18/72

SUPREME COURT OF QUEENSLAND — FULL COURT

SANCOFF v HOLFORD: ex parte HOLFORD

The Chief Justice, WB Campbell and Williams JJ

18 July 1972 — [1973] Qd R 25

SUMMARY PROCEEDINGS – POSSESS OBSCENE PUBLICATIONS FOR SALE – NEWSAGENT SELLING SUCH PUBLICATIONS – PUBLICATIONS DEPICTED MANY PHOTOGRAPHS OF A NUDE MALE AND FEMALE IN THE ACT OF SEXUAL INTERCOURSE – FINDING BY MAGISTRATE THAT PUBLICATIONS WERE OBSCENE AND CONVICTIONS IMPOSED – WHETHER DEFENDANT HAD A GOOD DEFENCE TO THE CHARGE – WHETHER MAGISTRATE IN ERROR: *THE VAGRANTS, GAMING AND OTHER OFFENCES ACTS* 1931-1970 (QLD), S12; *CRIMINAL CODE* (QLD), S24.

HELD: Order nisi discharged.

1. The approach that the Magistrate had to follow was to look at the publications and adopting what he reasonably thought were proper standards of decency now commonly accepted by the average person in the community, find whether such a person taking up the publications and reading them would regard them as publications offensive to his or her modesty in regard to matters of sex.

2. There was ample evidence upon which the Magistrate could have come to the conclusion which he did. He applied the correct test.

3. To raise the defence under s24 of the Criminal Code (Qld), it was necessary for the person charged to introduce evidence whether by cross-examination of the prosecution witnesses or by direct evidence, from which it could be reasonably inferred that an honest and reasonable belief in an appropriate state of things existed, and the onus then passed to the prosecution to negative the existence of such a belief.

4. The Magistrate held that in his opinion, despite the appellant's evidence, the appellant did not have any such belief at all. He consequently held that the defence had not even been fairly raised by the appellant. On any view of his finding it was clear that if one assumed that the defence was available in circumstances such as this and if one further assumed that the defence was properly raised so as to shift the onus to the prosecution then the Magistrate's finding clearly indicated that he did not accept the existence of an honest nor a reasonable belief in a state of things which would exculpate the appellant.

5. Knowing all the primary facts of the matter, the appellant claimed to have reached a mistaken conclusion as to the result of the tests – that the books were not obscene and that he was entitled to sell them within the law. This was an error in law which was no excuse.

THE CHIEF JUSTICE: The appellant, Holford, was convicted by the Stipendiary Magistrate, of a charge that on 10 December 1971, he had in his possession apparently for the purpose of sale, obscene publications namely one book entitled "Love Play" and seventeen books entitled "Sexual Techniques"; he was fined $40.

The offence is provided for by s12 of *The Vagrants, Gaming and Other Offences Acts* 1931 to 1970. The section provides (*inter alia*):

> "Any person who—
> (a) . .. has in his possession apparently for the purpose of sale ... any obscene publication shall be liable for a first offence to a penalty of forty dollars or imprisonment for three months."

There was no question that the appellant had possession of the books mentioned nor that he had them in his possession apparently for the purposes of sale. The points argued were that the books were not obscene and that if they were, the appellant had a good defence to the charge under s24 of the Code.

On the question of obscenity, the submissions made were that the Magistrate had applied a wrong test inasmuch as he had not directed his mind to the question whether the books had a tendency to deprave or corrupt; and that in any case, the decision that they were obscene was against the evidence, or not supported by the evidence.

As to the test to be applied, I adhere to what I said (as a member of the Full Court) in *Herbert v Guthrie, ex parte Guthrie* [1970] Qd R 16. I repeat that in my opinion a tendency to deprave or corrupt need not be shown where action is taken under s15 of the above Acts: and I see no reason for giving the word "obscene" any different meaning in s12 from that which it has in s15.

I am unable to say that the test which the Magistrate applied in finding that the books were obscene, was wrong: nor am I able to say that when that test is applied, the conclusion of the Magistrate was not one which he could reasonably reach on the material before him.

The remaining question arises from s24 of the Code. The section provides:

> "(1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist."

It was not in question that this provision of the Code is of general application to the statute law of Queensland.

One of the books is named "Sexual Techniques". The dust cover describes it as "an illustrated guide to 'love'". It contains in fact many photographs of a nude male and a nude female in the act of intercourse. The other book is named "Love Play"; and the front cover has the words "over 100 full page photographs of love positions". Each of the books states on the front that the book is not for sale to persons under eighteen years of age.

In giving evidence before the Magistrate, the appellant said that he knew of the book "Sexual Techniques" from reading English magazines where it was displayed prominently. Sancoff, the police officer who took possession of both books, said that the appellant said to him: "These books are not obscene; I have sold hundreds of them; nearly everyone in Mackay has one". The making of this statement was not denied by the appellant and the Magistrate appears to have found that it was made. I do not think there can be any doubt that the appellant was familiar with the contents of each of the books.

The basis of the assertion of a defence arising from s24 was that the appellant did not believe that the contents of the books were obscene, though he knew the contents of the book.

I think s24 has no application to the case. The position may be contrasted with that arising if a person has in his possession a book which he has not opened which is marked "Electrical Engineering" but which contains inside nothing but pornographic pictures. Here a plea that the possessor believed the contents of the book to relate only to electrical engineering would establish a belief in a state of things — the contents of the book. But the belief – if it existed – of the appellant in the instant case, based on a knowledge of the contents of the books is a very different thing. Knowing all the primary facts of the matter, the appellant claims to have reached a mistaken conclusion as to the result of the tests – that the books were not obscene and that he was entitled to sell them within the law. I think this was an error in law which was no excuse.

The argument for the appellant fails.

The appellant also claimed that the penalty imposed – a fine of $40 was excessive. The argument urged on the Court was that this was the maximum fine provided for by the section and that this should be reserved for the worst cases, of which this was not one. But the argument omits consideration of the fact that the section also provides for three months' imprisonment – a much more serious sentence. In the circumstances, I see no reason for interfering with the penalty.

WB CAMPBELL J: In my opinion the magistrate, in determining whether the publications were

obscene within the meaning of s12(a) of *The Vagrants Gaming and Other Offences Acts* 1931-1971, applied the correct test. In his reasons for judgment he said: "The requirement is that the matter as a whole should offend the conscience of the community" and he also made it clear that he was applying his mind to "the ordinary decent standards of morality of the Australian community as at the present time."

This approach is in accordance with that recently stated by the High Court in *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; [1968] ALR 524; (1968) 41 ALJR 402 per Barwick CJ at CLR p379, Kitto J at p387; Windeyer J at p399 and Owen J at pp403-4. Having examined the publications I am also of the opinion that there was material upon which the Magistrate properly directing himself on the law, could have come to the conclusion that they were obscene.

I have had the advantage of reading the judgments of the Chief Justice and of Williams J and I agree with them, for the reasons they have expressed that s24 of the *Criminal Code* has no application to this case. The fine imposed upon the appellant was not manifestly excessive and the order nisi should be discharged.

WILLIAMS J: This application to make absolute an order nisi to review the decision of the Stipendiary Magistrate at Mackay given on the 11 April 1972, is sought by the appellant, a Newsagency Proprietor, who was convicted on a complaint of having in his possession apparently for the purpose of sale obscene publications, namely one book entitled "Love Play" and sixteen books entitled "Sexual Tendencies" in breach of s12(a) of *The Vagrants Gaming and Other Offences Acts* 1931-1971.

Mr Lowenthal who appeared for the appellant contended that the conviction should be set aside on any one of three bases: firstly, that the Magistrate had adopted the wrong test of what was obscene and consequently of what constituted an obscene publication; secondly, that if he had applied the correct test then there was no material upon which he could reasonably have found the appellant guilty; and thirdly, that he should have found that a defence raised pursuant to the provisions of s24 of the *Criminal Code* had been established.

Section 12(a) provides

> "Any person who – (a) ...has in his possession apparently for the purpose of sale... any obscene publication...; shall be liable for a first offence to a penalty of twenty pounds or to imprisonment for three months;...."

With regard to the appropriate "test" to be applied Mr Lowenthal submitted that it was that which he says is set out in *R v Hicklin* (1868) LR 3 QB 360 at 371. This case he says, establishes that before the Magistrate can convict, it is necessary for him to find firstly, (as in fact he did), that the publications "dealt with matters of sex in a way that does not measure up to the ordinary decent standards of morality of the Australian community at the present time", and secondly, that they tend to deprave or corrupt. His argument proceeded on the basis that the onus was on the prosecution to prove as a fact that the publications had a tendency to deprave or corrupt or at the very least, that the Magistrate should have directed his mind to whether this was proved. He submitted that since the Magistrate did not consider this aspect then the order nisi should be made absolute.

He further submitted that in proceedings under s12(a) this Court was not bound by any pronouncements to the contrary by members of this Court in, for example, *Humphries v Smith, ex parte Smith* [1963] Qd R 67; 58 QJPR 4, *Bradbury v Staines; ex parte Staines* [1970] Qd R 76, and *Herbert v Guthrie, ex parte Guthrie* [1970] Qd R 16.

[...] of the Act which deals with the right to search and seize indecent or obscene publications and to take appropriate action in relation to such as are so seized. He said that except in circumstances involving ss8 thereof, since no person is liable to conviction or punishment, the section goes only against the goods seized. Consequently he said, a less rigorous test of the meaning of "obscene" should be applied.

He may have been encouraged to advance this argument because of the distinction referred

to by the Chief Justice in *Guthrie's case* at p21 where His Honour pointed out that *R v Hicklin* was concerned with the common law misdemeanour of publishing an obscene libel whereas the former case involved consideration of the meaning of "obscene" in s15 as extended by s2 of the Act. He further submitted that *Staines' case* dealing as it did with s7 of the Act was no support for any proposition contrary to that advanced by him.

It is true that whilst there has been very strong *dicta* in these three cases which, if adopted, would destroy Mr Lowenthal's argument, there has not been a judgment of this Court dealing expressly with this point raised by s12(1). This presupposes that it was not necessary for the decision in *Guthrie's case* to decide that the prints were such that their publication would be an offence and proper to be prosecuted as such under the part of s12(1) of the Act with which this prosecution is concerned. Whilst I think that the contrary is certainly open nevertheless in view of the point raised by Mr Lowenthal and of the submissions in both *Staines'* and *Guthrie's cases* that the appropriate "test" of obscenity was still that in *R v Hicklin*. I think I should state specifically what I consider is meant by the words "obscene publication" in s12(1) where the allegation is that such a publication is in a person's possession apparently for the purpose of sale.

It has been submitted more than once in this Court that the observations of Windeyer J in *Crowe v Graham supra* are merely *dicta*, and do not represent the view of the Court and further that one construction open on the remarks of Fullagar J in *R v Close* [1948] VicLawRp 79; [1948] VLR 445 at p463; [1949] ALR 125 supported the adoption of the *R v Hicklin* test in proceedings under our Act.

For my part I do not think it is a question of applying any "test" said to be derived from *R v Hicklin*. I think it is a question of interpreting the words of s12(1). In order to do so, one must go to s2 where it is provided that "'obscene publication' includes any obscene book ..." In this definition the word 'obscene' includes, but without limiting the generality of its meaning, emphasising matters of sex or crime or calculated to encourage depravity;". It seems clear to me that the use of the word "or" preceding the words "calculated to encourage depravity" in the extended definition of [...] added this second paragraph, intended that something which emphasised matters of sex could be obscene without it <u>necessarily</u> being calculated to encourage depravity.

In view of the arguments advanced by Mr Lowenthal and other Counsel before him in this Court it may be that I am over simplifying the matter and I therefore propose to deal shortly with *Hicklin's case*.

I feel that the question is answered if one adopts (as I respectfully do) the approach of Fullagar J in *R v Close* (*supra*) at p463. He there explained the origin of the contention that since *Hicklin's case*, before anything could be obscene, there had to be a tendency to deprave. The learned Judge clearly and concisely pointed out that the word "obscene" in its ordinary meaning had nothing to do with corrupting or depraving, but was used to describe what was offensive to current standards of decency. He pointed out, as had the Chief Justice in *Guthrie's case* at p21, that only when it was sought to proceed against anyone for the common law misdemeanour of obscene libel was it necessary that the tendency to deprave be present, since that was the characteristic which made what was an obscene publication, a publication meriting the attention of the criminal law.

As have said the Chief Justice of this Court has already adopted this approach and found support for it in what Windeyer J said in *Crowe v Graham*, *supra*, at p394. Indeed as I read the judgment of Sir Victor Windeyer in that case he goes further and in discussing *Hicklin's case* and cases preceding it, points out that although the intention to deprave, corrupt and injure morals was alleged as an element in the common law offence of obscene libel, that intention was, so far as he was aware, always found from the nature of the publication and the fact of publication. (See p392).

If, by his remarks on that page he intended to affirm that what was held to be obscene contrary to the criminal law must always impliedly and without express proof be taken to tend to deprave then I respectfully think that that proposition goes further than is necessary on a prosecution under s12(1) of our Act where "obscene publication" is given an extended meaning.

One must be careful in applying reasoning in cases such as *Mackinlay v Wiley* [1971] WAR 3 (which decision was relied on by Mr Lowenthal) without first carefully considering the definition clause (if any) involved and looking at the wording of our statute.

Likewise in considering the usefulness of cases where a person has been prosecuted for "publishing" obscene matter the manner of "publishing" and to whom, can have a bearing on the decision whether the matter although obscene was "published". See the judgments in *Crowe v Graham* so far as they deal with the persons to whom the matter was published or to whom it was likely to be available.

Section 12(1) of our Act deals merely with the situation where a person is alleged to have something in his possession, apparently for the [...] In the case before the Magistrate there was no contest that the books were in the possession of the appellant apparently for the purpose of sale, the contest being whether they were obscene publications.

As I have said this has to be resolved by the extended meaning given to that term by s2. After reading what I feel are all or most of the relevant recent authorities on this subject, the approach that the Magistrate had to follow was to look at the publications and adopting what he reasonably thought were proper standards of decency now commonly accepted by the average person in the community, find whether such a person taking up the publications and reading them would regard them as publications offensive to his or her modesty in regard to matters of sex. See Kitto J in *Crowe v Graham* (*supra*) at p387. Although His Honour was there dealing with what was indecent, I am of the view that his approach is the correct one in relation also to what is obscene.

The approach that this Court in dealing with an appeal by way of Order to review a Magistrate's decision has to adopt is that set out in *Humphries v Smith ex parte Smith*, *Herbert v Guthrie ex parte Guthrie* and *Crowe v Graham* (all *supra*); to decide whether the Magistrate properly directing himself was entitled on the evidence to reach the conclusion which he did. This Court will do that by examining the publications, not with a view to retrying the case, but solely with a view to discovering whether they reveal evidence on which a Magistrate could reasonably conclude that they were obscene publications. See *Crowe v Graham* (*supra*) at p394.

Although special leave was refused in *Staines' case* the remarks of some of the members of the High Court may give support for the contention that the Magistrate's decision in that case ought not to have been set aside by the majority of the Full Court.

One further matter which seems to me to be worthy of some discussion in the extended meaning of "obscene" is the reference to the words "emphasising matters of sex". This aspect has been fully canvassed in this Court in other cases, it being pointed out that the absence of the word "unduly" before "emphasising" could result in an interpretation of "obscene publication" which would make the most inoffensive of matters emphasising sex nevertheless obscene.

I think with respect, that the approach of Matthews J in *Guthrie's Case* at pp34 & 35 is correct and that a publication which emphasises matters of sex is only obscene when it offends current standards of decency in regard to matters of sex.

In view of the opinion I have formed of the publications in this case, it is not necessary to decide this matter expressly since I have concluded (as did the Magistrate) that the publications are plainly obscene, that they do emphasise sex and for that matter, most certainly emphasise [...]

[...] judge or jury as the case may be, to apply contemporary standards, looking at the matter as would the average citizen, not being carried away by ingrained ideas of prudery or by a desire to resist change on the one hand, nor on the other, by a wish to be modern avant garde, or "With it" as one hears those expressions used.

As Sir Garfield Barwick said in *Crowe v Graham* at p379 in dealing with the separate question of the "publishing" of obscene matter, whilst it may not be an offence to publish certain matter in the tap room or at a smoke concert (or as Windeyer J said at p398, in a barrack room or a hut) it may still be offensive in other locations. These publications, dealing as they do principally

with photographs of a naked man and woman having intercourse in a great variety of positions, are certainly not the type of books one would expect to find lying around in a doctor's or dentist's surgery and certainly not openly about in the home of the average decent citizen whether he has children or not. There will, of course, be those who would support the liberal dissemination of this type of material to persons of all ages. To borrow a phrase from a modern author, "I have yet to find a cause, from Black Magic to Lady Chatterley's Lover, which cannot rustle up a dog-collar or two among its luminaries as and when required."

In my opinion there was ample evidence upon which the Magistrate could come to the conclusion which he did. In my view he applied the correct "test".

The argument advanced to the Court in support of a defence based on s24 of the *Criminal Code* does not, in my opinion, merit a great deal of attention. It is clear that the section in a proper case is applicable to an offence charged under this Act. To raise the defence it is merely necessary for the person charged to introduce evidence whether by cross-examination of the prosecution witnesses or by direct evidence, from which it could be reasonably inferred that an honest and reasonable belief in an appropriate state of things exists, and the onus then passes to the prosecution to negative the existence of such a belief. See *Brimblecombe v Duncan ex parte Duncan* [1958] Qd R 8; (1958) 52 QJPR 83 and *Loveday v Ayre; ex parts Ayre* [1955] St RQd 264.

The Magistrate here held that in his opinion, despite the appellant's evidence, the appellant did not have any such belief at all. He consequently held that the defence had not even been fairly raised by the appellant. On any view of his finding it is clear that if one assumes the defence available in circumstances such as this and if one further assumes that the defence was properly raised so as to shift the onus to the prosecution then the Magistrate's finding clearly indicates that he did not accept the existence of an honest nor a reasonable belief in a state of things which would exculpate the appellant. I have grave doubts as to the applicability of this section to any "state of things" which was deposed to by the appellant.

Mr Lowenthal did not rely upon the defence set up at the original hearing based on s17 of the Act. Section 17 of the Act is as follows:-

> "Nothing in this Part shall apply to the printing, publishing, making, possessing, selling, or delivery, or the exhibiting in, the window of any shop for any lawful purpose, of any *bona fide* medical work or treatise:
>
> Provided that in any prosecution for an offence under this Part the burden of proof that a publication is a *bona fide* medical work or treatise shall lie on the defendant."

Apparently in support of this defence Dr Hamilton, a psychiatrist was called to give evidence. It is perhaps worthwhile to note the approach of the courts to the relevance of expert evidence in determining what is obscene as distinct from what would establish a defence under s117. See *Crowe v Graham* at pp393 & 396, and *R v Anderson* [1971] 3 All ER 1152 at p1158 (j) to 1159 (e).

Finally it was submitted that the fine of $40.00 being the maximum for a first offence was excessive. Mr Given pointed out that the maximum punishment was, pursuant to s50, not merely a fine of £20 or imprisonment for three months but £20 and imprisonment for three months. Again it is perhaps worthwhile to note the view of the Court of Appeal, in relation to the possibility of imprisonment for this type of offence. See *R v Anderson* (*supra*) at p1162.

Having considered all aspects of this matter it is my view that the fine is not manifestly excessive. The order nisi should be discharged with costs to be taxed.
