Republic of the Philippines
Supreme Court
Manila

THIRD DIVISION

EVEN DEMATA *y* GARZON,
Petitioner,

- versus -

PEOPLE OF THE PHILIPPINES,
Respondent.

G.R. No. 228583

Present:
LEONEN, *J.*,
Chairperson,
CARANDANG,
LAZARO-JAVIER,*
ZALAMEDA,
ROSARIO, *JJ.*

Promulgated:
September 15, 2021
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DECISION

CARANDANG, *J.*:

In its Decision[1] dated September 28, 2016, the Court of Appeals (CA) in CA-G.R. CR No. 37864 affirmed the Regional Trial Court's (RTC) Decision[2] in Criminal Case Nos. 13-301632 and 13-301633 finding petitioner Even Demata *y* Garzon (Demata)[3] guilty of violating Article 201, paragraph 3, of the Revised Penal Code (RPC) and Section 10(a) of Republic Act No. (R.A.) 7610. In a Resolution[4] dated November 29, 2016, the CA denied reconsideration. Thus, in this petition under Rule 45, Demata prays for this Court to reverse the CA and order his acquittal.

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* Designated as additional Member.
1 Penned by Associate Justice Jhosep Y. Lopez (now a Member of this Court), with the concurrence of Associate Justices Ramon R. Garcia and Melchor Quirino C. Sadang; *rollo*, pp. 45-60.
2 Penned by Judge Emily L. San Gaspar-Gito; id. at 85-117.
3 Represented by the Public Attorney's Office (PAO).
4 *Rollo*, pp. 62-63.

Facts of the Case

On November 21, 2013, the National Bureau of Investigation (NBI), upon the complaint of minor AAA's father, filed two criminal informations against Demata before the RTC of Manila. In Criminal Case No. 13-301632, for violation of Article 201 of the RPC, Demata was accused as follows:

> That on or about June 21, 2012, in the City of Manila, Philippines, the said accused, being then the Editor-in-Chief of Bagong Toro Tabloid, did then and there willfully, unlawfully, and knowingly sell and circulate, or caused to be sold and circulated to the public a BAGONG TORO Tabloid Vol. 1 Issue 224 dated June 21, 2012 containing a photo of one AAA, a 17-year old minor, under the article "facebook sexy and beauties" together with pictures showing nude and semi-naked women in uncompromising, scandalous, and sexually enticing poses and illustrated stories and depicting, describing, presenting, and showing indecent and immoral scenes of naked and half-naked female persons showing their private parts, which literature or publication serves no other purpose but to satisfy the market for lust or pornography and, therefore, are grossly and seriously offensive to morals.
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> Contrary to law.[5]

In the other Information (Criminal Case No. 13-301633), for violation of Section 10(a) of R.A. 7610, the accusation is as follows:

> That on or about June 21, 2012, in the City of Manila, Philippines, the said accused, being then and there willfully, unlawfully, and knowingly commit psychological injury to AAA, a 17-year old minor, assisted by her father, CCC, by posting her picture and circulate or caused to be posted and circulated in a Bagong Toro Tabloid Vol. 1 issued 224 dated June 21, 2012 without her consent which caused severe anxiety, depression, withdrawal or outward aggressive behaviour or a combination of said behaviours thereby causing harm to her intellectual and psychological functioning which is prejudicial to said child's development.
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> Contrary to law.[6]

The RTC consolidated the two actions.[7] Upon arraignment, Demata pleaded not guilty to both charges.[8] Trial ensued thereafter.

The records bear out the following facts.

Petitioner Demata was one of two editors-in-chief of *Bagong Toro*, a tabloid newspaper sold and circulated all over the nation. It is published by

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5 Id. at 47-48.
6 Id. at 48.
7 Id.
8 Id.

Remate News Central, which is owned by one Baby Antiporda, and has a Circulation Department headed by one Berna Paredes, who is in charge with the selling and distribution of the newspaper.[9] It holds offices at the National Press Club Building in Intramuros, Manila.[10]

The June 21, 2012 issue of *Bagong Toro* (Vol. 1, Issue 224) consists of 12 pages and consists of articles on news, showbusiness gossip, health, and commentary or opinion. But most relevant to this case, it also has photographs of women, most of whom are wearing skimpy swimwear, and even blurred images of a celebrity sex tape. It also has short erotic novellas written in the Filipino language. Chapters of these novellas are progressively published from one issue of *Bagong Toro* to another.[11]

Private complainant AAA was a student of Accounting Technology at the University of the East (UE). She was born on 16 February 1995 and only 17 years old at the time the June 21, 2012 issue of *Bagong Toro* was published.[12]

On August 22, 2012, AAA's brother, BBB, went to a barbershop in Quezon City. He browsed through the tabloids available in the shop and was surprised to see a picture of AAA in the June 21, 2012 issue of *Bagong Toro,* under a column entitled "facebook sexy and beauties." AAA's name was not published.[13] In the picture, she can be seen in a seated position and fully clothed, wearing shorts and a t-shirt.[14] Beside her picture were photos of other women wearing revealing swimwear.

BBB called up his father, CCC, and told the latter about AAA's picture. CCC was very angry upon seeing the newspaper.[15] He and his wife, DDD, confronted AAA about her photograph. Upon seeing the photograph, AAA cried and told her parents that she had no idea how her picture reached the tabloid. However, she told them that she had lost her cellphone sometime in February 2012. She had been using the cellphone to access her Facebook account which she could no longer access after losing the phone and because CCC had forbidden her from using Facebook.[16] AAA recalled that she and two of her cousins were originally in the photo, which was taken some time in late May 2012 on the rooftop of the condominium occupied by AAA's aunt. Her cousins, however, had been cropped out. DDD later testified that it was she who took the photograph. AAA cried the whole night and could not study for the calculus exam she was supposed to take the following day.

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9 TSN dated February 13, 2015, pp. 5-6.
10 Records, p. 75.
11 Id. at 63-74.
12 Id. 443.
13 TSN dated May 30, 2014, p. 32.
14 Records, p. 63.
15 Id. at 31; TSN dated August 12, 2014, pp. 10-11.
16 Id. at 29.

AAA lost self-confidence after learning of the publication. She took her calculus exam but was not able to finish it. In the end, she failed the course. CCC wrote a letter to the Chancellor of UE, seeking reconsideration of AAA's grade and that she be given an "incomplete" or "dropped status" to lessen her pain and emotional stress. However, his request went unheeded.

AAA is the youngest and the only girl among her siblings. She was raised in a conservative Muslim community. According to CCC, she is not allowed to go out alone. Even when going to the department store, she is accompanied by her mother. Someone drops off and picks her up at school.[17] When her relatives came to know of the publication, many of them were furious.[18] Her uncle, who had been financing her studies, withdrew his support,[19] constraining CCC to take on credit so that AAA could continue her studies.[20]

AAA became the target of bullying in her school. One professor even spread false rumors of her being involved in a sex scandal. All these things caused anxiety, sleeplessness, and paranoia to AAA and affected her studies and relations with other people.[21]

On August 22, 2012, AAA was psychologically examined by Dr. Jayson Bascos of Quezon City General Hospital. On October 12, 2012, Dr. Bascos arrived at a working diagnosis of Acute Stress Disorder with depressed features.[22] AAA had to go through further psychological consultation and counseling from Dr. Bascos from October 2013 to May 2014.[23] Eventually, Dr. Bascos diagnosed AAA as suffering from Chronic Post Traumatic Stress Disorder (PTSD) and prescribed her to take anti-depressants and to continue with the psychosocial processing and counseling.[24]

Only Demata took to the witness stand for his defense. He argues that the publication is not obscene. He emphasized that AAA's photo alone cannot be considered as obscene, pornographic, or lascivious as she was fully clothed, and her pose was not sexually provocative. He testified that the layout artists of *Bagong Toro* were tasked to verify the ownership of the photos submitted to the newspaper for publication. He would rely on the representations of the layout artists for such verification, proofs of which were recorded, including the addresses, phone numbers, and Facebook accounts of contributors. However, he could not produce these records in open court because they have been deleted and because he had been terminated from the newspaper. He said that he just followed the directives of his superiors, specifically mentioning Antiporda, to maintain his job.[25]

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17 TSN dated June 17, 2014, pp. 22-23.
18 TSN dated May 20, 2014, p. 28.
19 Id.; *see also* TSN June 17, 2014, pp. 22-23.
20 Id.
21 TSN dated July 3, 2014, pp. 14-15.
22 Records, p. 57.
23 Id. at 57, 432-438.
24 Id.
25 TSN dated February 13, 2015, pp. 10-11; *rollo*, p. 95.

Ruling of the Trial Court

The RTC found Demata guilty and disposed of the criminal cases as follows:

> WHEREFORE, in view of the foregoing disquisition, the Court finds accused EVEN DEMATA y GARZON guilty beyond reasonable doubt of the crime of violation of Article 201, paragraph 3 of the Revised Penal Code, as amended by P.D. No. 969. He is hereby sentenced to PAY the FINE of the Php 10,000,000.00 and to pay the cost
>
> Accused EVEN DEMATA y GARZON is also found guilty beyond reasonable doubt of the crime of violation of Section 10 paragraph (a) of R.A. No. 7610. He is hereby sentenced to suffer IMPRISONMENT of six (6) years of *prision correccional*, as minimum, to seven (7) years and four (4) months of *prision mayor*, as maximum, there being neither a mitigating nor aggravating circumstance.
>
> He is further adjudged to PAY private complainant (a) civil indemnity of P50,000.00, (b) moral damages of P50,000.00, (c) exemplary damages of P50,000.00; and (d) costs.
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> SO ORDERED.[26]

The RTC conceded that while AAA's photo is not obscene, but taken in its entirety, the newspaper is obscene. Citing the case of *Fernando v. Court of Appeals*[27] and *Gonzalez v. Kalaw Katigbak*,[28] the RTC ruled that the newspaper is "not only obscene by its appearance, but also by its substance. The photos of women are all scantily clad in sexually provocative poses. There are also photos of a naked woman with her private parts only blurred. The stories contained therein further increased the tabloid's obscenity level."[29]

The RTC further ruled that the placing of "[AAA's] photo in a pornographic tabloid without her consent certainly constitutes child abuse. Its psychological effect on her cannot be doubted and in this case has been duly established."[30] The RTC was not convinced that Demata properly verified the ownership of the photos and opined that as editor-in-chief, he should not have allowed the publication of the photo for a purpose for which it was not intended.[31]

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26 *Rollo*, p. 116.
27 539 Phil. 407 (2006).
28 222 Phil. 225 (1985).
29 *Rollo*, p. 100.
30 Id. at 115.
31 Id.

Ruling of the Court of Appeals

The CA denied Demata's appeal.[32] The CA echoed the RTC in ruling that the *Bagong Toro* issue did not pass the various obscenity tests espoused in such cases as *Kottinger, Go Pin, Padan,* and *Kalaw Katigbak*, which referred to the U.S. case of *Miller v. California.*[33] The CA did not agree with petitioner's argument that *Bagong Toro* is comparable to Playboy and FHM magazines, opining that the stories and photographs in the latter two publications are "presented in an artistic manner."[34] Thus, the CA maintained that the issue of *Bagong Toro* in question lacks serious literary, artistic, political, or scientific value and appeals only to prurient interests. The CA also found no reversible error in the RTC's ruling that Demata violated Section 10(a) of R.A. 7610, satisfied that the RTC had not overlooked any material facts in its assessment.[35]

Demata moved for reconsideration, but the CA denied the same.[36] Hence, this petition.

Demata hinges his petition on the following arguments. *First*, he argues that AAA's photo is not obscene as so found by the RTC itself[37] and by AAA, CCC, and BBB, a frequent reader of *Bagong Toro*. He also points out that AAA's cousin had previously uploaded the photo on Facebook. Citing *Fortun v. Quinsayas*,[38] he argues that this is already publication. Nevertheless, the CA attempted to rationalize his conviction by ruling that he was being charged not only for the publication of AAA's photo but of the entire tabloid itself. If this is so, he questions why no other person was charged for the crime and why *Bagong Toro* continues to operate up to this time. During the NBI investigation, Demata was represented by a lawyer whose services were supplied to him by Antiporda. However, Demata was terminated by the publisher and the lawyer withdrew his services. Demata claimed that this was to protect the company from the result of this case. Thus, in the proceedings before the RTC, Demata was represented by the Public Attorney's Office. *Second*, he argues that the photographs and stories are not obscene, and that the CA's ruling amounts to censorship or a prior restraint. *Third*, he argues that cases of libel under Article 360 of the RPC, are not analogous to crimes under Article 201. Under Article 360 of the RPC, editors are specifically stated as liable for defamations in a **newspaper, magazine, or serial publications**. Meanwhile, an editor is liable under Article 201(2)(a) for the publication of obscene **literature**. However, he was convicted under Article 201(3) for selling, giving away, or exhibiting films, prints, engravings, sculptures, or literature which are offensive to morals. He argues that paragraph 3 of Article 201 does not specifically mention the liability of an editor and that he had no hand in the "selling, giving away, or exhibiting" as his responsibility was to

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32 Id. at 59.
33 413 U.S. 15 (1973).
34 *Rollo*, p. 54.
35 Id. at 9.
36 Id. at 62-63.
37 Id. at 97.
38 703 Phil. 578 (2013).

edit the articles in the newspaper. *Fourth,* as to his conviction under Section 10(a) of R.A. 7610, Demata argues, citing *Bongalon v. People*,[39] that he may only be punished under said provision if it is proven that he intended to debase, degrade, or demean the intrinsic worth of dignity of AAA as a human being through an act of abuse, cruelty, or exploitation. He believes that the evidence on record does not show this because AAA herself testified that she had lost her phone which was logged on to her Facebook account. Through a person who got hold of the phone, her photo then made its way to *Bagong Toro*'s lay-out artists, who verified that the person who had submitted was the owner of the photograph.[40]

Respondent, represented by the Office of the Solicitor General (OSG) maintains that the CA committed no reversible error. The OSG argues that Demata had ultimate discretion on whether to publish the photo. If indeed there was a person who illegally "hacked" AAA's Facebook account, his liability is separate from Demata's.[41] Furthermore, the OSG argues that the absence of cases against persons who may be similarly liable to Demata, e.g. the owner/publisher, the circulation manager, and the layout artists, does not absolve him of criminal liability.[42] For the OSG, child abuse under R.A. 7610 is *mala prohibita*; therefore, the prosecution need not prove the *mens rea* or intent behind the publication of AAA's picture.[43] Lastly, the OSG maintains that the courts *a quo*'s factual determinations did not disregard any evidence that might otherwise affect the results of the case. Thus, citing *Fernando v. Court of Appeals*,[44] the lower courts' determination that the material is obscene can no longer be disturbed.[45]

Issues

The petition raises the following issues:

1) Whether Demata was properly charged and convicted of selling and circulating the *Bagong Toro* issue of June 21, 2012;
2) Whether the other photographs of women and erotic stories contained in the tabloid may be considered obscene under Article 201 of the RPC; and
3) Whether Demata is guilty of creating conditions prejudicial to development of AAA, in violation of Section 10(a) of R.A. 7610.

Ruling of the Court

The petition is meritorious.

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39 Id.
40 CA *rollo*, pp. 30-31.
41 *Rollo*, p. 181.
42 Id. at 183.
43 Id.
44 Supra note 27.
45 *Rollo*, pp. 186.

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I. *<u>There is variance between the crime charged and the crime proved; Demata cannot be found guilty of selling or giving away the subject issue of Bagong Taro solely on the basis of his being the editor.</u>*

As held in *Fernando v. Court of Appeals*,[46] to hold a person liable under Article 201 of the RPC, the prosecution must prove two elements: (1) the materials, publication, picture, **<u>or</u>** literature are obscene; and (2) the offender sold, exhibited, published, **<u>or</u>** gave away such materials. That said, it bears clarifying that Article 201 consists of several distinct offenses that are mutually exclusive of each other. Even before it was amended by Presidential Decree (P.D.) No. 969, the said provision enumerates several offenders.[47] As it is currently worded, the provision punishes **public exponents or proclaimers** of doctrines contrary to public morals under paragraph 1. Paragraph 2(a) punishes: (i) **authors** who consent to the publication of their obscene literature; (ii) the **editors** who publish such literature; and (iii) the **owners or operators** of establishments who sell such literature. Meanwhile, paragraph 2(b) punishes **actors or exhibitors** of immoral acts, shows, plays, cinematographs, and the like. Paragraph 3 punishes **sellers, disseminators, or exhibitors** of morally offensive films, prints, engravings, sculptures, and literature.

Demata was charged and found guilty by the RTC with the act of "selling or circulating" obscene materials which is specifically punished under Article 201(3). Both the CA and the RTC attribute the offense to Demata because he has the "active charge and control over the publication" in his position as editor.[48] Citing *Tulfo v. People*,[49] the RTC ruled that just as a newspaper editor is culpable in libel cases, Demata should be responsible for the obscene photographs and literature published in *Bagong Toro*.

Upon perusal of the RTC's decision, however, it appears that there is no discussion of any fact relating to the act of selling or circulating. This raises the question of whether Demata may nevertheless be found liable under paragraph Article 201(2)(a) in accordance with the "variance doctrine," which allows the conviction of the accused for a crime which is different from but

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46 Supra note 27.

47 The original provision under Act No. 3815 is as follows:
Article 201. Immoral Doctrines, Obscene Publications and Exhibitions. – The penalty of *prision correccional* in its minimum period, or a fine ranging from 200 to 2,000 pesos, or both, shall be imposed upon:
1. Those who shall publicly expound or proclaim doctrines openly contrary to public morals;
2. The authors of obscene literature, published with their knowledge in any form, and the editors publishing such literature;
3. Those who in theaters, fairs, cinematographs or any other place open to public view, shall exhibit indecent or immoral plays, scenes, acts or shows; and
4. Those who shall sell, give away or exhibit prints, engravings, sculptures or literature which are offensive to morals.

48 *Rollo*, p. 55.

49 587 Phil. 64 (2008).

necessarily included in the crime charged.[50] This doctrine is embodied in Sections 4 and 5 of Rule 120 of the Rules of Court, to wit:

> Section 4. Judgment in case of variance between allegation and proof. – When there is variance between the offense charged in the complaint or information and that proved, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved which is included in the offense charged, or of the offense charged which is included in the offense proved.
>
> Section 5. When an offense includes or is included in another. – **An offense charged necessarily includes the offense proved when some of the essential elements or ingredients of the former, as alleged in the complaint or information, constitute the latter.** And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form part of those constituting the latter. (Emphasis and underscoring supplied)

Based on the above standards, We do not think that the offense of "selling or giving away" obscene materials is necessarily included in the act of "publishing" or *vice versa*. These are two completely different acts as indicated by the fact that P.D. No. 969 classified them under two different paragraphs. The two acts are not necessarily proven by the same evidence. There is no disputing that Demata was the editor of *Bagong Toro* but there is no evidence at all proving that he actually sold or circulated the subject *Bagong Toro* issue. Thus, the CA erred in affirming the RTC's judgment convicting Demata under Article 201(3) of the RPC. Therefore, although the prosecution was successful in proving that Demata was the editor of *Bagong Toro* in question, it would be a leap of logic to conclude that to infer that he also committed the act of selling or giving away the newspaper. In fact, there is uncontroverted testimony that *Bagong Toro* has a Circulation Department, headed by a circulation manager, which controls the circulation and sale of the newspaper and over which Demata has no control, *viz.*:

> DIRECT EXAMINATION BY ATTY. MARIO DIONISIO JR.: Q: What is your work in [the] publishing company?
>
> A: Ako po ay itinalaga bilang Editor-in-Chief. Ang trabaho ko ay taga-edit ng mga news article, yung mga nagdadala gn (*sic*) mga reports.
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> Q: By the way, what is the name of your publishing company, of this Bagong Toro tabloid?
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> A: Remate News Central.
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> Q: And who is the publisher?

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50 *People of the Philippines v. Caoli*, 815 Phil. 839, 882 (2017).

A: Baby Antiporda.[51]

Q: You said you are not assigned in selling of said, relating to said tabloid. **Could you please tell us who is in-charge in the sale and the publication of this tabloid?**

A: **Ang circulation department po naming kasi ang Circulation Department sila po yung namamahagi ng diyaryo doon sa mga ahente. And the, yung mga ahente naman yung nagpapakalat dun sa mga vendor nila. And then yun naming mga vendor sila naman yung nagbebenta sa mga mamimili.**

Q: Being an employee, according to you of that publishing company aside from your ordinary (sic) as editor-in-chief, do you have any participation in the act of selling or circulating that tabloid into the public?

A: **Wala po. Wala po akong ano diyan kasi sa kumpanya naming may kanya-kanya kaming department. Ang circulation po hindi po ako makialam diyan dahil ako'y editor lamang, taga-review lang ng gawa ng aming mga artiest and then, taga-edit ng mga news. Bawal po sa amin ang makialam sa trabaho ng iba.**

Q: By the way, who is in-charge in the circulation department?

A: Si Berna Predes ang assign diyan bilang circulation manager.

Q: Was she charged before this court for the same offense?

A: Hindi po siya kasama.

Q: How about your publisher was she charged by [AAA]?

A: Hindi rin po siya kasama.[52] (Emphasis and underscoring supplied)

II. ***The prosecution failed to prove with proof beyond reasonable doubt that Demata was the proximate cause of the selling or giving away of the Bagong Toro issue; to attribute criminal responsibility for said acts, solely on the basis of his being an editor, is scapegoating.***

It appears that, despite having the nominal title of editor-in-chief, Demata does not have unfettered control over the final contents of any given issue of *Bagong Toro*. Moreover, the June 12, 2021 issue was already printed

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51 Also referred to as "Beany Antiporda" in other portions of the records, *e.g.*, TSN dated February 13, 2015, p. 10.

52 TSN dated February 13, 2015, pp. 5-6.

by the press when it was submitted to him for review.[53] Furthermore, not only was he one of two editors-in-chief, but the publisher also directs what stories to include in a given issue.

> CROSS-EXAMINATION BY PROS. ROCILLE S. A. TAMBASACAN: x x x
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> Q: Can you please described (sic) what is the job description of an Editor-in-chief?
>
> A: I review the news of our reporters and then I also review the designs of our artists.
>
> Q: Review the designs of artists. Let's go to the review of news. I have noticed that the newspaper does not contain only news but lots of stories, right?
>
> A: Yes.
>
> Q: Now whose job is this to review the stories on the newspaper?
>
> A: We have proofreaders.
>
> Q: Proofreader, but the proofreader is only to check the grammatical errors, am I correct?
>
> A: Yes.
>
> Q: But the overall contents like if the story is not properly written, that is the subject to your review?
>
> A: Yes.
>
> Q: So in short, if you find that the material is not properly written, not in proper writing, you have to re-write, you have to correct it?
>
> A: Kasi may mga writer din kami, pagdating sa mga stories maliban sa news, sila na ang bahala doon. Kasi sila ang nakakaalam kung ano ang takbo ng istorya.
>
> Q: Okay. We go back, you as editor-in-chief, under you as editor-in-chief who's next to you?
>
> A: Actually, Maraming (sic) editor. Marami kasing ano eh. Sa isang diyaryo kasi hindi naman ako actually ang lahat, katulad ng mga showbiz, meron ding editor.
>
> Q: Okay. The newspaper has editor-in-chief, after the editor-in-chief, there are many editors, who's next to you?
>
> A: Katulad ko, sa diyaryo kasi naming, bukod sa amin, ah **dalawa lang kaming editor-in-chief.**

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53 TSN dated March 13, 2015, p. 8.

> **Q: You were the editor-in-chief as well as the other editor?**
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> A: Susunod yung mga reporter at yung mga tinatawag na contributor. x x x[54]
>
> Q: As editor-in-chief you can rewrite the stories in a different line?
>
> A: Sa tingin ko pwede, pero mayroong kasing tinatawag yan na, meron kasing mga writer na sila ang higit na nakakaalam kung ano yung ano doon.
>
> Q: But you are the editor-in-chief, you are the one on top, you have the control to change the stories?
>
> **A: Pwede naman, kaso nga lang eh yun din ang gusto ng publisher eh ano ang magagawa ko pag sinabing ganon ang gusto niya.**[55] (Emphasis and underscoring supplied.)

Demata testified, without rebuttal from the prosecution, that he was terminated by Antiporda, because the latter did not want the newspaper or the publishing company to be affected by the outcome of this case. He was originally represented by a lawyer from the company whose services was supplied by Antiporda. Upon knowing that Demata's employment was terminated and his connection with Antiporda severed, the said lawyer withdrew his representation.[56] Thus, ostensibly, other persons who have greater control in both the publication and selling of *Bagong Toro* may be responsible for the charges laid on Demata, and yet no other person or staff from *Bagong Toro* was indicted.

In light of the above, it is not unreasonable to think that Demata was a scapegoat. One legal scholar has identified four types of scapegoating.[57] The first is called a *frame-up,* which is "the process by which an innocent person is punished for what a guilty person has done."[58] The second type is *axe-grinding,* which is when "accusers conjure up – though not quite consciously – the scapegoat's role, which is decoupled from factual reality, to halt an untoward recurring activity x x x the accusatory motive is to correct a trend of utmost priority rather than resolve a discrete dispute as in the first type."[59] The third type is called a *patsy* which is when "the basis of responsibility [of the scapegoat] is real, but exaggerated, at least when adjudged against others similarly situated x x x accusers overstate a guilty scapegoat's responsibility by understating or ignoring what other guilty parties have done x x x [it] can occur where parties with a common scheme or design rely on division of labor to pursue their shared illegal purposes. Within that division of labor, those

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54 TSN dated March 13, 2015, pp. 3-4.

55 Id. at 17.

56 TSN dated February 13, 2015, p. 11.

57 Daniel B. Yeager, Earl Warren Professor, California Western School of Law. *Temptations of Scapegoating*, American Criminal Law Review Vol. 56: 1735-1757 (2019).

58 Id. at 1738, citing the case of *Gibbs v. City of New York*, No. 065112, (E.D.N.Y. Sept. 22, 2006).

59 Id. at 1741, referring to the case of *Eramo v. Rolling Stone*, 209 F. Supp. 3d 862 (W.D. Va. 2016) (No. 3:15-cv-23-GEC).

who control and profit most from the enterprise leave the dirty work to functionaries. An upshot of such hierarchy is that these functionaries, or bit players, end up taking the fall for behind-the-scenes masterminds."[60] The last type is called a *reckoning,* which appears to be a permutation of the "similar acts" rule under Section 35 of Rule 130 of our Rules of Evidence,[61] and occurs when "accusers seek a reckoning for a wrong they justifiably believe the scapegoat to have unjustifiably gotten away with. Put slightly differently, here scapegoats are being scapegoated for their own acts. This payback motive on the part of accusers is concealed so that the former event and the current punishment can be presented as unrelated. The payback punishment can be either harsher or milder than the punishment associated with the prior event."[62]

Scapegoating, as a defense, may not necessarily succeed in cases of conspiracy or if raised by an accomplice or accessory to the crime. In the future, there may be a case where this Court will have occasion to discuss the interplay of these concepts. But in relation to this case, what is clear is that scapegoating may invariably result in acquittal because it is antithetical to the principle of proximate cause. Arguably, the principle of proximate cause finds application in the law on torts, but we have applied it to determine the guilt or innocence of the accused as early as in the case of *People v. Almonte*,[63] and more recently in the case of *Dumayag v. Philippines*,[64] where We said:

> Proximate cause is defined as that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. And more comprehensively, the proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinary prudent and intelligent person, have reasonable ground to expect at the moment of his act or

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60 Id. at 1745-46. Yeager points to the infamous story of Private Eddie Slovik, "the only deserter executed in the American Army from the [American] Civil War through World War II – who was shot on January 31, 1945 by a firing squad at Sainte Marie aux Mines, France." Citing Guido Calabresi, many American soldiers deserted during the Battle of the Bulge. The American Army did not want such a grievous offense go unpunished, "but there were too many deserters and the Army did not want to shoot them all. So they decided that they would look for double deserters x x x and came up with Eddie Slovik x x x".

61 2019 Rules of Evidence, Rule 130, Section 35. Similar acts as evidence. – Evidence that one did or did not do a certain thing at one time is not admissible to prove that he or she did or did not do the same or similar thing at another time; but it may be received to prove a specific intent or knowledge, identity, plan, system, scheme, habit, custom or usage, and the like.

62 Yeager, supra note 57 at 1750-1751, citing the later civil judgment against O.J. Simpson as an example of a "reckoning" for previously "getting away with" the murder of Nicole Brown and Ronald Goldman. *See Goldman v. Simpson*, 160 Cal. App. 4th 255, 264–65 (2008); *Rufo v. Simpson*, 103 Cal. Rptr. 2D 492, 497 (Ct. App. 2001).

63 56 Phil. 54 (1931).

64 699 Phil. 328 (2012).

> default that an injury to some person might probably result therefrom.[65]

As observed by Professor Daniel B. Yeager (Prof. Yeager), "proximate cause reduces scapegoating by recognizing that some contributions to harm are too trivial to count as the most legally relevant variable in a harm-causing event."[66] As will be explained below, We do not think that the *Bagong Toro* issue in question is obscene. But even if it were, for the sake of argument, We think that the prosecution's case ultimately amounts to scapegoating of the third type: a *patsy*. The prosecution's case overstates Demata's responsibility and hangs it all on the fact that he holds the title of "editor-in-chief." That is not sufficient for a conviction, especially when there are lingering doubts as to how much control he had on the final contents of the newspaper and where, to whom, and how it would be sold or circulated.

III. ***Under the three-pronged test of Miller v. California, the prosecution failed to prove that the June 21, 2012 issue of Bagong Toro is not protected speech***

The case now turns on the whether the publication in question is protected speech. In the United States, the prevailing obscenity standard to determine whether material is protected under the First Amendment, the Philippine equivalent of which is Sections 4 and 5 of the 1987 Constitution,[67] is the three-prong test established in the case of *Miller v. California*.[68] In this case, Demata raises the defense that the lower courts' ruling consists of censorship or prior restraint of speech. In ruling that the material in question is obscene, both the RTC and the CA cited many of the seminal obscenity cases that this Court has had occasion to adjudicate and as outlined in *Fernando v. Court of Appeals*.[69] However, a recapitulation of these cases is necessary to show that over time, this Court adopted and developed differing tests of obscenity and in so doing, highlight the importance for the courts to adhere to a consistent standard.

The 1923 case of *People v. Kottinger*[70] appears to be the first obscenity case which this Court has passed upon. In that case, the premises of Camera Supply Co. were raided by a detective, yielding 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." J.J. Kottinger, the manager of Camera

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65 Id. at 339.

66 Yeager, supra note 57 at 1737.

67 1987 Philippine Constitution. Section 4. No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances.
Section 5. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

68 Supra note 33.

69 Supra note 27.

70 45 Phil. 352 (1923).

Supply Co., was prosecuted Section 12 of Act No. 277,[71] otherwise known as the "Philippine Libel Law." The question before this Court was whether said pictures were obscene or indecent. This Court referred to the test used in the American case of *United States v. Harmon*,[72] based on an indictment under a U.S. federal statute, the Postal Law, *viz.*:

> 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?** (Emphasis and underscoring supplied)

Thus, this Court made use of a "*community standards*" test and disposed of *Kottinger* as follows:

> 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 or 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.

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71 Act No. 277. Section 12. 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.

72 45 Fed., 414 (1891).

> 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.[73] (Emphasis and underscoring supplied)

The issue of what may considered "obscene" material under Article 201 of the RPC was then first discussed by this Court in *People v. Go Pin*,[74] a 1955 case of a Chinese citizen who was charged for exhibiting "a large number of one-real 17-millimeter films about 100 feet in length each, which are allegedly indecent and/or immoral." The *ponencia* in *Go Pin*, while not describing the contents of the film, formulated a standard where a publication is considered obscene depending on whether it has a mainly *artistic purpose* or a *commercial purpose*, *viz.*:

> **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 for 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.[75] (Emphasis and underscoring supplied)

Then in the 1957 case of *People v. Padan*,[76] this Court ruled that the publication or exhibition must not only be art *per se*, but also art with a "*redeeming feature*," *viz.*:

> We have had occasion to consider offenses like the exhibition of still moving pictures of women in the nude, which we have condemned for obscenity and as offensive to morals. In those cases, **one might yet claim that there was involved the element of art:** that connoisseurs of the same, and painters and sculptors might find inspiration in the showing of pictures in the nude, or the human body exhibited

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73 Supra note 69.
74 97 Phil. 418 (1955).
75 Id.
76 101 Phil. 749 (1957).

> in sheer nakedness, as models in *tableaux vivants*. **But an actual exhibition of the sexual act, preceded by acts of lasciviousness, can have no redeeming feature. In it, there is no room for art.**[77] (Emphasis and underscoring supplied)

In the 1985 case of *Gonzales v. Kalaw Katigbak*,[78] petitioners objected to the Board of Review for Motion Pictures and Television's (BRMPT) classification of the film *Kapit sa Patalim* as "For Adults Only." This Court wrestled with the question of what constitutes obscenity in relation to the constitutional mandate that the State shall be the patron of the arts and letters. The BRMPT, in accordance with Section 3(c) of Executive Order No. 876 (1963), which provides as follows:

> Section 3. The Board shall have the following functions, powers and duties:
>
> x x x x
>
> (c) To approve or disapprove, delete objectionable portions from, and/or prohibit the importation, expropriation, production, copying, distribution, sale, lease, exhibition and/or television broadcast of the motion pictures and publicity materials subject of the preceding paragraph, which, in the judgment of the BOARD **applying contemporary Filipino cultural values as standard**, are objectionable for being immoral, indecent, contrary to law and/or good customs, injurious to the prestige of the Republic of the Philippines or its people, or with a dangerous tendency to encourage the commission of violence or of a wrong or crime x x x (Emphasis supplied)

This Court ruled that Section 3(c) of Executive Order No. 876 should be construed in an "analogous manner" to the ruling in *Roth v. United States*,[79] which did away with the standard in *Regina v. Hicklin*[80] (or the Hicklin test) as too restrictive and replaced it with the following standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." As may be observed, what is new in this standard is the aspect of a "dominant theme." This Court then ruled that the BRMPT's perception of what constitutes obscenity appeared to be unduly restrictive. The BRMPT committed abuse of discretion because it was only after the petitioners sought remedy from this Court that it changed its classification of *Kapit sa Patalim as* "For Adults Only," without any deletions or cuts. Such abuse of discretion, however, was not considered grave enough.

In the 1989 case of *Pita v. Court of Appeals*,[81] the petitioner, the publisher of *Pinoy Playboy*, sought injunctive relief against law enforcement agencies who seized and confiscated magazines, publications, and other

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77 Id.
78 222 Phil. 225 (1985).
79 354 U.S. 476 (1957).
80 LR 3 QB 360 (1868).
81 258-A Phil. 134 (1989).

reading materials being peddled along Manila sidewalks. This Court traced the development of obscenity tests from *Memoirs v. Massachusetts*[82] to *Miller v. California*.[83] *Memoirs* clarified that under the *Roth* test, a work of literature may be censored as obscene if the following are proven: (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

In *Memoirs*, the US Supreme Court held that John Cleland's book *Fanny Hill* (or *Memoirs of a Woman of Pleasure*), like all other books, "cannot be proscribed unless it is found to be utterly without redeeming social value x x x even though the book is found to possess the requisite prurient appeal and to be patently offensive."[84] It was also in *Pita* that this Court first referred to *Miller v. California*,[85] which established the following three-prong test:

> (a) whether 'the average person, applying contemporary standards' would find the work, taken as a whole, appeals to the prurient interest x x x;
>
> (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

In *Pope v. Illinois*,[86] the US Supreme Court made the following clarification on the *Miller* test:

> **Only the first and second prongs of the Miller test – appeal to prurient interest and patent offensiveness – should be decided with reference to "contemporary community standards."** The ideas that a work represents need not obtain majority approval to merit protection, and the value of that work does not vary from community to community based on the degree of local acceptance it has won. The proper inquiry is not whether an ordinary member of any given community would find serious value in the allegedly obscene material, **but whether a reasonable person would find such value in the material, taken as a whole.**[87] (Emphasis and underscoring supplied)

It may be observed that the *Miller* test did not repudiate *Roth*, but merely refined what had already been established in *Roth* and previous cases. That said, this Court did not apply the *Miller* test in *Pita*. Indeed, this Court made no ruling on whether the seized magazines, publications, and reading

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82 383 US 410 (1966).
83 413 US 15 (1973).
84 *Memoirs v. Massachusetts*, supra note 82.
85 Supra note 33.
86 481 U.S. 497 (1987).
87 Id.

materials were obscene and instead granted the petition because the government failed to prove that the seizure sought to prevent a *clear and present danger.*

It was not until 2006, in *Fernando v. Court of Appeals*,[88] that this Court spoke again of *Miller v. California*. In this case, the petitioner sought the reversal of their conviction under Article 201 of the RPC, for the sale and distribution of pornographic magazines and VHS tapes. What is new in *Fernando* are the following observations of this Court:

> x x x [I]t would be a serious misreading of Miller to conclude that the trier of facts has the unbridled discretion in determining what is "patently offensive." 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. 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.[89]

This Court, in *Fernando*, however, did not apply to the Miller test *per se* in the disposition of the case. Rather, the case was decided based on the principle that "[f]indings 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."[90] This Court thus affirmed the CA's finding, based on the standards in *Go Pin*, that "the nine (9) confiscated magazines namely Dalaga, Penthouse, Swank, Erotic, Rave, Playhouse, Gallery and two 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.**"[91]

In 2006, this Court again referenced *Miller v. California* in the case of *Soriano v. Laguardia*,[92] which is a counterpart case of *Kalaw Katigbak.* The petitioner, the late Eli Soriano, sought to nullify the Movie and Television Review and Classification Board's decision to suspend him from his TV program, *Ang Dating Daan*, for allegedly obscene uttered on air.[93] This Court ruled that based on the *Miller* test, the utterances did not "constitute obscene but merely indecent utterances. They can be viewed as figures of speech or merely a play on words. In the context they were used, they may not appeal to the prurient interests of an adult."[94] Nevertheless, this Court denied

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88 539 Phil. 407 (2006).

89 Id., citing *Jenkins v. Georgia*, 418 U.S. 153 (1974).

90 Id. at 418-419.

91 Id. at 418. Emphasis supplied.

92 605 Phil. 43 (2009).

93 Id. The remarks: *Lehitimong anak ng demonyo; sinungaling; Gago ka talaga Michael, masahol ka pa sa putang babae o di ba. Yung putang babae ang gumagana lang doon yung ibaba, [dito] kay Michael ang gumagana ang itaas. o di ba! O, masahol pa sa putang babae yan. Sabi ng lola ko masahol pa sa putang babae yan. Sobra ang kasinungalingan ng mga demonyong ito.*

94 Id. at 98.

Soriano's petition because "language uttered in a television broadcast, without doubt, was easily accessible to the children. His statements could have exposed children to a language that is unacceptable in everyday use. As such, the welfare of children and the State's mandate to protect and care for them, as *parens patriae*, constitute a substantial and compelling government interest in regulating petitioner's utterances in TV broadcast x x x x"[95]

As may be easily gathered, at every turn, from *Kottinger* to *Soriano*, this Court had a different way of deciding obscenity cases. Of course, this may be because they are few and far in between or simply because the facts of each case differ too greatly. But the result is that there is no definitive obscenity standard that trial courts may readily refer to in deciding cases of this type. This is an observation that was not lost to the majority in *Miller* who remarked: "It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts." The statement has been proven to be true in our jurisdiction. It is no wonder that in the disposition of this case, the RTC and the CA appear to have adopted an uneasy mixture of standards. Thus, the RTC was partial to the *Roth* test vis-a-vis *Kalaw Katigbak,* viz.:

> x x x this Court is convinced that the contents of *Bagong Toro* tabloid are obscene. In so arriving at such a conclusion, the Court did not look only at the the photo of private complainant. It looks into the tabloid in its entirety. As held in *Gonzales v. Kalaw Katigbak,* obscenity should be measured in terms of the "dominant theme" of the material taken as a "whole" rather than in isolated passages. [96]

The RTC also found the material obscene based on two prongs of the *Miller* test when it ruled that the "article appeal to the prurient interest and they lack serious literary, artistic, political, or scientific value."[97] Meanwhile, the CA appears to have combined the *Miller* test and the ruling *Go Pin*, *viz.*:

> While it is true that the presence of semi-nudity and erotic stories is not sufficient to brand a publication as obscene, the photographs and articles published in Volume I Issue 224 of Bagong Toro when taken as a whole **lacks serious literary, artistic, political, or scientific value** and may be taken as **appealing only to the prurient interest.**
>
> Although mainstream publication such as Playboy and FHM Magazine also feature similar stories and photographs, it must be noted that the stories and photographs published in these magazines are presented in an artistic manner. Appellant [Demata] cannot find cover in the protection enjoyed by these mainstream publications because the photos as well as the articles in Bagong Toro are presented in a manner that **do not reflect any artistic or literary value**. The tabloid even featured still frames from a sex tape involving a hollywood actor and his paramour. The

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95 Id. at 106.
96 *Rollo*, p. 100.
97 Id. at 102.

> inclusion of these still frames in the news write-up about the said affair did nothing but **satisfy the market for lust and lewdness.**
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> Moreover, the intentional use of unconventional terms to refer to the genitalias of both men and women as well as to different sexual acts can be viewed as **patently offensive and appealing only to prurient interest.**
>
> Clearly, the incorporation of photos of scantily clad women and sexually arousing stories in what was alleged to be a newspaper of general circulation, **served no other purpose but to boost its sales** by appealing to the lust of their would-be readers.[98] (Emphasis and underscoring in the original)

No obscenity standard has replaced *Miller* since its adoption by the US Supreme Court in 1973. Over the decades, it has had an enduring presence in American jurisprudence and appears to be the logical culmination of our own jurisprudential trend. Thus, whether a given material is obscene or constitutionally protected speech shall be decided on the following three-prong test adopted from *Miller v. California* and as clarified in *Pope v. Illinois*:[99]

> a) whether the average Filipino, applying contemporary community standards, would find the material as appealing to prurient interests;
>
> b) whether, applying contemporary community standards, the material describes or depicts sexual conduct in a patently offensive way; **and**
>
> c) whether the average Filipino would find the material, taken as a whole, as seriously lacking literary, artistic, political, or scientific value.

Citing *Mishkin v. New York*,[100] the US Supreme Court said in *Miller* that the "primary concern requiring [the trier of fact] to apply the standard of the average persons, applying contemporary community standards' is to be certain that, so far material is not aimed at a deviant group, it will **be judged by its impact on an average person, rather than a particularly susceptible or sensitive person – or indeed a totally insensitive one.**"[101] Thus, under this prong of the *Miller* test, the prosecution is not obligated to offer evidence of "national standards." To paraphrase the majority opinion in *Miller*, our Constitution does not require the B'laan people of Lake Sebu to accept public depiction of conduct found tolerable in the streets of Malate or Cebu. The identification of who the "average Filipino" is and the applicable community standards in any given obscenity case is critical considering the diversity of worldviews, social mores, educational attainment, and other factors that may

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98 Id. at 54.
99 481 U.S. 497 (1987).
100 383 U.S. 502, 508-509 (1966).
101 Id. Emphasis supplied.

shape one's view of what is obscene. Without knowing who the average Filipino is and the community standards to apply, how can the trier of fact decide what is prurient without unbridled discretion? Would Overseas Filipino Workers recently repatriated from Western countries share the same view? Would not a writing fellow in a university town in Negros Oriental consider the stories as legitimate forms of erotica? If the stories had been written in English or Cebuano, would they be less or more prurient? These examples may be outliers, but they highlight the need for the trier of fact to resist the temptation of assuming or imagining the "average" Filipino in each obscenity case.

The RTC's judgment was premised on its observation that private complainant was "conservatively raised as a moslem."[102] However, there is no factual or legal reason why the RTC should have considered the "average" Filipino as a conservative Muslim. The evidence simply does not sufficiently characterize the average Filipino as such. Furthermore, to hold otherwise would be to indirectly violate the non-establishment of religion clause under the Constitution. To be clear, this does not mean that our legal system is hostile to religion or to Muslim views on obscenity.

In *Estrada v. Escritor*,[103] We held that in this jurisdiction, We adhere to the "benevolent neutrality" theory of the separation of church and state and the non-establishment clause. Such a theory "recognizes the religious nature of the Filipino people and the elevating influence of religion in society; at the same time, it acknowledges that government must pursue its secular goals," one of which is the application and enforcement of penal laws. The outcome of this case may well be different had the facts been localized in a Muslim community and the prosecution was able to prove what standards that community holds. It is precisely because of benevolent neutrality, however, which prevents this Court from adopting the view of a particular religious community in determining standards of obscenity for purposes of Article 201 of the RPC considering that *Bagong Toro* is sold and circulated in the entire nation – not just to a specific community of a particular religious conviction. The evidence on record does not show that the community standards that the whole country (or even the citizens of Manila, a metropolitan area, where this case was instituted and tried) adheres to is characteristically that of a conservative Muslim. In the absence of facts on record, even the widely held notion that most Filipinos are Catholics would neither be a proper nor sufficient reason to hold that conservative and/or religious community standards should be applied in this case.

Since the prosecution failed to identify who the average Filipino is or establish the applicable community standards, the RTC and the CA had no sufficient basis to rule that the newspaper appealed to prurient interests.

Under the second prong of the *Miller* test, "no one will be subject to prosecution for the sale or exposure of obscene materials unless these

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102 Id. at 100.

103 A.M. No. P-02-1651, August 4, 2003.

materials depict or describe patently offensive 'hard core' sexual conduct **specifically defined by the regulating state law, as written or construed.**"[104] The importance of the "patent offensiveness" element is made even more so in this case because neither the Revised Penal Code nor P.D. No. 969 specifically defines what may be considered as "hard core."

In this case, the RTC conceded that "the subject photo is not obscene by itself as private complainant was wearing a shirt and short[s];" however, it considered the "entirety of the tabloid" as obscene,[105] not only because Demata was charged with the sale and circulation of private complainant's photo, but also of "nude and semi-naked women in uncompromising, scandalous and the sexually enticing poses and illustrated stories."[106]

There is no arguing that the *Bagong Toro* newspaper depicts or describes sexual conduct and displays the female body, but there is grave doubt as to whether it did so in a "patently offensive" manner. True, the women in the photographs can hardly be described as having puritanical modesty, but it is not patently offensive for them to wear low-cut swimwear. There is also serious doubt that the stories are "patently offensive" as they are, for the most part, couched in innuendos. The authors alluded to the reproductive organs using terms that are not sexual in and of themselves, *e.g.*, "*hiyas*" or "*alaga.*"[107] Consistently, the newspaper even blurred out images of what purported to be scenes from a sex tape of a celebrity. It leaves much to the reader's imagination as to how the images really appear had they not been blurred. As such, these do not fit the "hardcore" pornography considered as "patently offensive" in *Miller* and as affirmed in *Fernando*. For these reasons, We do not think that *Bagong Toro*'s depiction of sexual matters is "patently offensive."

Finally, it has not been sufficiently proven that taken as a whole, the *Bagong Toro* issue is seriously lacking literary, artistic, or political value. The issue consists of 12 pages, not all of which are devoted to pictures of women or novellas. It also has sections on news, comics, commentary, showbusiness gossip, leisure (puzzles), and health.[108] Both the RTC and the CA did not discuss how the newspaper should be taken as a whole, taking into consideration its other contents. It is as if the lower courts took a tunnel-vision approach, focusing only on the pages where stories and the pictures of the women appear.

Again, there is serious doubt that the *Bagong Toro* paper was evaluated from the perspective of the average Filipino. A patron of BusinessWorld or the literature student steeped in the works of Nabokov or Dostoevsky might perhaps consider the *Bagong Toro* entirely trite. But who is to say that the ordinary man, having toiled the whole daily under the sun and in the city

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104 *Miller v. California*, supra note 33.
105 *Rollo*, p. 97.
106 Id.
107 Id. at 100-101.
108 Records, pp. 63-74.

smog, would not find some leisurely respite or tidbits of knowledge from the various sections of the paper? The trier of fact ought to have established this, but unfortunately, it had not.

We reaffirm the primacy of the RTC, as the trier of fact, to judicially determine what is obscene in any given case. However, as We had ruled in *Fernando*, its discretion is not unbridled. We have thus underlined that the exercise of such discretion must be within bounds of the *Miller* test as submitted above. In this instance, We hold that the RTC and the CA utterly lacked factual or legal bases to rule that the *Bagong Toro* is not constitutionally protected speech. Therefore, such ruling deserves reversal.

IV. *Demata is not guilty of violating Section 10(a) of R.A. 7610*

The courts *a quo* found Demata liable under Section 10(a) of R.A. 7610 because by allowing the publication of AAA's picture in the newspaper without her consent, he supposedly caused conditions prejudicial to her development. We do not think the records support this conclusion.

To begin with, it was not uncontroverted that Demata and the layout artists believed, albeit erroneously, that they had AAA's consent to publish her picture. On this point, We see no material contradiction in Demata's statement in his counter affidavit, where he had said that he acquired the photo from someone "who introduced themselves as the friend of the person in the photo,"[109] and in his testimony that photo was emailed to the newspaper by a reader who wished to be a contributor.[110]

Thus, as it turns out, Demata may have been a victim of deception by whomever took possession of AAA's phone, illegally accessed her Facebook account, and then, posing as AAA, submitted the photo to the *Bagong Toro* layout artists. Could the newspaper have been more diligent in verifying the identity of the contributor? Perhaps, but that would be beside the point and may form a basis for an entirely different cause of action against the newspaper. As things stand, both AAA and the newspaper were victims of an identity thief.

Furthermore, the mere fact that Demata was the "editor-in-chief" of the newspaper is too remote a cause to ascribe criminal liability under R.A. 7610. This Court has previously applied the concept of *remote cause vis-à-vis proximate cause* in such criminal cases as *Urbano v. IAC*[111] and *People v. Villacorta*,[112] where We acquitted the accused of the crime charged because the harm was not the direct, natural, and logical consequence of the accused's

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109 Id. at 78.
110 TSN dated February 13, 2015, p. 7.
111 241 Phil. 1 (1988).
112 672 Phil. 712 (2011).

actions. In both cases, We cited our ruling in *Manila Electric Co. v. Remoquillo*,[113] *viz.*:

> A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the instances which result in injury because of the prior defective condition, such subsequent act or condition is the proximate cause.[114]

As explained above, this Court has lingering doubts as to how much editorial control Demata had over the newspaper. As far as the records show, this Court can only conclude with moral certainty that Demata was "editor-in-chief" only in name. This is not enough to rule that he was the proximate cause of AAA's PTSD.

Furthermore, the first of clinical abstracts prepared by Dr. Bascos[115] was issued on October 12, 2012, almost four months after the publication and two months after AAA's brother showed the *Bagong Toro* newspaper to the family. That there was a two-month interim between the publication and BBB's discovery of the paper – and another two-month interim between that and the first psychological consultation – are further reasons to believe that it was not the publication itself which necessarily or directly caused AAA's PTSD. In fact, Dr. Bascos testified that it was AAA's emotional response to exposure to the publication – and therefore not the publication *per se* – which caused her disorder:

> DIRECT EXAMINATION BY PROS. SIOSANA: x x x
>
> Q: Would you be able to get again the root of this traumatic distress disorder of the private complainant in this case?
>
> A: In [AAA's] case, it was severe emotional trauma that she experienced when exposed to that publication.[116]

Furthermore, it is not unreasonable to believe that the sudden revelation of the publication to her by her brother, the ensuing confrontation with her parents, the bullying from some of AAA's classmates, the uncalled-for remarks of one of her teachers, the anger of her relatives, her uncle's sudden withdrawal of financial support for her education all worked towards creating an emotionally tenuous atmosphere around AAA that was prejudicial to her

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113 99 Phil. 118 (1956).
114 Id.
115 Records, pp. 57, 432-438.
116 TSN dated July 1, 2014, p. 29.

development. The people in AAA's school and family are not automatons and therefore, their actions cannot be causally linked to Demata.

Moreover, We do not agree with the OSG's position that all offenses punished under R.A. 7610 are *mala prohibita*. In *Dungo v. People*,[117] We discussed the distinction between *mala in se* and *mala prohibita* as follows:

> Criminal law has long divided crimes into acts wrong in themselves called acts *mala in se*; and acts which would not be wrong but for the fact that positive law forbids them, called acts *mala prohibita*. **This distinction is important with reference to the intent with which a wrongful act is done. The rule on the subject is that in acts mala in se, the intent governs; but in acts mala prohibita, the only inquiry is, has the law been violated? When an act is illegal, the intent of the offender is immaterial.** When the doing of an act is prohibited by law, it is considered injurious to public welfare, and the doing of the prohibited act is the crime itself.
>
> **A common misconception is that all mala in se crimes are found in the Revised Penal Code (RPC), while all mala prohibita crimes are provided by special penal laws.** In reality, however, there may be mala in se crimes under special laws, such as plunder under R.A. No. 7080, as amended. Similarly, there may be mala prohibita crimes defined in the RPC, such as technical malversation.
>
> The better approach to distinguish between mala in se and mala prohibita crimes is the determination of the inherent immorality or vileness of the penalized act. If the punishable act or omission is immoral in itself, then it is a crime mala in se on the contrary, if it is not immoral in itself, but there is a statute prohibiting its commission for reasons of public policy, then it is mala prohibita. In the final analysis, whether or not a crime involves moral turpitude is ultimately a question of fact and frequently depends on all the circumstances surrounding the violation of the statute.[118] (Emphasis and underscoring supplied)

Based on the foregoing, this Court holds that the offense of creating "conditions prejudicial to the child's development" is not *mala prohibita*, for there may instances where the child finds himself/herself in that situation without the willful intent of the adults around him or her. For example, failure to send a child to school would certainly be prejudicial to his/her development, but if it was because the child lived in a remote area under the care of an unemployed and financially struggling single parent, the latter may not necessarily be convicted under Section 10(a) of R.A. 7610. The same may not necessarily be said of parents who are well-off but intentionally deprives education for their children just so that they could always have someone to order around the house. This is the same principle that underpins cases where

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117 762 Phil. 630 (2015).

118 Id. at 658-659.

this Court found the accused guilty of slight physical injuries instead of child abuse because the circumstances did not show the act was not intended to debase, degrade, or demean the intrinsic worth and dignity of a child as a human being.[119]

In the same vein, there is a burden upon the prosecution to prove how and why the act was intended to result in the conditions prejudicial to the child's development. We do not think that such intent was duly proven by the prosecution in this case. *First*, it is clearly unacceptable to include the photo of a minor in a paper that is decidedly for adult consumption, **if the publisher has previous knowledge that the photo is that of a minor**. However, the prosecution failed to prove that Demata knew that AAA was an underaged student. *Second*, Demata believed sincerely – although wrongly – that the newspaper had acquired AAA's consent to publish the photo. *Third*, he could not have known nor foreseen the events that would occur in consequence. Thus, while this Court sympathizes with AAA, We cannot, in good conscience, find Demata guilty of violating Section 10(a) of R.A. 7610.

Ideally, people should be free to share their pictures online without fear that it would fall in the wrong hands and taken advantage of. The great benefits brought about by the digital age are accompanied by unique dangers. We do not blame AAA for her plight, and We do not wish that her case be repeated with other children whose parents are increasingly under pressure to proactively provide guide them in maneuvering the digital space. Thus, this Court reiterates its exhortation in *Vivares v. St. Theresa's College*,[120] that "information, otherwise private, voluntarily surrendered [on online social networking] sites can be opened, read, or copied by third parties who may or may not be allowed access to such" and that "uploading any kind of data or information only [will inevitably] make it permanently available online, the perpetuation of which is outside the ambit of [the uploader's] control."[121]

WHEREFORE, the petition is **GRANTED**. The Decision dated September 28, 2016 and the Resolution dated November 29, 2016 in CA-G.R. CR No. 37864 are hereby **REVERSED** and **SET ASIDE**. Petitioner Even Demata *y* Garzon is hereby **ACQUITTED** of violating Article 201(3) of the Revised Penal Code and Section 10(a) of Republic Act No. 7610.

SO ORDERED.

ROSMARI D. CARANDANG
Associate Justice

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119 *Escolano v. People*, G.R. No. 226991, December 10, 2018, citing *Jabalde v. People*, 787 Phil. 255, 269-270 (2016).

120 744 Phil. 451 (2014).

121 Id. at 479.

WE CONCUR:

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

AMY C. LAZARO-JAVIER
Associate Justice

RODIL V. ZALAMEDA
Associate Justice

RICARDO R. ROSARIO
Associate Justice

ATTESTATION

I attest that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

MARVIC MARIO VICTOR F. LEONEN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, I certify that the conclusions in the above Decision had been reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

ALEXANDER G. GESMUNDO
Chief Justice