

1941

Present : Howard C.J.

SIRIWARDENE *v.* SINNETAMBY *et al.*526-28—*M. C. Jaffna, 16,449.*

Obscene representation—Writing of obscene expressions on walls—Meaning of representation—Penal Code, s. 285.

The writing of obscene expressions on the wall or other parts of a building does not amount to an obscene representation within the meaning of section 285 of the Penal Code.

A PPEAL from a conviction by the Magistrate of Jaffna.

S. Nadesan, for accused, appellants.

H. W. R. Weerasooriya, C.C., for complainant, respondent.

H. W. Thambiah (with him *G. G. Hoover*) as *amicus curiae*.

November 24, 1941. HOWARD C.J.—

In this case the first and second appellants appeal from their conviction by the Magistrate of Jaffna of having wilfully exhibited to public view certain obscene publications in contravention of section 285 of the Penal Code. The third appellant was charged with aiding and abetting the first and second appellants in the commission of this offence and thereby committing an offence under section 102 of the Penal Code. Crown Counsel has not supported the conviction of the third appellant. In fact there is no evidence on which he could have been convicted of this charge.

Mr. Nadesan has raised several points with regard to the conviction of the first and second appellants. For the purposes of this appeal it is only necessary to consider one of them. The case for the Crown was based on the evidence of a man called Sabaratnam. This witness stated that on the day in question he accompanied the three appellants to an Ambalam where they had toddy. The third appellant was sent

by the first and second appellants to fetch some charcoal from a crematorium. The second appellant on the return of the third appellant then started writing in Tamil on the wall, pillars and beam of the Ambalam certain obscene words. The witness testified as to certain of these words which are specified as particular items on a list referred to in the charge. The writing of two of the items is attributed by the witness to the first appellant and one of them to the second appellant. The obscenity of the words is not contested by Mr. Nadesan. The latter, however, contends that the acts of the first and second appellants in writing these obscene expressions on the walls, pillars and beam of the Ambalam do not constitute offences under section 285 of the Penal Code. With this contention I agree. Mr. Weerasooriya maintains that the writings made by the first and second appellants were "obscene representations" which they were exhibiting to public view. I am unable to accept the view that these writings were representations. Pornographic expressions made in this manner are not, in my opinion, covered by the term "representation". I am fortified in this opinion by the marginal note to the section and the phraseology of the next succeeding section 286. The marginal notes to both sections and the sections themselves contemplate the prevention of the mischief that would arise from the business of trading in obscene books and pamphlets. It cannot be said that what the first and second appellants did was for the purpose of a public exhibition.

I think it is possible that a charge laid under section 283 or 287 of the Penal Code might have succeeded.

In this connection I have considered whether section 347 (b) (ii) of the Criminal Procedure Code empowers me to substitute for the verdict of guilty under section 285 one of guilty under section 283 or 287. This provision allows me in the exercise of my discretion to do anything which the lower Court could have done at the time of its judgment and nothing more. The exercise of such a discretionary power must be regulated largely by what was the nature of the offence in respect of the charge upon which the appellants were convicted under section 285, and whether that evidence reasonably supports a charge under section 283 or 287 and whether the appellants will be in any way prejudiced or injured by the alteration of the charge. This is not one of those cases that comes within the ambit of either section 182 or 183 of the Criminal Procedure Code. On the other hand this fact in itself does not preclude me from exercising my powers under section 347. I am, however, of opinion that the alteration of the verdict in the manner suggested would in the circumstances of this case cause injustice to the appellants.

For the reasons I have given the appeals must be allowed and the conviction of the three appellants set aside.

Set aside.