ASSN.

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
(Lord Justice Woolf)

Royal Courts of Justice
Wednesday 14th December 1988

Before:

LORD JUSTICE CROOM-JOHNSON

LORD JUSTICE GLIDEWELL

and

SIR ROGER ORMROD

B E T W E E N:

NONCYP LIMITED — Appellants (Applicants)

and

(1) BOW STREET MAGISTRATES' COURT (Respondents)

(2) MARTIN DUBBEY — Respondent (Respondent)

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2).

MR. ANDREW NICOL (instructed by Messrs Simons Muirhead & Burton) appeared on behalf of the Appellants/Applicants.

MR. ANDREW COLLINS, Q.C. and MR. S. LAWSON ROGERS (instructed by the Solicitor to H.M. Customs and Excise) appeared on behalf of the Respondent/Respondent.

The First Respondent did not appear and was not represented.

J U D G M E N T

(Revised)

LORD JUSTICE CROOM-JOHNSON: The applicants, Noncyp Limited, own and run a bookshop in London known as "Gay's the Word". On 29th October 1986 their solicitors, acting in accordance with an agreement which had been come to with the Commissioners of Customs and Excise, wrote to H.M. Customs and Excise to tell them that certain books had been imported from Holland. The titles were -

1. Men in Erotic Art
2. Men Loving Men
3. Men Loving Themselves
4. My Brother Myself
5. Roman Conquests
6. Below the Belt

On 19th November 1986 sample copies were provided and formally seized by Customs for reference to the Magistrates Court for condemnation proceedings. It was agreed that the letter of 29th October 1986 from the solicitors was a claim against the seizure of the books.

Mr. Dubbey, the second respondent, is an officer of H.M. Customs and Excise. He made a complaint to Bow Street Magistrates Court asking that a summons be issued, for the books to be condemned as liable to forfeiture, because they are obscene.

Customs Consolidation Act 1876 sec. 42 prohibits the importation of (among other things) "indecent or obscene prints, paintings, photographs, books, cards, lithographic, or other engravings, or any other indecent or obscene articles". The procedure for seizure and condemnation is now governed by Customs and Excise Management Act 1979 sec.139, and Schedule 3.

For the purposes of those statutes the word "obscene" has its ordinary meaning including what is "repulsive", "filthy", "loathsome", or "lewd".

The Obscene Publications Act 1959 ("the 1959 Act") section 2 prohibits the publication, or the possession for purposes of publication, of an obscene article. To do so is a criminal offence. For the purposes of that statute, "obscene" is defined in section 1(1):

> "For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it."

It will be noticed that under the 1959 Act the word "obscene" has a less wide meaning than its ordinary meaning. Furthermore, the circumstances in which a criminal offence will be committed are carefully limited.

Section 3 makes provision that a justice of the peace, on information on oath, may issue a warrant for the search of premises in the petty sessions area for which he acts and the seizure of obscene articles so found, and later for the forfeiture of articles so seized.

Section 4 provides a defence:

> "4(1) Subject to Subsection (1A) of this section a person shall not be convicted of an offence against section 2 of this Act, and an order for forfeiture shall not be made under the foregoing section [section 3], if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern."

Section 4(1A) provides a comparable defence in the case of films and soundtracks.

It will be noticed that section 4 of the 1959 Act applies only to prosecutions under that Act, and that the forfeiture provisions in section 3 apply to articles which are already in this country, unlike the prohibition against importation which gives powers to the Customs and Excise.

At the hearing at Bow Street it was agreed between the parties that a preliminary issue should be decided by the magistrate, namely whether it was open to Noncyp to call evidence and make submissions as to whether publication of the books was justified as being for the public good within the meaning of section 4 of the 1959 Act. The magistrate, Mr. Bartle, ruled against Noncyp. He said that in deciding whether forfeiture under the customs legislation was appropriate, no account was to be taken of the special defence in section 4 of the 1959 Act.

Noncyp then obtained leave to proceed by way of judicial review to quash the magistrates' decision on the preliminary point and asked for mandamus ordering him to hear and determine the section 4 matter.

On 12th May 1988 the Queen's Bench Divisional Court (Woolf L.J. and Hutchison J.) dismissed that application. Noncyp have now appealed to this court. The grounds on which their application is made is that the Treaty of Rome article 30 prohibits quantitative restrictions on imports from Member States of the European Economic community, and that the Customs Consolidation Act 1876, sec.42 is invalid so far as EEC countries are concerned. There is no dispute about the effect of article 30. The question which has been argued is whether article 36 provides a saving to article 30 on the grounds which may for convenience be labelled

"public morality". Noncyp say it does not. H.M. Customs and Excise say it does.

Article 36 is as follows:

ARTICLE 36

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants: the protection of national treasures possessing artistic, historic or archaeological values; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Article 36 has been considered in detail in R. v. Henn and Darby [1981] A.C.850. The facts of that case were that Henn and Darby were convicted of fraudulently evading the prohibition on the importation of indecent or obscene articles, contrary to the Customs Consolidation Act 1876 sec.42. Henn (alone) was also convicted of an offence against the 1959 Act, sec.2, in respect of the same articles. He did not run a defence under sec.4, but the provisions of sec.4 were relied upon in the submissions made on article 36.

The Court of Appeal (Criminal Division) having dismissed their appeals, a point of law of general public importance was certified for consideration by the House of Lords, namely:

> "Whether section 42 of the Customs Consolidation Act 1876 is effective to prevent the importation of pornographic articles from Holland notwithstanding articles 30 and 36 of the E.E.C. Treaty".

After extensive argument, the House of Lords referred the case to the Court of European Communities at Luxembourg under article 177 of the Treaty of Rome, and submitted a number of questions to it.

Question 1 was whether sec.42 offended against article 30. The answer was "yes".

Questions 2 and 3 raised the problem that section 42 imposes a total ban on imports of obscene articles into the United Kingdom, although the four countries comprising the United Kingdom have a variety of different legislation forbidding or controlling the use of such articles.

All the different statutes were mentioned, including the 1959 Act and section 4.

The European Court answered (page 898):

> "Each member state is entitled to impose prohibitions on imports justified on grounds of public morality for the whole of its territory ..... whatever the structure of its constitution may be and however the powers of legislating in regard to the subject in question may be distributed. The fact that certain differences exist between the laws enforced in different constituent parts of a member State does not thereby prevent that state from enforcing a unitary concept in regard to prohibitions on imports imposed, on ground of public morality, on trade with other member states."

In view of the submissions which have been advanced by Noncyp and H.M. Customs, it is necessary to set out, albeit at length, the answers given by the European Court to some of the questions.

> "17. The answer to the second and third questions must therefore be that the first sentence of article 36 upon its true construction means that a member state may, in principle, lawfully impose prohibitions on the importation from any other member state of articles which are of an indecent or obscene character as understood by its domestic laws and that such prohibitions may lawfully be applied to the whole of its national territory even if, in regard to the field in question, variations exist between the laws in force in the different constituent parts of the member state concerned.
>
> Fourth, fifth and sixth questions
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> 18. The fourth, fifth and sixth questions are framed in the following terms:

4. If a prohibition on the importation of goods is justifiable on grounds of public morality or public policy, and imposed with that purpose, can that prohibition nevertheless amount to a means of arbitrary discrimination or a disguised restriction on trade contrary to article 36?

5. If the answer to question 4 is in the affirmative, does the fact that the prohibition imposed on the importation of such goods is different in scope from that imposed by the criminal law upon the possession and publication of such goods within the member state or any part of it necessarily constitute a means of arbitrary discrimination or a disguised restriction on trade between member states so as to conflict with the requirements of the second sentence of article 36?

6. If it be the fact that the prohibition imposed upon importation is, and a prohibition such as is imposed upon possession and publication is not, capable as a matter of administration of being applied by customs officials responsible for examining goods at the point of importation, would that fact have any bearing upon the answer to question 5?

19. In these questions the House of Lords takes account of the appellants' submissions based upon certain differences between, on the one hand, the prohibition on importing the goods in question, which is absolute, and, on the other, the laws in force in the various constituent parts of the United Kingdom, which appear to be less strict in the sense that the mere possession of obscene articles for non-commercial purposes does not constitute a criminal offence anywhere in the United Kingdom and that, even if it is generally forbidden trade in such articles is subject to certain exceptions, notably those in favour of articles having scientific literary artistic or educational interest. Having regard to those differences, the question has been raised whether the prohibition on imports might not come within the second sentence of article 36.

20. According to the second sentence of article 36 the restrictions on imports referred to in the first sentence may not "constitute a means of arbitrary discrimination or a disguised restruction on trade between member states.

21. In order to answer the questions which have been referred to the court it is appropriate to have regard to the function of this provision, which is designed to prevent restrictions on trade based on the grounds mentioned in the first sentence of article 36 from being diverted from their proper purpose and used in such a way as either to create discrimination in respect of goods originating in other member

states or indirectly to protect certain national products. That is not the purport of a prohibition, such as that in force in the United Kingdom, on the importation of articles which are of an indecent or obscene character. Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another member state.

22. The answer to the fourth question must therefore be that if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the member state concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to article 36.

23. In these circumstances it is not necessary to answer the fifth and sixth questions."

After considering the answers to their questions, the House of Lords dismissed the appeals of Henn and Darby.

It will be seen after the statement of general principle contained in the answer to questions 2 and 3, that questions 4, 5 and 6, and the composite answer to question 4 deal with more particular matters arising out of the second sentence of article 36.

Counsel for Noncyp submitted that it is not possible to say that there is "no lawful trade" (paragraph 21) in these six books within the United Kingdom unless the section

4 evidence has been admitted and it is seen whether the section 4 defence has been made out. He says that if that defence is established, then those six books may lawfully be sold at least in England and Wales. (There is no provision in the law of Scotland or Northern Ireland which has the same effect as sec.4). In order to make this point, he says that when, in paragraph 22, the court is talking about "a lawful trade in the same goods", it should be interpreted as meaning "these self-same goods", that is these six titles. Alternatively, the phrase means obscene books but books which are published "for the public good". He submits that article 36 must be read restrictively, and that it is illogical to say that there cannot be a "lawful trade" in something which is found to be for the public good. What is suggested is that there should be a "case by case" approach: in other words that the section 4 defence should be available to be considered every time it is thought to be appropriate in condemnation proceedings. If there is any doubt, he asks the Court of Appeal to refer this question to the European Court, under article 177, for a ruling to enable this court to give a judgment.

Counsel for the Customs and Excise submits that this matter is concluded by R. v. Henn and Darby. The reference to the European Court was specifically based upon the prohibition on importation into the United Kingdom contained in section 42 of the Customs Consolidation Act 1876. That is what is behind the language used in that court's decision dealing with the widespread differences between the statutory provisions in the four countries, and the emphasis on applying "a unitary concept in regard to prohibitions on imports

imposed". Moreover he points out that the references in the decision (paragraph 19) to the trade being "subject to certain exceptions, notably those in favour of articles having scientific, literary, artistic, or educational interest" show that so far as obscenity is concerned, the European Court clearly had the section 4 defence in mind.

Paragraph 21 states that it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom, although the laws in the different parts of the United Kingdom have "certain differences of scope". It is submitted that the 1959 Act has the purpose of prohibiting or restraining the manufacture and marketing of publications of an obscene character, and that ccnsequently even though section 42 of the Customs Consolidation Act 1876 is more strict, the purpose of the 1959 Act is the enforcement of that prohibition. Accordingly, in the language of paragraph 21, it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such publications in the United Kingdom.

In my view, that case is clear authority, accepted by the House of Lords, that sec. 42 may be applied in just such a way as the Bow Street Magistrate intended to do.

Reference must be made, however, to Conegate v. H.M. Customs and Excise [1987] Q.B.254. In that case, the Customs seized, with a view to forfeiture, consignments of erotic goods from Germany, on the grounds that they were indecent or obscene. They were not articles governed in any way by the 1959 Act. The Queen's Bench Division referred the question to the European Court to see whether article 36 provided a "public mcrality" exception to article 30.

The Customs were unable to point, by way of prohibition of trade in the United Kingdom, to more than an absolute prohibition of transmission by post, a restriction on their public display, and, in certain areas, a system of licensing shops for their sale to people over 18. The European Court decided that those very limited restrictions did not mean that such articles could not be manufactured and marketed freely in the United Kingdom, and since there could be a "lawful trade" in them in this ccuntry the "public morality" exception in article 36 was not available in respect of those objects. Upon receipt of that decision, the Queen's Bench Division quashed the order for the forfeiture of those goods.

I would adopt the passage in the judgment of Woolf L.J. in the Divisional Court in the present case, that the effect of Henn and Darby and Conegate, taken together, is to indicate "a general approach which was practical and readily understandable bearing in mind the differing laws in different parts of the United Kingdom and in the different member states". Does the relevant legislation taken as a whole, in the United Kingdom have the effect in substance of prohibiting the manufacture and marketing of the category of articles which it is sought to forfeit? In the case of obscene publications, the approach is clear. In Conegate, where the articles were quite different, the decision on the general approach went the other way.

I do not regard Conegate's case as in any way derogating from what was said in Henn and Darby concerning obscene publications or affecting the conclusion to which I have come. Nor do I see any need for a reference in the present

case to the European Court for further enlightenment on article 36 to enable me to give judgment in this case.

A As was pointed out by counsel for the Customs and Excise, the very differences in the United Kingdom legislation may well throw up anomalies. They must be accepted. The 1876 Act and the 1959 Act contain different tests of what should be B regarded as obscene. Normally, one would expect that what is obscene for the purposes of one of those Acts would equally be regarded as obscene for the purposes of the other, but that may not be so in every case. It may be that what is forfeited under one C Act may be protected by section 4 of the other. It is worth remembering that the section 4 defence only becomes necessary when the publication is an obscene publication within section 1 of the 1959 Act. The circumstances in which the section 4 defence D may become available were discussed in D.P.P. v. Jordan [1977] 64 C.A.R.33 by Lord Wilberforce. Those circumstances are various. On page 43 he said "the judgment to be reached under section 4(2) must be in order to show that publication should E be permitted in spite of obscenity - not to negative obscenity".

The customs officer, on the other hand, has to carry out his duty in different circumstances. It is section 42 of the F 1876 Act which creates his duty. He has to carry out that duty with both the definitions of "obscene" in mind, because the Treaty of Rome must be observed, and article 36 in particular.

For present purposes, Henn and Darby provides the G guidance.

The appellants' motion asking the Court of Appeal to make a reference to the European Court is dismissed, and I would dismiss their appeal.

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LORD JUSTICE GLIDEWELL: Article 30 of the EEC Treaty provides "Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between member states."

The basic argument of Mr. Nicol, for the appellants, is that if it be proved that the publication of a book which is deemed to be obscene within the meaning of the Obscene Publications Act 1959 s.1 is nevertheless justified as being for the public good within s.4 of the Act, so that no order for forfeiture may be made under s.3, the provisions of the Customs and Excise Management Act 1979 relating to the forfeiture and condemnation of imported goods cannot apply to that book because in relation to it those provisions contravene article 30. Therefore it is necessary for a magistrate considering whether to condemn such a book to decide, and to hear evidence and argument to enable him to decide, whether if forfeiture proceedings in respect of the book had been started under the 1959 Act, the "public good" justification would have been proved.

The counter-argument by Mr. Collins, for the Customs Officer, Mr. Dubbey, is based on article 36 of the EEC Treaty, which provides:

> "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports ..... justified on grounds of public morality ..... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member states."

If the book is obscene, so that its importation into the United Kingdom is prohibited by s.42 of the Customs Consolidation Act 1876, the forfeiture provisions in the 1979 Act are justified on grounds of public morality.

Mr. Collins concedes, as he is bound to do by the decision of the European Court of Justice in Henn and Darby v. D.P.P. [1981] A.C.850 -

(i) that in deciding whether the book is obscene, the test to be applied is the definition of the word in s.1(1) of the 1959 Act - see Lord Diplock at 908 C-D; and

(ii) that the provisions of the Customs and Excise Acts prohibiting the importation of obscene books are measures having an equivalent effect to a quantitative restriction, and thus contravene article 30, unless article 36 applies: decision of the European Court at page 897 E-H and Lord Diplock at page 907 A-C.

The issues therefore are:

1. Are the restrictions on, or prohibitions of, imports of obscene books in the Customs and Excise Acts justified on grounds of public morality? If so,

2. Do they nevertheless constitute arbitrary discrimination?

It was agreed between counsel that the decision in Henn and Darby, as applied in Conegate Ltd. v. Customs & Excise [1987] Q.B.254 made it clear that the answer to both these questions depends on whether there is a lawful trade in the relevant articles in the United Kingdom (see Henn and Darby p 900A). That in turn depends upon deciding what are the relevant articles.

Mr. Nicol argues that, if a book is immune from forfeiture under the Obscene Publications Act 1959 because its publication was justified as being for the public good, it is illogical to prohibit the importation of such a book on the grounds of public morality. Thus the range of articles

to which the question "Is there a lawful trade in these articles in the U.K.?" applies, is limited either to the very books the subject of the forfeiture proceedings, or at most to books which would come under the "public good" protection.

The Divisional Court held that the correct category is wider, viz. books which are obscene under the Customs Consolidation Act 1876. Mr. Collins before us contends for a somewhat more restricted category viz. books which are obscene within the meaning of s.1(1) of the Obscene Publications Act 1959.

If the question were free of authority, I would regard Mr. Nicol's argument as having great attraction, but it is not so free. In my view, despite Mr. Nicol's arguments to the contrary, the European Court and the House of Lords clearly decided in Henn and Darby that the correct category is, as Mr. Collins contends, books which are obscene within the meaning of the Obscene Publications Act 1959 s.1(1). Croom-Johnson L.J. has set out in his judgment passages from the judgment of the European Court in Henn and Darby which make this clear. The critical passage is that in paras. 21-22 at p.899 G-H of the report:

> "Whatever may be the differences between the laws on this subject in force in the different constituent parts of the United Kingdom, and notwithstanding the fact that they contain certain exceptions of limited scope, these laws, taken as a whole, have as their purpose the prohibition, or at least the restraining, of the manufacture and marketing of publications or articles of an indecent or obscene character. In these circumstances it is permissible to conclude, on a comprehensive view, that there is no lawful trade in such goods in the United Kingdom. A prohibition on imports which may in certain respects be more strict than some of the laws applied within the United Kingdom cannot therefore be regarded as

> amounting to a measure designed to give indirect protection to some national product or aimed at creating arbitrary discrimination between goods of this type depending on whether they are produced within the national territory or another member state.
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> 22. The answer to the fourth question must therefore be that if a prohibition on the importation of goods is justifiable on grounds of public morality and if it is imposed with that purpose the enforcement of that prohibition cannot, in the absence within the member state concerned of a lawful trade in the same goods, constitute a means of arbitrary discrimination or a disguised restriction on trade contrary to article 36."

Mr. Nicol sought to place some reliance on a passage in the opinion of Mr. Judge Advocate General Warner at page 877 F-H. In so far as that passage supports his argument, it was in my view contradicted by the court's decision in the passage to which I have referred, and thus is of no authority.

There is nothing in Conegate which alters or detracts from the decision in Henn and Darby in relation to this matter. The question here in issue did not arise in Conegate, since the dolls in that case were not obscene articles within the 1959 Act, and their sale in England and Wales was legal provided certain licensing and similar conditions were met.

Thus I agree with the Divisional Court that it was not necessary for the magistrate to consider, or to hear argument or evidence upon, the "public good" issue derived from s.4 of the 1959 Act. I have made it clear that I respectfully disagree with that court as to the proper test of obscenity to be applied by the magistrate. As I have said, he should in my view apply the test derived from the 1959 Act, not the 1876 Act. Towards the end of his judgment in the Divisional Court, Woolf L.J. said:

> "If for example there was a situation where a prosecution had already failed in respect of the same books under the Obscene Publications Act 1959 because of the reliance upon the test of obscenity contained in s.1 or because of the public good defence in s.4, it would be an abuse of their discretion by the Commissioners of Customs and Excise, if contrary to my expectations, they were to seek to forfeit on importation other copies of the same books pursuant to s.42. The remedy in these circumstances would however be an application for judicial review on which an order could be sought quashing the decision to seize and forfeit and prohibiting the condemnation proceedings."

As I said during argument, I am far from confident that in such circumstances an application for judicial review would succeed.

However, neither of these matters affects the question which is for decision, namely, whether the Magistrate's decision not to hear evidence or submissions as to whether the publication of the books was justified as being for the public good was correct. In my view, for the reasons I have given, it was correct. I also would therefore dismiss the appeal.

SIR ROGER ORMROD: I agree.

Appeal dismissed with costs. Application for leave to appeal to the House of Lords refused.