

47/73

SUPREME COURT OF VICTORIA

JOHNSON v INCORPORATED NEWSAGENCIES COMPANY PTY LTD

Dunn J

19 December 1973

PROCEDURE – SUMMARY OFFENCES – MAKE/PUBLISH AN OBSCENE ARTICLE – REQUEST FOR FURTHER AND BETTER PARTICULARS OF THE ALLEGED OBSCENITY – INFORMANT REFUSED TO SUPPLY PARTICULARS STATING THAT THE WHOLE PUBLICATION WAS ALLEGED TO BE OBSCENE – CHARGES DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: POLICE OFFENCES ACT 1958, S166(c).

HELD: Order nisi absolute. Dismissals set aside. Remitted to the Magistrates' Court for hearing and determination according to law.

1. The question came down to this: in the circumstances of this case when the publication as a whole was alleged to be obscene, could the informant be required to specify those particular parts from which the court was to be asked to draw the conclusion as to its obscene character? The answer was 'no'. Particulars were not necessary to inform the defendant of the nature of the case to be made against it. It knew from the charge that it was from the publication as a whole, that the court was required to make its decision. The charge required the Court to examine the whole publication.

2. Accordingly, the Magistrate was in error in ordering the informant to supply further and better particulars, and dismissing the Information on non-compliance with such order.

DUNN J: The informant was granted these orders nisi to review (a) the orders made by the learned Stipendiary Magistrate in the Magistrates' Court at Melbourne on the 4 April 1973, that the informant give further and better particulars of the offences alleged in each of two informations in which the Incorporated Newspapers Company Pty Ltd was the defendant, and (b) the orders dismissing the informations upon the informant's refusal to supply the particulars so ordered.

Any order of a Magistrates' Court or Justice may be reviewed. "Order" is defined in s3 of the *Justices Act* 1958 in terms wide enough to include the first of the orders above referred to. The offences with which the defendant was charged were (a) that on or about the 28 October 1972 at North Melbourne did make an obscene article to wit *The Nation Review* dated October 28 to November 3, and (b) that on or about the 28 October 1972, at North Melbourne did publish an obscene article to wit *The Nation Review* dated October 28 to November 3.

The offences alleged are provided for in s166(c) of the *Police Offences Act* 1958. Each of the offences alleged related to one and the same issue of *The Nation Review*. The summonses were returnable on the 6 March 1973. They were adjourned to the 21 March 1973, at the request of the defendant to enable it to apply for further particulars of the offences alleged. On the 7 March 1973, the defendant caused to be served on the informant a request for further particulars in respect of each offence. The requests were in identical terms and required further and better particulars "to identify specifically the matter or matters in *The Nation Review* Volume 3 Number 2, October 28 to November 3, 1972 alleged to be 'obscene'".

The informant refused to supply any further and better particulars. When the informations eventually came on for bearing on the 4 April 1973, counsel for the defendant informed the Stipendiary Magistrate of the foregoing facts and that the purpose of the application was to obtain an order of the court requiring the informant to supply particulars. During the course of the legal argument which then ensued, the issue of the paper, the subject of the charges, was tendered to the court. It is a printed publication in newspaper style, containing 72 pages. At the conclusion of the argument, the learned Stipendiary Magistrate ordered that the informant supply further and better particulars sought by the defendant. An invitation to apply for an adjournment was refused on behalf of the informant and the Magistrate was informed that the informant did not intend to supply any further particulars.

The learned Stipendiary Magistrate thereupon dismissed the Informations in the case of that relating to the charge of publication, with \$84 costs.

The grounds on which each order nisi was granted are the same, and are:

- (1) That the Stipendiary Magistrate was wrong in law in ordering the informant to supply the said further and better particulars because it was not necessary in the interests of justice for the said further and better particulars to be supplied in order for the defendant to apprehend the case against it;
- (2) That the Stipendiary Magistrate should have held that the defendant was not entitled to the further and better particulars that he ordered the informant to supply; and
- (3) That the Stipendiary Magistrate was wrong in law in dismissing the Information when the informant stated that he did not intend to supply the further and better particulars because the order to supply them should not have been made.

Since it is a matter of principle which the informant desires to have considered, no point is made of the form of the request for the further and better particulars.

The *Police Offences Act* 1958 s166(1)(c) makes it an offence to, *inter alia*, make or publish any obscene articles. "Articles" are defined in s164(1) in terms which include the publication the subject of these Informations. It is clear that a Magistrates' Court has the power to order particulars in respect of the offences charged if that course is necessary in the interests of justice. It is equally clear that particulars should not be ordered as a matter of course. It will be convenient to consider first what the informant has to prove in respect of each Information and then to consider the question of the particulars. For the purposes of this case both these matters are restricted to the question of obscenity.

In each of these informations, the allegation is that the whole of the particular issue of the *Nation Review* was obscene. When a publication as a whole is alleged to be obscene then the Court must examine the whole publication and not merely particular parts which are alleged to be obscene: see *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402, per Barwick CJ at p380, per Kitto J at p387.

Windeyer J as he then was, at p398 said, "I think too that the members of the Supreme Court went astray in the way they looked at the publication. They examined it page by page, picture by picture, to pass judgment on each but the charge was that the publication was, as a whole 'indecent printed matter'" Later in the same portion of his judgment he proceeded to say, "The publication is to be considered as a whole, its several parts in the context of the whole; When the question is whether there has been a publication of indecent matter, the goodness of part does not necessarily redeem the whole. It is the whole that is on trial in the whole circumstances of its publication." These statements related to a charge of publication of an alleged indecent article. They are equally applicable to a charge of publishing an obscene one. (See *R v Bacon* [1973] 1 NSWLR 87 at p99; 3 ACLR 970.) The charge being that the publication as a whole was obscene, and the publication hearing necessarily to be considered as a whole, was there any justification for ordering the informant to supply particulars? This as a question of some nicety.

Particulars are not to be ordered as a matter of course. There must be some justification for them. (See *ex parte Graham; re Dowling* (1968) 88 WN (NSW) 270 at p285.) The justification depends on whether or not, in the interests of justice, particulars are necessary to enable the defendant to know the case he has to meet, i.e. the nature of the acts or omission alleged to constitute the offence, not the evidence by which they are to be proved. (See *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467; [1938] ALR 104, per Dixon J, as he then was, at p489, per Evatt J at p497.)

The question comes down to this: in the circumstances of this case when the publication as a whole is alleged to be obscene, can the informant be required to specify those particular parts from which the court is to be asked to draw the conclusion as to its obscene character? In my opinion the answer is no. Particulars are not necessary to inform the defendant of the nature of the case to be made against it. It knows from the charge that it is from the publication as a whole, that the court must make its decision. The charge requires the Court to examine the whole publication. (See *Transport Publishing Company Pty Ltd v The Literature Board of Review* [1956]

HCA 73; (1956) 99 CLR 111 at p116.) In *Mackay v Gordon & Gotch (Australasia) Ltd* [1959] VicRp 60; [1959] VR 420; [1959] ALR 953 Sholl J, as he then was, did not confine his consideration of the case to those parts of the publication in respect of which particulars had been given in the court below. (See pp424-5 *infra*.) The reason is obvious – that consideration of parts of the publication cannot be excluded from the court's consideration by means of particulars because it is the whole publication that has to be considered, the nature and quality of all the material, the manner of presentation of all the material, and so on. The defendant knows that it is from the whole of the contents of the publication that the court will be asked to determine whether or not it is obscene.

For these reasons I am of opinion that the learned Stipendiary Magistrate was in error in ordering the informant to supply further and better particulars, and dismissing the Information on non-compliance with such order.

I appreciate that in making an order for further particulars the learned Stipendiary Magistrate was, in a sense, exercising a discretionary power and a court, on appeal or review, should not disturb the exercise of such a power unless it has clearly miscarried. In this case, I think it has, and the learned Stipendiary Magistrate misconceived the purpose of further particulars.

In the course of giving his reasons for ordering further particulars, he said, "In relation to this particular paper, it would not be reasonable to require the court to examine it as a whole and then decide what parts are obscene, without any assistance from the prosecution." He further said that he would have expected the prosecution to invite the court to look at those parts of the publication which is alleged were obscene. The purpose of particulars is for the benefit of the defendant, and not the court. Further, these passages indicate that it was not fully appreciated by the learned Stipendiary Magistrate that it was the whole publication that was alleged to be obscene, the determination of which problem necessitated an examination of the whole publication. Further, whether or not a publication is obscene, is not a matter about which evidence may be called.

I perhaps should add that this is not a case in which particulars are required to remove any ambiguity in the charge or remove the risk of duplicity.

The orders nisi will be accordingly made absolute with \$75 costs in each case. The orders requiring the informant to deliver further particulars, and dismissing the Informations and ordering the informant to pay \$84 costs will be set aside and the matters remitted to the Magistrates' Court at Melbourne to be dealt with according to law.