

1960

Present: Sinnetamby, J.

K. E. PERERA, Appellant, and R. E. KITTO (Superintendent of Police,
C. I. D.), Respondent

S. C. 305—Jt. M. C. Colombo, 15388

*Having in possession obscene pamphlet for distribution—Ingredients of offence—
Penal Code, ss. 285, 286.*

In a prosecution under Section 286 of the Penal Code for having in possession an obscene pamphlet for the purpose of distribution, it would be sufficient for the Crown to prove that the accused intended to distribute, by some means mechanical or otherwise, not the pamphlet itself but only the representation contained in the pamphlet.

Further, if the Crown proves that the accused had the pamphlet in his possession and was making copies from it, it would be reasonable, in the absence of an explanation, to assume that the accused intended to distribute the pamphlet also.

APPPEAL from a judgment of the Joint Magistrate's Court, Colombo.

Colvin R. de Silva, with *M. L. de Silva*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 17, 1960. SINNETAMBY, J.—

The accused in this case was charged with having in his possession for the purpose of sale or distribution an obscene pamphlet which has been produced in the case marked "A" and with thereby having committed an offence punishable under Section 286 of the Penal Code.

The learned Counsel for the appellant did not contest the correctness of the learned Magistrate's findings on the facts which for the purpose of this case may shortly be stated as follows:—

The accused was employed as a clerk in the office of the Local Government Service Commission. He was also versed in Sinhalese and, in the absence of the Sinhalese typist, used to perform the latter's duties. There was in the office a sinhalese typewriter. On the day in question, at about 2.15 p.m. Assistant Superintendent of Police R. E. Kitto and certain other Police officers went to this office and found the accused seated in front of the sinhalese typewriter. By the side of the typewriter was the document marked "A" and in the typewriter itself there was a wax sheet with two or three lines appearing on it which has been produced, marked P2, while below it was a carbon copy marked P3 and below that a piece of tissue paper marked P4. It was later found that six paragraphs of document "A" were typed on P2, P3 and P4. Document "A" was not merely obscene but also scurrilous.

For the purpose of this case, learned Counsel for the appellant was prepared to concede that it was the accused who had typed these six paragraphs from document "A" onto the documents P2, P3 and P4. That, indeed, is on the facts as found by the Magistrate an irresistible conclusion. He, however, relied purely upon a legal defence. His contention was that the charge was in respect of the document "A" and the evidence showed that the accused was only using document "A" as an original in order to prepare copies and that, therefore, what was intended to be distributed was not document "A" but the copies: had the charge been in respect of the copies which at the moment though incomplete, was, nevertheless, obscene, then the accused would be guilty; but, in as much as the charge was restricted to document "A", the Crown has failed to establish that the possession of document "A" was for the purpose of sale or distribution. It is necessary, therefore, to consider the provisions of Section 286 and also Section 285 to which it refers. Sections 285 and 286 are in the following terms:—

Section 285: Whoever sells or distributes, imports, or prints for sale or hire, or wilfully exhibits to public view, any obscene book, pamphlet, paper, drawing, painting, photograph, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Section 286: Whoever has in his possession any such obscene book or other thing as is mentioned in the last preceding section for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Section 285 contemplates a case where the offender actually sells or distributes any obscene book, pamphlet, paper, drawing, painting, photograph, representation or figure. Section 286 covers cases where there has been no sale or distribution but where there is possession of any one of the articles mentioned in Section 285 coupled with an intention to distribute: it contemplates a stage, in point of time, prior to the actual distribution.

Ordinarily it is quite easy to envisage a case in which the intention to sell or distribute is manifest. Such would be the situation if several copies far more than are intended for the offender's personal use are found in his possession. In the absence of an explanation from him, it would in such a situation be reasonable to assume that the articles were kept for the purpose of sale or distribution. But what is it that is penalised by these sections. It is not in my view just merely the 'document' or 'container' but the 'contents'. The 'container' itself without the 'contents' would not be obscene. Neither a pamphlet, paper, nor a book can be regarded as obscene until and unless the contents are seen or heard. What, therefore, in my view, Section 285 seeks to penalise is the distribution of the contents and not merely the container. It, therefore, in my view, does not matter that the accused did not intend to distribute document "A" but only intended to distribute

the copies that he intended to make from the stencil. What he wanted to do was to distribute the contents of document "A" to the public. I find myself unable to agree with the contention of the learned counsel that what the Crown had to prove was that what the accused intended to distribute was the tangible object, viz: document "A", along with the obscene representations appearing upon it. One can, I agree, conceive of a case where the obscenity does not exist independent of the tangible object on which appears the obscene representation. Such would be the case if the obscenity took the form of a figure or object associated with what it seeks to depict, but the much more common instance is where the obscenity lies not in the object on which the representation is made but in the representation itself.

It is to be noted that Section 285 penalises also the distribution of an obscene representation. I am using the word "representation" because it appears in Section 285 and is most appropriate to cover cases which may not have been envisaged when the Penal Code was enacted in 1885 but can exist now. For instance let me take the case of a man who has a lantern slide on which there is depicted an obscene act. He can distribute the representation on the slide by using a lantern and projecting it on a screen. That, in my view, would come within the purview of Section 285. He would be distributing an obscene representation though he may not part with the material used for the purpose of so distributing the representation. It cannot for instance be said that if a cinema show is shown of certain obscene acts to be seen by several persons that there was no distribution of an obscene representation merely because the film used for the purpose of projecting the obscene scenes was not itself distributed among the viewers.

I, therefore, take the view that it is not necessary to find that the accused intended to distribute the actual sheet of paper marked "A" if it is clearly established that he intended to distribute the representation contained in that sheet of paper marked "A" by some means mechanical or otherwise. If he does so or it is proved that he had the document "A" in his possession with the object of distributing the contents of it, he would be guilty of an offence punishable under Section 286. In this view of the matter, the accused was clearly guilty of the offence with which he was charged. I may say that this aspect of the case was apparently not argued before the Magistrate nor was it considered by him. I may also add that the learned Crown Counsel supported the judgment on another ground, namely that where the Crown has proved that the accused had document "A" in his possession and was making copies from it, it would be reasonable in the absence of an explanation to assume that the accused intended to distribute the document "A" also.

It seems to me that even this contention is entitled to succeed. There is the fact that the accused had document "A" in his possession and was making copies from it. He has given no explanation as to why he was doing so. Indeed, his defence is that he did not do it at all and this has been rejected by the Magistrate. If he had stated that document "A" was merely the original which he intended to keep himself and

the stencil copies were intended to be distributed, then there might have been some force in the contention of the learned Counsel for the accused. In the absence of such evidence, the Court was entitled to draw from the incriminating and circumstantial evidence an inference adverse to the accused. ~~Intention is something which~~ is to be gathered from the attendant circumstances and the circumstances suggest, in the absence of an explanation to the contrary, that the accused intended to distribute the copies he was preparing as well as the original from which he was preparing it. There is nothing to justify the suggestion made by the learned Counsel that it was only the copies that the accused intended to distribute. For this reason, too, I think the appeal must fail. I would accordingly dismiss it.

Appeal dismissed.
