SUPREME COURT OF UNITED STATES

Edward Mishkin

Vs.

State of New York

No. 49.

Argued Dec. 7, 1965.

Decided March 21, 1966.

Rehearing Denied May 2, 1966.

See 384 U.S. 934, 86 S.Ct. 1440.

Emanuel Redfield, New York City, for appellant.

H. Richard Uviller, New York City, for appellee.

Mr. Justice BRENNAN delivered the opinion of the Court.

This case, like Ginzburg v. United States, [1966] USSC 49; 383 U.S. 463, 86 S.Ct. 942, also decided today, involves convictions under a criminal obscenity statute. A panel of three judges of the Court of Special Sessions of the City of New York found appellant guilty of violating § 1141 of the New York Penal Law1 by hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them.2 26 Misc.2d 152, 207 N.Y.S.2d 390 (1960). He was sentenced to prison terms aggregating three years and ordered to pay $12,000 in fines for these crimes.3 The Appellate Division, First Department, affirmed those convictions. 17 A.D.2d 243, 234 N.Y.S.2d 342 (1962). The Court of Appeals affirmed without opinion. 15 N.Y.2d 671, 255 N.Y.S.2d 881, 204 N.E.2d 209 (1964), remittitur amended, 15 N.Y.2d 724, 256 N.Y.S.2d 936, 205 N.E.2d 201 (1965). We noted probable jurisdiction. [1965] USSC 69; 380 U.S. 960, 85 S.Ct. 1103, 14 L.Ed.2d 15i. We affirm.

Appellant was not prosecuted for anything he said or believed, but for what he did, for his dominant role in several enterprises engaged in producing and selling allegedly obscene books. Fifty books are involved in this case. They portray sexuality in many guises. Some depict relatively normal

heterosexual relations, but more depict such deviations as sadomasochism, fetishism, and homosexuality. Many have covers with drawings of scantly clad women being whipped, beaten, tortured, or abused. Many, if not most, are photo-offsets of typewritten books written and illustrated by authors and artists according to detailed instructions given by the appellant. Typical of appellant's instructions was that related by one author who testified that appellant insisted that the books be 'full of sex scenes and lesbian scenes * * *. (T)he sex had to be very strong, it had to be rough, it had to be clearly spelled out. * * * I had to write sex very bluntly, make the sex scenes very strong. * * * (T)he sex scenes had to be unusual sex scenes between men and women, and women and women, and men and men. * * * (H)e wanted scenes in which women were making love with women * * *. (H)e wanted sex scenes * * * in which there were lesbian scenes. He didn't call it lesbian, but he described women making love to women and men * * * making love to men, and there were spankings and scenes—sex in an abnormal and irregular fashion.' Another author testified that appellant instructed him 'to deal very graphically with * * * the darkening of the flesh under flagellation * * *.' Artists testified in similar vein as to appellant's instructions regarding illustrations and covers for the books.

All the books are cheaply prepared paperbound 'pulps' with imprinted sales prices that are several thousand percent above costs. All but three were printed by a photo-offset printer who was paid 40¢ or 15¢ per copy, depending on whether it was a 'thick' or 'thin' book. The printer was instructed by appellant not to use appellant's name as publisher but to print some fictitious name on each book, to 'make up any name and address.' Appellant stored books on the printer's premises and paid part of the printer's rent for the storage space. The printer filled orders for the books, at appellant's direction, delivering them to appellant's retail store, Publishers' Outlet, and, on occasion, shipping books to other places. Appellant paid the authors, artists, and printer cash for their services, usually at his bookstore.

I.

Appellant attacks § 1141 as invalid on its face, contending that it exceeds First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms 'sadistic' and 'masochistic' are impermissibly vague, and that the term 'obscene' is also impermissibly vague. We need not decide the merits of the first two contentions, for the New York courts held in this case that the terms 'sadistic' and 'masochistic,' as well as the other adjectives used in § 1141 to describe proscribed books are 'synonymous with 'obscene." 26 Misc.2d, at 154, 207 N.Y.S.2d, at 393. The contention that the term 'obscene' is also impermissibly vague fails under our holding in Roth v. United States, [1957] USSC 100; 354 U.S. 476, 491—492[1957] USSC 100; , 77 S.Ct. 1304, 1312, 1 L.Ed.2d 1498. Indeed, the definition of 'obscene' adopted by the New York courts in interpreting § 1141 delimits a narrower class of conduct than that delimited under the Roth definition, People v. Richmond County News, Inc., 9 N.Y.2d 578, 586—587, 216 N.Y.S.2d 369, 175 N.E.2d 681, 685—686 (1961),4 and thus § 1141, like the statutes in Roth, provides reasonably ascertainable standards of guilt.

Appellant also objects that § 1141 is invalid as applied, first, because the books he was convicted of publishing, hiring others to prepare, and possessing for sale are not obscene, and second, because the proof of scienter is inadequate.

1. The Nature of the Material.—The First Amendment prohibits criminal prosecution for the publication and dissemination of allegedly obscene books that do not satisfy the Roth definition of obscenity. States are free to adopt other definitions of obscenity only to the extent that those adopted stay within the bounds set by the constitutional criteria of the Roth definition, which restrict the regulation of the publication and sale of the books to that traditionally and universally tolerated in our society.

The New York courts have interpreted obscenity in § 1141 to cover only so-called 'hard-core pornography,' see People v. Richmond County News, Inc., 9 N.Y.2d 578, 586—587, 216 N.Y.S.2d 369, 175 N.E.2d 681, 685—686 (1961), quoted in note 4, supra. Since that definition of obscenity is more stringent than the Roth definition, the judgment that the constitutional criteria are satisfied is implicit in the application of § 1141 below. Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution,6 those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient-appeal requirement because they do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.

Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in Roth, 354 U.S., at 489—490, 77 S.Ct., at 1311, does not foreclose this holding.7 In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin, (1868) L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons,8 it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test.

No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. The evidence fully establishes that these books were specifically conceived and marketed for such groups. Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them. It was for this reason that appellant 'wanted an emphasis on beatings and fetishism and clothing—irregular clothing, and that sort of thing, and again sex scenes between women; always sex scenes had to be very strong.' And to be certain that authors fulfilled his purpose, appellant furnished them with such source materials as Caprio, Variations in Sexual Behavior, and Krafft-Ebing, Psychopathia Sexualis. Not only was there proof of the books' prurient appeal, compare United States v. Klaw, [1964] USCA2 609; 350 F.2d 155 (C.A.2d Cir. 1965), but the proof was compelling; in addition appellant's own evaluation of his material confirms such a finding. See Ginzburg v. United States, [1966] USSC 49; 383 U.S. 463, 86 S.Ct. 942.

2. Scienter.—In People v. Finkelstein, 9 N.Y.2d 342, 344—345, 214 N.Y.S.2d 363, 364, 174 N.E.2d 470, 471 (1961), the New York Court of Appeals authoritatively interpreted § 1141 to require the

'vital element of scienter,' and it defined the required mental element in these terms:

'A reading of the statute (§ 1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised * * *.'9 (Emphasis added.)

Appellant's challenge to the validity of § 1141 founded on Smith v. People of State of California, [1960] USSC 89; 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, is thus foreclosed,10 and this construction of § 1141 makes it unnecessary for us to define today 'what sort of mental element is requisite to a constitutionally permissible prosecution.' Id., at 154, 80 S.Ct. at 219. The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution.11 Cf. Roth v. United States, 354 U.S., at 495—496, 77 S.Ct., at 1314—1315 (Warren, C.J., concurring).

Appellant's principal argument is that there was insufficient proof of scienter. This argument is without merit. The evidence of scienter in this record consists, in part, of appellant's instructions to his artists and writers; his efforts to disguise his role in the enterprise that published and sold the books; the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations; the massive number of obscene books appellant published, hired others to prepare, and possessed for sale; the repetitive quality of the sequences and formats of the books; and the exorbitant prices marked on the books. This evidence amply shows that appellant was 'aware of the character of the material' and that his activity was 'not innocent but calculated purveyance of filth.'

II.

Appellant claims that all but one of the books were improperly admitted in evidence because they were fruits of illegal searches and seizures. This claim is not capable in itself of being brought here by appeal, but only by a petition for a writ of certiorari under 28 U.S.C. § 1257(3) (1964 ed.) as specifically setting up a federal constitutional right.12 Nevertheless, since appellant challenged the constitutionality of § 1141 in this prosecution, and the New York courts sustained the statute, the case is properly here on appeal, and our unrestricted notation of probable jurisdiction justified appellant's briefing of the search and seizure issue. Flournoy v. Weiner, [1944] USSC 36; 321 U.S. 253, 263[1944] USSC 36; , 64 S.Ct. 548, 553[1944] USSC 36; , 88 L.Ed. 708; Prudential Ins. Co. v. Cheek, [1922] USSC 134; 259 U.S. 530, 547[1922] USSC 134; , 42 S.Ct. 516, 523[1922] USSC 134; , 66 L.Ed. 1044. The nonappealable issue is treated, however, as if contained in a petition for a writ of certiorari, see 28 U.S.C. § 2103 (1964 ed.) and the unrestricted notation of probable jurisdiction of the appeal is to be understood as a grant of the writ on that issue. The issue thus remains within our certiorari jurisdiction, and we may, for good reason, even at this stage, decline to decide the merits of the issue, much as we would dismiss a writ of certiorari as improvidently granted. We think that this is a case for such an exercise of our discretion.

The far-reaching and important questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision. Appellant's standing to assert the claim in regard to all the seizures is not entirely clear; there is no finding on the extent or nature of his

interest in two book stores, the Main Stem Book Shop and Midget Book Shop, in which some of the books were seized. The State seeks to justify the basement storeroom seizure, in part, n the basis of the consent of the printer-accomplice; but there were no findings as to the authority of the printer over the access to the storeroom, or as to the voluntariness of his alleged consent. It is also maintained that the seizure in the storeroom was made on the authority of a search warrant; yet neither the affidavit upon which the warrant issued nor the warrant itself is in the record. Finally, while the search and seizure issue has a First Amendment aspect because of the alleged massive quality of the seizures, see A Quantity of Copies of Books v. State of Kansas, [1964] USSC 180; 378 U.S. 205, 206[1964] USSC 180; , 84 S.Ct. 1723 (opinion of Brennan, J.); Marcus v. Search Warrants of Property at 104 East Tenth Street, Kansas City, Mo.[1961] USSC 130; , 367 U.S. 717, 81 S.Ct. 1708, the record in this regard is inadequate. There is neither evidence nor findings as to how many of the total available copies of the books in the various bookstores were seized and it is impossible to determine whether the books seized in the basement storeroom were on the threshold of dissemination. Indeed, this First Amendment aspect apparently was not presented or considered by the state courts, nor was it raised in appellant's jurisdictional statement; it appeared for the first time in his brief on the merits.

In light of these circumstances, which were not fully apprehended at the time we took the case, we decline to reach the merits of the search and seizure claim; insofar as notation of probable jurisdiction may be regarded as a grant of the certiorari writ on the search and seizure issue, that writ is dismissed as improvidently granted. 'Examination of a case on the merits * * * may bring into 'proper focus' a consideration which * * * later indicates that the grant was improvident.' The Monrosa v. Carbon Black Export, Inc., [1959] USSC 83; 359 U.S. 180, 184[1959] USSC 83; , 79 S.Ct. 710, 713[1959] USSC 83; , 3 L.Ed.2d 723.

Affirmed.

APPENDIX TO OPINION OF THE COURT.

THE CONVICTIONS BEING REVIEWED.

§ 1141 Counts Naming the Book

Exhibit Publishing Hiring

No. Title of Book Possession Others

1 Chances Go Around 1 63 111

2 Impact 2 64 112

3 Female Sultan 3 65 113

4 Satin Satellite 4

5 Her Highness 5 67 115

6 Mistress of Leather 6 68 116

7 Educating Edna 7 69 117

8 Strange Passions 8 70 118

9 The Whipping Chorus Girls 9 71 119

10 Order Of The Day and Bound

Maritally 10 72 120

11 Dance With the Dominant

Whip 11 73 121

12 Cult Of The Spankers 12 74 122

13 Confessions 13 75 123

14 & 46 The Hours Of Torture 14 & 40 76 124

15 & 47 Bound In Rubber 15 & 41 77 125

16 & 48 Arduous Figure Training at

Bondhaven 16 & 42 78 126

17 & 49 Return Visit To Fetterland 17 & 43 79 127

18 Fearful Ordeal In Restraintland 18 80 128

19 & 50 Women In Distress 19 & 44 81 129

20 & 54 Pleasure Parade No. 1 20 & 48 82 130

21 & 57 Screaming Flesh 21 & 51 86 134

22 & 58 Fury 22 & 52

23 So Firm So Fully Packed 23 87 135

24 I'll Try Anything Twice 24

25 & 59 Masque 25 & 53

26 Catanis 26

§ 1141 Counts Naming

the Book

Exhibit Publishing Hiring

No. Title of Book Possession Others

27 The Violated Wrestler 27 89 137

28 Betrayal 28

29 Swish Bottom 29 90 138

30 Raw Dames 30 91 139

31 The Strap Returns 31 92 140

32 Dangerous Years 32 93 141

43 Columns of Agony 37 95 144

44 The Tainted Pleasure 38 96 145

45 Intense Desire 39 97 146

51 Pleasure Parade No. 4 45 85 133

52 Pleasure Parade No. 3 46 84 132

53 Pleasure Parade No. 2 47 83 131

55 Sorority Girls Stringent

Initiation 49 98 147

56 Terror At The Bizarre

Museum 50 99 148

60 Temptation 57

61 Peggy's Distress On Planet

Venus 58 101 150

62 Ways of Discipline 59 102 151

63 Mrs. Tyrant's Finishing

School 60 103 152

64 Perilous Assignment 61 104 153

68 Bondage Correspondence 107 156

69 Woman Impelled 106 155

70 Eye Witness 108 157

71 Stud Broad 109 158

72 Queen Bee 110 159

Mr. Justice HARLAN, concurring.

On the issue of obscenity I concur in the judgment of affirmance on premises stated in my dissenting opinion in A Book Named 'John Cleland's Memoirs of a Woman of Pleasure' v. Attorney General, 383 U.S. 455, 86 S.Ct. 996. In all other respects I agree with and join the Court's opinion.

Mr. Justice BLACK, dissenting.

The Court here affirms convictions and prison sentences aggregating three years plus fines totaling $12,000 imposed on appellant Mishkin based on state charges that he hired others to prepare and publish obscene books and that Mishkin himself possessed such books. This Court has held in many cases that the Fourteenth Amendment makes the First applicable to the States. See for illustration cases collected in my concurring opinion in Speiser v. Randall, [1958] USSC 154; 357 U.S. 513, 530[1958] USSC 154; , 78 S.Ct. 1332, 1344, 2 L.Ed.2d 1460. Consequently upon the same grounds that I dissented from a five-year federal sentence imposed upon Ginzburg in 383 U.S. 476, 86 S.Ct. 950, for sending 'obscene' printed matter through the United States mails I dissent from affirmance of this three-year state sentence imposed on Mishkin. Neither in this case nor in Ginzburg have I read the alleged obscene matter. This is because I believe for reasons stated in my dissent in Ginzburg and in many other prior cases that this Court is without constitutional power to censor speech or press regardless of the particular subject discussed. I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read. When this Court makes particularized rules on what people can see and read, it determines which policies are reasonable and right thereby performing the classical function of legislative bodies directly responsible to the people. Accordingly, I wish once more to express my objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read. If censorship of views about sex or any other subject is constitutional then I am reluctantly compelled to say that I believe the tedious, time-consuming and unwelcome responsibility for finally deciding what particular discussions or opinions must be

suppressed in this country, should, for the good of this Court and of the Nation, be vested in some governmental institution or institutions other than this Court.

I would reverse these convictions. The three-year sentence imposed on Mishkin and the five-year sentence imposed on Ginzburg for expressing views about sex are minor in comparison with those more lengthy sentences that are inexorably bound to follow in state and federal courts as pressures and prejudices increase and grow more powerful, which of course they will. Nor is it a sufficient answer to these assuredly ever-increasing punishments to rely on this Court's power to strike down 'cruel and unusual punishments' under the Eighth Amendment. Distorting or stretching that Amendment by reading it as granting unreviewable power to this Court to perform the legislative function of fixing punishments for all state and national offenses offers a sadly inadequate solution to the multitudinous problems generated by what I consider to be the un-American policy of censoring the thoughts and opinions of people. The only practical answer to these concededly almost unanswerable problems is, I think, for this Court to decline to act as a national board of censors over speech and press but instead to stick to its clearly authorized constitutional duty to adjudicate cases over things and conduct. Halfway censorship methods, no matter how laudably motivated, cannot in my judgment protect our cherished First Amendment freedoms from the destructive aggressions of both state and national government. I would reverse this case and announce that the First and Fourteenth Amendments taken together command that neither Congress nor the States shall pass laws which in any manner abridge freedom of speech and press—whatever the subjects discussed. I think the Founders of our Nation in adopting the First Amendment meant precisely that the Federal Government should pass 'no law' regulating speech and press but should confine its legislation to the regulation of conduct. So too, that policy of the First Amendment made applicable to the States by the Fourteenth, leaves the States vast power to regulate conduct but no power at all, in my judgment, to make the expression of views a crime.

Mr. Justice STEWART, dissenting.

The appellant was sentenced to three years in prison for publishing numerous books. However tawdry those books may be, they are not hard-core pornography, and their publication is, therefore, protected by the First and Fourteenth Amendments. Ginzburg v. United States, 383 U.S. 497, 86 S.Ct. 956 (dissenting opinion). The judgment should be reversed.*