

(New Zealand Law Reports, 1917, page 624.)

CLARKSON v. MCCARTHY.

S.C.
IN BANCO.
AUCKLAND.
1917.
July 30.
COOPER, J.

Indecent Publication—Picture—“The Sleeping Venus”—Exhibited in a Public Place—Indecent Publications Act, 1910, ss. 2, 3, 5.

A photographic representation of the painting by Giorgione entitled “The Sleeping Venus” is an indecent document within the meaning of s. 2 of the Indecent Publications Act, 1910, and its exhibition in the window of a shop fronting a public place is an offence under s. 3 of that Act, such exhibition having a mischievous or immoral tendency within the meaning of that section.

GENERAL appeal from conviction by E. C. Cutten, Esq., S.M., sitting at Auckland.

The following statement of facts is taken from the judgment:—

The appellant was charged upon an information laid by Sergeant McCarthy with a breach of the Indecent Publications Act, 1910, by publicly exhibiting in Auckland a document—to wit, a picture called “Venus sleeping”—so that the same was in view of persons in a public place—to wit, Queen Street, in the City of Auckland. The Magistrate convicted the appellant and fined him £6 and costs. He appealed under Part X of the Justices of the Peace Act, 1908.

The evidence consisted of the production of the picture exhibited, the evidence by Sergeant McCarthy, the informant, and the following admissions made by the appellant: That the appellant publicly exhibited or caused to be exhibited a picture called “The Sleeping Venus” in view of persons in a public place—to wit, Queen Street. that the prosecution was commenced with the leave of the Attorney-General; and that the picture produced to the Court is the picture so exhibited. Sergeant McCarthy’s evidence is that the situation of the appellant’s shop is in Queen Street, opposite Smeeton’s Buildings, and at the entrance to the Empire Picture-theatre; that the picture was exhibited for six days in full view of the passers-by, with a notice on it that it had been purchased by a gentleman for his private house; that the appellant told the sergeant he had two of the pictures for sale; that the shop is a well-known

(1) 32 N.Z. L.R. 193; 15 G.L.R. 259. (2) 16 G.L.R. 115.

picture-shop; and that pictures of a good class are kept there. The sergeant stated that he had seen a number of youths and girls looking at the picture and laughing and giggling.

Tole, K.C., for the respondent:—

The picture in itself is indecent, and in view of the circumstances under which it was exhibited it certainly has an immoral tendency. The test of obscenity is whether the tendency of the matter charged as obscenity is to corrupt those persons whose minds are open to such immoral influences, and under whose notice a picture of this kind may fall: *Reg. v. Hicklin*(1). Accepting that as the test the work is an obscene one, for the evidence of Sergeant McCarthy shows the effect it had upon certain numbers of young people who saw it. It made no difference that the picture was a copy of a well-known painting exhibited in one of the well-known galleries of Europe: *In re Jacobs*(2).

Bamford, for the appellant:—

The terms of the statute must be considered. The onus of proving the indecency rests upon the Crown. It is submitted that the Crown must prove the indecency of the picture *per se* irrespective of its situation. Then the Crown must go further and must establish that the act of exhibiting the picture had a mischievous or immoral tendency. The primary appeal of the picture is an appeal to the artistic taste. The picture, if in an art gallery, could not be called indecent. It is a copy of a recognized work of art. The position is well summed up in *Reg. v. Thomson*(3).

COOPER, J.:—

[After stating the facts His Honour proceeded:] The term “indecent document” is defined in the Act of 1910 as including, *inter alia*, a picture or photograph, and s. 5 of the Act states that “in determining whether any document or other matter is “indecent within the meaning of this Act the Magistrate shall “take into consideration not merely the nature of that document “or matter itself, but also the nature and circumstances of the “act done by the defendant with respect thereto, and the purpose with which the act was done, and the literary, scientific, “or artistic merit or importance of the document or matter;

(1) L.R. 3 Q.B. 360.

(3) 64 J.P. 456.

(2) 37 J.P. 235.

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“ and no document or matter shall be held to be indecent unless,
“ having regard to these and all other relevant considerations,
“ the Magistrate is of opinion that the act of the defendant
“ was of an immoral or mischievous tendency.”

Now, in determining whether a picture is “ indecent ” within the meaning of the statute three things have to be considered : (i) The nature of the picture ; (ii) the nature and circumstances of the act done by the defendant with respect thereto, the purpose with which the act was done, and the artistic merit of the picture ; and (iii) was the act of the defendant in exhibiting the picture of an immoral or mischievous tendency ?

The picture is a large-sized photograph of “ The Sleeping Venus,” a famous picture in the Dresden Gallery painted by Giorgione. It is of an entirely nude sleeping woman lying on her back, with her right hand supporting her head and the fingers of her left hand over her private parts. The photograph is coloured, showing the flesh tints of the figure. The original painting is in the Royal Dresden Gallery, and the artist was Giorgione da Castelfranco, a Venetian painter who died in 1511.

Dr. Bamford has contended that, as the picture is the photograph of a celebrated work of art and is a study in the nude of a heathen goddess, it cannot be said to be indecent *per se*. The picture is, no doubt, a reproduction of a celebrated work of art, and if placed in an art gallery it would not necessarily be classed as an indecent picture. Even if in an art gallery it could not, I think, be said that it would have an elevating effect, and I do not think that parents who had a proper regard for the morality of their boys or girls would like them to see the picture even there. But I have not to consider what the position would be if the authorities governing an art gallery were to admit such a picture to the gallery : *Reg. v. Hicklin*(1), per Lush, J., and per Cockburn, C.J. ; but I have to consider what effect this picture of a nude woman might be reasonably said to have upon the minds of young people who would be — and, as the evidence of Sergeant McCarthy shows, were — attracted by its exhibition in a shop in a public thoroughfare. The picture is of such a nature that the attention of the observers must be directed to the woman and not to the landscape surrounding her. In my opinion the picture is an indecent picture ; and it is a reasonable inference from the

(1) L.R. 3 Q.B. 360, 365, 367.

manner in which it was exhibited that it was placed by the appellant in his shop-window for the purpose of attracting the attention by its nudity of the passers-by, probably as an advertisement of the appellant. I do not wish to suggest that the appellant had any desire in exhibiting the picture to corrupt the morals of those who viewed it, but after inspecting the picture I have formed a clear opinion that, having regard to the conditions stated in s. 5 of the Act and to all other relevant considerations, the act of the appellant in exhibiting this picture was of an immoral or mischievous tendency within the meaning of the section.

The appeal must be dismissed and the conviction affirmed, with £5 5s. costs.

Appeal dismissed.

Solicitors for the appellant: *Nicholson & Gribbin* (Auckland).

Solicitor for the respondent: *The Crown Solicitor* (Auckland).

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