[HIGH COURT OF AUSTRALIA.]

ASSOCIATED NEWSPAPERS LIMITED . . APPLICANT; DEFENDANT,

AND

WAVISH . . . . . RESPONDENT. INFORMANT,

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1956.

MELBOURNE, *Oct.* 25.

Dixon C.J., Williams, Webb, Fullagar and Taylor JJ.

Police Offences (Vict.)—Obscene publication—"Obscene"—Definition—Interpretation—Police Offences Act 1928-1954 (*No.* 3749—*No.* 5779) (*Vict.*), *s.* 169.

Section 169 of the *Police Offences Act* 1928-1954 (Vict.) provides:—"(1) In this Part—'obscene' (without limiting the generality of the meaning thereof) includes—(*a*) tending to deprave and corrupt persons whose minds are open to immoral influences; and (*b*) unduly emphasizing matters of sex, crimes of violence, gross cruelty or horror. (2) In determining for the purposes of this Part whether any article is obscene the court shall have regard to—(*a*) the nature of the article; and (*b*) the persons, classes of persons and age groups to or amongst whom it was or was intended or was likely to be published, distributed, sold, exhibited, given or delivered; and (*c*) the tendency of the article to deprave or corrupt any such persons class of persons or age group—to the intent that an article should be held to be obscene when it tends or is likely in any manner to deprave or corrupt any such persons or the persons in any such class or age group, notwithstanding that persons in other classes or age groups may not be similarly affected."

Held (1) that sub-s. (1) means that an article is obscene if the conditions of either par. (*a*) or par. (*b*) are fulfilled; (2) in determining whether an article falls within either par. (*a*) or (*b*) of sub-s. (1) regard must be had to each of the matters enumerated in pars. (*a*), (*b*) and (*c*) of sub-s. (2).

Special leave to appeal from the decision of the Supreme Court of Victoria (*Martin* J.), refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

On 6th June 1956, James Ben Wavish, Senior-Detective of Police, as informant, laid an information against Associated Newspapers Limited, a company incorporated in the State of New South Wales and registered in the State of Victoria, as defendant, alleging that the defendant on or about 31st May 1956, at Melbourne, contrary to s. 171 (*c*) of the *Police Offences Act* 1928, as amended, distributed obscene articles, to wit, copies of a magazine called "People" dated 30th May 1956.

The information was heard before the Court of Petty Sessions at Melbourne constituted by H. R. Pyvis, Esq., Stipendiary Magistrate, who, on 18th July 1956, dismissed the information, holding that the article in question "Love in the South Seas" was not obscene

because it did not tend to deprave or corrupt persons whose minds were open to immoral influences.

The informant obtained from the Supreme Court of Victoria an order nisi to review the decision of the magistrate. The order nisi was heard before *Martin* J. who, in a written judgment delivered on 26th September 1956, held that the order nisi should be made absolute and the information remitted to the court of petty sessions for further consideration on the ground that the magistrate had failed to consider whether the article was obscene by reason of the fact that it dealt with sexual matters in a manner which offended against the standards of the community.

From this decision the defendant sought special leave to appeal to the High Court of Australia.

R. A. Smithers Q.C. and *B. L. Murray*, for the applicant.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria, and Dr. *S. H. Z. Woinarski*, for the respondent.

The following oral judgment of the Court was delivered by *Dixon* C.J. :—

This is an application for special leave to appeal from an order made by *Martin* J. making absolute an order nisi to review a decision of a magistrate upon a charge under s. 171 of the *Police Offences Act* aided by s. 169. The magistrate had dismissed the information. *Martin* J. reversed his decision.

The question before the magistrate was whether, within the definition of the word " obscene " contained in s. 169 as it now stands, a publication was obscene. His Honour in a sense substituted his view of the article published for that of the magistrate. In so far as that involved some displacement of a finding of fact, under Victorian law his Honour was entitled to take such a course provided he was of opinion that the magistrate was clearly wrong.

The question, however, is not free from matter of law and I propose to state what, in the view of the Court, is the construction to be placed upon s. 169 in its application to s. 171. Section 171 relates to what are called " articles ". The word " articles " is the subject of what may be described as an inclusive definition contained in s. 169. It has been held in Victoria that, although the definition is inclusive, the word in s. 171 does not extend beyond what is *ejusdem generis* with what is stated in the inclusive definition in s. 169.

It therefore follows that s. 171 relates to the kind of publications and representational objects, and to things *ejusdem generis* therewith, which are described in the definition of " articles " and would not extend to matters and physical objects having no relation to representation.

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In relation to the definition of the word " obscene " in s. 169 (1), we are of opinion that the word " and " does not mean that what is stated in pars. (*a*) and (*b*) provides cumulative conditions which must be both fulfilled before an " article " can fall within that definition. It is enough if the article has the tendency described in (*a*) or has the undue emphasis described in (*b*). But at the same time we are of opinion that sub-s. (2) applies in every case and that in arriving at a conclusion as to the character of a particular article which is the subject of a prosecution, the tribunal must, in determining that question, have regard to the matters which are stated in pars. (*a*), (*b*) and (*c*) of sub-s. (2). That is to say, those are considerations which must be taken into account in determining the issue which arises under par. (*a*) or par. (*b*) of the definition of the word " obscene ", as the case may be.

What the effect of those considerations may be in any given case depends upon the circumstances of that case and the matters which are raised in the course of ascertaining or determining whether the condition stated in par. (*a*) or the condition stated in par. (*b*) is satisfied. It is evident that there will be cases in which the assistance obtained by having regard to the considerations mentioned in sub-s. (2) will be small and others in which it will be decisive. It is true that the last portion of sub-s. (2), following the words " to the intent ", has the purpose of ensuring that the tendency to deprave or corrupt may be sufficiently made out although it affects a particular class or classes of person and not other classes of persons. But it still remains true that " in determining for the purposes of this Part " of the Act whether any article is obscene, the tribunal must have regard to the considerations which are enumerated in sub-s. (2).

In this particular case four members of the Court have read the article carefully and are of opinion that it is clearly within the definition of " obscene ". For myself, I have not read the article through but I have seen sufficient of it to leave me with no doubt that their Honours are entirely right in the view they have taken.

We think that it is enough to express the view of the law which we have stated and to dismiss the application for special leave on the ground that an appeal could not succeed.

The application will be refused with costs.

Application refused with costs.

Solicitors for the applicant, *J. M. Smith & Emmerton.*

Solicitor for the respondent, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.