PETITIONER:
RANJIT D. UDESHI

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT:
19/08/1964

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
SHAH, J.C.
AYYANGAR, N. RAJAGOPALA

CITATION:
1965 AIR 881 1965 SCR (1) 65
CITATOR INFO :
R 1970 SC1390 (5)
R 1971 SC 481 (40,50,54)
R 1986 SC 967 (23,25,26)

ACT:
Constitution of India, 1950, Arts. 19(1)(a) and 19(2)-Indian Penal Code, 1860 (Act 45 of 1860), s. 292-If ultra vires-"Obscene", meaning of-Accused-Knowledge of obscenity-Relevance.

HEADNOTE:
The appellant, a bookseller, sold a copy of the unexpurgated edition of "Lady Chatterley's Lover". He was convicted under s. 292, Indian Penal Code. In his appeal to the Supreme Court he contended that : (i) the section was void because it violated the freedom of speech and expression guaranteed by Art. 19(1)(a) of the Constitution of India., (ii) even if the section was valid, the book was not obscene and (iii) it must be shown by the prosecution that he sold the book with the intention to corrupt the purchaser, that is to say, that he knew that the book was obscene.
HELD : (i) the section embodies a reasonable restriction upon the freedom of speech and expression guaranteed by Art. 19 and does not fall outside the limits of restriction permitted by cl. (2) of the Article. The section seeks no more than the promotion of public decency and morality which are the words of that clause. [69G; 70E-F; 74B].
(ii) The book must be declared obscene within the meaning of s. 292, Indian Penal Code. [81C].
The word "obscene" in the section is not limited to writings, pictures etc. intended to arouse sexual desire. At the same time the mere treating with sex and nudity in art and literature is not per se evidence of obscenity. The test given by Cockburn C.J., in Queen v. Hicklin, (1868) L.R. 3 Q.B. 360, to the effect that the tendency of the matter charged as obscene must be to deprave and corrupt those, whose minds are open to such immoral influences and into whose hands a publication of the sort may fall, so far followed in India, is the right test. The test does not

offend Art. 19(1) (a) of the Constitution. [70B-C; 73H-1; 74B-C. F;]
75F].
In judging a work, stress should not be laid upon a word here and a word there, or a passage here and a passage there. Though the work as a whole must be considered, the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort. In this connection the interests of contemporary society and particularly the influence of the impugned book on it must not be overlooked. Where, obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. It is necessary that a balance should be maintained between "freedom of speech and expression" and "public decency or morality"; but when the latter is substantially transgressed the former must give way. In other cases obscenity may be overlooked if it has a preponderating social purpose or profit. [75GH; 76A-B, E-G. 77A-C].
66
In judging the obscenity of one book the character of other books is a collateral issue which need not be explored. [76C-D]
(iii) The section does not make the book-seller's knowledge of obscenity an ingredient of the offence and the prosecution need not establish it. Absence of knowledge may be taken in mitigation but does not take the case out of the section. But the prosecution must prove the ordinary mens rea in the second part of the guilty act and it must be proved that he had actually sold or kept for sale the offending article. Such mens rea may be established by circumstantial evidence. [71C-D, F-H].

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 178 of 1962.
Appeal by special leave from the judgment and order dated February 6, 1962, of the Bombay High Court in Criminal Revision Application No. 1149 of 1961.
R. K. Garg, S. C. Agarwal, D. P. Singh, M. K. Ramamurthi and B. A. Desai, for the appellant.
C. K. Daphtary, Attorney-General, 0. P. Rana and R. H. Dhebar, for the respondent.
The Judgment of the Court was delivered by
Hidayatullah J. The appellant is one of four partners of a firm which owns a book-stall in Bombay. He was prosecuted along with the other partners under S. 292, Indian Penal Code. All the facts necessary for our purpose appear from the simple charge with two counts which was framed against them. It reads :

> "That you accused Nos. 1, 2, 3, 4 on or about the 12th day of December, 1959 at Bombay being the partners of a book-stall named Happy Book Stall were found in possession for the purpose of sale copies of an obscene book called Lady Chatterley's Lover (unexpurgated edition) which inter alia contained, obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code;

AND

That you Gokuldas Shamji on or about the 12th day of December 1959 at Bombay did sell to Bogus Customer Ali Raza Sayeed Hasan a copy of an obscene book called Lady Chatterley's Lover (unexpurgated edition) which inter alia contained obscene matter as detailed separately and attached herewith and thereby committed an offence punishable u/s 292 of the I.P. Code."

67

The first count applied to the appellant who was accused No. 2 in the case. The Additional Chief Presidency Magistrate, III Court, Esplanade, Bombay, convicted all the partners on the first count and fined each of them Rs. 20 with one week's simple imprisonment in default. Gokuldas Shamji was additionally convicted on the second count and was sentenced to a further fine of Rs. 20 or like imprisonment in default. The Magistrate held that the offending book was obscene for purposes of the section. The present appellant filed a revision in the High Court of Bombay. The decision of the High Court was against him. He has now appealed to this Court by special leave and has raised the issue of freedom of speech and expression guaranteed by the nineteenth Article. Before the High Court he had questioned the finding of the Magistrate regarding the novel.

It is convenient to set out s. 292 of the Indian Penal Code at this stage:

"292. Sale of obscene books etc. : Whoever-

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence -under this section,

68

shall be punished with imprisonment for either description for a term which may extend to three months, or with fine, or with both.

Exception.-This section does not extend to any book, pamphlet, writing, drawing or painting

kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose."

To prove the requirements of the section the prosecution examined two witnesses. One was the test purchaser named in the charge and the other an Inspector of the Vigilance Department. These witnesses proved possession and sale of the book which facts are not denied. The Inspector in his testimony also offered his reasons for considering the book to be obscene. On behalf of the accused Mr. Mulkraj Anand, a writer and art critic gave evidence and in a detailed analysis of the novel, he sought to establish that in spite of its apparent indelicate theme and the candidness of its delineation and diction, the novel was a work of considerable literary merit and a classic and not obscene. The question does not altogether depend on oral evidence because the offending novel and the portions which are the subject of the charge must be judged by the' court in the light of s. 292, Indian- Penal Code, and the provisions of the Constitution. This raises two broad and independent issues of law-the validity of s. 292, Indian Penal Code, and the proper interpretation of the section and its application to the offending novel.

Mr. Garg who argued the case with ability, raised these two issues. He bases his argument on three legal grounds which briefly are:

(i) that s. 292 of the Indian Penal Code is void as being an impermissible and vague restriction on the freedom of speech and expression guaranteed by Art. 19 (1) (a) and is not saved by cl. (2) of the same article;

(ii) that even if s. 292, Indian Penal Code, be valid, the book is not obscene if the section is properly construed and the book as a whole is considered; and

(iii) that the possession or sale to be punishable under the section must be with the intention to corrupt the public in general and the purchasers in particular.

69

On the subject of obscenity his general submission is that a work of art is not necessarily obscene if it treats with sex even with nudity and he submits that a work of art or a book of literary merit should not be destroyed if the interest of society requires that it be preserved. He submits that it should be viewed as a whole, and its artistic or literary merits should be weighed against the so-called obscenity, the context in which the obscenity occurs and the purpose it seeks to serve. If on a fair consideration' of these opposite aspects, lie submits, the interest of society prevails, then the work of art or the book must be preserved, for then the obscenity is overborne. In no case, he submits, can stray passage or passages serve to stamp an adverse verdict on the book. He submits that the standard should not be that of an immature teenager or a person who is abnormal but of one who is normal, that is to say. with a mens sana in corporis sana. He also contends that the test adopted in the High Court and the Court below from Queen v. Hicklin(1) is out of date and needs to be modified and be commends for our acceptance the views expressed recently by the courts in England and the United States.

Article 19 of the Constitution which is the main plank to

support these arguments reads

> "19(1) All citizens shall have the right-
> (a) to freedom of speech and expression;
> (2) Nothing -in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of public order, decency or morality"

No doubt this article guarantees complete freedom of speech and expression but it also makes an exception in favour of existing laws which impose restrictions on the exercise of the right in the interests of public decency or morality. The section of the Penal Code in dispute was introduced by the Obscene Publications Act (7 of 1925) to give effect to Article 1 of the International' Convention for the suppression of or traffic in obscene publications signed by India in 1923 at Geneva. It does not go beyond obscenity which falls directly within the words "public decency

(1) (1868) L.R. 3 Q.B. 360.

70

and morality" of the second clause of the article. The word, as the dictionaries tell us, denotes the quality of being obscene which means offensive to modesty or decency; lewd, filthy and repulsive. It cannot be denied that it is an important interest of society to suppress obscenity. There is, of course, some difference between obscenity and pornography in that the latter denotes writings, pictures etc. intended to arouse sexual desire while the former may include writings etc. not intended to do so but which have that tendency. Both, of course, offend against public decency and morals but pornography is obscenity in a more aggravated form. Mr. Garg seeks to limit action to cases of intentional lewdness which he describes as "dirt for dirt's sake" and which has now received the appellation of hard-core pornography by which term is meant libidinous writings of high erotic effect unredeemed by anything literary or artistic and intended to arouse ,sexual feelings.

Speaking in terms of the Constitution it can hardly be claimed ,that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, ,because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the in-terest of public decency and morality. Section 292, Indian Penal ,,Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is really not vague because it is a word which is well-understood even if persons differ in,. their attitude to what is obscene and what is not. Lawrence thought James Joyce's Ulysses to be an obscene book deserving suppression but it was lgalised and he considered Jane Eyre to be pornographic but very few people will agree with him. The former he thought so because it dealt with excretory functions and the latter because it dealt -with sex repression. (See Sex, Literature and Censorship pp. 26 201). Condemnation of obscenity depends as much upon the mores of the people as upon the

individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely "poor value in the-propagation of ideas, opinions and informations of public interest or profit." When there is propagation of ideas, opinions and informations of public interest

71

or profit, the approach to the problem may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292, Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Art. 19. The next question is when can an object be said to be obscene ?

Before dealing with that problem we wish to dispose of Mr. Garg's third argument that the prosecution must prove that the person who sells or keeps for sale any obscene object knows that it is obscene, before he can be adjudged guilty. We do not accept this argument. The first sub-section of s. 292 (unlike some others which open with the words "whoever knowingly or negligently etc.") does not make knowledge of obscenity an ingredient of the offence. The prosecution need not prove something which the law does not burden it with. If knowledge were made a part of the guilty act (actus reus), and the law required the prosecution to prove it would place an almost impenetrable defence in the hands of offenders. Something much less than actual knowledge must therefore suffice. It is argued that the number of books these days is so large and their contents so varied that the question whether there is mens era or not must be based on definite knowledge of the existence of obscenity. We can only interpret the law as we find it and if any exception is to be made it is for Parliament to enact a law. As we have pointed out, the difficulty of obtaining legal evidence of the offender's knowledge of the obscenity of the book etc., has made the liability strict. Under our law absence of such knowledge, may be taken in mitigation but it does not take the case out of the sub-section.

Next to consider is the second part of the guilty act (actus reus), namely, the selling or keeping for sale of an object which is found to be obscene. Here, of course, the ordinary guilty intention (mens rea) will be required before the offence can be said to be complete. The offender must have actually sold or kept for sale, the offending article. The circumstances of the case will then determine the criminal intent and it will be a matter of a proper inference from them. The argument that the prosecution must give positive evidence to establish a guilty intention involves a supposi-tion that mens rea must always be established by the prosecution

72

through positive evidence. In criminal prosecution mens rea must necessarily be proved by circumstantial evidence alone unless the accused confesses. The sub-section makes sale and possession for sale one of the elements of the offence. As sale has taken place and the appellant is a book-seller the necessary inference is readily drawn at least in this case. Difficulties may, however, arise in cases close to the border. To escape liability the appellant can prove his

lack of knowledge unless the circumstances are such that he must be held guilty for the acts of another. The court will presume that he is guilty if the book is sold on his behalf and is later found to be obscene unless he can establish that the sale was without his knowledge or consent. The law against obscenity has always imposed a strict responsibility. When Wilkes printed a dozen copies of his Essay on Woman for private circulation, the printer took an extra copy for himself. That copy was purchased from the printer and it brought Wilkes to grief before Lord Mansfield. The gist of the offence was taken to be publication-circulation and Wilkes was presumed to have circulated it. Of course, Wilkes published numerous other obscene and libellous writings in different ways and when Madame Pampadour asked him : "How far does the liberty of the Press extend in England ?" he gave the characteristic answer : "I do not know. I am trying to find out" (See 52 Harv. L. Rev. 40).

The problem of scienter (knowingly doing an act) has caused anxious thought in the United States under the Comstock law [19 U.S.C. 1461 (1958)] which deals with the non-mailability of obscene matter. We were cited Manual Enterprises Inc. v. J. Edward Day(1) but there was so little concurrence in the Court that it has often been said, and perhaps rightly, that the case has little opinion value. The same is perhaps true of the latest case Nico Jacobellis v. State of Ohio (decided on June 22, 1964) of which a copy of the judgment was produced for our perusal.

It may, however, be pointed out that one may have to consider a plea that the publication was for public good. This bears on the question whether the book etc. can in those circumstances be regarded as obscene. It is necessary to bear in mind that this may raise nice points of the claims of society to suppress obscenity and the claims of society to allow free speech. No such plea has been raised in this case but we mention it to draw attention to the fact that this may lead to different results in different cases. When Savage published his Progress of a Divine, and was prosecuted for it, his plea was that he bad "introduced obscene ideas with a view to exposing them to detestation, and of amending the age by showing

(1) 370 U.S. 478: 8 L. ed. 2nd 639.

73

the depravity of wickedness" and the plea was accepted (See Dr. Johnson's Life of Savage in his Lives of the Poets). In Hicklin's case(1) Blackburn J. did not accept a similar plea in respect of the pamphlet before him observing that it would "justify the publication of anything however indecent, however obscene, and, however mischievous." We are not called upon to decide this issue in this case but we have found it necessary to mention it because ideas having social importance will prima facie be protected unless obscenity is so gross and decided that the interest of the public dictates the other way. We shall now consider what is meant by the word "obscene" in s. 292, Indian Penal Code.

The Indian Penal Code borrowed the word from the English Statute. As the word "obscene" has been interpreted by English Courts something may be said of that interpretation first. The Common law offence of obscenity was established in England three hundred years ago when Sir Charles Sedley exposed his person to the public gaze on the balcony of a tavern. Obscenity in books, however, was punishable only before the spiritual courts because it was so held down to 1708 in which year Queen v. Read (II Mod 205 O.B.) was decided. In 1727 in the case against one Curl it was ruled

for the first time that it was a Common Law offence (2 Stra. 789 K.B.). In 1857 Lord Campbell enacted the first legislative measure against obscene books etc. and his successor in the office of Chief Justice interpreted his statute (20 & 21 Viet. C. 83) in Hicklin's case(2). The section of the English Act is long (they were so in those days), but it used the word "obscene" and provided for search, seizure and destruction of obscene books etc. and made their sale, possession for sale, distribution etc. a misdemeanour. The section may thus be regarded as substantially in pari materia with s. 292, Indian Penal Code, in spite of some differences in language. In Hicklin's case(3) the Queen's Bench was called upon to consider a pamphlet, the nature of which can be gathered from the title and the colophon which read : "The Confession Unmasked, showing the depravity of Romish priesthood, the iniquity of the confessional, and the questions put to females in confession'." It was bilingual with Latin and English texts on opposite pages and the latter half of the pamphlet according to the report was "grossly obscene. as relating to impure and filthy acts, words or ideas". Cockburn,. C.J. laid down the test of obscenity in these words

> "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deperave and corrupt those whose minds are open to such immoral
>
> (1) (1868) L.R. 3 Q.B, 360
>
> 74
>
> influences, and into whose hands a publication of this sort may fall. . . . . it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character."

This test has been uniformly applied in India. The important question is whether this test of obscenity squares with the freedom of speech and expression guaranteed under our Constitution, or it needs to be modified and, if so, in what respects. The first of these questions invites the Court to reach a decision on a constitutional issue of a most far-reaching character and we must beware that we may not lean too far away from the guaranteed freedom. The laying down of the true test is not rendered any easier because art has such varied facets and such individualistic appeals that in the same object the insensitive sees only obscenity because his attention is arrested, not by the general or artistic appeal or message which he cannot comprehend, but by what he can see, and the intellectual sees beauty and art but nothing gross. The Indian Penal Code does not define the word "obscene" and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by us. The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. It is not necessary that the angels and saints of Michelangelo should be made to wear breeches before they can be viewed. If the rigid test of

treating with sex as the minimum ingredient were accepted hardly any writer of fiction today would escape the fate Lawrence had in his days. Half the book-shops would close and the other half would deal in nothing but moral and religious books which Lord Campbell boasted was the effect of his Act.

The question is now narrowed to what is obscenity as distinguished from a permissible treating with sex ? Mr. Garg relies on some passages from the opinions expressed in the Supreme Court of the United States in Samuel Roth v. U.S.A.(') and from the

(1) 354 U.S. 476; 1 L ed. 2d. 1498 (1957).

75

charge to the jury by Stable J. in Regina v. Martin Secker and Warburg Ltd.(1) and invites us to adopt the test of "hard-core pornography" for the interpretation of the word "obscene" in the Indian Penal Code. He points out that the latest statute in England now makes exceptions leading to the same result. He has also referred to some books and literary and artistic publications which have not been considered objectionable.

It may be admitted that the world has certainly moved far away from the times when Pamela, Mall Flanders, Mrs. Warren's Profession, and even Mill on the Floss were considered immodest. 'Today all these and authors from Aristophanes to Zola are widely read and in most of, them one hardly notices obscenity. If our attitude to art versus obscenity had not undergone a radical change, books like Caldwell's God's Little Acre and Andre Gide's If It Die would not have survived the strict test. The English Novel has come out of the drawing room and it is a far cry from the days when Thomas Hardy described the seduction of Tess by speaking of her guardian angels. Thomas Hardy himself put in his last two novels situations which "were strongly disapproved of under the conventions of the age", but they were extremely mild compared with books today. The world is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. Curiously, varying results are noticeable in respect of the same book and in the United States the same book is held to be obscene in one State but not in another [See A Suggested Solution to the Riddle of Obscenity (1964), 112 Penn. L. Rev. 8341.

But even if we agree thus far, the question remains still whether the Hicklin test is to be discarded ? We do not think that it should be discarded. It makes the court the judge of obscenity in relation to an impugned book etc. and lays emphasis on the potentiality of the impugned object to deprave and corrupt by immoral influences. It 'Will always remain a question to decide in each case and it does not compel an adverse decision in all cases. Mr. Garg, however, urges that the test must be modified in two respects. He wants us to say that a book is not necessarily obscene because there is a word here or a word there, or a passage here and a passage there which may be offensive to particularly sensitive persons. He says that the overall effect of the book should be the test and secondly, that the book should only be condemned if it has no redeeming merit at all, for then it is "dirt for dirt's sake", or as Mr. Justice Frankfurter put it in his inimitable way "dirt for money's sake." His contention is that judged

(1) [1954] 1 W.L.R. 738.

76

of in this light the impugned novel passes the Hicklin test if it is reasonably modified.

Mr. Garg is not right in saying that the Hicklin case(1) emphasised the importance of a few words or a stray passage. The words of the Chief Justice were that "the matter charged" must have "a tendency to deprave and corrupt". The observation does not suggest that even a stray word or an insignificant passage would suffice. Any observation to that effect in the ruling must be read secundum subjectum material, that is to say, applicable to the pamphlet there considered. Nor is it necessary to compare on-book with another to find the extent of permissible action. It is useful to bear in mind the words of Lord Goddard, Chief Justice in the Reiter case. (2)

> "The character of other books is a collateral issue, the exploration of which would be endless and futile. If the books produced by the prosecution are indecent or obscene, their quality in that respect cannot be made any better by examining other books . . ."

The Court must, therefore, apply itself to consider each work at a time. This should not, of course, be done in the spirit of the lady who charged Dr. Johnson with putting improper words in his Dictionary and was rebuked by him : "Madam, you must have been looking- for them." To adopt such an attitude towards art and literature would make the courts a board of censors. An overall view of the obscene matter in the setting of the whole work would, of course, be necessary, but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprave and corrupt those whose minds are open to influences of this sort and into whose hands the book :is likely to fall. In this connection the interests of our contemporary society and Particularly the influence of the book etc. on it must not be overlooked A number of considerations may here enter which it is not necessary to enumerate, ’out we must draw attention to one fact. Today our national and regional languages are strengthening themselves by new literary standards after a deadening period under the impact of English. Emulation by our writers of an obscene book under the aegis of this Court’s determination is likely to -pervert our entire literature because obscenity pays and true -art finds little popular support. Only an obscurant will deny the need for such caution. This consideration marches with all law and precedent on this subject and so considered we can only say that where

(1) (1868) L. R. 3 Q. B. 360 (2) (1954) 2 Q. B. 16

77

obscenity and art are mixed, art must so preponderate as to throw the obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked. In other words, treating with sex in a manner offensive to public decency and morality (and these are the words, of our Fundamental Law), judged of by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds, must determine the result. We need not attempt to bowdlerize all literature and thus rob speech and expression of freedom. A balance should be maintained between freedom of speech and expression and public decency and morality but when the latter is substantially transgressed the former must give way.

We may now refer to Roth’s case(1) to which a reference has been made. Mr. Justice Brennan, who delivered the majority opinion in that case observed that if obscenity is to be judged of by the effect of an isolated passage or two upon

particularly susceptible persons, it might well encompass material legitimately treating with sex and might become unduly restrictive and so the offending book must be considered in its entirety. Chief Justice Warren on the other hand made "Substantial tendency to corrupt by arousing lustful desires as the test. Mr. Justice Harlan regarded as the test that must "tend to sexually impure thoughts". In our opinion, the test to adopt in our country (regard being had to our community mores) is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech and expression, and obscenity is treating with sex in a manner appealing to the carnal side of human nature, or having that tendency. Such a treating with sex is offensive to modesty and decency but the extent of such appeal in a particular book etc. are matters for consideration in each individual case.

It now remains to consider the book Lady Chatterley's Lover. The story is simple. A baronet, wounded in the war is paralysed from the waist downwards. He married Constance (Lady Chatterley) a little before he joined up and they had a very brief honeymoon. Sensing the sexual frustration of his wife and their failure to have an heir he leaves his wife free to associate with other men. She first experiences with one Michaelis and later with a game-keeper Mellors in charge of the grounds. The first over was selfish sexually, the other was something of an artist. He explains to Constance the entire mystery of eroticism and they put it into practice. There are over a dozen descriptions of their sexual intimacies. The game-keeper's speech and vocabulary

(1) 354 U.S. 476, 1 L. ed. 2d. 1498 (1957).

ISUP./64--6

78

were not genteel. He knew no Latin which could be used to appease the censors and the human pudenda and other erogenous parts are freely discussed by him and also named by the author in the descriptions. The sexual congress each time is described with great candidness and in prose as tense as it is intense and of which Lawrence was always a consummate master. The rest of the story is a mundane one. There is some criticism of the modern machine civilization and its enervating effects and the production of sexually inefficient men and women and this, according to Lawrence, is the cause of maladjustment of sexes and their unhappiness.

Lawrence had a dual purpose in writing the book. The first was to shock the genteel society of the country of his birth which had hounded him and the second was to portray his ideal of sexual relations which was never absent from any of his books. His life was a long battle with the censor-morons, as he called them. Even before he became an author he was in clash with conventions. He had a very repressive mother who could not reconcile herself to the thought that her son had written the White Peacock. His sisters were extremely prim and correct. In Ms letters he said that he would not like them to read Lady Chatterley's Lover. His school teacher would not let him use the word 'stallion' in an essay and his first love Jessie could not read aloud Ibsen as she considered him immodest. This was a bad beginning for a hyper-sensitive man of "wild and untamed masculinity." Then came the publishers and last of all the censors. From 1910 the publishers asked him to prune and prune his writings and he wrote and rewrote his novels to satisfy them. Aldous Huxley tells us that Lady Chatterley's Lover was written three times [Essays (Dent)]. Aldington in

his Portrait of a Genius has seen in this a desire to avoid being pornographic but the fact is that Lawrence hated to be bowdlerized. His first publisher Heinemann refused his Sons and Lovers and he went over to Duckworths. They refused his Rainbow and he went to Secker. They brought out his Lost Girl and it won a prize but after the Rainbow he was a banned author whose name could not be mentioned in genteel society. He became bitter and decided to produce a "taboo-shattering bomb". At the same time he started writing in defence of his fight for sexual liberation in English writing. This was Lawrence's first reason for writing the book under our review.

Lawrence viewed sex with indifference and also with passion. He was indifferent to it because he saw in it nothing to hide and he saw it with passion because to him it was the only "motivating

79

power of life" and the culmination of all human strength and happiness. His thesis in his own words was-"I want men and women to be able to think of sex fully, completely, honestly and cleanly" and not to make of it "a dirty little secret". The taboo on sex in art and literature which was more strict thirty-five years ago, seemed to him to corrode domestic and social life and his definite view was that a candid discussion of sex through art was the only catharsis for purifying and relieving the congested emotion is. This is the view he expounded through his writings and sex is never absent from his novels, his poems and his critical writings. As he was inclined freely to use words which Swift had used before him and many more, he never considered his writings obscene. He used them in this book with profusion and they occur in conversation between Mellors and Constance and in the descriptions of the sexual congresses and the erotic love play. The realism is staggering and outpaces the French Realists. But he says of himself :

> "I am abused most of all for using the so called 'obscene words'. Nobody quite knows what the word 'obscene' itself means, or what it is intended to mean; but gradually all the old words that belong to the body below the navel, have come to be judged obscene." (Introduction to Pansies).
>
> This was the second motivating factor in the book.

One cannot doubt the sincerity of Lawrence's belief and his missionary zeal. Boccaccio seemed fresh and wholesome to him and Dante was obscene. He prepared a theme which would lend itself to treating with sex on the most erotic plane and one from which the genteel society would get the greatest shock and introduced a game-keeper in whose mouth he could put all the taboo words and then he wrote of sex, of the sex organs and sex actions with brutal candidness. With the magic of words he made the characters live and what might even have passed for allegory and symbolism became extreme realism. He went too far. While trying to edit the book so that it could be published in England he could not excise the prurient parts. He admitted defeat and wrote to Seekers that he "got colour-blind and did not know any more what was supposed to be proper and what not." Perhaps he got colour-blind when he wrote it. He wanted to shock genteel society, a society which had cast him out and banned him. He wrote a book which in his own words was "a revolutions bit of a bomb". No doubt he wrote a flowering book with pistil and stamens standing but it was to quote his own words again "a phallic

80
novel, a shocking novel". He admitted it was too good for the public. He was a courageous writer but his zeal was misplaced because it was born of hate and his novel was "too phallic for the gross public."
This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As J. B. Priestley said, "Very foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses: he is the poet of a world in rut, and lately he has become its prophet, with unfortunate results in his fiction." [The English Novel. p. 142 (Nelson)]. The expurgated copy is available but the people who would buy the unexpurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:

> "Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words."
> The whole book really consists of detailed descriptions of their sexual fulfilment. They are not offensive, sometimes very beautiful, but on the whole strangely wearisome. The sexual atmosphere is suffocating. Beyond this sexual atmosphere there is nothing." [Son of Woman (Jonathan Cape)].

No doubt Murray says that in a very little while and on repeated readings the mind becomes accustomed to them but he says that the value of the book then diminishes and it leaves no permanent impression. The poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing. The promptings of the unconscious particularly in the region of sex is suggested as the message in the book. But it is not easy for the ordinary reader to find it. The Machine Age and its impact on social life which is its-secondary theme does not interest the reader for whose protection, as we said, the law has been framed.
81
We have dealt with the question at some length because this is the first case before this Court invoking the constitutional guarantee against the operation of the law regarding obscenity and the book is one from an author of repute and the centre of many controversies. The book is probably an unfolding of his philosophy of life and of the urges of the Unconscious but these are unfolded in his other books also and have been fully set out in his Psychoanalysis and the- Unconscious and finally in the Fantasia of the Unconscious. There is no loss to society if there was a message in the book. The divagations with sex are not a legitimate embroidery but they are the only attractions to the common man. When everything said in its favour we find that in treating with sex the impugned portions viewed separately and also in the setting of the whole book pass the permissible limits judged of from our community

standards and as there is no social gain to us which can be said to preponderate, we must hold the book to satisfy the test we have indicated above.

In the conclusion we are of the opinion that the High Court was right in dismissing the revision petition. The appeal fails and is dismissed.

Appeal dismissed.

82