**10/77**

## SUPREME COURT OF VICTORIA — FULL COURT

# *PRESWELL v BAUGHURST*

**Young CJ, Barber and Nelson JJ**

**18, 19 November, 7 December 1976 — [1977] VicRp 22; [1977] VR 193**

**CRIMINAL LAW – OBSCENE ARTICLES (MOVIE FILMS) KEPT FOR GAIN – CHARGES LAID – DEFENDANT CONVICTED – MEANING OF 'ARTICLES' – WHETHER A FILM IS AN 'ARTICLE' – NO PROSECUTION TO BE TAKEN WITHOUT WRITTEN AUTHORITY – WHETHER THE WORD "PUBLICATION" INCLUDES A FILM – WHETHER MAGISTRATE IN ERROR: *POLICE OFFENCES ACT* 1958, S166(1).**

**HELD: Order nisi discharged.**

**1. A film as a series of photographs falls within the definition of "articles" to which s166 of the *Police Offences Act* 1958 ('Act') applies.**

***Fagg & Anor v Caulfield & Anor*, MC09/77, overruled.**

**2. A publication for the purposes of Div 1A of the Act is limited to objects which have a quality of being printed, in the sense of being reproduced on paper or the like. The word "photograph" in the definition of "publication" can be so interpreted without doing violence to its natural meaning and should be so interpreted. It therefore does not include a film for the purposes of this Division. In Div.1, however, there is no similar limitation, arising either from the words used in the definition of "articles" or from the purpose of the Division, which should be imposed upon its meaning and no anomaly or inconsistency consequently follows from its bearing a different sense in the two Divisions.**

**3. The order sought to be reviewed cannot therefore be successfully challenged.**

**The Full Court (Young, CJ, Barber and Nelson JJ)** delivered the following judgment: This is the return of an order nisi to review an order made by a Magistrates' Court, which was referred to this Court for hearing and determination. The Magistrates' Court had convicted the defendant upon an information that he, being the owner of obscene articles, to wit, a number of movie films, did knowingly keep such obscene articles for the purpose of gain. The offence is created by s166(1)(b) of the *Police Offences Act* 1958. The first two grounds upon which the order nisi had been granted raise the question as to whether a movie film is an "article" for the purposes of s166(1)(b). The relevant sections of the Act are contained in Pt V which is headed "Obscene and Indecent Publications". In Div. 1, which includes s166, s164(1) provides:

> "In this Division unless inconsistent with the context or subject-matter—
> 'Articles' includes books papers newspapers pamphlets magazines periodicals letter-press writings prints pictures photographs lithographs drawings statues figures carvings sculptures and other representations and also includes records."

"Records" are defined in terms of gramophone records and other things by which words or sounds are recorded and from which they are capable of being reproduced.

S166(1), which it is unnecessary to set out in detail, makes the keeping for the purpose of gain or the selling, publishing, distributing or other specified treatment of obscene articles an offence.

The Division also creates offences in regard to specified objects including films, pictures, printed or written matter, records, advertisements, articles concerned with sexual behaviour and postcards, some of which are specifically mentioned in the definition of "articles" in s164 and some of which are not. The penalties prescribed for the same type of behaviour in relation to a number of such specified objects vary considerably. For example, the penalty prescribed under s166 for a first offence of selling or exhibiting in a public place an obscene article is not more than $1000 or imprisonment for a term of not more than 12 months; although "picture" and "record" and, one would think, clearly "printed or written matter" are included in the definition of "article", the penalties under s168 and s169 for similar offences in respect of these objects are not more than $200 or imprisonment for not more than 12 months or three months respectively

(cf. s172); for similar offences under s177 in respect of postcards, the penalty is not more than $50 or imprisonment for not more than six months. "Postcards" are not referred to specifically in the definition of "articles" but could clearly be "photographs" or "pictures" or "drawings" or "other representations".

Prosecutions for some offences cannot take place without the consent or authority of some officials, of varying status; other offences can be prosecuted without any such consent or authority. There are many other anomalies and apparent inconsistencies and duplications disclosed in an examination of the various sections. The explanation, no doubt, is that the Division has resulted from a patchwork of amendments over the years and the incorporation of sections or parts of sections introduced by or from statutes on other subject matters, i.e., the *Crimes Act* and the *Venereal Diseases Act* 1916. The Division and, indeed, the whole of Pt V of the Act is long overdue for complete overhaul to provide a consistent and intelligible scheme for regulation of obscene articles. In its present state, it is very difficult to draw any conclusions as to the meaning to be attributed to a particular word or expression in some sections or as to the scope of any particular section by referring to the use of the same word or expression elsewhere in the Division or Part. The history of the legislation does, however, give some assistance.

It is unnecessary to commence a review of the history at any earlier stage than the *Police Offences* Act 1890 and we intend to limit our review to such parts of the history as may give some assistance upon the matter before us. Pt V of the *Police Offences* Act 1890, which was headed "Obscene Publications", commenced with s77, which was the forerunner of the present s165. Briefly summarized, it provided that, upon complaint that any obscene "books papers newspapers pamphlets magazines periodicals letter-press writings prints pictures photographs lithographs drawings or other representations" were kept in any house or other place for any of a number of purposes, which were all associated with gain, a police magistrate, on being satisfied of certain facts including the character and description of "such articles", could authorize their seizure and destruction. S78, which was the forerunner of the present s166, provided that certain persons, who had dealt in certain ways with "such obscene articles", were liable on conviction to certain penalties. It is clear that the articles in relation to which s78 applied were the articles specified in s77. It is unnecessary to refer to the other sections which were then contained in Pt V of the Act since they do not touch the question we are considering.

The *Police Offences Act* was again consolidated in 1912 (Act No. 2422), when a number of sections which had up to that time appeared in the *Crimes Act* were incorporated into Pt V of the Act. These sections dealt with any picture or advertisement or printed or written matter of an obscene or indecent nature. One of the sections (s172) provided that any picture or advertisement should, for the purpose of the sections, be deemed to be of an indecent and obscene nature if it referred to syphilis, gonorrhoea or certain other matters. Another one of the sections (s173) created the offences which are now in substantially the same terms created by pars (b) and (c) of the present s168. The same sections under the same numbers were contained in the 1915 consolidation of the Act.

By Pt II of the *Venereal Diseases Act* 1916 (Act No. 2858), s173 of the *Police Offences Act* 1915 was amended to include within its scope any persons who exhibited in any picture theatre or place of public resort any film or cinematograph display which was of an indecent or obscene nature (see s168(a) of the present Act). It was in this state of the statute law that Hood J in *Kiernan v Lipman* [1920] VicLawRp 14; [1920] VLR 81 decided that the word "picture" in s172 of the then Act included a film or cinematograph display under s173, so that the exhibition of such a film or cinematograph display which referred to syphilis, gonorrhoea or any of the other matters set out in s172 was deemed to be the exhibition of a film or cinematograph display of an indecent and obscene nature. The case with which Hood J was dealing was a case in which a film had been exhibited by being projected onto a screen and it was the image produced by such an exhibition which his Honour considered fell within the description of a "picture" for the purposes of s172.

Upon that view, logical difficulties would arise in extending his Honour's interpretation of the word "picture" in that section to subsequent sections in which the word was used and in which it clearly referred to a material object. It may not be surprising in the circumstances that in 1922, by Act No. 3262, s172 was amended to include specifically within its scope a film and a cinematograph display. Thus, the effect of his Honour's judgment was preserved but the logical difficulties involved

in achieving that result by including a film or a cinematograph display within the meaning of the word "picture" were avoided. In the circumstances, however, we do not rely upon his Honour's decision as supporting the proposition that a film as a material object is included in the definition of "article" in s164 of the present Act.

The next amendment to the Act to which it is necessary to refer was made by Act No. 5968 in 1956. This Act extended the operation of the legislation to cover "records" by including them in the definition of "articles" in what was then s169 of the 1928 Act and by adding to the then s173 an offence of playing an obscene record within the hearing of persons in a public place. Other amendments have been made from time to time altering the content and form of the various sections in Pt V but it is unnecessary for the present purposes to review these amendments.

The history of the legislation to which we have referred appears to us to support the following analysis. Under the *Police Offences Act* 1890, the keeping or other use of certain obscene articles for the purpose of gain was an offence by s78 (the forerunner of the present s166). Those articles were specified and included "photographs". A film is a series of photographs. Although at that time the film itself as an article may not have been well known and certainly in earlier years when the word "photographs" was first used in similar legislation would have been unknown, the photographs of which was comprised were within the description of the articles specified in the legislation. Apart, however, from its character as a series of photographs, a film, by the rapid and continuous projection of its photographs onto a screen, has the capacity to produce a moving picture. When in 1916 it was decided to make such a use of an obscene film in public an offence, the offence was included in the section then dealing with public exhibitions of other obscene articles (ie. s173 of the 1915 Act, which is the forerunner of the present s168). It was unnecessary to make any specific reference to a film as an article for the purpose of the then s171 (the forerunner of the present s166) relating to the keeping and use of obscene articles for the purpose of gain, because the photographs comprising it already fell within the scope of that section. A record, like a film, has a dual nature. It is in itself an article and it has the capacity when played on a mechanical device to produce sounds. When in 1956 it was decided to bring an obscene record within the scope of the legislation, its keeping and use as an article for the purpose of gain was brought within the operation of the forerunner of the present s166 by amending the definition of "articles" to include its specifically and its playing in public was brought within the operation of the forerunner of the present s168.

There was nothing in the legislative provisions made in 1956 to bring records within the scope of the section corresponding to the present s164 which could affect the question of whether or not for many years before that date a film was included within the scope of that section. Nor would such provisions operate to exclude from the section any articles to which it at that time applied. Subsequent legislative changes, resulting in the present form of s166, removed the words "for the purpose of gain" from some of the offences created by the section and added the requirement of exhibition in a public place to that of exhibiting an obscene article thereunder. The latter amendment, by producing an apparent duplication with the provisions of s168, in so far as the two sections dealt with films, may have led to some difficulty in distinguishing between the nature of the operations to which s166(1)(d) and s168 respectively referred but it could not remove from the operation of s166 as a whole an article to which it had previously referred. In our opinion, therefore, a film as a series of photographs falls within the definition of "articles" to which s166 applies.

This view accords with that expressed by the Divisional Court in *Derrick v Customs and Excise Commissioners* [1972] 2 QB 28; [1972] 1 All ER 993; [1972] 2 WLR 359. The Court in that case was considering whether reels of 35mm cinematograph films fell within the description of goods prohibited from importation by the *Customs Consolidation Act* 1876 (39 and 40 Vict c36). One class of goods so prohibited was described as "... Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings, or any other indecent or obscene articles ...." There was no issue as to the indecent or obscene character of the films in that case. Lord Widgery CJ held that they fell within the expression "any other indecent or obscene articles".

In regard to an alternative argument by counsel for the prosecutor that the film was "a photograph not the less because it consisted of a series of photographs, not the less because the photographs were in transparency form, not the less because the photographs were small and required some

kind of mechanical enlargement in order that they might be enjoyed," Lord Widgery CJ said (QB at pp32-3; All ER at pp996; WLR at p362) that he was prepared to accept that argument and that had it been necessary, he would certainly have been prepared to hold that the films were photographs despite the limitations upon their use to which he had referred. Ashworth and Griffiths JJ agreed with the decision of his Lordship and expressed no dissent from his observations upon the alternative argument.

Our attention was, however, drawn to a recent decision of Murphy J in *Fagg and Anor v Caulfield and Anor*, judgment in which was delivered on 16 July 1976. In that case his Honour decided that the showing of an obscene moving picture in a football pavilion to a number of people was not an exhibition of an obscene article in a public place or any other place to which the public had access, within the meaning of s166(1)(d). It is unnecessary for us to express any opinion as to whether his Honour's decision was, on the facts of that case, correct but if and in so far as his Honour in the course of his judgment held that movie films, as distinguished from images projected from them on to screens, were not "articles" as defined by s164 of the Act, he was in our opinion in error for the reasons we have already given.

The first two grounds upon which the order nisi was granted are not, therefore, sustained.

Grounds three and four of the order nisi raise the question of the meaning of the word "publication" in s180B of the Act. S166A provides:

> "No prosecution shall be taken against any person for an offence against s166 in respect of any publication (within the meaning of s180B) otherwise than by a member of the police force with the written authority of the Chief Secretary given in the particular case."

No such authority was given for the prosecution of the defendant, which resulted in the conviction which is sought to be reviewed.

S166A was inserted in the Act by the *Police Offences (Obscene Publications) Act* 1967 (No. 7544). In its then form it related to prosecutions in respect of "any book pamphlet magazine or periodical". By the same Act, s180A was enacted and provided that no action should be brought in Victoria against a member of the National Literature Board of Review established for the purposes of the Commonwealth *Customs Act* 1901 in respect of any opinion expressed by him as a member of the Board upon any book, pamphlet, magazine or periodical submitted for the opinion of the Board. In 1973 by Act No. 8433 Div 1A, which provided for a State Advisory Board on Publications, was enacted. The Division provided that the Minister might refer any publication to the Board for report (s180D(1)); that the Board should report to the Minister whether or not in its opinion the publication, by reason of the nature or extent of reference therein to sex or other matters, including its disgusting or indecent language or illustration, was unsuitable for persons under the age of eighteen years (s180D(2a)); and that the Minister, on the recommendation of the Board, might determine that a publication be classified as a restricted publication (s180H(1)). Certain offences in respect of restricted publications were provided for.

By s180I, it was provided that no prosecution should be taken for an offence against s166 against any person other than a distributor (a word defined in 180B) for keeping, distributing, selling or exhibiting any restricted publication unless he contravened a provision of the Division. Act No. 8433 also amended s166A by substituting the expression "publication (within the meaning of s180B)" for the words "book pamphlet magazine or periodical". The combined effect of s180I and s166A as so amended was that no prosecution should be taken against any person for an offence against s166 in respect of a publication within the meaning of s180B without the authority of the Chief Secretary and once the publication became a restricted publication, no prosecution either with or without that authority could be taken in respect of it for an offence against s166, except in the cases for which s180I provided.

For the purpose of Div. 1A, the word "publication" was defined by s180B as follows:-

> "'Publication' means book paper pamphlet magazine periodical letterpress writing print picture photograph lithograph drawing and other printed matter or representation but does not include—
>
> (a) any newspaper registered pursuant to Pt II of the *Printers and Newspapers Act* 1958; or

(b) a properly bound book which has substantial literary or artistic merit or is a bona fide medical or scientific text—
unless it has been declared..."

The repetition of so many of the same words in the definition of "publication" in s180B and the definition of "articles" in s164 strongly supports the inference that where the same word is used in each definition it refers to the same thing. It was, accordingly, contended that if a film fell within the definition of "articles" in s164, whether as a "photograph" or "picture" or "other representation", then it fell within the definition of "publication" in s180B. In many statutes this contention would have considerable force. Whether or not it is sound in this case may, however, depend upon a consideration of the purposes of the different divisions of the Act to which the respective definitions are applicable and of the context in which the words so defined are used.

Division 1 of Pt V is clearly designed and has for many years been designed to deal with the evil which the legislation contemplates of the keeping, exhibiting or dissemination of obscene articles or of their use in circumstances which affect or may affect the public. Division 1A is designed to exclude or to modify the application of s166 of Div.1 to certain of those articles, as defined in s180B. The named articles in the definition of "publication" are followed by the general words "and other printed matter or representation", whereas in the definition of "articles" they are followed by the words "and other representations". The fact that the disjunctive is used between the words "matter" and "representation" instead of the conjunctive which has been previously employed suggests that the whole expression "other printed matter or representation" as a composite phrase is intended to be added to the previous publications referred to, rather than that the word "representation" is to be read as an addition separate from the expression "printed matter" which precedes it. The word "other" clearly qualifies both "matter" and "representation" and in a composite phrase it is more natural to read the word "printed" as also qualifying both words. The phrase, then, if extended would read "and other printed matter or other printed representation". In this sense it would impress the publications previously named with the quality of being "printed matter" or "printed representations" and all the publications named either possess that quality or can appear in forms which have that quality.

There are other indications in the Division that the publications with which it deals have this printed quality. The opinion of the Board upon any publication referred to it under s180D is to be based upon the nature and extent "of reference therein" to sex or other matters or its disgusting or indecent "language or illustration". Under s180D(3) the Board may form its opinion by reason of the indecent or offensive nature of "the cover of the publication". Several of the offences created by s180K refer to the "perusal" of publications. These various expressions are more apposite to be applied to objects of a printed nature, whether what is printed is literal or pictorial, than to an object like a film.

In our opinion, a publication for the purposes of Div 1A limited to objects which have this quality of being printed, in the sense of being reproduced on paper or the like. The word "photograph" in the definition of "publication" can be so interpreted without doing violence to its natural meaning and should be so interpreted. It therefore does not include a film for the purposes of this Division. In Div.1, however, there is no similar limitation, arising either from the words used in the definition of "articles" or from the purpose of the Division, which should be imposed upon its meaning and no anomaly or inconsistency consequently follows from its bearing a different sense in the two Divisions.

The order sought to be reviewed cannot therefore, in our opinion, be successfully challenged on grounds three and four of the order nisi, which, accordingly, should be discharged with costs. Order nisi discharged.

Solicitors for the appellant: Galbally and Rolfe.
Solicitor for the respondent: EL Lane, Crown Solicitor.

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