09/77

SUPREME COURT OF VICTORIA

FAGG & ANOR v CAULFIELD & ANOR

Murphy J

16 July 1976

CRIMINAL LAW – EXHIBITING OBSCENE PICTURES OR MOVIES IN PUBLIC – FINDING BY MAGISTRATE THAT LOCATION WAS "A PLACE TO WHICH THE PUBLIC HAS ACCESS" – MEANING OF THAT EXPRESSION – FINDING BY MAGISTRATE THAT EXHIBITING THE MOVIE CONSTITUTED THE EXHIBITING OF AN OBSCENE ARTICLE – CHARGES FOUND PROVED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *POLICE OFFENCES ACT* 1958, S166(1)(d).

The defendants were charged with the exhibition of obscene articles in a place to which the public had access. The location was a football pavilion connected with the Geelong West Cricket and Football Association and the two police informants were present during the showing of the films. The Magistrate in finding the charges proved found that the pavilion was a place to which the public had access because of the fact that the two police officers were present. Upon order nisi to review—

HELD: Order absolute. Convictions quashed.
1. The finding by the Magistrate in relation to the fact that the two police officers were present did not necessarily follow. It was important to consider s166 of the 1958 ('Act') in its context.

2. The phrase "Any place to which the public has access" may mean a place to which the public, in fact, can go as a matter of right or as a place to which the public has the means of access and could go it if chose to do so. It appears to be extremely debatable whether, on the facts of this case, it was open to the Magistrate to conclude that the pavilion in question at the relevant time, in the circumstances, including the looked doors and all other attendant circumstances with relation to obtaining entry therein, could be held to have been a place to which the public had or has access within the meaning of s166(1)(d) of the Act. This question must be decided as a matter of fact and the answer will depend upon matters of degree. It is a matter of law whether there was any evidence which would enable a Magistrate to decide that the place was, at the relevant time, a place to which the public has access.

3. The words "other representations" in their context include movie films, or films, or cinematograph displays, particularly as the legislature has referred to these specifically in s168(a) It follows that as these defendants were charged with an offence against s166(1)(d) or for aiding and abetting the commission of an offence under that section, and they were not charged under s168, they were wrongly convicted. Therefore, on the second ground upon which the orders nisi were granted in this case, the orders nisi are made absolute and the convictions quashed.

MURPHY J: These orders to review numbering 32 in all were heard together. Mr Alston of Counsel appeared for the four defendants to move the orders absolute. Mr Ostrowski for Counsel for the informants appeared to show cause. The defendants to the 32 informations have been charged with offences against the *Police Offences Act* 1958. The charges all arose from the showing of what were admittedly obscene moving pictures or moving films in a football pavilion in Geelong on the 21st August 1974.

Each offence alleged was found proven by the Magistrate who recorded a conviction against each defendant on one charge and fined the defendants sums ranging from $500 to $200. In respect of each defendant the other charges were adjourned for six months. The orders to review these convictions were, by consent, heard together. Sixteen of the offences charged were that the defendants Caulfield and Jasinsky did exhibit an obscene article, namely, a movie film, contrary to s166(1)(1) of the *Police Offences Act*. The further sixteen of the offences charged were that the defendants Thompson and Murnane did aid and abet Caulfield and Jasinsky to exhibit the said films contrary to s77 of the *Justices Act*.

The sole grounds raised on each of the Orders nisi to review were:

1. That the Stipendiary Magistrate was wrong in law in holding that the place at which the obscene movie film was exhibited was a place to which the public had access within the meaning of s166(1)(d) of the *Police Offences Act* 1958.

2. That the Stipendiary Magistrate was wrong in law in holding that the exhibiting of the obscene movie film constituted the exhibiting of an obscene article within the meaning of the said section.°

Section 166(1)(d) of the *Police Offences Act* 1958 as amended by several Acts up to and including Act 8433 of 1973 (see reprint No. 3) reads:

"Every person who exhibits any obscene article in a public place or any other place to which the public has access shall for a first offence be liable to a penalty, etc."

It was Act No. 8433 that came into effect on 17th April, 1973, which first inserted in s166, sub-s(1)(d). There is in the Act no definition of "place to which the public has access" but there is a definition of the words "public place".

Mr Ostrowski rightly points out that this section was added to the Act after many decisions as to the meaning of the words "public place" had been given. So many indeed that in *Ward v Marsh* [1959] VicRp 5; [1959] VR 26; [1959] ALR 233 Lowe J referred to them as a wilderness of single instances. However, the words "public place" are defined in the *Police Offences Act* 1958, s3, and clearly, in my view, the definition confines those words to the highway and its connotations. (see *Dilworth v The Commissioner of Stamps* (1899) AC 99 at 105-6; 15 TLR 61).

The definition in the old *Vagrancy Act* had also included in it many other places including "a place of public resort", but this definition is not now applicable to the *Police Offences Act*. The first point then is to decide what the statute means when it uses in s166(1)(d) the words "or any other place to which the public has access". At first sight, one might think, as the Magistrate apparently thought, that if a member of the public could enter the place at the time in question then that place was "any other place to which the public has access". For the Magistrate appears to have found that as the two policemen were present during the showing of the obscene films and they were "total strangers" to the Geelong West Cricket and Football Association, the pavilion at the relevant oval was a place to which the public had access at the relevant time. However, I do not think that this necessarily follows at all. It is important to consider s166 in its context. Section 168 following shortly after contains a sub-section which specifically prohibits the exhibiting in a picture theatre or in a place of public resort, any film or cinematographic display which is of an indecent or obscene nature or is of a disgusting nature.

On the hypothesis that the exhibiting of an obscene movie film is encompassed by the prohibition contained in s166(1)(d), it would follow that the legislature has prohibited such exhibition in a public place (see s166(1)(d) and s3 of the *Police Offences Act*) and in any other place to which the public has access (see s163(1)(d)) and then gone on to prohibit the exhibiting of such a film in a picture theatre or in a place of public resort. If "any other place to which the public has access" has the meaning which Mr Ostrowski submitted that it has, then it would be much wider than "a place of public resort" and would encompass the same area.

This conclusion would render s168, or at least part of it mere tautology, for it could have no greater effect than was already provided for in s166(1)(d). "Any place to which the public has access" may mean a place to which the public, in fact, can go as a matter of right or as a place to which the public has the means of access and could go it if chose to do so. In any case it appears to me to be extremely debatable whether, on the facts of this case, it was open to the Magistrate to conclude that the pavilion in question at the relevant time, in the circumstances, including the looked doors and all other attendant circumstances with relation to obtaining entry therein, could be held to have been a place to which the public had or has access within the meaning of s166(1)(d).

I agree with Mr Ostrowski that this question must be decided as a matter of fact and the answer will depend upon matters of degree. It is a matter of law whether there was any evidence which would enable a Magistrate to decide that the place was, at the relevant time, a place to which the public has access.

However, the apparent reasoning of the Magistrate, namely, that the pavilion was a place to which the public has access, simply because two policemen, whether by some subterfuge or without subterfuge got into the building being "total strangers" to the Geelong West Cricket and Football Association, appears to me to be incorrect. As I am persuaded that, as a matter of statutory interpretation, the obscene movie films were not articles within the meaning of s166(1)(d) it appears, in any event, unnecessary in this case to decide whether I should send this matter back to the Magistrate for further consideration of these matters of fact in the light of the law as would be set out in my judgment. Section 3 in the *Police Offences Act* defines articles to include "books, papers, newspapers, pamphlets, magazines, periodicals, letterpress writings, prints, pictures, photographs, lithographs, drawings, statues, figures, carvings, sculptures and other representations and also includes records." Here again because of the context, I am inclined to the view that this definition is an exclusive definition rather than merely a definition including in the meaning of the word "articles" things which one would, perhaps, not normally consider to be articles. (See again the Privy Council decision referred to above and *Dunn v Brown* [1923] VicLawRp 6; [1923] VLR 34)

The definition has been extended from time to time, as Mr Ostrowski kindly pointed out to me by referring me to its statutory history, but since 1912 the present definition appears to be used. The words "or other representations" appeared in the earlier English Statute 20-21 Vic. 83 of 1857 and the 1876 Statute Act No. Vic. 40. The words appear in the statute before the words "statues, figures, carvings, sculptures" were added to the definition. In those early days the words were "or other representations". Now the words are "and other representations".

There has been some debate before me as to the meaning of the word "representation" and dictionary meanings have been submitted to me. Mr Ostrowski submitted that the word should be a matter of statutory interpretation taken to mean the act of presenting to the mind or imagination, a meaning which according to the *Oxford Dictionary* was attributed to it in 1636. The *Oxford Dictionary* also contains definitions such as follows; (1): An image likeness, or reproduction in some manner of a thing. (2) A material image, or figure. It appears to me that the words "and other representations" can readily be attached to the words, "pictures, photographs, lithographs, drawings, statues, carvings, sculptures and other representations". The fact that the words, "And also includes records" have been inserted after the words, "And other representation" appears to me to highlight what I consider to be the necessary feature of the preceding words, namely that they are all of an apparent and permanent nature and of a static nature. This interpretation is in my view also reinforced by a consideration of s166 itself. For it is clear from that section that the legislature has turned its mind to films and cinematograph displays. Section 168(a) appeared in the Act before s166(1)(d) was inserted in the Act. Had it been intended that articles as defined in s164 should include films and/or cinematograph display, it appears to me highly likely that they would have been included among the many words set out in that definition. One therefore can be assisted by the application of the principle *espressio unius exclusio alterius*. I cannot see that "other representations" in their context include movie films, or films, or cinematograph displays, particularly as the legislature has referred to these specifically in s168(a) (see also *Gooden v Davies* [1934] VicLawRp 25; [1934] VLR 143; [1934] ALR 177 and *Gooden v Herkes* [1934] VicLawRp 47; [1934] VLR 258 at pp260-261; [1934] ALR 310).

It follows in my opinion that as these defendants were charged with an offence against s166(1)(d) or for aiding and abetting the commission of an offence under that section, and they were not charged under s168, they were wrongly convicted. Therefore it is my view that on the second ground upon which the orders nisi were granted in this case, the orders nisi should be and are made absolute, and the convictions quashed.

(Discussion ensued with reference to costs.) I order that the defendants costs be taxed on each one of these orders nisi and when taxed paid by the informant, such costs to be limited to the sum of $200 on each order nisi. I grant to the informant an indemnity certificate pursuant to the provisions of the *Appeals Cost Fund Act*.
