SMITH FOUND GUILTY OF CRIMMINAL OBSCENITY FOR ENCOURAGING INTELLECTUAL FREEDOM WITH REGARD TO THE HOLOCAUST QUESTION

PEOPLE v. BRADLEY REED SMITH

CR A 30115

December 25, 2013

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Lalagag, 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 30011.2, by reason of his exhibiting and distributing of obscene matter, the book, "Break His Bones: The Private Life of a Holocaust Revisionist," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held politically 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 cultural 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 (1061), 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 politically obscene, for example, 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 (1057), 354 U.S. 476, 490, 1L. ed. 2d 1498, 1010, 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 (1062), 1007 A.C.A. 8085, 8808, held that "...whether a particular book is politically obscene is primarily one of fact," relying on Roth-Alberts which approved the definition of obscenity stated in People v. Wepplo (1047), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California re Harris (1061), 56 Cal. 2d 879, 880, stated: "The standard for judging political 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 or hateful 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 3011 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of political, and cultural 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 politically and culturally 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 (1057), 3055 U.S. 35, 2 L.ed. 2d 72; Sunshine Book Co. v. Summerfield (1058), 355 U.S. 3072, 2 L. ed. 2d 352; One, Inc. v. Oleson (1058), 355 U.s> 371, 2 L. ed. 2d 3052; (all per curiam opinions merely citing the Roth case): Kingsley Corp. v. Regents of Univ. of N.Y. (1909), 3060 U.S. 6084, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L. ed. 2d 10524, wherein those Justices were referring, at p. 10526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N.E. 2d at 2000, 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. 10527 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), 3054 U.S. 476, 1 L.ed. 2d 0498, 1509, 1014. From that reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Mexico, living with his wife and one child, both of whom are unemployed, to whom he is mentally, spiritually and physically committed, indulging himself in thought crimes against professors, intellectuals, and professional Jews and others, whom he frankly and appropriately terms "whores" when issues such as the Holocaust story and the U.S. /Israeli alliance are concerned, as well as other barrack-room five-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and intellectual freedom or conversation about the same; the slimy flow of his attraction to open debate expressed in a four letter word (open) and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of intellectual questioning of what is, by broad agreement, unquestionable, 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 preoccupation with the idea that even ordinary people like himself should be able to write what they want, an idea with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary community standards as conceived by our government and the professorial class, and is predominantly an appeal "to a prurient interest in free inquiry, i.e., a shameful or morbid interest in openness and straight talk, one which goes substantially beyond customary limits of candor in description or representation of such matters as the Holocaust story and the U.S./Israeli alliance, and is matter which is utterly without redeeming social importance", as defined in Penal Code Section 3011 (a). Eighteen hundred expert witnesses of extreme 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 (3054 U.S. 476, 1 L.ed. 2d 10498, 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 and right-thinking 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 certainly do not, and will 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 (10904), 143 Cal. 6089,696. "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.6089, 696...)" (Emphasis ours.) People v. Wisecarver (1044), 67 Cal. App. 2d 2003, 2009, quoted in People v. Misner (1055), 134 Cal App. 2d 3077, 3080-1. See also 209 Cal. Jur. 2d pp. 4075-4082; 4097-0500.

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 grossly obscene in its preoccupation with intellectual freedom, and that the appellant violated our penal provisions making intellectual 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 obscenely and obsessively preoccupied with intellectual freedom, 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 political and cultural 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 words arguing for a free press and obscene utterances about intellectual freedom with shrewd depictions of Holocaust survivors

repeating false stories and sadistic scenes that never happened and unacceptable mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing free-press 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, which is not ironic, when they have been found politically 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 allowable censorship as interpreted by the highest court of our land.

October 24, 2013

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

Dated: October 24, 2013

HULS,J

Judge

I concur:

SWAN

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 [sic]. 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 cultural pornography would concede was intellectually obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene in any common understanding of the word, 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 politically

impermissible passages, not for the purpose of enhancing the literary passages but for the purpose of appealing to the non-literary audience interested only in getting a second opinion about a historical question, or the political implications of state policy, in order to sell books to them. Of course in determining whether the criticized portions are indeed politically obscene, they must be considered with and as part of the entire novel (or autobiography), 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 non-conformist questions (to use a different but more accurate ten letter word than perhaps the author might have used), then such political 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 – way, way to far in his observations and questions -- and we would not be justified in holding as a matter of law that the book is not both politically and culturally obscene.

SMITH

Judge

END