreme Court and lesser Federal courts, signifies that form of immorality which has relation to sexual impurity, and has the same meaning as is given at common law in prosecutions for obscene libel. (Swearingen *vs*. U. S. [1896], 161 U. S., 446; U. S. *vs*. Males [1892], 51 Fed., 41; 6 Words and Phrases, 4888, 4889.)

The case of United States *vs*. Harmon ([1891], 45 Fed., 414), grew out of an indictment for depositing an obscene publication in a United States post-office in violation of the Postal Law. Judge Philips said:

> "The statute does not undertake to define the meaning of the terms 'obscene,' etc., further than may be implied by the succeeding phrase, 'or other publication of an indecent character.' On the well-recognized canon of construction these words are presumed to have been employed by the law-maker in
> their ordinary acceptation and use. As they cannot be said to have acquired any technical significance as applied to some particular matter, calling, or profession, but are terms of popular use, the court might perhaps with propriety leave their import to the presumed intelligence of the jury. A standard dictionary says that 'obscene' mean 'offensive to chastity and decency; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed.' This mere dictionary definition may be extended or amplified by the courts in actual practice, preserving, however, its essential thought, and having always due regard to the popular and proper sense in which the legislature employed the term. Chief Justice Cockburn, in Rex *vs*. Hicklin (L. R. 3 Q. B., 360), said: 'The test of obscenity is this:
> Where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall;' and where 'it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of the most impure and libidinous character.' So, also, it has been held that a

book is obscene which is offensive to decency or chastity, which is immodest, which is indelicate, impure, causing lewd thoughts of an immoral tendency.' U. S. *vs*. Bennett, 16 Blatchf., 338. Judge Thayer, in U. S. *vs*. Clarke, 38 Fed. Rep., 732, observed:

> " 'The word "obscene" ordinarily means something which is offensive to chastity; something that is foul or filthy, and for that reason is offensive to pure-minded persons. That is the meaning of the word in the concrete; but when used, as in the statute, to describe the character of a book, pamphlet, or paper, it means containing immodest and indecent matter, the reading whereof would have a tendency to deprave and corrupt the minds of those into whose hands the publication might fall whose minds are open to such immoral influences.'

"Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be, allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the state reposes?

"* * * To the pure all things are pure, is too poetical for the actualities of practical life. There is in the popular conception and heart such a thing as modesty. It was born in the Garden of Eden. After Adam and Eve ate of the fruit

> of the tree of knowledge they passed from that condition of perfectibility which some people nowadays aspire to, and, their eyes being opened, they discerned that there was both good and evil; 'and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.' From that day to this civilized man has carried with him the sense of shame,—the feeling that there were some things on which the eye—the mind—should not look; and where men and
> women become so depraved by the use, or so insensate from perverted education,
> that they will not veil their eyes, nor hold their tongues, the government should perform the office for them in protection of the social compact and the body politic."

As above intimated, the Federal statute prohibits the importation or shipment into the Philippine Islands of the following: "Articles, books, pamphlets, printed matter, manuscripts, typewritten matter, paintings, illustrations, figures or objects of obscene or indecent character or subversive of public order." There are, however, in the record, copies of reputable magazines which circulate freely thruout the United States and other countries, and which are admitted into the Philippines without question, containing illustrations identical in nature to those forming the basis of the prosecution at bar. Publications of the Philippine Government have also been offered in evidence such as Barton's "Ifugao Law," the "Philippine Journal of Science" for October, 1906, and the Reports of the Philippine Commission for 1903, 1912, and 1913, in which are found illustrations either exactly the same or nearly akin to those which are now impugned.

It appears therefore that a national standard has been set up by the Congress of the United States. Tested by that standard, it would be extremely doubtful if the pictures here challenged would be held obscene or indecent by any state of Federal court. It would be particularly unwise to sanction a different type of censorship in the Philippines than in the United States, or for that matter in the rest of the world.

The pictures in question merely depict persons as they actually live, without attempted presentation of persons in unusual postures or dress. The aggregate

judgment of the Philippine community, the moral sense of all the people in the Philippines, would not be shocked by photographs of this type. We are convinced that the post-card pictures in this case cannot be characterized as offensive to chastity, or foul, or filthy.

We readily understand the laudable motives which moved the Government to initiate this prosecution. We fully appreciate the sentiments of colleagues who take a different view of the case. We would be the last to offend the sensibilities of the Filipino people and to sanction anything which would hold them up to ridicule in the eyes of mankind. But we emphasize that we are not deciding a question in political theory or in social ethics. We are dealing with a legal question predicated on a legal fact, and on this question and fact, we reach the conclusion that there has not been proved a violation of section 12 of the Libel Law. When other cases predicated on other states of facts are brought to our attention, we will decide them as they arise.

We seem to recall the statement of counsel that the proprietor of the photographic concern whom he represents would on his own initiative place suitable and explicit inscriptions on the pictures so that no one may be misled as to them. Indeed, he might even go further and out of consideration for the natural sensibilities of his customers, withdraw from sale certain pictures which can be pointed out to him.

We hold that pictures portraying the inhabitants of the country in native dress and as they appear and can be seen in the regions in which they live, are not obscene or indecent within the meaning of the Libel Law. Disagreeing therefore with the appellant on his technical argument but agreeing with him on his main contention, it becomes our duty to order the dismissal of the information.

Judgment is reversed, the information is dismissed, and the defendant-appellant is acquitted with all costs *de oficio*. So ordered.

Johnson, Street, Avanceña, Villamor, and *Johns, JJ.,* concur.

Mr. Chief Justice Manuel Araullo was present at the time this case

was voted and then voted with Mr. Justice Romualdez. (Sgd.) E. FINLEY JOHNSON.

DISSENTING

ROMUALDEZ, J., with whom concurs **ARAULLO, C. J.:**

I do not agree with the view taken by the majority as to the nature of the photographic pictures in question. While said pictures cannot, strictly, be termed *obscene*, they must, however, be regarded as *indecent*, for they are so.

Such pictures offend modesty and refinement, and for this reason, they are indecent. This is shown by common sense. No woman claiming to be decent would dare to stand before the public in Manila, where said pictures were exhibited, in the same fashion as these pictures are.

It is alleged that these pictures were taken from nature in non-Christian regions. We agree that in said regions they are not, perhaps, regarded as offensive to modesty, and, therefore, are accidentally not indecent there. But in the City of Manila where they were exhibited, no doubt they are.

And the law prohibits the exhibition not only of obscene pictures, but of indecent as well. (Sec. 12, Act No. 277.)

I understand that the judgment appealed from should have been affirmed.

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