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[DIVISIONAL COURT]

THE QUEEN v. CHARLES BRADLAUGH AND ANNIE BESANT.

1877 June 28.

COCKBURN, C.J., MELLOR, J.

Obscene Publication - Absence of Corrupt Motive - Indictment - Omission to set out Words charged as Obscene - Practice.

In an indictment for the publication of an obscene book, the fact that the book is described by its title only, without setting out any of the words charged as obscene, is no ground for a motion to quash the indictment or arrest the judgment.

Semble, that such omission of the words charged as obscene is not open to objection by demurrer or otherwise.

THE indictment which had been removed by certiorari into this Court, contained two counts charging that the defendants "unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the Queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, &c., did print, publish, sell, and utter a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating, vitiating, and corrupting the morals, &c."

At the trial before Cockburn, C.J., on the 18th of June, 1877, the defendants moved to quash the indictment on the ground of its insufficiency. The Chief Justice reserved the point. Evidence was then given of the publication by the defendants, at the price of 6*d.*, of a pamphlet called 'Fruits of Philosophy,' in which certain checks upon the increase of population were described and recommended. The jury found that the book was calculated to deprave

the public morals, but they entirely exonerated the defendants from any corrupt motives in publishing it. A verdict of guilty was entered, judgment being postponed till the 25th of June.

June 25. The defendants in person moved to quash the indictment, or to arrest judgment on the ground that the indictment being for an obscene libel, the words supposed to be criminal in that libel ought to have been expressly specified in the indictment, which had not been done.(1)

In Archbold's Criminal Pleading, p. 58 (18th edition), it is said, "where words are the gist of the offence, they must be set forth with particularity in the indictment." In *Dr. Sacheverell's Case* (2) the judges, in answer to a question from the Lord Chancellor, gave their opinion that by the laws of England and constant practice in all prosecutions by indictment or information for crimes or misdemeanours, in writing or speaking, the particular words supposed to be criminal, ought to be specified in such indictment or information. In *Rex v. Christopher Layer* (3) a different opinion was expressed; but in *Rex v. Goldstein* (4) it was again laid down that the words in the libel must be set out. *Zenobio v. Axtell* (5) is to the same effect In Russell on Crimes, 5th ed., vol. iii., p. 219, it is said: "The libellous matter must be set out in the indictment, and the libel proved must appear to correspond with the statement of it in the indictment." Archbold, on Criminal Pleading, pp. 806, 808, states the law to the same effect. In Broom and Hadley's commentaries, vol. iv. p. 408, it is explained that the indictment must have precise and sufficient certainty in order that the defendant may know what it is that he is called upon to answer. The defendants did not not know when this prosecution commenced whether they had to answer for the whole book or for the language of a part.

[COCKBURN, C.J. Suppose the prosecution had set out the whole of the book, you would still have been in the same difficulty. It is described as a book, and you must assume that that means the whole of the book.]

(1) They also moved for a new trial upon various grounds. It is unnecessary to refer to this part of the motion.

(2) 15 How. St. Tr. at p. 466.

(3) 16 How. St. Tr. 93, at p. 317.

(4) 3 B. & B. 201.

(5) 6 T. R. 162.

Even then the book as a whole, or the parts specified, ought to be set out in the indictment at length. It is not enough to merely set out the title of the book. In *Rex v. Curll* (1), one of the first cases on this branch of the law, the libellous passages were set out at length on the record.

Sir H. Giffard, S.G., and **Mead** (**Straight** with them), shewed cause. In *Dr. Sackeverell's Case* (2), the House of Lords decided against the opinions of the judges.

[COCKBURN, C.J. Ought not the libel to be set out to enable the defendant to demur?]

The same reasoning must apply, whether the libel is in the form of a printed book or a picture, and a picture could not be copied in the indictment. The book as a whole is indicted, and it cannot be set out regardless of its length. The precise question has come before the American courts. In *The Commonwealth v. Holmes* (3), where the defendant was indicted for an obscene libel, described as the 'Memoirs of a Woman of Pleasure,' it was contended that the obscene matter ought to have been set out in the indictment, but Parker, C.J., said that it never could be required that the obscene book or picture should be displayed upon the records of the court. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it. In *The Commonwealth v. Sharpless* (4) the indictment was for exhibiting an indecent picture, and the objection was taken by the defendant that it ought to be set out distinctly, so that he might prepare his defence, and that the Court might know precisely the charge it had to try. Tilghman, C.J., said, "Must the indictment describe minutely the attitude and posture of the figures? - I am of opinion that the description is sufficient." *Reg. v. Dugdale* (5) is the only English case that bears in any way on this particular point of law. In that case the defendant was indicted for having obscene works in his possession for the purpose of selling them, and for procuring them for a like purpose, but though the libels had not been set out on the indictment, the objection raised in this case was not urged by counsel. Secondly,

(1) 17 How. St. Tr. 154.

(2) 15 How. St. Tr. at p. 466.

(3) 17 Mass. Rep. 335, at p. 336.

(4) 2 Serg. & Rawl. 91, at p. 103.

(5) Dearsley & Pearce C. C. 64.

it is too late to raise the objection, for the defendants are in the same position now as they were before the trial, and it would have been too late to have raised the objection then. It should have been raised by demurrer. Issue had. been joined, and the Court will not quash an indictment for an objection which might be taken by demurrer.

[COCKBURN, C.J. It may be taken on a motion in arrest of judgment.]

The jury have found that the book is obscene, and it is too late to move in arrest of judgment.

COCKBURN, C.J. (after stating that the application for a new trial must be refused, proceeded):- It is said that even if there can be no new trial, on the ground that the verdict of the jury was conclusive on the facts, nevertheless the indictment cannot be sustained, and that we ought now to arrest the judgment by reason of the legal insufficiency of the indictment. This contention is founded upon the proposition that in an indictment for an ordinary libel, where the libellous matter consists of words, the words must be set out so that the defendant may know what it is that he is called upon to answer, and that if he chooses to take the legal objections, which he may do on demurrer, to the sufficiency of the indictment, he may have the opportunity of doing so. We agree with that proposition. It is said, on the other hand, that it would be highly inconvenient that obscene matters should be set out upon the records of the Court, and that the same argument and the same rule would apply to the case of an indecent print which applies to the case of indecent words, and that it would be impossible, or at all events in the highest degree objectionable, to have an indecent print exhibited upon an indictment which would afterwards form part of the records of this court. We have had pressed upon us two decisions of the American courts. These decisions are not so conclusive upon us as if they were decisions of courts having equal jurisdiction in this country, but we look upon the decisions of the American courts with very great respect, and take advantage of them in the solution of questions of law. Even putting these decisions on one side, the question of convenience presses upon us strongly. I agree that where particular

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passages in a work, as contradistinguished from the work itself, are made the subject-matter of an indictment, it would be highly expedient that the attention of those against whom the publication of such matters is made the subject-matter of prosecution, should be drawn to such passages, that they may have the opportunity of knowing what it is against which they are to direct their defence. On the other hand if not particular portions of a work, but the work itself in its entirety and as a whole is made the subject-matter of a prosecution, one cannot but see that it would lead to the greatest inconvenience to have the whole of the work set out from beginning to end. We were told the other day that a prosecution had recently been instituted, or was about to be instituted, in respect of the publication of the 'Memoirs of the Comte de Grammont,' on the ground that it was an indecent and obscene publication, because it describes with a great deal of particularity the licentious habits of the court of Charles II. While I do not express any opinion with reference to a prosecution founded upon the publication of a work which has existed for so many years, and has gone through so many editions, and been translated into several languages, I merely mention this as an instance of what would be the monstrous inconvenience of setting out in extenso the whole of a publication which may consist of two or three volumes. Many other works might be mentioned, which are more or less of an indecent and indelicate character, and more or less inconsistent with good morals, and which may therefore be made the subject-matter of an indictment, in which the objection to the work would be not that it contains particular passages which are objectionable, but that it is objectionable in toto; and in such instances to set out the whole work would lead to a degree of inconvenience which we cannot help taking into account.

I do not think it was competent for me upon this objection to quash the indictment. The Solicitor General has also said the defendants should hare applied earlier if they desired to have the indictment quashed, and it appears to me that I went too far, and that I was not called upon to give leave to more upon the point. Another difficulty I feel with reference to the objection is that it ought to have been taken by demurrer. If the omission

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is in the indictment - if that be the objection, and it be a valid one, it is an objection that ought to have been taken by demurrer, and, therefore, I cannot help thinking that, upon the balance of convenience we shall act more wisely in saying that the judgment pronounced upon this indictment ought not to be set aside by making the motion absolute to arrest the judgment; but if there be any valid foundation for the contention the defendants have raised upon the indictment it should be taken by demurrer.

Although the subject-matter of this indictment falls within the law of libel, it to a certain extent arises out of the general law, as being commune nocumentum - a matter complaint as to which arises from its being subver-

sive of public morals and therefore a public nuisance, I therefore cannot feel that the authorities which have been cited for the purpose of shewing that in an indictment for libel the words must be specially set forth apply to this case. No doubt, there is the inconvenience to the defendant, that he may be put to the inconvenience and expense of a trial, when if the words were set forth, on demurrer, judgment might be given in his favour at once. The advantage of an early decision cannot be obtained under this form of indictment, and it may be that this is an advantage of which it is hard that the defendants should be deprived.

We shall, however, shelter ourselves under the decisions of the American courts, leaving the ultimate decision of this matter, an important one, no doubt, to the Court of Error. I do not think that there should be any rule for an arrest of judgment.

MELLOR, J. (The learned judge concurred in refusing the application for a new trial and proceeded):- With regard to the other point, I cannot help thinking that there is no reason why an objection of this character could not be taken by demurrer to the indictment. The objection was not taken upon demurrer and the jury have now interpreted and applied the general description of the book in the indictment as an obscene work. If it be essential to set forth the terms in which the libel was published, the point may still be taken upon error.

Rule refused.

Solicitor for the prosecution: *T. J. Nelson*.