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Criminal Law And Procedure—Evidence Of Contemporary Community Obscenity Prosecution Standards Irrelevant in Obscenity Prosecution

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they are susceptible of demonstration.[21] Mere convenience in crime detection as well as unproved allegations of threats to national security do not provide a convincing argument for mass governmental invasion of personal privacy. Under New York law the right against unreasonable search and seizure is substantially protected by requiring a warrant which describes with particularity "the place to be searched, and the person or things to be seized."[22] This provides an effective safeguard against government evidentiary expeditions in the area of real and personal property. Immediately following, a clause in the Constitution dealing with wiretapping states: "The right of the people to be secure against unreasonable interception of telephone communications shall not be violated." This clause, however, is completely negated by the following sentences which permit government officials to listen to each and every conversation of a citizen regardless of its relevance to the investigation in the hopes that something incriminating will turn up. Thus, while the law provides adequate protection against intrusions into a citizen's real and personal property rights, it has emasculated an individual's right to privacy. We have advanced beyond the Lockean concept of law as primarily the protector of property, to a realization of law "as the strongest link between man and freedom."[23] Such tactics are reminiscent of the monstrosities in George Orwell's *Nineteen Eighty-Four* and are inconsistent with the principles of a free society.

W. A. C.

EVIDENCE OF CONTEMPORARY COMMUNITY STANDARDS IRRELEVANT IN OBSCENITY PROSECUTION

Two bookstore operators in the City of New York were arrested by a plainclothes detective after his purchase of allegedly obscene publications. Both were charged with violating section 1141 of the Penal Law, which makes it a misdemeanor for anyone to sell or have in his possession with intent to sell any *obscene book*. Upon the trial of the action the defense counsel attempted to introduce into evidence various other publications similar in content to those the defendants had sold. These were offered in proof by presenting them to the arresting officer, who was then asked if he had seen such issues sold throughout the city. Moreover, counsel attempted to put two such publications, handled by other newsstands and bookstores, directly into evidence to show the state of contemporary community standards regarding obscenity. The trial court excluded such evidence. A collateral issue was raised as to whether the proof was sufficient to prove that the defendants had knowledge of the contents of the books. On appeal of convictions, *held*; affirmed, two judges concurring in separate opinions and two judges dissenting. The proffered evi-

21. Williams, One Man's Freedom, ch. 7 at 88-106 (1962). For an interesting argument against the use of wiretap evidence.
22. N.Y. Const. art. I, § 12; N.Y. Civ. Prac. Act § 345(a).
23. Proclamation of President John F. Kennedy, Law Day May 1, 1961.

dence was properly excluded as irrelevant to prove, according to contemporary community standards of morality, what constituted permissible literature, and scienter was proven beyond a reasonable doubt. *People v. Finkelstein,* 11 N.Y.2d 300, 183 N.E.2d 661, 229 N.Y.S.2d 367 (1962).[1]

The contention was made by the defendants that the proof failed to establish scienter, knowledge by the defendants of the contents of the books. But the Court disposed of this argument by relying on a decision of the United States Supreme Court which held that the circumstances may warrant the inference that the bookseller was aware of the contents of the publication which he was selling.[2] With regard to the question of the proffered evidence in the trial court, the majority based its decision on the holding in the case of *People v. Richmond County News.*[3] In that case the Court of Appeals held that section 1141 of the Penal Law would only prohibit that literature which may properly be termed "hard core pornography."[4] The test to determine whether material is within the class of hard core pornography is an objective appraisal of the content of the material by the court. As expressed by Chief Judge Desmond in a concurring opinion in the case at bar, if publications are so vile on their face that they lie outside the bounds of any contemporary standards of community acceptance, then no matter how many other people buy or sell it, its sale is prohibited under section 1141.

But, the majority opinion goes on to say that the publications in the instant case also meet the standard of obscenity established by the United States Supreme Court in the case of *Roth v. United States*[5] which classified obscene material as that which deals with sex in a manner appealing to prurient interest. Unlike the objective appraisal test of the New York Court of Appeals in the *Richmond County* case the *Roth* case defines obscenity in the following manner: "Whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest." As a result of the *Roth* case, any material which falls within the above definition is deemed obscene and therefore not entitled to the constitutional protection of freedom of speech or press. This poses the question of whether or not the publications in the instant case fall within the Supreme Court definition of obscenity. The majority answered this question affirmatively by simply stating that the books in the instant case "unquestionably meet the *Roth* test." But the *Roth* test requires that the court must use "contem-

1. 28 Misc. 2d 771, 218 N.Y.S.2d 341 (Ct. Spec. Sess. 1961), aff'd, 15 A.D.2d 641, 223 N.Y.S.2d 855 (1st Dep't 1962).

2. Smith v. California, 361 U.S. 147 (1959). The circumstances which established scienter in the instant case were the statements by defendants that they had seen worse books, the lurid statements on the covers, and the high selling price.

3. 9 N.Y.2d 578, 175 N.E.2d 681, 216 N.Y.S.2d 369 (1961).

4. Id. at 587, 175 N.E.2d at 686, 216 N.Y.S.2d at 376. Case defines hard core pornography as that which depicts dirt for dirt's sake, is vile rather than coarse, and represents "a debauchery of the sexual faculty."

5. 354 U.S. 476 (1957).

porary community standards" in determining what is and what is not obscene. In the case at bar when the defendants offered other books on sale in the community for the purpose of comparison, the trial court rejected this proof as improper and irrelevant. It is clear, as the dissent points out, that by this ruling the trial court did not use contemporary community standards in reaching its decision.

The dissenting opinion, in voting for reversal of the convictions, based its reasoning on the concurring opinions of Justices Frankfurter and Harlan in the case of *Smith v. California.*[6] Both Justices would make it a violation of constitutional due process for the court to exclude evidence tending to "allow light to be shed" on what are the "contemporary community standards." Justice Frankfurter makes it a requirement of *Roth* that qualified expert testimony be admitted into evidence to enlighten the trier of facts on the current community standards. To exclude such testimony as irrelevant "goes to the very essence of the defense and therefore to the constitutional safeguards of due process." Justice Harlan agrees with Justice Frankfurter but does not limit to expert testimony the evidence that the defendant in an obscenity prosecution may introduce. He would allow other proof, among which would be the introduction of similar publications which were openly published, sold and purchased and received general acceptance by the community. And, he would also base a denial of the right to introduce such evidence on constitutional grounds:

> The community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates. This being so, it follows that due process—"using that term in its primary sense of an opportunity to be heard and to defend (a) substantive right . . ."—requires a State to allow a litigant in some manner to introduce proof on this score.[7]

Recently, the Maryland Court of Appeals in an obscenity prosecution was faced with the same issue as that in the instant case. In holding that it was reversible error for the trial court to exclude other books on sale in the community for comparison purposes the court adopted the views of Justices Harlan and Frankfurter.[8] In another recent case in a state court, the Supreme Court of California held that it was a denial of due process for the trial court not to allow the defendant to prove contemporary community standards by expert testimony and comparable publications.[9]

In the instant case the defendants applied by way of certiorari to the United States Supreme Court for review. Certiorari was not granted.[10] Should the Court eventually consider the question it shall be difficult to avoid the real issue of defendant's right to have evidence introduced. Here, it may well

6. Supra note 2.
7. Supra note 2, at 171-2.
8. Yudkin v. State, 229 Md. 223, 182 A.2d 798 (1962).
9. In Re Harris, 56 Cal. 2d 879, 366 P.2d 305 (1961).
10. Cert. denied, 31 U.S.L. Week 3129 (U.S. Oct. 15, 1962).

have been that the proffered evidence did not show what that standard was. Yet, if the real issue is faced a new constitutional right may be struck. The theme of Justice Harlan in the *Smith* case points the way by demonstrating that where constitutional freedoms of expression are at stake, one cannot in keeping with due process be condemned for dealing in forms of expression the community at large tolerates.

W. J. L.

EXTREMELY LONG AND UNREASONABLE DELAY IN SENTENCING CONVICTED CRIMINAL DIVESTS COURT OF JURISDICTION

Relator pleaded guilty in the Bronx County Court to second degree robbery in February 1953, and sentencing, scheduled for April 1953, was not imposed until November 1959.[1] Whether or not the delay was of such an unreasonable length of time as to divest the court of jurisdiction over the convicted criminal was the center of controversy in this habeas corpus proceeding. The events that occurred between the time of scheduled sentencing and actual sentencing were as follows: Before the April 1953 sentencing date, relator was tried in the same court for first degree robbery. This ended in a mistrial. He was then ordered to Westchester County to face a third charge of robbery pending against him. He pleaded guilty to this charge and was sentenced on May 27, 1953, to the Elmira Reception Center for a term not to exceed five years. He was paroled in October 1955, but prior to this time the Superintendent at the Center had sought to learn from the Bronx authorities the disposition to be made of five warrants lodged against relator as detainers, one of which pertained to the February 1953 conviction. Before relator's release, all of these warrants had been withdrawn. This supposedly led the relator to believe that the February 1953 proceedings against him had been abandoned. Out on parole for little over a year, the relator was returned to jail and released in April 1958. Within a few weeks he was arrested on two felony charges, pleaded guilty in Bronx County Court, and was sentenced to Riker's Island. At this time a motion was made by the District Attorney to have the relator sentenced upon the conviction of February 1953, and he received five years probation which he began to serve upon his release from the Island in May 1959. Within a few months he absconded, his probation was revoked, and he was sentenced to Sing Sing Prison for a maximum of three years. In his writ for habeas corpus, relator claimed that by virtue of the delay, the Bronx County Court lost jurisdiction over him, and the sentencing on the February 1953 conviction was void. The Supreme Court, Dutchess

1. Relator was 17 years old at the time. For a complete record of the charges and convictions lodged against him from March 1952 to November 1959 see the report of the State of New York Dept. of Correction, Div. of Identification, Albany, N.Y., dated November 11, 1961, in Respondent's Brief, People ex rel. Harty v. Fay, 10 N.Y.2d 374, 179 N.E.2d 483, 223 N.Y.S.2d 468 (1961).