49/69

SUPREME COURT OF VICTORIA

McKENNA v LYALL

Gillard J

29 November 1967

SUMMARY OFFENCES – EXHIBITING PICTURES OF AN OBSCENE NATURE – PHOTOGRAPHS DISPLAYED IN A SHOP WINDOW WHICH UNDULY EMPHASISED MATTERS OF SEX – WHETHER OBSCENE – WHETHER THE ARTICLES HAD A TENDENCY TO DEPRAVE AND CORRUPT MEMBERS OF THE COMMUNITY – INFORMATION DISMISSED BY THE MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *POLICE OFFENCES ACT* 1958, S166(1).

HELD: Orders nisi in each case made absolute. Dismissals set aside.
1. In order to render the article or object obscene it must unduly emphasise the matter of sex. In order to determine whether the emphasis is undue, then the Court must consider for itself the question of the emphasis and the extent of the emphasis, and in order to determine whether undue emphasis has been made, then it has been said that the test is — "Did the article or object deal with a matter of sex in a manner which offended against the standards of the community in which the article or object was published or shown."

2. The photographs on display were taken solely for the purpose of emphasizing the sexual characteristics of the female body, and the question was whether the Magistrate wrong in saying that the photographs did not unduly emphasize those characteristics. Having regard to the posture of each person being photographed, it seemed that it was intended to over-emphasise these characteristics. It was not a question of the whole female form being photographed and the emphasis on the sex being merely incidental to the photograph of the whole model. The model had posed in such a fashion as to bring out the sensual characteristics of her body.

3. When one had regard to the persons to whom the article was published or exhibited, that was to the world at large, then it seemed that it would have had a tendency to deprave or corrupt those who were immature but normal members of our community. It seemed that the exhibition of such photographs could well have had a depraving influence upon the young members of our community and would have been offensive to a great body of the community who thought seriously on the subject. The Court was not concerned about the social questions of censorship but was concerned to construe the relevant sections of the *Police Offences Act*, and having regard to the provisions of the Act it seemed that the Magistrate could not have properly directed himself to reach the conclusion that he did.

GILLARD J: This is the hearing of an Order nisi granted by Starke J on 10 October 1967, to review an order of the Court of Petty Sessions at Melbourne, given on the 5 September 1967, when the presiding Stipendiary Magistrate dismissed an Information brought by Peter Julian McKenna, the Informant, against James Lyall, Defendant, alleging that on 11 July 1967 the said James Lyall did exhibit to public view in the window of a shop situated at 37 Hardware Street, Melbourne, twelve pictures of an obscene nature.

The facts were admitted in the Court below. It appears that at about 5.10pm on the 11 July 1967, two constables of police went to the premises of the defendant at 37 Hardware Street, Melbourne, where he carries on a camera shop. In the window of the shop were a number of photographs and the police noted that of a number of people passing by, two young men stopped and looked at the photographs displayed. The constables then went in and interviewed the defendant and in the course of a discussion with the defendant he stated that he had had the photographs displayed so that people over the age of 21 years could see them and buy them. The defendant also stated to the police that he saw nothing wrong with the photographs which he was selling for $1.25, coloured, and 95 cents and 45 cents apparently for the black and white.

It was agreed that the defendant was carrying on a genuine photographic business and he also displayed other figure studies in the window according to the police evidence.

When the prosecution case finished in the Court below counsel for the defendant submitted that the photographs were not obscene. He stated there was no dispute as to the facts but he submitted that on the definition of 'obscene' as set out in the *Police Offences Act*, these photographs were not obscene in the relevant sense. After he had addressed the Court, the senior constable who was prosecuting also addressed the Court. Counsel was then given the privilege of reply, and during the course of that reply he submitted examples of photographs appearing in newspapers which he produced to the Stipendiary Magistrate for the purpose of comparing these photographs with the photographs, the subject of the information.

The police prosecutor objected to the leading of this evidence on the ground of irrelevance, but the Stipendiary Magistrate overruled his objection and allowed counsel to continue with his submissions and accepted the comparisons being urged on him.

After counsel had concluded, the Stipendiary Magistrate immediately gave his decision as follows:

> "I do not consider the photographs to be obscene. The Information is dismissed."

The Informant satisfied Starke J that such order should be reviewed on the following grounds:

> 1. That on the evidence the Magistrate should have held that the pictures were of an obscene nature .
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> 2. That the Magistrate was wrong in holding that the pictures were not obscene.
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> 3. That the Magistrate wrongly admitted as evidence for the defendant certain photographs other than those in respect of which the defendant was charged.
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> 4. That the Magistrate was wrong in having regard to the photographs produced on behalf of the defendant.

As to the third and fourth grounds, I say immediately that in my view the Magistrate did not admit in evidence any photographs. As I understand the course of the proceedings, counsel for the defendant clearly waived any right to call evidence by informing the Court that the facts were not in dispute and he thereupon addressed the Court on the question of law.

When he had concluded his statement the prosecuting officer sought to make *ex parte* statements from the Bar table which were clearly prejudicial to the defendant's interest. Accordingly, when counsel resumed his submission in reply, he tried to make a riposte by doing something equally wrong, by giving or attempting to give evidence from the Bar table. I believe in effect what he was saying was that he was attempting to induce the Court to consider very seriously present-day standards, particularly with reference to nude figures. It was not done in an evidentiary way but was done as a matter of submission in rebuttal to the allegations made by the police prosecutor. Accordingly, as I indicated to counsel before me, I would not have been disposed in any way to upset or vary the magistrate's decision on either grounds 3 or 4.

I therefore turn to grounds 1 and 2, which in my view do raise matters of some difficulty. To begin with, I observe I am not justified in reversing the Magistrate's decision unless I am satisfied he was clearly wrong. The test, as it seems to me, is – if the Magistrate had properly instructed himself on the law, the facts having been admitted, did he come to the proper conclusion that the law demanded of him.

If I believed that it were open to him to come to the conclusion that he did as a matter of reasonable inference from the admitted facts then it would be quite wrong of me to upset the decision. On the other hand, the facts having been admitted, possibly a Court of Appeal is in just as good a situation as the primary Court to draw the appropriate inference from the facts. In a case of this character, however, as we shall see, one of the matters to which I have to advert to is the standard in the community. It is a standard to be objectively decided by the Court in dealing with any particular Information of this character, and accordingly it might be said that a Magistrate is in just as good a situation or position as a member of this Court, to decide what the normal standards are in our community. Nevertheless, I believe where the facts are admitted, as

they are in this case, the Court is bound to look at the so-called offending articles independently, to decide whether or not the Magistrate could have drawn the inferences that he did. Bearing in mind this burden I now turn to the substantial matters.

In a recent decision of *Abbey and McDonald v Wallace and Ors*, 10 March 1967, Newton J has reviewed all the authorities on this section of the *Police Offences Act.* Accordingly, my task has been made much simpler because, if I might respectfully say so, His Honour has, as I see it, accurately analysed the preceding authority and has laid down in very succinct fashion the various matters for consideration.

In these proceedings the Informant alleges that the photographs being displayed in the defendant's shop at the material time unduly emphasised matters of sex. I adopt what was said by Newton J, in the unreported case, which in effect simply repeated what had been earlier said by Sholl J in *Mackay v Gordon & Gotch (Australasia) Ltd* [1959] VicRp 60; [1959] VR 420 at p426; [1959] ALR 953. Also see per Pape J in *Kyte-Powell v William Heinemann Ltd* [1960] VicRp 67; [1960] VR 425 at p432. It has been pointed out that an article or an object may quite legitimately emphasise sex. This might in certain quarters be regarded as reprehensible and distasteful. It, however, does not come within the definition of "obscenity" in the *Police Offences Act*. In order to render the article or object obscene it must unduly emphasise the matter of sex. In order to determine whether the emphasis is undue, then the Court must consider for itself the question of the emphasis and the extent of the emphasis, and in order to determine whether undue emphasis has been made, then it has been said that the test is — "Did the article or object deal with a matter of sex in a manner which offended against the standards of the community in which the article or object was published or shown."

This criterion introduces a matter of opinion. It is clear in my experience that standards have changed in the course of my lifetime. Attitudes towards questions of sex have singularly changed in my view since World War II. Accordingly the Court, doing the best it can, must apply the above test objectively, and looking at the articles, ask did they unduly emphasise sex in relation to what the Court believes to be the normal standards of the community.

Now as I pointed out earlier, initially this is a question that must be decided by the Magistrate and unless I am satisfied that he is clearly wrong, in that the conclusion he reached showed that the standard he adopted must have been wrong, then my duty is to leave the decision untouched.

On the other hand, if taking his conclusion and looking at the reasons for it, it seems to me that he must have adopted a wrong standard for the community, then I believe this court should intervene and say, that the decision he has come to was wrong and clearly wrong. I therefore now turn to the photographs, the subject of these proceedings.

Without exception, each photograph emphasised the breasts of a young woman. In a few cases the whole of the human form was shown – even these I think the feet were not shown – but in the great majority of cases it was just the head, shoulders, and breasts of the person being photographed, and the obvious emphasis was a portrayal of the breasts. This clearly was intended to be an emphasis on the sex of the person being photographed.

I pointed out earlier, it is not merely sufficient for the prosecution to establish that sex was being emphasised, but that it was being unduly emphasised. Sholl J pointed out in *Mackay's case*, at page 429, in relation to photographs of nudes,

> "The question in each case depends principally on current standards of society and the tendency of the publication in its effect on those to whom it is addressed".

Earlier at page 426 His Honour said,

> "It is for the court to ascertain those standards for itself. I agree that it is not to be narrow or puritanical, and that it is to recognize that it must allow for many tastes and many degrees and standards of education and of refinement, and for the grave lack of them in some quarters. On the other hand, the court is not called upon to overlook or minimize what is really obscenity, merely in order supposedly, to show its own judicial broadmindedness or tolerance or imperturbability or even cynicism."

It seems to me that these photographs were taken solely for the purpose of emphasizing the sexual characteristics of the female body, and the difficult question is, was the Magistrate wrong in saying that the photographs did not unduly emphasize those characteristics. Having regard to the posture of each person being photographed, it seems to me that it was intended to over-emphasise these characteristics. It was not a question of the whole female form being photographed and the emphasis on the sex being merely incidental to the photograph of the whole model. The model has posed in such a fashion as to bring out the sensual characteristics of her body.

I believe, therefore, that it was intended to appeal to the lower instincts of those who may view these photographs. That in itself would be insufficient, in my view. I agree with Mr Hampel's argument that one has to see what influence such a photograph may have on the ordinary normal being in our community. But for the presence of sub-section 2 in s164, I might have had a little difficulty in saying that in this respect there was this undue emphasis on sex.

But when one has regard to the persons to whom the article was published or exhibited, that is, to the world at large, then it seems to me that it would have a tendency to deprave or corrupt those who were immature but normal members of our community. It seems to me that the exhibition of such photographs could well have a depraving influence upon the young members of our community and would be offensive to a great body of the community who thought seriously on the subject. I am not concerned about the social questions of censorship. All that I am concerned about is to construe these sections of the *Police Offences Act*, and having regard to the provisions of the Act it seems to me that the Magistrate here could not have properly directed himself to reach the conclusion that he did.

Some of the photographs I think might have been classified as not proven, but some on the other hand, I think are so clearly obscene, that the Magistrate must have, in my view, adopted a wrong criteria.

Accordingly, on grounds 1 and 2, I would make the Order Nisi absolute. I do not feel it is necessary to give any further exposition of the laws because in my view, it is so happily phrased by my brother Newton, and all I hope is, his decision will, in due time be reported for the use of the profession. For myself, I adopted it *in toto*.

APPEARANCES: For the informant McKenna: The Solicitor-General with him Mr BJ Shaw, counsel. Thomas F Mornane, Crown Solicitor. For the defendant Lyall: Mr G Hampel, counsel. Frank Galbally & Peter O'Bryan, solicitors.
