

CANADA / JUDGMENT

Hawkshaw v. The Queen

[1986] 1 SCR 668

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DECIDED

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Hawkshaw v. The Queen

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[1986] 1 SCR 668

Case number

17308

Judges

Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; McIntyre, William Rogers; Lamer, Antonio; Wilson, Bertha; Le Dain, Gerald Eric

On appeal from

Ontario

Subjects

Criminal law

Notes

SCC Case Information: 17308

Decision Content

Hawkshaw v. The Queen, [1986] 1 S.C.R. 668

Allin Ross Hawkshaw Appellant;

and

Her Majesty The Queen Respondent.

File No.: 17308

1985: January 28; 1986: May 22.

Present: Dickson C.J. and Beetz, Estey, McIntyre, Lamer, Wilson and Le Dain JJ.

on appeal from the court of appeal for ontario

Criminal law--Obscenity--Accused charged with making obscene publication--Charge brought because of obscene photograph taken by accused--No evidence of publication or intention to publish--Whether including of word "publication" in charge an essential averment or mere surplusage--Criminal Code, R.S.C. 1970, c. C-34, s. 159(1)(a), (8).

Appellant was charged under s. 159(1) (a) of the Criminal Code in that he "unlawfully did make an obscene publication, to wit: a photograph of an act of gross indecency". There was evidence at the preliminary hearing to support findings that the photograph was taken by the appellant and that the photograph was obscene, but none as to an intention to publish it. The committing magistrate decided that the word "publication" in the charge was surplusage. An order for certiorari to quash the committal, granted in the Supreme Court of Ontario, was set aside on appeal. At issue here was whether an intent to publish an obscene photograph was an essential ingredient for conviction of the accused under the charge as framed. Argument also centred on the applicability of the test for obscenity under s. 159(8) of the Criminal Code .

Held: The appeal should be allowed.

The test of obscenity laid down in s. 159(8) of the Criminal Code should apply to the issue of obscenity in charges under the Criminal Code , whether based on publication or not.

Section 159(1) (a) of the Criminal Code creates a number of offences which are separate and apart. One of these offences, the making of an obscene photograph, does not involve any necessary element of publication.

The word "publication" introduced an element of publication into the indictment. To be given any meaning the indictment as framed must have encompassed something more than the mere making of a photograph. The surplusage rule--that words in the indictment are said to be surplus in the sense that they need not be proved in order to prove conviction--was inapplicable here in that it would prejudice the accused.

The accused could well have concluded that evidence of an intent to publish or evidence of actual publication would form a necessary part of the Crown's case. Although it might be possible to conclude, on a detailed analysis of the meanings to be attributed to the word "publication" used in this context, that neither an intent to publish nor an actual publication was involved the accused should not be confronted with this sort of exercise in making his response to a criminal charge.

Cases Cited

Dechow v. The Queen, [1978] 1 S.C.R. 951; Vézina and Côté v. The Queen, [1986] 1 S.C.R. 2, applied; R. v. Hicklin (1868), L.R. 3 Q.B. 360, not followed; Skogman v. The Queen, [1984] 2 S.C.R. 93; R. v. Munster (1960), 34 C.R. 47; R. v. Modenese (1962), 38 C.R. 45; Brodie v. The Queen, [1962] S.C.R. 681; R. v. Schell (1973), 13 C.C.C. (2d) 342; R. v. McCormick, York Co. Ct. (Ont.), January 10, 1980, unreported, referred to.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1970, c. C-34, s. 159(1)(a), (8).

APPEAL from a judgment of the Ontario Court of Appeal (1982), 69 C.C.C. (2d) 503, 39 O.R. (2d) 571, allowing an appeal from a judgment of Osler J. allowing an application to quash an order of Nadeau Prov. Ct. J. for committal to trial. Appeal allowed.

Patrick S. Duffy, Q.C., for the appellant.

Susan Ficek, for the respondent.

The judgment of the Court was delivered by

1. McIntyre J.--The principal question with which this appeal is concerned is whether an intent to publish an obscene photograph is an essential element for the conviction of a person charged, under s. 159(1) (a) of the Criminal Code, that he "unlawfully did make an obscene publication, to wit: a photograph of an act of gross indecency".
2. A commercial film developer delivered to the police a series of photographs which it had received for development. One of the photographs was the basis for the charge in this case. The Crown elected to proceed by indictment. The appellant elected trial by judge alone and a preliminary hearing was held.
3. At the preliminary hearing there was evidence from which a properly instructed jury could find that the photograph was taken by the appellant and that it was itself of such nature that it afforded evidence of obscenity. There was, however, no evidence of any intention to publish the photograph. The committing magistrate committed for trial despite the absence of such evidence. He concluded that the word "publication" in the charge was surplusage--a non-allegation--which did not form an essential ingredient of the charge.

4. An application was made before Osler J. in the Supreme Court of Ontario for certiorari to quash the committal (reported at (1981), 62 C.C.C. (2d) 289). The motion succeeded. Osler J. was of the view that evidence of an intent to publish was a necessary element for the proof of the charge and that to commit for trial in the absence of such evidence was an excess of jurisdiction. This ruling, given his view of the elements of the charge against the accused, was consistent with the majority judgment in this Court in *Skogman v. The Queen*, [1984] 2 S.C.R. 93.
5. The Crown appeal to the Court of Appeal (Howland C.J.O., Brooke and Cory JJ.A.) was allowed with Brooke J.A. dissenting (reported at (1982), 69 C.C.C. (2d) 503). Howland C.J.O., for the majority, reviewed the authorities dealing with the construction of s. 159 and its predecessors. He came to the conclusion that publication was not an essential element of the charge. The word "publication" where used in the charge was, in his view, surplusage. He was also of the view that on a construction of s. 159(1) (a) of the Criminal Code a separate offence of making an obscene photograph had been created. A conviction could be obtained therefore in the absence of evidence of an intent to publish. There was then evidence before the committing magistrate which would justify a committal and the committal order was restored. The majority was also of the view that the test for obscenity to be applied in cases under s. 159(1)(a) of the Code should be that set out in s. 159(8) whether publication was involved or not. This displaced the common law test of obscenity laid down by Cockburn C.J. in *R. v. Hicklin* (1868), L.R. 3 Q.B. 360, at p. 371. Brooke J.A. (in dissent) expressed the view that, given the construction of s. 159 in its complete context, publication is an element in the commission of an offence under s. 159(1) (a). He would have upheld the reviewing court's order to quash. In this Court the argument centred on the question of publication and on the applicability of the test for obscenity under s. 159(8) .
6. The leading case on the interpretation of s. 159(8) of the Code is *Dechow v. The Queen*, [1978] 1 S.C.R. 951. Dechow arose out of the prosecution of a sex shop operator under s. 159(1)(a) of the Code. There the appellant was charged that he:

...unlawfully did have in his possession, for the purpose of distribution, obscene materials consisting of written matter, pictures, models, preparations, tape recordings, and other devices, equipment and paraphernalia.

The appellant was convicted and the conviction was upheld on a trial *de novo*. An appeal was taken to the Ontario Court of Appeal on the question of whether the obscenity test laid down in s. 159(8) of the Criminal Code applied to the articles which were the subject matter of the case. The appellant's appeal was dismissed. The appellant appealed to this Court upon the following question of law:

Did the Court of Appeal err in holding that s. 159(8) of the Criminal Code applied to the articles found by the trial judge to be obscene and that consequently the trial judge did not err in holding that s. 159(8) provided the sole test of obscenity in respect of those articles?

Ritchie J., speaking for the majority of the Court (Martland, Ritchie, Pigeon, Beetz and de Grandpré JJ.) held that the meaning of the word "publication" where it appears in s. 159(8) must be determined not from the verb "to publish" but from the noun itself meaning "that which is published". However, the manner in which the offending articles were displayed in the shop when taken together with the printed descriptions attached to the articles constituted an element of publication. This would qualify the objects as publications within the meaning of s. 159(8) of the Code. It followed that the test set out in the subsection would apply. No question of the applicability of the Hicklin rule arose. Ritchie J. concluded his judgment, however, by saying, at p. 968:

...I do not find it necessary to consider what test is to be applied in determining whether or not matters other than publications are obscene.

7. Laskin C.J., for the minority (the Chief Justice and Judson, Spence and Dickson JJ.), did not regard the offending articles as publications. He nevertheless concluded that the test in s. 159(8) should be applied in considering the question of obscenity. The Chief Justice expressed the view that where the Criminal Code had provided the definitive test of obscenity which displaced the common law Hicklin test, then in the interests of consistency that test should be applied in all cases of obscenity. He would have applied the s. 159(8) test in obscenity cases not involving publications. He said, at pp. 962-63:

I am not only satisfied to regard s. 159(8) as prescribing an exhaustive test of obscenity in respect of a publication which has sex as a theme or characteristic but I am also of the opinion that this Court should apply that test in respect of other provisions of the Code, such as ss. 163 and 164, in cases in which the allegation of obscenity revolves around sex considerations. Since the view that I take, in line with that expressed by Judson J. in the Brodie case, is that the Hicklin rule has been displaced by s. 159(8) in respect of publications, I would not bring it back under any other sections of the Code, such as ss. 159, 163 and 164, to provide a back-up where a sexual theme or sexual factors are the basis upon which obscenity charges are laid and the charges fail because the test prescribed by s. 159(8) has not been met.

...

It is reasonable for a Court to apply the statutory standard, prescribed by Parliament as a definition of an offence of a generic character, when it is called upon to determine, in allied provisions of the Criminal Code, the sense in which the expression of some offence, made punishable in other circumstances, should be taken. Where no constitutional considerations are involved but only the interpretation and application of the words of Parliament, the judicial approach should be in the direction of consistency of meaning of the same word used by Parliament where that word is a designation of an offence which is a distributive one by reason of the specification of different situations in which it may be committed. So it is with obscenity in the various provisions of the Code under which it is an offence. If the issue under any of those provisions is sexual exploitation, either alone or in association with any of the subjects mentioned in s. 159(8), then I think it the proper course for this Court to apply in all such cases the standard or test that s. 159(8) prescribes for publications.

In my view, Laskin C.J. was not in conflict with the majority on this point. The majority had clearly left the question open. As has been pointed out, Howland C.J.O., for the majority in the Court of Appeal, adopted the reasons of Laskin C.J. in Dechow and applied the s. 159(8) test. He said, at p. 513:

I am in agreement with the above view expressed by Laskin C.J.C. that the test of obscenity to be applied in the case of offences under s. 159(1) (a), where no publication is involved, should be the same as the test prescribed under s. 159(8) in respect of publications. This would appear to be the proper course to follow in the interests of consistency. There is no justification for applying a different test of obscenity for non-publication offences.

It is my view that he was right in law to do so. In my opinion, the test of obscenity laid down in s. 159(8) should apply to the issue of obscenity in charges under the Criminal Code whether based on publication or not. For the reasons outlined by Laskin C.J. in Dechow, the Hicklin test is no longer applicable in Canada in such cases.

8. Turning now to the case at bar, s. 159(1) (a) of the Criminal Code provides:

159. (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

This section creates a number of offences, one of which, that of making an obscene picture, is said to be the subject of this charge. It is an offence which is separate and distinct from the other offences there mentioned and it involves no necessary element of publication. The various offences are separated by commas and one does violence to no rule of construction in recognizing them as separate concepts. I am in agreement with Howland C.J.O. in this respect. After discussing various authorities, such as *R. v. Munster* (1960), 34 C.R. 47; *R. v. Modenese* (1962), 38 C.R. 45; *Brodie v. The Queen*, [1962] S.C.R. 681; *R. v. Schell* (1973), 13 C.C.C. (2d) 342; *R. v. McCormick*, York Co. Ct. (Ont.), Ferguson Co. Ct. J., Jan. 10, 1980, unreported, and *Dechow v. The Queen*, supra, he said, at p. 515:

There are no dicta in the Dechow case to suggest that publication is a prerequisite to every offence under s. 159(1) (a). On the contrary, both the reasons of the majority and the minority recognize the need to consider the test for obscenity in cases of non-publications. The majority also recognized that s. 159(8) only applied to publications. Furthermore, some of the offences included in s. 159(1) (a) such as "possession for the purpose of publication, distribution or circulation" relate to a point of time before publication has occurred.

9. The real question raised in this case then is not whether there is a separate offence of making an obscene article, but whether the Crown in framing the indictment in this case has alleged the separate offence of making an obscene publication. The committing judge and the majority in the Court of Appeal considered the word "publication" in the indictment could be disregarded as mere surplusage. This approach left a simple charge of making an obscene photograph on which there was evidence which would warrant a committal.
10. The surplusage rule--by which a word or words in an indictment are said to be surplus in the sense that they need not be proved in order to procure a conviction--may not be applied where it would prejudice an accused. This matter was recently canvassed in this Court in *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2, where Lamer J., speaking for the unanimous Court, reviewed the authorities on the question. He commenced his discussion with the statement, at p. 26:

Similarly, the "surplusage rule", which as noted above, is the converse of s. 510(3), must also be seen as subject to the proviso that the accused not be prejudiced in his or her defence.

Then after reviewing the apposite authorities he concluded, by saying, at p. 28:

In summary, the early Canadian cases on the "surplusage rule", e.g. *R. v. Coote* (1903), 8 C.C.C. 199 (B.C.S.C.), do not specifically mention the issue of prejudice, but many of the more recent cases, specifically those noted above, expressly and repeatedly underline the issue of prejudice. Prejudice to the accused is in my view, a clear limitation to the invocation of the "surplusage rule".

11. It remains now to consider whether the treatment as surplusage of the word "publication" in the indictment before the Court would cause prejudice to the accused appellant. The word "publication", as used in the indictment, is capable of two differing meanings. It could have the meaning ascribed to the noun "publication", that is, "that which is published", or it could have the meaning of the verb "to publish". In either case an element of publication is introduced into the indictment. This being so, can it be said that the Crown has alleged the separate offence of making an obscene photograph? If the answer is "yes", the word "publication" must be disregarded. If the word is to be given any meaning, then something more than the mere making of an obscene photograph has been alleged. The accused could well have concluded that evidence of an intent to publish or evidence of actual publication would form a necessary part of the Crown's case. A finding that the word is largely surplus would surely prejudice an accused who had committed himself to a defence against an allegation involving publication. It may be possible on a detailed analysis of the meanings which could be attributed to the word "publication" in this context to conclude that no intent to publish or no actual publication is involved. This is not, however, the sort of exercise which should confront an accused in making his response to a criminal charge.

12. It is, therefore, my opinion that on the indictment as framed, evidence was required of publication or an intent to publish. The committal without such evidence cannot be sustained on the basis of the majority decision of this Court in *Skogman*, supra. I would therefore allow the appeal and restore the order of Osler J. quashing the committal.
13. Before leaving this case, I would observe that the Crown was faced with a genuine dilemma in framing its indictment. The offence alleged is found in s. 159 of the Criminal Code . This section, in its various subsections, creates several offences relating to obscene objects. Some of them involve publication or some element of public exposure, others do not. The only definition of obscenity is in subs. (8). It refers only to publications. There is then no statutory provision defining obscenity applicable to non-published material.
14. The Crown in framing its indictment attempted to apply the section by characterizing the offending object as a publication--presumably, to invoke the definition of obscenity in subs. (8)--and described the offending object as a photograph. This approach led to the confusion which could have confronted the accused and which has led to the allowance of this appeal. The Crown's approach to this matter, in view of the wording of the section, may be understandable. The difficulty it creates, however, should not be visited upon the accused. Section 159 of the Criminal Code , by limiting the statutory definition of obscenity to publications, creates on its face a problem which, in my view, has been solved or at least accommodated in *Dechow*, supra. Its effect is to apply the definition of obscenity in s. 159(8) of the Code wherever the word is employed in the Code, whether for publication or not. This obviates the need for any use of the word "publication" in framing indictments where no publication is alleged. In the absence of a statutory amendment, this approach would give effect to s. 159 , as a whole, and in my view should be adopted.

Appeal allowed.

Solicitor for the appellant: Patrick S. Duffy, Toronto.

Solicitor for the respondent: Ministry of the Attorney General, Toronto.

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