

**JOSE ANTONIO U. GONZALEZ IN BEHALF OF MALAYA FILMS, LINO BROCKA, JOSE F. LACABA, AND DULCE Q. SAGUISAG, PETITIONERS, VS. CHAIRMAN MARIA KALAW KATIGBAK, GENERAL WILFREDO C. ESTRA...**

*G.R. No. 69500. July 22, 1985*

Ponente: FERNANDO, C.J.

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**FERNANDO, C.J.:**

In this case of first impression, a certiorari proceeding filed on January 10, 1985, there is a persuasive ring to the invocation of the constitutional right to freedom of expression<sup>[1]</sup> of an artist — and for that matter a man of letters too — as the basis for a ruling on the scope of the power of respondent Board of Review for Motion Pictures and Television and how it should be exercised. The dispute between the parties has been narrowed down. The motion picture in question, *Kapit sa Patalim* was classified "For Adults Only." There is the further issue then, also one of first impression, as to the proper test of what constitutes obscenity in view of the objections raised. Thus the relevance of this constitutional command: "Arts and letters shall be under the patronage of the State."<sup>[2]</sup>

The principal petitioner is Jose Antonio U. Gonzalez,<sup>[3]</sup> President of the Malaya Films, a movie production outfit duly registered as a single proprietorship with the Bureau of Domestic Trade. The respondent is the Board of Review for Motion Pictures and Television, with Maria Kalaw Katigbak as its Chairman and Brig. Gen. Wilfredo C. Estrada as its Vice-Chairman, also named respondents.

In a resolution of a sub-committee of respondent Board of October 23, 1984, a permit to exhibit the film *Kapit sa Patalim* under the classification "For Adults Only," with certain changes and deletions enumerated was granted. A motion for reconsideration was filed by petitioners stating that the classification of the film "For Adults Only" was without basis.<sup>[4]</sup> Then on November 12, 1984, respondent Board released its decision: "Acting on the applicant's Motion for Reconsideration dated 29 October 1984, the Board, after a review of the resolution of the sub-committee and an examination of the film, Resolves to affirm in toto the ruling of the sub-committee. Considering, however, certain vital deficiencies in the application, the Board further Resolves to direct the Chairman of the Board to Withheld the issuance of the Permit to exhibit until these deficiencies are supplied."<sup>[5]</sup> Hence this petition.

This Court, in a resolution of January 12, 1985, required respondent to answer. In such pleading submitted on January 21, 1985, as one of its special and affirmative defenses, it was alleged that the petition is moot as "respondent Board has revoked, its questioned resolution, replacing it with one immediately granting petitioner company a permit to exhibit the film *Kapit* without any deletion or cut [thus an] adjudication of the questions presented above would be academic on the case."<sup>[6]</sup> Further: "The modified resolution of the Board, of course, classifies *Kapit* as for-adults-only, but the petition does not raise any issue as to the validity of this classification. All that petitioners assail as arbitrary on the part of the Board's action are the deletions ordered in the film."<sup>[7]</sup> The prayer was for the dismissal of the petition.

An amended petition was then filed on January 25, 1985. The main objection was the classification of the film as "For Adults Only." For petitioners, such classification "is without legal and factual basis and is exercised as impermissible restraint of artistic expression. The film is an integral whole and all its portions, including those to which the Board now offers belated objection, are essential for the integrity of the film. Viewed as a whole, there is no basis even for the vague speculations advanced by the Board as basis for its classification." [8] There was an answer to the amended petition filed on February 18, 1985. It was therein asserted that the issue presented as to the previous deletions ordered by the Board as well as the statutory provisions for review of films and as to the requirement to submit the master negative have been all rendered moot. It was also submitted that the standard of the law for classifying films afford a practical and determinative yardstick for the exercise of judgment. For respondents, the question of the sufficiency of the standards remains the only question at issue.

It would be unduly restrictive under the circumstances to limit the issue to one of the sufficiency of standards to guide respondent Board in the exercise of its power. Even if such were the case, there is justification for an inquiry into the controlling standard to warrant the classification of "For Adults Only." This is especially so when obscenity is the basis for any alleged invasion of the right to the freedom of artistic and literary expression embraced in the free speech and free press guarantees of the Constitution.

1. Motion pictures are important both as a medium for the communication of ideas and the expression of the artistic impulse. Their effects on the perception by our people of issues and public officials or public figures as well as the prevailing cultural traits is considerable. Nor as pointed out in *Burstyn v. Wilson* [9] is the "importance of motion pictures as an organ of public opinion lessened by the fact that they are designed to entertain as well as to inform." [10] There is no clear dividing line between what involves knowledge and what affords pleasure. If such a distinction were sustained, there is a diminution of the basic right to free expression. Our recent decision in *Reyes v. Bagatsing* [11] cautions against such a move. Press freedom, as stated in the opinion of the Court, "may be identified with the liberty to discuss publicly and truthfully any matter of public concern without censorship or punishment." [12] This is not to say that such freedom, as is the freedom of speech, absolute. It can be limited if "there be a 'clear and present danger of a substantive evil that [the State] has a right to prevent.'" [13]

2. Censorship or previous restraint certainly is not all there is to free speech or free press. If it were so, then such basic rights are emasculated. It is, however, except in exceptional circumstances a *sine qua non* for the meaningful exercise of such right. This is not to deny that equally basic is the other important aspect of freedom from liability. Nonetheless, for the purposes of this litigation, the emphasis should rightly be on freedom from censorship. It is, beyond question, a well-settled principle in our juris-diction. As early as 1909, in the case of *United States v. Sedano*, [14] a prosecution for libel, the Supreme Court of the Philippines already made clear that freedom of the press consists in the right to print what one chooses without any previous license. There is re-affirmation of such a view in *Mutuc v. Commission on Elections*, [15] where an order of respondent Commission on Elections giving due course to the certificate of candidacy of petitioner but prohibiting him from using jingles in his mobile units equipped with sound systems and loud speakers was considered an abridgment of the right of the freedom of expression amounting as it does to censorship. It is the opinion of this Court, therefore, that to avoid an unconstitutional taint on its creation, the power of respondent Board is limited to the classification of films. It can, to safeguard other constitutional objections, determine what motion pictures are for general patronage and what may require either parental guidance or be limited to adults only. That is to abide by the principle that freedom of expression is the rule and restrictions the exemption. The power to exercise prior restraint is not to be presumed, rather the presumption is against its validity. [16]

3. The test, to repeat, to determine whether freedom of expression may be limited is the clear and present danger of an evil of a substantive character that the State has a right to prevent. Such danger must not only be clear but

also present. There should be no doubt that what is feared may be traced to the expression complained of. The causal connection must be evident. Also, there must be reasonable apprehension about its imminence. The time element cannot be ignored. Nor does it suffice if such danger be only probable. There is the requirement of its being well-nigh inevitable. The basic postulate, therefore, as noted earlier, is that where the movies, theatrical productions, radio scripts, television programs, and other such media of expression are concerned — included as they are in freedom of expression — censorship, especially so if an entire production is banned, is allowable only under the clearest proof of a clear and present danger of a substantive evil to public safety, public morals, public health or any other legitimate public interest.[17] There is merit to the observation of Justice Douglas that "every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor." [18]

4. The law, however, frowns on obscenity — and rightly so. As categorically stated by Justice Brennan in *Roth v. United States*, [19] speaking of the free speech and press guarantee of the United States Constitution: "All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." [20] Such a view commends itself for approval.

5. There is, however, some difficulty in determining what is obscene. There is persuasiveness to the approach followed in *Roth*: "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina v. Hicklin* [1868] LR 3 QB 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity." [21]

6. The above excerpt which imposes on the judiciary the duty to be ever on guard against any impermissible infringement on the freedom of artistic expression calls to mind the landmark ponencia of Justice Malcolm in *United States v. Bustos*, [22] decided in 1918. While recognizing the principle that libel is beyond the pale of constitutional protection, it left no doubt that in determining what constitutes such an offense, a court should ever be mindful that no violation of the right to freedom of expression is allowable. It is a matter of pride for the Philippines that it was not until 1984 in *New York Times v. Sullivan*, [23] thirty-six years later, that the United States Supreme Court enunciated a similar doctrine.

7. It is quite understandable then why in the *Roth* opinion, Justice Brennan took pains to emphasize that "sex and obscenity are not synonymous." [24] Further: "Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." [25]

8. In the applicable law, Executive Order No. 876, reference was made to respondent Board "applying contemporary Filipino cultural values as standard," [26] words which can be construed in an analogous manner. Moreover, as far as the question of sex and obscenity are concerned, it cannot be stressed strongly that the arts and letters "shall be under the patronage of the State." [27] That is a constitutional mandate. It will be less than true to

its function if any government office or agency would invade the sphere of autonomy that an artist enjoys. There is no orthodoxy in what passes for beauty or for reality. It is for the artist to determine what for him is a true representation. It is not to be forgotten that art and belleslettres deal primarily with imagination, not so much with ideas in a strict sense. What is seen or perceived by an artist is entitled to respect, unless there is a showing that the product of his talent rightfully may be considered obscene. As so well put by Justice Frankfurter in a concurring opinion, "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit"[28] in this sensitive area of a man's personality. On the question of obscenity, therefore, and in the light of the facts of this case, such standard set forth in Executive Order No. 878 is to be construed in such a fashion to avoid any taint of unconstitutionality. To repeat, what was stated in a recent decision[29] citing the language of Justice Malcolm in *Yu Cong Eng v. Trinidad*,[30] it is "an elementary, a fundamental, and a universal role of construction, applied when considering constitutional questions, that when a law is susceptible of two constructions one of which will maintain and the other destroy it, the courts will always adopt the former." [31] As thus construed, there can be no valid objection to the sufficiency of the controlling standard and its conformity to what the Constitution ordains.

9. This being a certiorari petition, the question before the Court is whether or not there was a grave abuse of discretion. That there was an abuse of discretion by respondent Board is evident in the light of the difficulty and travail undergone by petitioners before *Kapit sa Patalim* was classified as "For Adults Only," without any deletion or cut. Moreover its perception of what constitutes obscenity appears to be unduly restrictive. This Court concludes then that there was an abuse of discretion. Nonetheless, there are not enough votes to maintain that such an abuse can be considered grave. Accordingly, certiorari does not lie. This conclusion finds support in this explanation of respondents in its Answer to the amended petition: "The adult classification given the film serves as a warning to theater operators and viewers that some contents of *Kapit* are not fit for the young. Some of the scenes in the picture were taken in a theater-club and a good portion of the film shots concentrated on some women erotically dancing naked, or at least nearly naked, on the theater stage. Another scene on that stage depicted the women kissing and caressing as lesbians. And toward the end of the picture, there exists scenes of excessive violence attending the battle between a group of robbers and the police. The vulnerable and imitative in the young audience will misunderstand these scenes." [32] Further: "Respondents further stated in its answer that petitioner company has an option to have the film reclassified to For-General-Patronage if it would agree to remove the obscene scenes and pare down the violence in the film." [33] Petitioners, however, refused the "For Adults Only" classification and instead, as noted at the outset, filed this suit for certiorari.

10. All that remains to be said is that the ruling is to be limited to the concept of obscenity applicable to motion pictures. It is the consensus of this Court that where television is concerned, a less liberal approach calls for observance. This is so because unlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set. Children then will likely will be among the avid viewers of the programs therein shown. As was observed by Circuit Court of Appeals Judge Jerome Frank, it is hardly the concern of the law to deal with the sexual fantasies of the adult population.[34] It cannot be denied though that the State as *parens patriae* is called upon to manifest an attitude of caring for the welfare of the young.

WHEREFORE, this Court, in the light of the principles of law enunciated in the opinion, dismisses this petition for certiorari solely on the ground that there are not enough votes for a ruling that there was a grave abuse of discretion in the classification of *Kapit sa Patalim* as "For Adults Only."

Teehankee, Makasiar, Concepcion, Jr., Melencio-Herrera, Plana, Escolin, Relova, Gutierrez, Jr., Cuevas, and Alampay, JJ., concur.

Aquino, J., in the result. Petitioner has no cause of action for certiorari.

Abad Santos, J., on official leave.

De la Fuente, J., no part.

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[1] The Constitution provides: "No law shall be passed abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances."

[2] Article XV, Section 9, par. (2) reads in full: "Filipino culture shall be pre-served and developed for national identity. Arts and letter shall be under the patro-nage of the State."

[3] The other petitioners are Lino Brocka, Jose F. Lacaba and Dulce Q. Saguisag.

[4] Petition, par. 3.33.

[5] Ibid, par. 3.35.

[6] Answer, 9-10.

[7] Ibid, 10.

[8] Amended Petition, 20.

**[9] 343 US 495 (1942).**

[10] Ibid, 501.

[11] G.R. No. 65366, November 9, 1983, 125 SCRA 553. Cf. *Winters v. New York*, 333 US 507 (1948).

[12] Ibid, 560.

[13] Ibid, 561.

[14] 14 Phil. 338. Cf. *US v. Sotto*, 38 Phil. 666 (1918).

[15] L-32717, November 26, 1970, 36 SCRA 228.

[16] Cf. *Bantam Books, Inc. v. Sullivans*, 372 US 58 (1962); *Organization for Better Austria v. Keafe*, 402 US 415 (1971).

[17] Cf. *Reyes v. Bagatsing*, 125 SCRA 553, 562.

[18] *Superior Films v. Regents of University of State of New York*, 346 US 587, 589 (1954), Douglas, J., concurring.

**[19] 354 US 476 (1957).**

[20] Ibid, 484-485. There was reference to international agreements of over 50 nations and the obscenity laws of all the then 48 States of the Union as well as 20 obscenity laws enacted by the Congress of the United States from 1842 to 1956. *Chaplinsky v. New Hampshire*, 315 US 568 (1942) was also cited.

[21] Ibid, 488-489.

[22] 37 Phil. 731.

**[23] 376 US 254.**

[24] Roth v. United States, 354 US 476, 487 (1957).

[25] Ibid.

[26] Executive Order No. 876, Section 3(c) (1983).

[27] Article XV, Section 9, par. (2), last sentence of the Constitution.

[28] Kingsley v. Regents, 360 US 684, 695 (1959).

[29] Lopez, Jr. v. Commission on Elections, G.R. No. 65022, May 31, 1985.

[30] 47 Phil. 385 (1925).

[31] Ibid, 415.

[32] Answer to Amended Petition, 4.

[33] Ibid, 4-5.

[34] Cf. United States v. Roth, 237 F 2d 796 (1956).

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