**PATEL v THE PEOPLE (1974) ZR 111 (HC)**

HIGH COURT

CULLINAN J

24th MAY 1974 35

(Criminal Appeal No. HLA 18 of 1974)

**Flynote**

**Criminal law - Possession of obscene material - Test for "obscene" material.**

**Headnote**

The appellant was convicted of being in possession of obscene printed matter. The test of obscenity applied by the trial magistrate was other than a tendency to corrupt morals. On appeal, 40

**1974 ZR p112**

CULLINAN J

*Held*:

   (i)   "Obscene" material is that which tends to corrupt morals.

   (ii)   The magistrate had misdirected himself inasmuch as he regarded the test of obscenity as being something other than a tendency 5 to corrupt morals.

Cases cited:

   [1]   *Richard Clive Neville and Others*, 46 Cr. App. R 115.

   [2]   *Calder and Boyars Ltd.* 52 Cr. App. R 706.

   [3]   *The Queen v Hicklin, Law Rep.* 3 QB  360.

   [4]   *R v Martin Secker Warburg Ltd and Others* [1954] 2 All ER 683. 10

Legislation referred to:

Penal Code, Cap. 146, s. 117 *(a)*

*A R  Lawrence, Peter Cobbett - Tribe & Co*., for the appellant.

*R  E M  Mwape, State Advocate*, for the respondent.

**Judgment**

**Cullinan J:** The 15 appellant was convicted on one count of being in possession of obscene printed matter contrary to section 177 *(a)* of the Penal Code.

I approach this appeal bearing in mind the following passage from the Court of Appeal case of *Neville and Others* [1]:

   "The function 20 of this Court is also worth explaining. It is not here to consider whether the jury was right or wrong, nor to consider whether the publication was obscene or not obscene - that is a decision for the jury and the jury only. The function of this Court is to review the proceedings below, with the assistance of counsel, 25 to see if the proceedings were properly conducted, and, if not, to see whether any irregularities which arose in the course of the proceedings were sufficient to render the finding of the jury unsafe or unsatisfactory."

The prosecution adduced evidence of finding the appellant in 30 possession of two publications. The particular police officer who produced the publications was cross - examined by the learned defence counsel as to his views on the contents thereof. In this respect, the learned trial magistrate's judgment reads as follows:

   "Under cross - examination, this witness said he considered the two 35 books in question to be obscene because people's private parts were exposed. He said he had based his opinion of obscenity on the pictures alone and not taking the pictures in conjunction with the written text of the books. When shown a medical book by the defence counsel, which contained pictures of naked people, including 40 pictures of private parts, he maintained that this medical book was also obscene, because it had pictures of people without clothes and pictures of private parts."

**1974 ZR p113**

CULLINAN J

In the case of *Neville* [1] the Court of Appeal held, at page 124:

   "Now whether the article is obscene or not is a question exclusively in the hands of the jury, and it was decided in this Court in *Calder and Boyars* [2] that expert evidence should not be admitted on the issue of obscene or no." 5

And further on (at page 124):

   "In the ordinary run - of - the - mill cases in the future the issue 'obscene or no' must be tried by the jury without the assistance of expert evidence upon that issue, and we draw attention to the failure to observe that rule in this case in order that that failure 10 may not occur again. We are not oblivious of the fact that some people, perhaps many people, will think a jury, unassisted by experts a very unsatisfactory tribunal to decide such a matter. Those who feel like that, must Campaign elsewhere for a change of the law. We can only deal with the law as it stands, and that is 15 how it stands on this point."

One could hardly regard a police officer as being an expert witness in the matter of the test of obscenity, that is, without evidence of expert status having been adduced. Although the police officer's evidence of opinion was adduced in cross - examination, none the less it was adduced 20 from a prosecution witness and formed the case, against the appellant. Even were he an expert such evidence would be inadmissible against the appellant. When it came to deciding whether the publications were obscene (and here let me say that the learned trial magistrate made no finding, with regard to any particular illustration in either publication) 25 the learned trial magistrate made no particular reference to the police officer's evidence. His judgment, however, reads:

   "I have therefore strongly believed in the prosecution evidence against the accused, and have consequently rejected the defence evidence that the books and the pictures in them were for 30 educational purposes to the accused."

It seems there that the learned trial magistrate placed some reliance on the police officer's opinion evidence.

Although the learned trial magistrate noted that section 177 had been amended by Act No. 41 of 1970 he none the less quoted from the 35 unamended section. I am satisfied that no misdirection thereby occurred, however, as in applying the test of obscenity he seemed to rely on the amended provisions. When it came to applying the latter test, passages in his Judgment read as follows:

   "The Shorter Oxford English Dictionary gives the definition of 40 'obscene' as 'inauspicious, filthy, indecent, that is, offensive to modesty or decency, expressing or suggesting lewd thoughts, and offensive to the senses of the mind, disgusting or filthy'. The Advanced Learner's Dictionary of Current English, defines 'obscene' as 'morally disgusting, likely to corrupt, especially by 45 regarding or describing sex indecently' ".

**1974 ZR p114**

CULLINAN J

   "The printed matter referred to in this case, properly fits in the definition of the word 'obscene' as found in the two English dictionaries quoted above, and they could be said to be covered by the section of the laws under which the accused is charged."

The common law test of obscenity is, among other authorities to be found In the case of *R v Hicklin* [3] quoted with approval in the case of *R v Martin Secker* [4] at 685:

   ". . . whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral 10 influences, and into whose hands a publication of this sort may fall."

The following passage appears in the illuminating judgment of Stable, J, in *R v Martin Secker* [4] at 686:

   "Turning for a moment to the book that you have to consider, it 15 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." 20

On the same point, the following passage appears in the judgment in the case of *Neville* [1] at 126:

   '' It is for you as a jury, so the law says, to decide whether taken as a whole, this is likely to deprave or corrupt a significant proportion of people who are likely to read it. As I shall mention later on, 25 this may not, in fact, be so difficult or formidable a task for you as might first appear. The word "obscene" in the dictionary sense is "repulsive", "filthy", "loathsome" or "lewd".' In considering it in its legal sense in each of these five charges - because it is mentioned in each one - that is the approach to it which I wish you 30 to adopt, please, as I have been explaining to you during the last few minutes.'

   "We have had a good deal of argument in this Court about exactly what those words mean and exactly how the jury would have reacted to them, but we feel bound to accede to Mr. Mortimer's 35 argument that at least there is grave danger that the jury from that passage in the direction to them, took the view or might have taken the view, that 'obscene' for all purposes including the purposes of the Act of 1959 included 'repulsive', 'filthy', 'loathsome' or 'lewd'." 40

Paragraph *(a)* of section 177 of the Penal Code reads as follows:

   "*(a)* makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other object tending to corrupt morals; . . . ".

It 45 is to be noted that the phrase "or any other obscene objects" was not repeated in the above amended paragraph; no doubt the legislature considered the phrase otiose in view of the phrase "or any other object tending to corrupt morals" also contained in the unamended paragraph.

**1974 ZR p115**

CULLINAN J

Bearing in mind the authorities quoted above it seems to me on a study of the paragraph that the legislature regarded as "obscene" anything which tended to corrupt morals.

The following passage appears in the learned trial magistrate's judgment: 5

   "The first ingredient is the possession of the alleged obscene matter by the accused, and the second ingredient is the question of the obscenity of the matter charged, and the third ingredient is whether the subject matter is such as to tend to corrupt morals."

Thereafter the learned trial magistrate repeatedly indicated that he 10 found the articles to be "obscene" and also that they tended to corrupt morals. I consider this to be a misdirection inasmuch as he obviously regarded the test of obscenity as being something other than a tendency to corrupt morals. The learned trial magistrate did indeed state that he considered the publications had a tendency to corrupt morals; it is not 15 clear from his judgment, however, as to what extent he was influenced by the two definitions of "obscene" contained in the two dictionaries which he quoted in coming to such conclusion.

In all the circumstances of this case I consider it would be unsafe to allow the conviction to stand. The appeal against conviction is allowed, 20 the finding and sentence of the Court below are set aside and the appellant is acquitted.

*Appeal allowed*

**1974 ZR p115**