27/77

SUPREME COURT OF VICTORIA

ASHE v STIRTON

O'Bryan J

8 March 1977

CRIMINAL LAW – OBSCENE ARTICLES (FILMS) – MEANINGS OF "PUBLISH", "ARTICLES" CONSIDERED – DEFENDANT EXHIBITED OBSCENE FILMS IN PRIVATE HOMES – WHETHER A ROLL OF MOVIE FILM WAS AN ARTICLE – WHETHER EXHIBITING WAS PUBLISHING – CONVICTIONS IMPOSED – WHETHER MAGISTRATE IN ERROR: *POLICE OFFENCES ACT* 1958, S166(i)(c).

The defendant had exhibited to certain persons in private homes films which were obscene. The Magistrate's decisions were reviewed on three grounds:—
1. that the films were not "articles" within s166(i)(c);

2. that there was no evidence that the defendant had "published" the films within s166(i)(c);

3. that exhibiting the films in a private dwelling house did not amount to "publishing".
Upon Order Nisi to review—

HELD: Order nisi discharged.
1. A roll of movie film is an 'article' as defined in s164, in that it consists of a series of prints and pictures in negative form. The words 'prints' and 'pictures' are both included in the definition of articles in s164.
***Fagg & Johnson v Caulfield & Jasinsky* MC9/1977, not followed.**

2. A movie film, which consists of a series of negatives joined in a strip, is published when the series of negatives are viewed on a screen by the use of light and a projector and is seen by a person through the iris lens system.

3. The word 'publishes' is an appropriate word to use in relation to the showing of a movie film. Indeed, it may be considered by some persons to be more appropriate than the word 'exhibits' which was chosen by the legislature in section 168(a). It is not to be regarded as any less appropriate than the word 'exhibit'.

4. Accordingly, the Magistrate correctly decided on the evidence that the defendant did publish obscene articles.

As to ground (1) **O'BRYAN J** said:— "Mr Strong based his argument upon the unreported decision of Murphy J in the case of *Fagg and Johnson v Caulfield and Jasinsky* (delivered on the 16 July 1976). In that case Murphy J was considering a large number of orders nisi to review the convictions of persons who were charged with offences against s166(i)(d). The charges arose from the showing of an obscene movie film in a football pavilion to a group of persons. It was contended that the definition of 'articles' in s164(i) was an exclusive definition rather than merely a definition including in the meaning of the word 'articles', things which one would not normally consider to be articles. If that proposition was right then the words that were used in the definition had the same genus and 'are all of an apparent and permanent nature and of a static nature'. Murphy J accepted this argument and decided that an interpretation of the word 'article' in s166, which excluded films and/or cinematograph displays, was right because such articles were included specifically in s168, a section which created offences when persons exhibited films or cinematograph displays of an indecent or obscene nature in a picture theatre or place of public resort.

I faced considerable difficulty in accepting the reasoning of Murphy J in the case referred to and was constrained to ask counsel for the informant whether the informant wished to have me refer these matters to the Full Court for decision, pursuant to s155(3) of the *Justices Act* 1958, rather than face the possibility of having two conflicting judgments of this court on virtually the same point, thus causing inevitable confusion to magistrates hearing this type of case.

At that stage, Mr Murdoch drew my attention to a decision of the Full Court delivered on 7 December 1976, as yet unreported, which he contended resolved the argument of Mr Strong in ground 3 of the orders nisi. I am, of course, bound to follow a decision of the Full Court where it is in point, whether or not I agree with it. In *Preswell v Baughurst* [1977] VicRp 22; [1977] VR 193 the Full Court, consisting of the Chief Justice (Sir John Young) and Barber and Nelson JJ had to determine an order nisi to review an order made by a Magistrates' Court upon an information alleging that a defendant 'being the owner of obscene articles, to wit, a number of movie films, did knowingly keep such obscene articles for the purpose of gain', contrary to s166(i)(b) of the *Police Offences Act* 1958.

A ground of the order nisi raised the question whether a movie film is an 'article' for the purposes of s166(i)(b). In the course of argument the unreported decision of Murphy J was referred to the Full Court. After reviewing the history of the legislation, and in particular Part V Division 1, the Full Court in a joint judgment said at page 7:

> 'In our opinion, therefore, a film as a series of photographs falls within the definition of 'articles' to which s166 applies'.

The Full Court, at pages 8 to 9, referred to the decision of Murphy J in these terms:

> 'If, and insofar as His Honour in the course of his judgment held that movie films, as distinguished from images projected from them onto 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'.

I am of the opinion that a roll of movie film is an 'article' as defined in s164, in that it consists of a series of prints and pictures in negative form. The words 'prints' and 'pictures' are both included in the definition of articles in s164. In my opinion this ground is not made out.

[As to the remaining two grounds His Honour said:] The remaining grounds raise the point whether a person who shows an obscene movie film to a small group of persons, by means of a screen and a projector whether in a private home or elsewhere, 'publishes' any obscene article contrary to s166(i)(c) of the *Police Offences Act*.

Mr Strong presented a persuasive argument that the word 'publishes' in s166 should be given its ordinary and natural meaning as a matter of statutory construction. In its ordinary and natural meaning, he argued it did not include 'showing' or 'exhibiting' a movie film. He fortified that argument by drawing my attention to s168 which creates offence for 'every person who exhibits in any picture theatre or place of public resort any film or cinematograph display which is of an indecent or obscene nature or is of a disgusting nature'. He contended that the legislature outlawed a certain type of behaviour, namely 'exhibiting an obscene film in a place of public resort' (s168), and he argued the word 'exhibits' had a special meaning in the Act in relation to the showing or projecting of movie films.

It is necessary for me to refer briefly to certain legal authority referred to in the course of the argument. In *Sullivan v Hamel-Green* [1970] VicRp 21; [1970] VR 156; (1969) 16 FLR 1, Starke J decided the word 'publishes' when used in s7A(b) of the *Crimes Act* (Commonwealth), should be construed in its natural and popular sense. He referred to the *Shorter Oxford English Dictionary* to derive the ordinary and natural meaning of the word 'publish'. At page 159 he said: 'It seems to me that all the definitions envisage the making public or known of information to a person or persons'.

For my part I have no difficulty in regarding the word 'publishes' as an appropriate word to use in relation to the showing of a movie film. Indeed, it may be considered by some persons to be more appropriate than the word 'exhibits' which was chosen by the legislature in section 168(a). Certainly, I do not regard it as any less appropriate than the word 'exhibit'. In the course of argument I reminded counsel that in the law of defamation, if the defamatory material is a film, as was the case in *Youssoupoff v Metro Goldwyn Mayer* (1934) 50 TLR 581, an appropriate and usual way to plead the libel would be: 'The defendant published of and concerning the plaintiff, a film entitled etc.'

In the *Oxford Dictionary* meaning of the word 'publish' the following appears: 'To make publicly or generally known'. In my view a movie film, which consists of a series of negatives joined

in a strip, is published when the series of negatives are viewed on a screen by the use of light and a projector and is seen by a person through the iris lens system.

In s166(i)(c) the legislature has used three words to create three separate offences in relation to obscene articles. The words are 'sells', 'publishes' and 'distributes'. They have no common genus, in my opinion, and connote three quite different circumstances which may give rise to a charge being laid against a person. Every person who sells an obscene article, i.e. parts permanently with possession of the article for valuable consideration, commits an offence. Every person who publishes an obscene article, i.e. makes it known to persons generally, but without necessarily parting with possession of the film, commits an offence. Every person who distributes an obscene article, i.e. gives it to another person or persons either temporarily or permanently, commits an offence.

I was referred to an unreported decision of McInerney J published on the 17 July,1968 – *Adamson v Helbig*. In that case His Honour had before him an order to review relating to charges laid under s166(c) of the *Police Offences Act* 1958. The defendant was charged with publishing and having assisted to make an obscene photograph, to wit a colour slide, which was seen by certain employees of a film processing company as it was produced from an exposed roll of film. His Honour referred to two judgments delivered in a High Court case of *Crowe v Graham* [1968] HCA 6; (1968) 121 CLR 375; (1968) 41 ALJR 402; (1968) 41 ALJR 402. At p7(a) and 8(a) of his judgment His Honour cited passages from the judgments of Windeyer J at p407 and Kitto J at p406. I do not find them helpful to me as they were given in a case quite different to the one before me. McInerney J did find there had been a publication of the slide, but again, this decision is easily distinguishable from the present case and I do not base my decision in this case upon it.

In the case I earlier referred to, *Preswell v Baughurst*, The Full Court, having decided the movie films were 'articles' proceeded to decide the meaning of the word 'publication' in s180B of the *Police Offences Act* because it was contended by the defendant that the provisions of s166A had not been complied with by the informant.

The court examined the meaning of the word 'publication' in Division 1A of the said Act and came to the conclusion a film could not be said to be published for the purposes of Division 1A. At p12 the court said in the judgment:—

> 'In Division 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'.

Mr Strong has further argued that for the purposes of s166 of the *Police Offences Act*, the word 'publishes' should be construed in a more strict way than its general meaning bears in the English language. He submitted the legislature in amending s166 of the *Police Offences Act* in 1973 must have intended to make lawful the showing of obscene movie films in private to persons who wished to see such films. The intention of Parliament could be so found because it included in sub-s(d) of s166 'The exhibiting of obscene articles in a public place' and it further provided in s168(a) 'That persons who exhibit in picture theatres or places of public resort any film or cinematograph displays, which is of an indecent or obscene nature, or is of a disgusting nature', acts contrary to the Act. I am unable to accept this argument. I have been unable to appreciate the will of Parliament through this process of reasoning. It is appropriate perhaps for me to repeat words used by the Full Court in *Preswell v Baughurst*, on page 3:-

> 'The Division and indeed the whole of Part V of the Act is long overdue for complete overhaul to provide a consistent and intelligent 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'.

Reform of this part of the law is now overdue. It follows from which I have now said that in my opinion grounds 1 and 2 in each of the orders nisi are not sustained. The Magistrate, in my opinion, correctly decided on the evidence that the defendant did publish obscene articles."