1966
*May 26, 27
Oct. 31

TED FRASER, EIRAN HARRIS and FRASER BOOK BIN LTD. ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

TED FRASER, DON POIRIER and FRASER BOOK BIN LTD. ..... APPELLANTS;

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TED FRASER and FRASER BOOK BIN LTD. ..... APPELLANTS;

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HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Possession of obscene material for purpose of publication, distribution or circulation—Retail bookseller—Charge under s. 150(1)(a) of the Criminal Code—Whether three offences included in charge—Whether accused should properly be charged under s. 150(2)(a)—Criminal Code, 1953-54 (Can.), c. 51, s. 150.

The appellant company, the owner of two retail bookshops and a warehouse for the storage of books, was convicted, together with the individual appellants, of unlawfully having in their possession obscene material for the purpose of publication, distribution or circulation, contrary to s. 150(1)(a) of the *Criminal Code*. The convictions were affirmed by a majority judgment in the Court of Appeal. The accused were granted leave to appeal to this Court. There was no appeal from the finding that the material was obscene. The accused submitted that the information was void for duplicity and multiplicity and further that it had been laid under the wrong subsection of s. 150 of the Code.

Held: The appeal should be dismissed.

The gravamen of the offences charged in this case is possession of a quantity of obscene matter. Once possession is established it only remains for the Crown to lead evidence to prove one of the various

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*PRESENT: Taschereau C.J. and Fauteux, Martland, Ritchie and Hall JJ.

purposes for which the possession was had, namely, publication, distribution or circulation. It is one offence only which may be committed in different ways. In the circumstances of this case it was not necessary to make each book or pamphlet the subject of a separate count. The various titles recited in the different counts constituted nothing more than particulars of the offences charged.

On the facts of this case, the submission that the offence defined in s. 150(1)(*a*) of the Code could have no application to retail booksellers, such as the appellants, and that the charges should have been laid under s. 150(2)(*a*), could not be entertained. The evidence fully justified the inference that the distribution of obscene matter was a part of the business in which the appellants were engaged.

Droit criminel—Possession de matières obscènes aux fins de les publier, distribuer ou mettre en circulation—Libraire—Accusation portée sous l'art. 150(1)(a) du Code criminel—L'accusation contient-elle trois infractions—L'acte d'accusation aurait-il dû être porté sous l'art. 150(2)(a)—Code criminel, 1953-54 (Can.), c. 51, art. 150.

La compagnie appelante, propriétaire de deux librairies et d'un entrepôt servant à l'emmagasinage de livres, a été trouvée coupable, ainsi que les autres appelants, d'avoir eu illégalement en leur possession des matières obscènes aux fins de les publier, distribuer ou mettre en circulation, le tout contrairement à l'art. 150(1)(*a*) du *Code criminel*. Le verdict de culpabilité fut confirmé par un jugement majoritaire de la Cour d'appel. Les accusés ont obtenu permission d'en appeler devant cette Cour. Aucun appel ne fut porté à l'encontre du verdict que les matières étaient obscènes. Les accusés ont soutenu que l'acte d'accusation était nul parce qu'il était double et multiple et en plus qu'il avait été porté sous le mauvais alinéa de l'art. 150 du Code.

Arrêt: L'appel doit être rejeté.

La matière de l'infraction reprochée dans cette cause est la possession d'une quantité de matières obscènes. Une fois que la possession est établie, la Couronne n'a qu'à produire une preuve établissant une des diverses fins pour lesquelles on en avait la possession, à savoir, la publication, distribution ou mise en circulation. Il ne s'agit que d'une seule infraction qui peut être commise de diverses manières. Dans les circonstances, il n'était pas nécessaire de faire de chaque livre ou pamphlet le sujet d'un chef d'accusation séparé. Les titres énumérés aux divers chefs d'accusation ne constituaient autre chose qu'une communication de détails sur les infractions reprochées.

En se basant sur les faits de cette cause, la prétention que l'infraction telle que définie à l'art. 150(1)(*a*) du Code ne peut s'appliquer à des libraires, tels que les appelants, et que l'acte d'accusation aurait dû être porté sous l'art. 150(2)(*a*), ne peut pas être admise. La preuve justifie amplement l'inférence que la distribution de matières obscènes faisait partie des entreprises des appelants.

APPELS de trois jugements de la Cour d'appel de la Colombie-Britannique[1], confirmant un verdict de culpabilité. Appels rejetés.

[1] (1965), 52 W.W.R. 712, [1966] 1 C.C.C. 110.

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APPEALS from three judgments of the Court of Appeal for British Columbia[1], affirming a conviction. Appeals dismissed.

Joseph Sedgwick, Q.C., and *W. H. Deverell,* for the appellants.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from three judgments of the Court of Appeal for British Columbia[1] rendered in accordance with a decision of the majority of that Court (Bull J.A. dissenting) which affirmed the convictions of the various appellants before Magistrate G. W. Scott on three separate informations each alleging that the various accused therein named "unlawfully had in their possession...for the purpose of publication, distribution or circulation a quantity of obscene written matter and pictures..." and each containing separate counts wherein the titles of a number of allegedly obscene publications were recited.

The appellant Company, Fraser Book Bin Ltd., is the owner of two retail book shops and a warehouse for the storage of books at Vancouver and Ted Fraser, who is a Director and General Manager of that Company, was at all material times in charge of the Company's book shop at 1247 Granville Street where he was assisted by the appellant Harris while the appellant Poirier was in charge of the Company's other book shop at 6184 Fraser Street.

The first information relates only to the shop at 1247 Granville Street, the second to the shop at 6184 Fraser Street and the third to the warehouse at 1390 Granville Street. Ted Fraser and Fraser Book Bin Limited are charged in each of the informations but Harris is charged only in the first and Poirier only in the second.

The learned Magistrate found that all the publications referred to, except those specified in Count 3 of the first and second informations and Count 1 of the third information, were obscene within the meaning of s. 150(8) of the *Criminal Code* and Fraser, Harris and Fraser Book Bin

[1] (1965), 52 W.W.R. 712, [1966] 1 C.C.C. 110.

Ltd. were found guilty on the first and fourth Counts of the first information on evidence which disclosed that the offending books referred to in those counts were found on the shelves of the shop at 1247 Granville Street at a time when customers were present. The Magistrate acquitted the accused on the second Count of this information on the ground that he had a doubt as to whether they had the motion pictures therein referred to in their possession "for the purpose of publication, distribution or circulation".

When the second and third informations came on to be heard no evidence was given as counsel in both cases formally admitted that the accused had the publications and motion pictures therein referred to in their possession "for the purpose of publication, distribution or circulation" and it was further admitted that the publications referred to in Counts 1 and 2 of the second information and Counts 2 and 3 of the third information were "identical in nature" with publications which the learned Magistrate had found to be "obscene" at the trial of the first information.

Fraser, Harris and the Company appealed their conviction on the first information on the ground that the shop at 1247 Granville Street was a retail book store exclusively operated for the purpose of selling books to individuals and that the charges contained in that information, alleging as they did that they had the publications "in their possession...for the purpose of publication, distribution or circulation" were charges framed in the language of s. 150(1)(*a*) of the *Criminal Code* which section was intended to be reserved for the prosecution of makers, publishers and wholesale distributors of obscene material and had no application to the selling of such material by retail which is the subject of s. 150(2)(*a*) of the Code.

The two subsections in question read as follows:

150 (1) Every one commits an offence who

(*a*) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever, or...

150 (2) Every one commits an offence who knowingly, without lawful justification or excuse,

(*a*) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever,...

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The essence of the submission in this regard is that the accused in the first information were charged under the wrong subsection and the distinction between the two subsections is said to be reinforced by the fact that s. 150(6) provides that ignorance of the nature or presence of the material by means of or in relation to which the offence was committed is not a defence to a charge under s. 150(1)(*a*) whereas when a charge is laid under s. 150(2)(*a*) the burden rests upon the Crown to prove that the accused had knowledge of the nature and presence of the material in respect of which it was laid.

It was upon this latter ground that Bull J.A., in the course of his dissenting opinion in the Court of Appeal found that the first information should have been quashed. This ground of appeal was, however, not open to those convicted on the second and third informations because of the formal admissions hereinbefore referred to.

The second ground of appeal, which applies to all the informations, was unanimously dismissed by the Court of Appeal for British Columbia and was the subject of an order granting leave to appeal to this Court by which it was expressly confined to the issue raised by the contention:

> That each of the counts in each of the said informations is bad and void for duplicity and multiplicity.

There is no appeal from the finding of the learned Magistrate with respect to obscenity which was unanimously affirmed by the Court of Appeal.

The appellants' submission that all the counts are void for "duplicity and multiplicity" is twofold. In the first place it is contended that the charge of having in their "possession...for the purpose of *publication, distribution* and *circulation,* a quantity of obscene written matter..." involves three separate charges each of which should be the subject of a separate count; and in the second place it is argued that possession of each publication constitutes a separate offence which should have been charged separately and that the counts each charging the accused with having a number of different publications in their possession are therefore void.

I agree with the members of the Court of Appeal that the gravamen of the offences charged in these informations

is "*possession*" of a "quantity of obscene matter..." and that the various titles recited in the different Counts constitute nothing more than particulars of the offences charged of the kind which the Court would have been justified in ordering to be delivered to the accused under the provisions of s. 497 of the Code. In this regard I can do no better than to adopt the language used by Maclean J.A., in the course of his reasons for judgment in the Court of Appeal where he said:

> In my view the gravamen of the charge is 'possession'. Once possession is established it only remains for the Crown to lead evidence to prove one of the various purposes for which the possession was had, namely, publication, distribution or circulation. In other words, it is one offence only which may be committed in different ways.
>
> I am fortified in this view by *Couture v. The Queen, supra,* where the charge of 'having in possession for sale, distribution or circulation' was regarded as one offence. Duplicity was found in that case only because the full charge alleged that the accused 'made, printed and had in possession for sale, distribution or circulation'.
>
> Dealing with the second branch of the appellants on duplicity, it is my view that the enumeration of a number of book titles is merely a particularization of the expression 'a quantity of obscene written matter'. In my view, in the circumstances of this case it was not necessary to make each book or pamphlet the subject of a separate count.

The submission that the offence defined in s. 150(1)(*a*) as charged in the first information could have no application to retail booksellers such as the appellants named therein, was advanced with great force by Mr. Sedgewick. In this regard it was argued that a retail bookseller might well have acquired his stock in bulk and never have read any of the offensive books or, indeed, that he might be a blind man, and it was strenuously contended that Parliament could never have intended that such a person could be exposed to a charge under s. 150(1)(*a*) and thus, by virtue of s. 150(6), be deprived of the defence that he was ignorant of the presence or contents of such books which defence would have been open to him if he had been charged as a "seller" under s. 150(2)(*a*).

However persuasive this argument may be thought to be, it does not appear to me to fit the circumstances of the present case. Here the appellant company, with the appellant Fraser as its General Manager, was proved to be operating a warehouse from which books were distributed to its two retail outlets one of which was referred to in the

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first information and was the place where the third appellant, Harris, was employed. This was, in my opinion, an organization for the distribution of books, a substantial number of which were found to be obscene.

In this regard the following excerpt from the evidence of the detective who supervised the seizure of the offending books appears to me to be revealing:

> I did go with Detective Matches to 1247 Granville Street, where I met Mr. Fraser and he told us at that time that he was the General Manager of Fraser Book Bin and that particular store. He took us to a warehouse at 1390 Granville and he told us he also had another store at 6184 Fraser, that they did a large volume of business in mail order as well as counter business, all over the world, both buying and selling.

I agree with the view expressed by Maclean J.A. on behalf of the majority of the Court of Appeal that the word "distribution" as used in s. 150(1)(*a*) "is obviously a word of wider connotation than 'sale' as sale is only one of a number of means of distribution". The appellant submitted that this construction would mean that everyone who "sells" within the meaning of s. 150(2)(*a*) would also be guilty of the offence defined in s. 150(1)(*a*) and that the provisions of the former section would thus be "reduced to a futility" to employ the language used in the factum filed on behalf of the appellants. Like Mr. Justice Maclean, however, I can envisage cases of individual sales which would constitute an offence under s. 150(2)(*a*) and yet would not be a "distribution" within the meaning of s. 150(1)(*a*), and I think also that there may well be cases of a bookseller who has in his shop a scattered few of these publications amongst a mass of inoffensive books, where a charge of possession for the purpose of sale contrary to s. 150(2)(*a*) would be more appropriate than one relating to "distribution" under s. 150(1)(*a*).

There may, indeed, be many cases in which it is difficult to determine which of these two subsections should be invoked in a prosecution but, in my opinion, the present circumstances do not present any such difficulty. I am satisfied that the evidence called in respect of the first information fully justifies the inference that the distribution of obscene written matter was a part of the business in which the appellants Fraser and Fraser Book Bin Ltd. were engaged and that the appellant Harris was employed as an active participant in that business.

For these reasons I would dismiss the appeals of all the appellants and affirm the convictions entered by the learned Magistrate.

Appeals dismissed.

Solicitors for the appellants: Macey, Dowding & Co., Vancouver.

Solicitors for the respondent: Cumming, Bird & Richards, Vancouver.