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R v Martin Secker Warburg Ltd and Others

CENTRAL CRIMINAL COURT

STABLE J

29 JUNE, 2 JULY 1954

Criminal Law – Obscene publications – Contemporary novel – Test of obscenity – Tending to corrupt and deprave according to the standards of the present day.

In applying the test of obscenity laid down in *R v Hicklin* (1868) (LR 3 QB, 371) the jury must decide whether the tendency of any publication alleged to be obscene is to corrupt and deprave those whose minds today are open to immoral influences and into whose hands the publication may fall at the time when it is published or in the future. Accordingly, in deciding whether a recently published novel, admittedly absorbed with the sex relationship of man and woman and purporting to describe contemporary life, is an obscene libel, it is necessary to take into account the changed

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approach to the question of sex since *R v Hicklin* was decided. A book is not obscene merely because it is in bad taste or because it is an undesirable book.

Note

As to Indecent Publications, see *Halsbury*, Hailsham Edn, Vol 9, pp 395, 396, paras 667–669; and for Cases, see *Digest*, Vol 15, pp 748–751, Nos 8068–8095 and *Digest Supps*.

Case referred to in judgment

R v Hicklin (1868), LR 3 QB 360, 37 LJMC 89, sub nom *R v Wolverhampton (Recorder)* 18 LT 395, sub nom *Scott v Wolverhampton JJ* 32 JP 533, 15 *Digest* 748, 8070.

Trial

Trial on indictment.

Martin Secker Warburg Ltd publishers, of John Street, London, WC, Frederic John Warburg, a director of that firm, and the Camelot Press Ltd of Stanley Road, Southampton, printers, were charged on indictment with publishing an obscene libel, to wit, a novel called "The Philanderers" by Stanley Kauffman. All pleaded Not Guilty. After evidence had been heard Stable J directed that the members of the jury should each be given a copy of the book so that they might take it home and read it for themselves.

J M G Griffith-Jones for the Crown.

Winn for the defendant, Frederic John Warburg.

M J H Turner for the defendant companies, Martin Secker Warburg, Ltd and the Camelot Press Ltd.

2 July 1954. The following judgment was delivered.

STABLE J.

The charge against two limited liability companies, and one individual, is a charge of publishing what is called an obscene libel. Everybody agrees here that the two companies and the individual director stand or fall together. There can be no dispute that the verdict that you will give is a matter of the utmost consequence. It is a matter of very real importance to the accused and to the individuals who are associated with them. It is of importance to authors who, from their minds and imagination, create imaginary worlds for our edification, amusement, and sometimes, too, for our escape. It is a matter of importance to the community in general, to the adolescent, perhaps in particular. In addition to that, it is of great importance in relation to the future of the novel in the civilised world and the future generations who can only derive their knowledge of how persons lived, thought, and acted from the contemporary literature of the particular age in which they are interested. Your verdict will have a great bearing on where the line is drawn between liberty, that freedom to read and think as the spirit moves us, on the one hand, and licence which is an affront to the society of which we are all members, on the other.

The important duty of deciding rests fairly and squarely on your shoulders. It is not what I think about this book; it is the conclusion that you reach. You represent that diversity of minds and ages which represents the reading public of the English-speaking world. You and alone must decide this case and if, in the course of this summing-up, I express my opinion about the matter, you are entitled to ignore it. During the closing speech for the prosecution it seemed to me that there was, if I may say so without offence, a certain confusion of thought. It was suggested that you are, by what you decide today, to determine whether books like this will or will not be published in the future. May I venture to say that your task is nothing of the kind. We are not sitting here as judges of taste. We are not here to say whether we like a book of that kind. We are not here to say whether we think it would be a good thing if books like that were never written. You are here trying a criminal charge. In a criminal court you cannot find a verdict of "Guilty" against the accused unless, on the evidence that you have heard, you are fully satisfied that the charge

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against the accused person has been proved. The burden of proof in this criminal case, as in all criminal cases, rests on the prosecution from start to finish.

The test today is extracted from a decision of 1868, and the test of obscenity is this (*R v Hicklin* (LR 3 QB 371)):

"... whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Because that is a test laid down in 1868, that does not mean that what you have to consider is, supposing this book had been published in 1868 and the publishers had been prosecuted in 1868, whether the court or the jury, nearly a century ago, would have reached the conclusion that the book was an obscene book. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose lands the book may fall in this year, or last year when it was published in this country, or next year or the year after that. Considering the curious change of approach from one age to another, it is not uninteresting to observe that in the course of the argument of the case in 1868 the rhetorical question was asked (*ibid*, 365):

"What can be more obscene than many pictures publicly exhibited, as the Venus in the Dulwich gallery?"

There are some who think with reverence that man is fashioned in the image of God, and you know that babies of either sex are not born into this world dressed up in a frock-coat or an equivalent feminine garment.

This book, as I venture to think you will have already appreciated, is a book which obviously and admittedly is absorbed with sex, the relationship between the male and the female of the human species. I, at all events, approach that great mystery with profound interest and at the same time a very deep sense of reverence. We cannot get away from it. It is not our fault that but for the love of men and women and the act of sex the human race would have ceased to exist thousands of years ago. It is not our fault that the moment in, shall we say, an over-civilised world—if "civilised" is an appropriate word—sex ceases to be one of the great motive forces in human life, the human race will cease to exist. It is the essential condition of the survival and development of the human race, for whatever ultimate purpose we have been brought into this world. Speaking to a representative group of people, nine men and three ladies, I suppose each one of you is of good will and anxious that in our approach to this great mystery today we should achieve some solution which will lead to personal happiness between individuals of the opposite sex in millions of homes throughout this island. This, after all, is the only possible foundation on which to build a vigorous, strong and useful nation.

It is interesting that, throwing one's mind back over the ages, the only real guidance we get about how people thought and behaved is in their contemporary literature. Where should we be today if the literature of Greece, Rome and other past civilisations portrayed, not how people really thought and behaved, but how they did not think and how they did not speak and how they did not behave? Rome and Greece, it is not uninteresting to reflect, elevated human love to a cult, if not a religion, represented by Venus in the Roman world and Aphrodite in the Greek, two goddesses in the form of woman. Then Greece and Rome, like other civilisations, were swept away. When we reach the Middle Ages we find an entirely different approach. The priesthood was compelled to be celibate and a particular qualitative holiness was attached to the monks and the nuns who dedicated themselves to a cloistered and sheltered life. You may think it is lucky that the people were not all quite as holy as that because, if they had been, we should none of us have been here today.

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Approaching this matter which—let us fact it—throughout the ages has been one of absorbing interest to men and women, you get two schools of thought poles apart and in between those two extremes you have a variety of opinion and thought. At one extreme you get the conception, I venture to think, illustrated in some of the teachings of the medieval church; that sex is sin; that the whole thing is dirty; that it was a mistake from beginning to end (and, if it was, it was the great creator of life who made the mistake and not you or I) and the less that is said about this wholly distasteful topic the better; let it be covered up and let us pretend it does not exist. In speaking of the birth of a baby let us refer to “the happy event on Monday” instead of saying “a baby was born on Monday”—it means exactly the same thing. I suppose the high tide was reached in the Victorian era (possibly as a reaction against the coarseness of the Georges and the rather libertine attitude of the Regency) when I understand that in some houses legs of tables were actually draped and rather stricter females never referred to gentlemen's legs as such but called them their “understandings.” At the other extreme you get the line of thought which says that nothing but mischief results from this policy of secrecy and covering up, that the whole thing is just as much a part of God's universe as anything else, and the proper approach to the matter is one of frankness, plain speaking, and the avoidance of any sort of pretence. I suppose that the extreme expression of that view is to be found in the nudist colonies where people, I understand, walk about, weather permitting, without any clothes on at all. Somewhere between those two poles the average, decent, well-meaning man or woman takes his or her stand.

Turning for a moment to the book that you have to consider, it is, as you know, in the form of a novel. Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. The charge is that the tendency of the book is to corrupt and deprave. Then you say: “Well, corrupt and deprave whom?” to which the answer is: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for the decently brought up young female aged fourteen? Or do we go even further back than that and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature, from many angles, is wholly unsuitable for reading by the adolescent, but that does not mean that a publisher is guilty of a criminal offence for making those works available to the general public. I venture to suggest that you give a thought to what is the function of the novel. I am not talking about historical novels when people write a story of some past age. I am talking about the contemporary novelist. By “the contemporary novelist,” I mean the novelist who writes about his contemporaries, who holds up a mirror to the society of his own day. The function of the novel is not merely to entertain contemporaries; it stands as a record or a picture of the society when it was written. Those of us who enjoy the great Victorian novelists get such understanding as we have of that great age from chroniclers such as Thackeray, Dickens, Trollope, Surtees, and many others of that age.

In the world in which we live today it is equally important that we should have an understanding of how life is lived and how the human mind is working in those parts of the world which are not separated from us in point of time but are separated from us in point of space; and that we should have this understanding (particularly at a time like today when ideas and creeds and processes of thought seem, to some extent, to be in the

melting pot and people are bewildered and puzzled to know in what direction humanity is heading and in what column we propose to march). If we are to understand how life is lived in

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the United States of America, France, Germany, or elsewhere, the contemporary novels of those nations may afford us some guide, and to those of us who have not the time, opportunity, money or, possibly, the inclination to travel, it may even be the only guide. This is an American novel written by a citizen of the United States of America, published originally in New York, purporting to depict the lives of people living to-day in New York, and to portray the speech, the turn of phrase, and the current attitude towards this particular aspect of life in New York. If we are going to read novels about how things go in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman or teenager has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage patches or under gooseberry bushes?

This is a very crude work, as you may think. You will consider whether or not it does seek to present a fair picture of aspects of contemporary American thought in relation to this problem. You will, no doubt, further consider whether or not it is desirable that on this side of the Atlantic we should close our eyes to a fact because we do not find it altogether palatable. You have heard a good deal about the putting of ideas into young heads. Really, is it books that put ideas into young heads, or is it nature? When a boy or a girl reaches that stage in life's journey when he or she is passing from the state of blissful ignorance through that perilous part of the journey which we call "adolescence" and finds himself or herself traversing an unknown country without a map, without a compass, and sometimes, I am afraid, from a bad home, without a guide, it is the natural change from childhood to maturity that puts ideas into young heads. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life.

I am going to say a few words about the book itself, again reminding you that the determination of this case is a matter exclusively for you. If you do not agree with any view that I may indicate or express, well, you do not agree with it; that is all, and your disagreement is paramount. You may agree that it is a good book, or a bad book, or a moderate book. It is at least a book. It is the creation of a human mind and it depicts people created by the author in the environment in which that portion or portions of their lives with which the book deals were spent. You may agree or you may not—I do not know—that it is not mere pornographic literature, the filthy, bawdy muck that is just filth for filth's sake. Probably you, ladies, have never seen such a work except, perhaps, by accident. Some of the men, in their younger days, may furtively have glanced at the literary output of Port Said and felt rather ashamed of themselves afterwards. This book purports to be a picture of contemporary life in New York and the subject-matter of the work is largely the relationship of the two sexes. If you look at the front page, you will see the text. It is taken from a Victorian poet, Browning:

"What of soul was left, I wonder,

When the kissing had to stop?"

I suppose men and women of all ages have wondered that.

The theme of this book is the story of a rather attractive young man who is absolutely obsessed with his desire for women. It is not presented as an admirable thing, or a thing to be copied. It is not presented as a thing that brought him happiness or any sort of permanent satisfaction. Throughout the book you hear the note of impending disaster. He is like the drunkard who cannot keep away from drink although he knows where it will land him in the end. So far as his amatory adventures are concerned, the book does deal with candour or, if you prefer it, crudity with the realities of human love and of human intercourse. There is no getting away from that, and the Crown say:

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“Well, that is sheer filth.” Is it? Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which, perhaps, old-fashioned people would mourn the reticence that was observed in these matters yesterday, but is it sheer filth? That is a matter which you have to consider and ultimately to decide.

There is another aspect of the book, which certainly is not pretty or particularly attractive, but that is not what you have to consider. I have told you the test and I will not repeat it. That part of the story deals with this young man's adolescence, and begins on p 76:

“But Russell never told Robert that his own first memory, dating from about the age of three, was of being waked in the middle of the night by two shouting voices, of hearing a plate crash and his father's voice raised almost to a high-pitched scream,”

and so on. The author is tracing the moral decline of this man back to his childhood where the unhappy relations between his mother and his father left a sort of permanent bruise on his personality. It goes on to describe the pitfalls of slime and filth into which the unhappy adolescent, without knowledge or experience, without the map and the compass and without the guiding hand of a wise parent or the example of a well-ordered, decent, home, stumbles. You will have to consider whether in this the author was pursuing an honest purpose and an honest thread of thought or whether that was all just a bit of camouflage to render the crudity, the sex of the book sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions.

The literature of the world from the earliest times when people first learned to write so far as we have it today—literature sacred and profane, poetry and prose—represents the sum total of human thought throughout the ages and from all the varied civilisations the human pilgrimage has traversed. Are we going to say in England that our contemporary literature is to be measured by what is suitable for the fourteen-year-old schoolgirl to read? You must consider that aspect of the matter. And there is another aspect of the matter which I should like you to consider before you come to your conclusion. I do not suppose there is a decent man or woman in this court who does not wholeheartedly believe that pornography, filthy books, ought to be stamped out and suppressed. They are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing. They are just filth, and, of course, that ought to be stamped out; but in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is not there a risk that there will be a revolt, a demand for a change in the law, so that the pendulum will swing too far the other way and allow to creep in things that under the law as it exists today we can exclude and keep out? Remember what I said when I began. You are dealing with a criminal charge. This is not a question of what you think is a desirable book to read. It is a criminal charge of publishing a work with a tendency to corrupt and deprave those into whose hands it may fall. Before you can return a verdict of “Guilty” on that charge you have to be satisfied that that charge has been proved. If it is anything short of that the accused companies and individual are entitled to a verdict at your hands of “Not guilty.”

Verdict: “Not Guilty.”

Solicitors: *Director of Public Prosecutions* (for the Crown); *Oswald Hickson, Collier & Co* (for the defendant and the defendant companies).

T J Kelly Esq Barrister.