David Webb

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

No: CO-392-92

Royal Courts of Justice
Strand
London WC2

Wednesday 9th June, 1993

B e f o r e :

LORD JUSTICE GLIDEWELL

and

MR JUSTICE CRESSWELL

- - - - - - - -

CROWN OFFICE LIST

R E G I N A

-v-

UXBRIDGE JUSTICES
EX PARTE DAVID WEBB

- - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)

- - - - - - - -

MR D WEBB appeared in person.
MISS C MONTGOMERY (instructed by Uxbridge Magistrates' Court) appeared on behalf of the Respondent.

- - - - - - - -

J U D G M E N T
(As Approved by the Judge)

- - - - - - - -

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

No: CO-392-92

Royal Courts of Justice
Strand
London WC2

Wednesday 9th June, 1993

B e f o r e :

LORD JUSTICE GLIDEWELL

and

MR JUSTICE CRESSWELL

- - - - - - - -

CROWN OFFICE LIST

R E G I N A

-v-

UXBRIDGE JUSTICES
EX PARTE DAVID WEBB

- - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)

- - - - - - - -

MR D WEBB appeared in person.
MISS C MONTGOMERY (instructed by Uxbridge Magistrates' Court) appeared on behalf of the Respondent.

- - - - - - - -

J U D G M E N T
(As Approved by the Judge)

- - - - - - - -

Wednesday 9th June 1993

JUDGMENT

LORD JUSTICE GLIDEWELL: This is an application, with leave granted by the Full Court on 19th May last year, by Mr David Webb for an order of mandamus addressed to the Uxbridge Justices requiring them to state a case for the opinion of this court, they having refused to do so.

The history of the matter can be stated quite shortly. Mr Webb is the honorary director and, I believe, the original founder member of an organization called the "National Campaign for the Reform of the Obscene Publications Acts". He holds the views which he has expressed quite shortly, and which I think I can summarise: that the laws relating to obscene publications of the United Kingdom are, if not absurd, at any rate much in need of amendment. He has, for a good many years now, campaigned for such amendment.

On 14th November 1990 he entered the United Kingdom, returning from the Netherlands, at Heathrow Airport. In his possession he had some six video tapes which were seized by officers of the Customs and Excise as being liable to forfeiture by virtue of s.42 of the Customs Consolidation Act 1876.

It is Mr Webb's case, in general terms, that he had been given these tapes by a friend or acquaintance in Holland and that he required them or intended to use them or

to view them himself in connection with the campaign to which I have already referred. It is common ground that each of the tapes contained explicit representations of homosexual activity. It is not necessary to go into any more detail about them.

The provisions for the forfeiture of imported goods starts with s.42 of the Customs Consolidation Act 1876 which provides, so far as is material:

> "The goods enumerated and described in the following table of prohibitions and restrictions inwards are hereby prohibited to be imported or brought into the United Kingdom..."

The table includes:

> "Indecent or obscene prints, paintings, photographs, books, cards, lithographic or other engravings or any other indecent or obscene articles."

Thus, if an article is obscene it is prohibited from being imported into the United Kingdom. By s.49(1) of the Customs and Excise Management Act 1979:

> "Where-
> (b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment; ..... those goods shall, subject to subsection (2) below, be liable to forfeiture. ",

subsection 2 does not apply.

So there is the power under which the Customs were acting in seeking to forfeit these goods.

Proceedings ensued in the Magistrates' Court because as

he was entitled to do, Mr Webb gave formal notice that he did not agree that the video tapes or any of them were liable to forfeiture. He was then required to show cause why the video tapes should not be condemned as forfeit and on 27th June 1991 the Magistrates' Court heard that application. The court determined in favour of the Customs and Excise that the goods should be forfeited.

On 17th July 1991, Mr Webb wrote to the Clerk of the Magistrates' Court, inviting the Court to state a case for the opinion of this court. He desired to appeal by way of case stated and he set out his contentions in a document of some length that went into the matter in detail.

On 9th August 1991 the Clerk to the Justices replied:

> "The magistrates have considered your application for them to state a case for the opinion of the High Court, following their determination of the above proceedings on 27th June 1991.
>
> They have decided to decline to state a case, being of the view that the matters on which the opinion of the High Court is being sought are settled points of law and procedure."

It is that decision that Mr Webb now challenges in this Court. He seeks to require the Magistrates to state a case and he asks us to order them to do so. It is common ground that where it is appropriate for Magistrates to state a case and they refuse or decline to do so, this Court can order them to do so. The Magistrates' Court is subject to this Court's jurisdiction in that respect. The question is, are the matters upon which Mr Webb addressed the Magistrates and

which he now seeks to raise by way of an appeal by case stated in this Court, questions of law for the determination of this Court? Secondly, if they are, are they questions of law which have not already been determined in a sense that this Court would not be bound to find against Mr Webb? If as the Magistrates' Court considered was the case, there was binding authority on this Court against Mr Webb's contentions of law, then there would be no point in them stating a case and we should not require them to do so.

Mr Webb has addressed us with skill and courtesy and has said all that could possibly be said carefully and clearly. He has advanced his argument under eight heads. The first, however, is really a resume of the other seven, it is, "Were the Magistrates justified in refusing to state a case on the grounds that the points were settled points of law?" The others are really sub-heads to that.

The second point, the first sub-head so to speak, is whether the interpretation of the word "obscene" advanced by the Customs and Excise during the course of the argument at the Magistrates' Court and adopted by that court, was correct.

There is no definition of the word "obscene" in either the 1876 or 1979 Customs Act. However, the decision of the House of Lords in R v Henn [1981] A.C. 850 is clear authority for the proposition that in interpreting that word in the Customs Acts, the definition of the word contained in

Section 1 of the Obscene Publications Act 1959, is to be adopted (see the speech of Lord Diplock in R v Henn at page 908). The definition in the Obscene Publications Act is:

> "...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."

The Magistrates adopted that definition. As I have said there is clear authority for the proposition that they were right to do so and there is no issue of law on which the Court could conceivably find in Mr Webb's favour that that was a wrong definition because this court was bound by the House of Lords' decision in Henn.

The next point is: "Was the interpretation which the Magistrates placed on section 42 of the 1876 Act correct?" In essence that is the same point, so I need say no more about it.

The next point is that the Magistrates failed to give due regard to the provisions of the Treaty of Rome. I need say very little about this because this point has already been dealt with, both by this Court and by the Court of Appeal (although in a somewhat different context) in R v Bow Street Metropolitan Stipendary Magistrate Ex Parte Noncyp Limited, [1991] 1 Q.B. 123. The issue in that case was different but the argument revolved around Articles 30 and

36 of the Treaty of Rome. Article 36 of the Treaty contains an exception which provides that the Treaty does not "preclude prohibitions or restrictions on imports..... justified on grounds of public morality." This court held that this exception entitled the United Kingdom to continue to apply the prohibitions contained in the various Customs Acts on the importation of obscene material. In other words the decision of the Court of Appeal in Noncyp is conclusive against Mr Webb's argument in that respect.

Mr Webb also argues that the Magistrates' Court ignored the provisions of Article 10(1) and (2) of the European Convention of Human Rights. Article 10(1) provides in general terms for freedom of expression and publication. But just as Article 36 contains exceptions to the broad words of Article 30 of the Treaty of Rome, so Article 10(2) of the Convention of Human Rights contains an exception to or restriction on the width of Article 10(1), because it provides that the law of a member state may include provisions which are "necessary in a democratic society for the protection of morals". There is no doubt that it can properly be held that the provisions of domestic legislation whether one agrees with them or not, whether one thinks that domestic legislation of the United Kingdom ought to be more akin to that of Germany, Denmark or Holland, is not the point. It does not contravene the European Convention of Human Rights in so far as the exception in Article 10(2)

expressly provides that there may be such legislation.

Those are all matters of pure law, but there are three other points that Mr Webb has argued before us which are not quite so clearly matters of pure law. The next one is this. Mr Webb had come into possession of an internal Customs' memorandum. The document is really advice to customs officers on the way in which they should approach the decision whether or not particular material would qualify as being classified as obscene and thus be liable to forfeiture. Obviously an individual customs officer dealing with this matter when a passenger comes with material before him, has to make up his or her mind very rapidly and obviously advice of this kind is helpful. Mr Webb, as I say, had come into possession of a copy of this document. This caused a certain amount of consternation in the Magistrates' Court because the advocate who appeared for the Customs and Excise did not realise Mr Webb had it and was somewhat taken by surprise. His immediate reaction was to object that it was not admissible because of public interest immunity. I am speaking for myself and I will go so far as to say that I very much doubt, at least in relation to the particular provisions on which Mr Webb wanted to rely, that there was any public interest immunity. Whether that is right or not the Magistrates did not deal with that. According to an affidavit sworn by Mr Bond who was Chairman of the relevant bench:

> "We were of the opinion that we should not admit this document in evidence on the grounds that it was irrelevant in determining whether or not the six video tapes were liable to forfeiture."

The argument advanced by Miss Montgomery on behalf of the Customs is twofold. Firstly, she said it was irrelevant because what the Magistrates had to do was to decide whether, according to law, any one of these video tapes was an obscene article. If it was, that was an end of the matter and guidance to customs officers was not binding on the Magistrates nor indeed guidance to them. At the very most, what it could be, is an indication of what the Customs themselves thought was a sensible test. That is no doubt right. If Mr Webb had been allowed to introduce the document no doubt he would have sought to argue that if the Customs thought it was a sensible test, the Magistrates might well think so too. The argument could not go further than that; in fact he succeeded in advancing that argument because although he did not actually produce the document, he was allowed by the Magistrates to read to them the relevant provisions and he then proceeded to put the very argument I have summarised. Whether it was quite in those terms is another matter, but the sense of it was put.

I would not, myself, think that this is a matter that could properly be the subject of a case stated. If it is a point that was open to any sort of challenge at all, in my view, it is a challenge that should have been made by way of

appeal to the Crown Court. As is well known, there are two ways of challenging a decision of the Magistrates' Court; one is by way of appeal to the Crown Court which involves a complete re-hearing and involves the introduction (if parties desire it) of other evidence than that given before the Magistrates and the argument could have been advanced to the Crown Court, whatever the Magistrates decided, that this document ought to be admitted and relied upon. However, there is the difficulty which Mr Webb faced: he did try to appeal to the Crown Court after the Magistrates refused to state the case and was then met with s.111(4) of the Magistrates Court Act 1980 which provides:

> "On the making of an application under this section in respect of a decision any right of the applicant to appeal against the decision of the Crown Court shall cease"

In other words, once he had applied to the Magistrates to state the case, he had lost his right to appeal to the Crown Court.

Mr Webb's next two points relate to the procedure which the Magistrates followed in viewing the video films in question. As I have said there were six. It is not entirely clear how long they were but they obviously went on for quite some time. So if the Magistrates were to view the whole contents of all six, they were going to have to devote quite a number of hours to that process. In the end on the invitation of the advocate for the Customs and Excise, they

decided to view two plus a part of a third. But two were chosen in the end, contrary to Mr Webb's objection. He put forward one, the Customs and Excise put forward another and the Magistrates viewed those two having excluded the public from the court.

Magistrates have a complete discretion whether to sit in private, if there is good reason for doing so. It is a discretion which on the authorities must be exercised sparingly. Nevertheless the Magistrates take the view that the interests of justice so require, then they are entitled to sit in private for the purposes of part of the evidence before them. In this respect, Mr Webb goes further than complaining that they excluded the public; he complains that the press were also excluded. It is not entirely clear, although he asserts the press were excluded, whether this is the case or not. The affidavit of Mr Bond does not make it clear even when he speaks of excluding the public. Mr Webb is quite clear that the press themselves were hustled out.

From now on I propose to treat this matter on the basis that that is accurate. He has referred us to R v Waterfield (1975) 1 W.L.R. 711, a decision of the Court of Appeal, Criminal division. The Court consisted of Lawton LJ and Mocatta and Cantley JJ. It was a case in which the defendant was charged with evading the prohibition on the importation of indecent films and magazines. One of the points was that the proceedings were a nullity as part of

the trial was not held in public. The court dismissed the appeal but Lawton LJ giving the judgment of the Court gave guidance on the general procedure which courts should adopt when faced with the question of whether they should view or read material of this kind in public or in private. In relation to films, he said:

> "We appreciate that some judges may be of the opinion that the showing of what are alleged to be indecent films in a crowded court is undesirable."

But he then went on to say:

> "Whenever a jury in this class of case returns a verdict whether guilty or not guilty, intelligent readers of newspapers and weekly journals may want to know what kind of film was under consideration"

He concluded:

> "It follows, so it seems to us, that normally when a film is being shown to a jury and the judge in the exercise of his discretion, decides that it should be done in a closed courtroom or in a cinema, he should allow representatives of the press to be present."

That is guidance, it is not binding, and it seems to me that if in this case the court did not follow the advice given in Waterfield nevertheless this Court would be most unlikely to allow an appeal against a forfeiture order on that ground alone. I say that because the advice is not mandatory and it could not be said that the court had erred in law if it came to the conclusion that despite the advice of Waterfield it was right to exclude the press. We do not know whether this

issue was raised before the Justices, though Miss Montgomery points out to us that Waterfield is clearly referred to in the relevant part of Stones' Justices Manual, and thus she assumes that it is likely that the Clerk to the Justices would have advised the Justices of the effect on the advice given in Waterfield.

The other point made by Mr Webb is that the Justices viewed only two of the films and as I have said, it seems part of a third; they certainly did not view all six. He submits that if they were going to forfeit all six, they ought to have viewed all six, otherwise how could they conclude that each of the six was obscene?

The answer given by the Customs to that is that they were entitled to rely and indeed invited the Magistrates to rely upon the provisions of s.141 of the Customs and Excise Management Act 1979 which provides, so far as material:

> "Without prejudice to any other provision of the Customs and Excise Acts 1979, where any thing has become liable to forfeiture under the Customs and Excise Acts-
>
> (b) any other thing mixed, packed or found with the thing so liable, shall also be liable to forfeiture."

Mr Webb argues that that cannot have been intended to cover this sort of situation. He argues that it would be absurd if, for instance, the customs had sought to forfeit not merely the video films but his electric shaver. The answer to that is that the statutory provision must be read

subject to the common principle of interpretation; that a provision in the statute is, broadly speaking, to be interpreted as including things of a like kind, but not things not of a like kind. The rule, translated into Latin, is called the ejusdem generis rule. I have no doubt at all that that provision in that section is to be read as meaning that neither Mr Webb's electric shaver, nor his socks, nor any other articles of ordinary wear or use would fall to be forfeited because two of the video films were obscene. It seems to me to be quite clear from s.141 that the Customs and Excise were entitled to forfeit six video films which were admitted to be, in general, of the same nature as the two which the court found to be obscene. Accordingly, on that I see no arguable issue of law.

It follows that on two of the points which Mr Webb has raised, the issues seems to me questions of judgment, if not of fact, and thus not apt for a case stated. On all the other matters they are, as the Magistrates said, points of law on which there is already clear authority against Mr Webb, on which it follows that if it were allowed to proceed by way of case stated, the law is clearly against him and he would be bound to lose.

For all of those reasons I refuse this application.

MR JUSTICE CRESSWELL: I agree.

MISS C MONTGOMERY: I am instructed to make an application for costs in this case.

LORD JUSTICE GLIDEWELL: Mr Webb, that is the normal result of losing in these circumstances.

MR WEBB: My Lord, I tried to get legal aid for this case. It was refused on grounds that the cost of proceedings are out of proportion of any benefit likely to be obtained. I do not accept that because I think it is a case of public interest, I even say, national interest, that is why I have pursued it. I am unemployed. I have no money. I would have been eligible for legal aid as I am in receipt of income support, and partly do not work because I have a heart condition. But the Customs and Excise...

LORD JUSTICE GLIDEWELL: You are not actually in receipt of income support?.

MR WEBB: I am, yes, my Lord. This is one of the reasons why I have pursued my own case and I have not had legal representation. But with regard to a state agency like Customs and Excise who can well afford to pay their own costs, have all the facilities, backup and well with all to do so, I would ask that you do not award costs against me, my Lord.

LORD JUSTICE GLIDEWELL: Miss Montgomery, we are minded, subject to anything you say, to make an order for costs not to be enforced without leave of the court, as if he were on legal aid, because unless his circumstances change you are effectively not going to get anything. It would be a waste of time going to court seeking to enforce it because you

would simply get a very small order for periodical payments, I suppose.

MISS MONTGOMERY: Would your Lordship give me one moment to take instructions?

LORD JUSTICE GLIDEWELL: Yes.

MISS MONTGOMERY: In the circumstances, I invite your Lordship to make that order.

LORD JUSTICE GLIDEWELL: That is the order we make. Mr Webb, that means that unless your circumstances change, it will not be enforced. I do not know whether you are a Pools better, it is an expression that is normally used, but if you should come into a source of funds then it would be open to the Customs and Excise to come back to the court and seek to enforce the order. In the absence of any such provision they will not be able to.

MR WEBB: Thank you, my Lord.