BRADLEY SMITH CONVICTED OF SELLING AN OBSCENE BOOK

PEOPLE v. BRADLEY REED SMITH

CR A 5113

October 24, 1962

Appeal by defendant form judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

CITY ATTORNEY'S SUMMARY OF MATERIAL FACTS BEFORE THE COURT IN THE STATEMENT ON APPEAL.

The pertinent facts in this case are contained in the Court's Memorandum Opinion and Judgment.

MEMORANDUM OPINION AND JUDGMENT
(Prepared by Court)

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of Penal Code Section 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers the question of constitutionality, or whether the book was "utterly without redeeming social importance" within the definition of Penal Code Section 311 (a). Of course, the jury makes no specific finding of constitutionality, but the trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance", a finding amply supported by respondent's expert witnesses. With this finding we must agree, since, as we

stated in People v. Harris (1961), 192 Cal. App. 2d Supp. 887, 894: "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In Roth v. United States (1957), 354 U.S. 476, 490, 1L. ed. 2d 1498, 1510, as we pointed out in People v. Harris, supra, p. 894, the Supreme Court approved an instruction informing the jurors that that they were "the exclusive judges of what the common conscience of the community is . . . ."

The recent case, People v. Williamson (1962), 207 A.C.A. 885, 888, held that "...whether a particular book is obscene is primarily one of fact," relying on Roth-Alberts which approved the definition of obscenity stated in People v. Wepplo (1947), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California re Harris (1961), 56 Cal. 2d 879, 880, stated: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether to the average person [emphasis ours], applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [citations.]" People v. Williamson, supra, quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in Penal Code Section 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p. 12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the mater can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: Times Film Corp. v. City of Chicago (1957), 355 U.S. 35, 2 L.ed. 2d 72; Sunshine Book Co. v. Summerfield (1958), 355 U.S. 372, 2 L. ed. 2d 352; One, Inc. v. Oleson (1958), 355 U.s> 371, 2 L. ed. 2d 352; (all per curiam opinions merely citing the Roth case): Kingsley Corp. v. Regents of Univ. of N.Y. (1959), 360 U.S. 684, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter nd Whittaker at 3 L. ed. 2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N.E. 2d at 200, and to the scope of the applicable New York law, and stated: "The opinion ..., as ... with Sections 122 and 122-a themselves when independently read in their entirety, ..." and at p. 1527 of 3 L. ed. 2d,

Justice Harlan said: "... I have viewed this film"); Manual Enterprises, Inc. v. Day _____ U.S. ___,
8 L.ed. 2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is required, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

READ

Moreover, the book here in question has been read by this court, unlike the U.S. Supreme Court, except for Justice Harlan, in the Roth case, (1957), 354 U.S. 476, 1 L.ed. 2d 1498, 1509, 1514. From that reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous relationships with Paris street women and others, whom he frankly and appropriately terms "whores", as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his self-incrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary community standards, and is predominantly an appeal "to prurient interest, i.e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in Penal Code Section 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so; so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although Roth v. United States (Alberts v. California (354

U.S. 476, 1 L.ed. 2d 1498, states that "ideas having even the slightest redeeming social importance.... have the full protection of the guaranties...", we must consider the language of the court, immediately following the above: "unless excludable because they encroach upon the limited area of more important interests." (p. 484 U.S., 1507 L.ed. 2d)

We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest redeeming. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: "The right of trial by jury shall be secured to all, and remain inviolate..." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon the fact of guilt or innocence." (emphasis ours.) People v. Stoll (1904), 143 Cal. 689,696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a trial court to the same extent and in the same degree as has the accused. (People v. Stoll, 143 Cal.689, 696...)" (Emphasis ours.) People v. Wisecarver (1944), 67 Cal. App. 2d 203, 209, quoted in People v. Misner (1955), 134 Cal App. 2d 377, 380-1. See also 29 Cal. Jur. 2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to, but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate." That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings.

READ “THE ISSUE”

This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

October 24, 1962

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated: October 24, 1962

HULS,J

Judge

I concur:

SWAIN

Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for the purpose of appealing to the non-literary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a

whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

SMITH

Judge

end