

THIRD DIVISION

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

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

DECISION

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:

- a. Copies of New Rave Magazines with nude obscene pictures;
- b. Copies of IOU Penthouse Magazine with nude obscene pictures;
- c. Copies of Hustler International Magazine with nude obscene pictures; and
- d. 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:

- I. Respondent court erred in convicting petitioner Fernando even if he was not present at the time of the raid
- II. 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