

GAUDENCIO E. FERNANDO AND RUDY ESTORNINOS, PETITIONERS, VS. COURT OF APPEALS, RESPONDENT.

G.R. NO. 159751. December 06, 2006

Ponente: QUISUMBING, J.

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QUISUMBING, J.:

This petition for review on certiorari assails the Decision[1] dated March 21, 2003 and the Resolution dated September 2, 2003, of the Court of Appeals in CA-G.R. CR No. 25796, which affirmed the Decision of the Regional Trial Court of Manila (RTC), Branch 21, in Criminal Case No. 99-176582.

The RTC convicted Gaudencio E. Fernando and Rudy Estorninos for violation of Article 201[2] of the Revised Penal Code, as amended by Presidential Decree Nos. 960 and 969, and sentenced each to imprisonment of four (4) years and one (1) day to six (6) years of prision correccional, and to pay the fine of P6,000 and cost of suit.

The facts as culled from the records are as follows.

Acting on reports of sale and distribution of pornographic materials, officers of the Philippine National Police Criminal Investigation and Detection Group in the National Capital Region (PNP-CIDG NCR) conducted police surveillance on the store bearing the name of Gaudencio E. Fernando Music Fair (Music Fair). On May 5, 1999, Judge Perfecto Laguio of the Regional Trial Court of Manila, Branch 19, issued Search Warrant No. 99-1216 for violation of Article 201 of the Revised Penal Code against petitioner Gaudencio E. Fernando and a certain Warren Tingchuy. The warrant ordered the search of Gaudencio E. Fernando Music Fair at 564 Quezon Blvd., corner Zigay Street, Quiapo, Manila, and the seizure of the following items:

- Copies of New Rave Magazines with nude obscene pictures;
- Copies of IOU Penthouse Magazine with nude obscene pictures;
- Copies of Hustler International Magazine with nude obscene pictures; and
- Copies of VHS tapes containing pornographic shows.[3]

On the same day, police officers of the PNP-CIDG NCR served the warrant on Rudy Estorninos, who, according to the prosecution, introduced himself as the store attendant of Music Fair. The police searched the premises and confiscated twenty-five (25) VHS tapes and ten (10) different magazines, which they deemed pornographic.

On September 13, 1999, petitioners with Warren Tingchuy, were charged in an Information which reads as follows:

That on or about May 5, 1999, in the City of Manila, Philippines, the said accused, did then and there willfully, unlawfully, feloniously, publicly and jointly exhibit indecent or immoral acts, scenes or shows at Music Fair, located at 564 Quezon Blvd., corner Zigay [S]t., Quiapo[,] this City[,] by then and there selling and exhibiting obscene copies of x-rated VHS Tapes, lewd films depicting men and women having sexual intercourse[,] lewd photographs of nude men and women in explicating (sic) positions which acts serve no other purpose but to

satisfy the market for lust or pornography to public view.

Contrary to law.[4]

When arraigned, petitioners and Tingchuy pleaded not guilty to the offense charged. Thereafter, trial ensued.

The prosecution offered the confiscated materials in evidence and presented the following witnesses: Police Inspector Rodolfo L. Tababan, SPO4 Rolando Buenaventura and Barangay Chairperson Socorro Lipana, who were all present during the raid. After the prosecution presented its evidence, the counsel for the accused moved for leave of court to file a demurrer to evidence, which the court granted. On October 5, 2000, the RTC however denied the demurrer to evidence and scheduled the reception of evidence for the accused. A motion for reconsideration was likewise denied.

Thereafter, the accused waived their right to present evidence and instead submitted the case for decision.[5]

The RTC acquitted Tingchuy for lack of evidence to prove his guilt, but convicted herein petitioners as follows:

WHEREFORE, premises considered, the Court finds accused GAUDENCIO FERNANDO and RUDY ESTORNINOS GUILTY beyond reasonable doubt of the crime charged and are hereby sentenced to suffer the indeterminate penalty of FOUR (4) YEARS and ONE (1) DAY as minimum to SIX (6) YEARS of prision correccional as maximum, to pay fine of P6,000.00 each and to pay the cost.

For failure of the prosecution to prove the guilt of accused WARREN TINGCHUY beyond reasonable doubt, he is hereby ACQUITTED of the crime charged.

The VHS tapes and the nine (9) magazines utilized as evidence in this case are hereby confiscated in favor of the government.

SO ORDERED.[6]

Petitioners appealed to the Court of Appeals. But the appellate courtlatter affirmed in toto the decision of the trial court, as follows,

WHEREFORE, finding no reversible error on the part of the trial court, the decision appealed from is AFFIRMED IN TOTO.

Costs against accused-appellants.

SO ORDERED.[7]

Hence the instant petition assigning the following errors:

- Respondent court erred in convicting petitioner Fernando even if he was not present at the time of the raid
- Respondent erred in convicting petitioner Estorninos who was not doing anything illegal at the time of the raid.[8]

Simply, the issue in this case is whether the appellate court erred in affirming the petitioners' conviction.

Petitioners contend that the prosecution failed to prove that at the time of the search, they were selling pornographic materials. Fernando contends that since he was not charged as the owner of an establishment selling obscene materials, the prosecution must prove that he was present during the raid and that he was selling the said materials. Moreover, he contends that the appellate court's reason for convicting him, on a presumption of continuing ownership shown by an expired mayor's permit, has no sufficient basis since the prosecution failed to prove his ownership of the establishment. Estorninos, on the other hand, insists that he was not an attendant in

Music Fair, nor did he introduce himself so.[9]

The Solicitor General counters that owners of establishments selling obscene publications are expressly held liable under Article 201, and petitioner Fernando's ownership was sufficiently proven. As the owner, according to the Solicitor General, Fernando was naturally a seller of the prohibited materials and liable under the Information. The Solicitor General also maintains that Estorninos was identified by Barangay Chairperson Socorro Lipana as the store attendant, thus he was likewise liable.[10]

At the outset, we note that the trial court gave petitioners the opportunity to adduce evidence to disprove refute the prosecution's evidence.[11] Instead, they waived their right to present evidence submitted the case for decision.[A1] [12] The trial court therefore resolved the case on the basis of prosecution's evidence against the petitioners.

As obscenity is an unprotected speech which the State has the right to regulate, the State in pursuing its mandate to protect, as *parens patriae*, the public from obscene, immoral and indecent materials must justify the regulation or limitation.

One such regulation is Article 201 of the Revised Penal Code. To be held liable, the prosecution must prove that (a) the materials, publication, picture or literature are obscene; and (b) the offender sold, exhibited, published or gave away such materials.[13] Necessarily, that the confiscated materials are obscene must be proved.

Almost a century has passed since the Court first attempted to define obscenity in *People v. Kottinger*.^[14] There the Court defined obscenity as something which is offensive to chastity, decency or delicacy. The test to determine the existence of obscenity 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.^[15] Another test according to *Kottinger* is "that which shocks the ordinary and common sense of men as an indecency."^[16] But, *Kottinger* hastened to say that whether a picture is obscene or indecent must depend upon the circumstances of the case, and that ultimately, the question is to be decided by the judgment of the aggregate sense of the community reached by it.^[17]

Thereafter, the Court in *People v. Go Pin*^[18] and *People v. Padan y Alova, et al.*,^[19] involving a prosecution under Article 201 of the Revised Penal Code, laid the tests which did little to clearly draw the fine lines of obscenity.

In *People v. Go Pin*, the Court said:

If such pictures, sculptures and paintings are shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed. However, the pictures here in question were used not exactly for art's sake but rather for commercial purposes. In other words, the supposed artistic qualities of said pictures were being commercialized so that the cause of art was of secondary or minor importance. Gain and profit would appear to have been the main, if not the exclusive consideration in their exhibition; and it would not be surprising if the persons who went to see those pictures and paid entrance fees for the privilege of doing so, were not exactly artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes, but rather people desirous of satisfying their morbid curiosity and taste, and lust, and for love [of] excitement, including the youth who because of their immaturity are not in a position to resist and shield themselves from the ill and perverting effects of these pictures.^[20]

People v. Padan y Alova, et al. in a way reaffirmed the standards set in *Go Pin* but with its own test of "redeeming feature." The Court therein said that:

[A]n actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art. One can see nothing in it but clear and unmitigated obscenity, indecency, and an offense to public morals, inspiring and causing as it does, nothing but lust and lewdness, and exerting a corrupting influence specially on the youth of the land.[21]

Notably, the Court in the later case of *Gonzales v. Kalaw Katigbak*,[22] involving motion pictures, still applied the "contemporary community standards" of *Kottinger* but departed from the rulings of *Kottinger*, *Go Pin* and *Padan y Alova* in that the Court measures obscenity in terms of the "dominant theme" of the material taken as a "whole" rather than in isolated passages.

Later, in *Pita v. Court of Appeals*, concerning alleged pornographic publications, the Court recognized that *Kottinger* failed to afford a conclusive definition of obscenity, and that both *Go Pin* and *Padan y Alova* raised more questions than answers such as, whether the absence or presence of artists and persons interested in art and who generally go to art exhibitions and galleries to satisfy and improve their artistic tastes, determine what art is; or that if they find inspiration in the exhibitions, whether such exhibitions cease to be obscene.[23] *Go Pin* and *Padan y Alova* gave too much latitude for judicial arbitrament, which has permitted ad lib of ideas and "two-cents worths" among judges as to what is obscene or what is art.[24]

The Court in *Pita* also emphasized the difficulty of the question and pointed out how hazy jurisprudence is on obscenity and how jurisprudence actually failed to settle questions on the matter. Significantly, the dynamism of human civilization does not help at all. It is evident that individual tastes develop, adapt to wide-ranging influences, and keep in step with the rapid advance of civilization.[25] It seems futile at this point to formulate a perfect definition of obscenity that shall apply in all cases.

There is no perfect definition of "obscenity" but the latest word is that of *Miller v. California* which established basic guidelines, to wit: (a) whether to the average person, applying contemporary standards would find the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[26] But, it would be a serious misreading of *Miller* to conclude that the trier of facts has the unbridled discretion in determining what is "patently offensive." [27] No one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct.[28] Examples included (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.[29] What remains clear is that obscenity is an issue proper for judicial determination and should be treated on a case to case basis and on the judge's sound discretion.

In this case, the trial court found the confiscated materials obscene and the Court of Appeals affirmed such findings. The trial court in ruling that the confiscated materials are obscene, reasoned as follows:

Are the magazines and VHS tapes confiscated by the raiding team obscene or offensive to morals? . . .

Pictures of men and women in the nude doing the sexual act appearing in the nine (9) confiscated magazines namely *Dalaga*, *Penthouse*, *Swank*, *Erotic*, *Rave*, *Playhouse*, *Gallery* and two (2) issues of *QUI* are offensive to morals and are made and shown not for the sake of art but rather for commercial purposes, that is gain and profit as the exclusive consideration in their exhibition. The pictures in the magazine exhibited indecent and immoral scenes and acts...The exhibition of the sexual act in their magazines is but a clear and unmitigated obscenity, indecency and an offense to public morals, inspiring...lust and lewdness, exerting a corrupting influence especially on the youth. (Citations omitted)

The VHS tapes also [exhibit] nude men and women doing the sexual intercourse. The tape entitled "Kahit sa Pangarap Lang" with Myra Manibog as the actress shows the naked body of the actress. The tape exhibited indecent and immoral scenes and acts. Her dancing movements excited the sexual instinct of her male audience. The motive may be innocent, but the performance was revolting and shocking to good minds...

In one (1) case the Supreme Court ruled:

Since the persons who went to see those pictures and paid entrance fees were usually not artists or persons interested in art to satisfy and inspire their artistic tastes but persons who are desirous of satisfying their morbid curiosity, taste and lust and for [love] of excitement, including the youth who because of their immaturity are not in a position to resist and shield themselves from the ill and perverting effects of the pictures, the display of such pictures for commercial purposes is a violation of Art. 201. If those pictures were shown in art exhibits and art galleries for the cause of art, to be viewed and appreciated by people interested in art, there would be no offense committed (People vs. Go Pin, 97 Phil 418).

[B]ut this is not so in this case.[30]

Findings of fact of the Court of Appeals affirming that of the trial court are accorded great respect, even by this Court, unless such findings are patently unsupported by the evidence on record or the judgment itself is based on misapprehension of facts.[31] In this case, petitioners neither presented contrary evidence nor questioned the trial court's findings. There is also no showing that the trial court, in finding the materials obscene, was arbitrary.

Did petitioners participate in the distribution and exhibition of obscene materials?

We emphasize that mere possession of obscene materials, without intention to sell, exhibit, or give them away, is not punishable under Article 201, considering the purpose of the law is to prohibit the dissemination of obscene materials to the public. The offense in any of the forms under Article 201 is committed only when there is publicity.[32] The law does not require that a person be caught in the act of selling, giving away or exhibiting obscene materials to be liable, for as long as the said materials are offered for sale, displayed or exhibited to the public. In the present case, we find that petitioners are engaged in selling and exhibiting obscene materials.

Notably, the subject premises of the search warrant was the Gaudencio E. Fernando Music Fair, named after petitioner Fernando.[33] Even his bail bond shows that he lives in the same place.[34] Moreover, the mayor's permit dated August 8, 1996, shows that he is the owner/operator of the store.[35] While the mayor's permit had already expired, it does not negate the fact that Fernando owned and operated the establishment. It would be absurd to make his failure to renew his business permit and illegal operation a shield from prosecution of an unlawful act. Furthermore, when he preferred not to present contrary evidence, the things which he possessed were presumptively his.[36]

Petitioner Estorninos is likewise liable as the store attendant actively engaged in selling and exhibiting the obscene materials. Prosecution witness Police Inspector Tababan, who led the PNP-CIDG NCR that conducted the search, identified him as the store attendant upon whom the search warrant was served.[37] Tababan had no motive for testifying falsely against Estorninos and we uphold the presumption of regularity in the performance of his duties. Lastly, this Court accords great respect to and treats with finality the findings of the trial court on the matter of credibility of witnesses, absent any palpable error or arbitrariness in their findings.[38] In our view, no reversible error was committed by the appellate court as well as the trial court in finding the herein petitioners guilty as charged.

WHEREFORE, the Decision dated March 21, 2003 and the Resolution dated September 2, 2003, of the Court of Appeals affirming the Decision of the Regional Trial Court of Manila, Branch 21, in Criminal Case No. 99-176582 are hereby AFFIRMED.

SO ORDERED.

Carpio, Carpio-Morales, Tinga, and Velasco, Jr., JJ., concur.

[1] Rollo, pp. 44-52.

[2] ART. 201. Immoral doctrines, obscene publications and exhibitions, and indecent shows. – The penalty of prison mayor or a fine ranging from six thousand to twelve thousand pesos, or both such imprisonment and fine, shall be imposed upon:

- Those who shall publicly expound or proclaim doctrines openly contrary to public morals;

- (a) The authors of obscene literature, published with their knowledge in any form; the editors publishing such literature; and the owners/operators of the establishment selling the same;

(b) Those who, in theaters, fairs, cinematographs, or any other place, exhibit, indecent or immoral plays, scenes, acts or shows, it being understood that the obscene literature or indecent or immoral plays, scenes, acts or shows, whether live or in film, which are prescribed by virtue hereof, shall include those which: (1) glorify criminals or condone crimes; (2) serve no other purpose but to satisfy the market for violence, lust or pornography; (3) offend any race or religion; (4) tend to abet traffic in and use of prohibited drugs; and (5) are contrary to law, public order, morals, good customs, established policies, lawful orders, decrees and edicts;

- Those who shall sell, give away, or exhibit films, prints, engravings, sculptures, or literature which are offensive to morals.

[3] Records, p. 3.

[4] Id. at 1.

[5] Id. at 150.

[6] Rollo, pp. 42-43.

[7] Id. at 51.

[8] Id. at 13.

[9] Id. at 101-103.

[10] Id. at 120-122.

[11] Records, pp. 135-136 and 145.

[12] Id. at 150.

[13] R. Aquino, THE REVISED PENAL CODE BOOK TWO 395 (1987).

[14] 45 Phil. 352 (1923).

[15] Id. at 356.

[16] Id. at 356-357.

[17] Pita v. Court of Appeals, G.R. No. 80806, October 5, 1989, 178 SCRA 362, 368.

[18] 97 Phil. 418 (1955).

- [19] 101 Phil. 749 (1957).
- [20] *People v. Go Pin*, supra note 18, at 419.
- [21] *People v. Padan y Alova, et al.*, supra note 19, at 752.
- [22] No. L-69500, July 22, 1985, 137 SCRA 717, 726.
- [23] *Pita v. Court of Appeals*, supra note 17, at 369-370.
- [24] *Id.* at 370.
- [25] *Id.* at 372.
- [26] *Id.* at 371.
- [27] *Jenkins v. Georgia*, 418 U.S. 153 (1974).
- [28] *Id.*
- [29] *Miller v. California*, 413 U.S. 15 (1973).
- [30] *Rollo*, pp. 40-42.
- [31] *Pangonorom v. People*, G.R. No. 143380, April 11, 2005, 455 SCRA 211, 220 and *Jose v. People*, G.R. No. 148371, August 12, 2004, 436 SCRA 294, 303.
- [32] L. Reyes, REVISED PENAL CODE BOOK TWO 347 (1998).
- [33] *Records*, p. 3.
- [34] *Id.* at 27.
- [35] *Id.* at 71.
- [36] *People v. Agcaoli*, G.R. No. 92143, February 26, 1992, 206 SCRA 606, 613.
- [37] *TSN*, October 11, 1999, p. 6.
- [38] *People v. Khor*, G.R. No. 126391, May 19, 1999, 307 SCRA 295, 326.

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