

## CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS v. PARASHRAM YESHVANT.\*

*Indian Penal Code (Act XLV of 1860), Secs. 292 and 293—"Obscene"*

—*Meaning of the word.*

In interpreting the word "obscene" in sections 292 and 293 of the Indian Penal Code, the Courts may rightly follow *Reg. v. Hicklin*(<sup>1</sup>) where Lord Cockburn, C. J., says: "I think the test [of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

Whether a publication is obscene, is a question of fact.

THIS was a reference by G. Jacob, Sessions Judge of Poona, under section 438 of the Code of Criminal Procedure (Act X of 1882).

The accused was charged under section 293 of the Indian Penal Code with having in his possession certain obscene pictures for the purpose of sale.

Mr. Plunkett, the trying Magistrate, found that "the pictures were decidedly obscene and indecent." He, therefore, convicted the accused and sentenced him to pay a fine of Rs. 10.

The accused applied to the Sessions Court for revision of the Magistrate's proceedings, contending that the pictures were not obscene.

The Sessions Judge thereupon made a reference to the High Court on the following grounds:—

"I am of opinion, however, that the Magistrate was wrong in holding the pictures to be obscene within the meaning of the exception. There are four pictures. The pictures are of female figures partly, and in one case entirely, naked, but in the latter case a somewhat strained attempt at conventional decency has been observed. I have not given a more full description, as I forward herewith copies of the four pictures for inspection.

"The pictures are not, I think, such 'as to deprave and corrupt those whose minds are open to such immoral influences, or

\* Criminal Reference, No. 162 of 1894.

(<sup>1</sup>) L.R., 3 Q.B., 360.

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that their primary and palpable result would be to excite to lust' (see Mayne's Notes under section 292 of the Indian Penal Code). The Magistrate's finding that the pictures are obscene, cannot, I think, be accepted as final, as he has given no reasons for it. It would be, I think, well if there should be an authoritative decision on this point if the Magistrate's opinion be deemed correct, as it would seem, from the documents now tendered by the applicant, that such pictures are passed without objection through the Custom Office.

"The effect of the Magistrate's decision would be that even partial nudity is obscenity, for he makes no distinction between the different pictures: There is nothing objectionable in attitude or gesture, apart from the mere fact of nudity or partial nudity.

"I am of opinion that the Magistrate's decision should be reversed and that the fine be refunded."

There was no appearance either for the Crown or for the accused.

JARDINE, J. :—The trying Magistrate found that "the pictures were decidedly obscene and indecent," and convicted and fined the accused under section 293 of the Indian Penal Code. The accused moved the Sessions Judge to refer the case to this Court. The learned Judge thinks the judgment defective as not stating reasons, and wrong in fact, as in his opinion the primary and palpable result of the pictures is not to deprave or corrupt or excite to lust.

We are of opinion that in the interpretation of the word "obscene" in sections 292 and 293 the Courts may rightly follow *Reg. v. Hicklin*<sup>(1)</sup> which was approved by the Court of Common Pleas in *Steel v. Brannan*<sup>(2)</sup>. It was followed in *Empress v. Indarman*<sup>(3)</sup>. Lord Cockburn, C. J., said in *Reg. v. Hicklin*, p. 371: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall. Now, with regard to this work, it is quite certain that it would suggest to the minds of the

(1) L. R., 3 Q. B., 360.

(2) L. R., 7 C. P., 261.

(3) I. L. R., 3 All., 837 at p. 843.

young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character." The Court below had found the book to be, "by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come."

The Sessions Judge remarks that the effect of the Magistrate's decision would be that even a partial nudity in a picture is obscenity, for he makes no distinction between the different pictures. If the conviction related only to the half-draped pictures entitled Danube and Lorely, we might use our powers of revision, following the opinion expressed by Mr. Mayne in his Commentary on section 292, as we do not think they are of such a sort as excite to sensual feelings. The other two pictures, which are naked women, are so drawn and coloured as to make it a question, in our opinion, for the trying Court whether or not they come within the mischief at which section 293 explained by the decisions quoted above is intended to strike. Now, the Magistrate has found that they are "indecent," and we presume that this is the reason why he held them to be obscene. It was open to the accused at the trial to show by argument and evidence that the effect of these two pictures is not necessarily to deprave or debauch, or that they are artistic or conventional or otherwise not polluting to the morals of the public. We are of opinion that there are sufficient grounds for interfering with the decision of the Magistrate, to whom the law leaves the question of obscenity which is very much one of fact.

We, therefore, return the record and proceedings.

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