

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

and

1. JAG JIWAN JOGIA s/o HARI LAL JOGIA
2. AMRIT LAL JOGIA s/o HARI LAL JOGIA

Mr. D. Fatiaki for the Appellant

Mr. H.M. Patel for the Cross-Appellants/Respondents

JUDGMENT

On 9th April 1980 the first and second respondents were convicted after trial in the Suva Magistrate's Court of the following offences:-

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FIRST COUNT

Statement of Offence

BEING IN POSSESSION OF OBSCENE OBJECTS FOR TRADE:
Contrary to Section 199(1)(a) of the Penal Code, Cap.11.

Particulars of Offence

JAG JIWAN JOGIA s/o HARI LAL JOGIA, between the 10th day of September and the 12th day of September, both days inclusive, 1979, at Suva, in the Central Division, for the purpose by way of trade had in his possession certain obscene art plates, the said plates tending to corrupt morals.

SECOND COUNT

Statement of Offence

CONVEYING OBSCENE ARTICLES FOR TRADE: Contrary to Section 199(1)(b) of the Penal Code, Cap.11.

Particulars of Offence

AMRIT LAL JOGIA s/o HARI LAL JOGIA, between the 9th day of September, and the 10th day of September, both days inclusive, 1979, at Suva, in the Central Division, for the purpose by way of trade conveyed certain obscene art plates from Nadi to Suva, the said art plates tending to corrupt morals."

Upon his conviction on the first count the first respondent was fined \$20 or ten days' imprisonment while the second respondent upon his conviction on the second count was given a conditional discharge for a period of six months in addition the trial Court declined to order forfeiture and destruction of the alleged obscene objects and articles.

The Director of Public Prosecutions appeals on the ground that the sentences imposed on the respondents were manifestly lenient and that an order for the destruction of the obscene objects and articles ought to have been made.

The respondents cross-appeal mainly on the ground that the objects in question are not obscene in law and that the learned Magistrate had erred in ruling to the contrary.

The facts in this case show that a number of articles were seized by the police from first respondent's shop in Suva on 12th September 1979 on the basis that they were obscene. Altogether some 161 impugned items were seized and there was little doubt that they were displayed or stored in the shop for trade purposes. Most of the items which are cast in procelain plates with one or two wood carvings making the entire exhibits are said to be reproductions of sculptures to be found in certain temples in India such as Khajuraho, Lakshman and Vishwanath. These allegedly art reproductions show men and women engaging in various erotic postures including depictions of such sexual practices as oral and anal sex.

The main justification claimed on behalf of the respondents for bringing these allegedly obscene objects to Fiji is that they are art objects, being revered reproductions of fine sculpture works from famous Indian temples. They are, it is claimed, acceptable as art work in India by the predominantly Hindu community among whom they are freely and readily available. The respondents claimed that they were

genuinely of the belief that these so-called art objects would be equally acceptable in Fiji where a large segment of the population are Hindus who do not regard such erotic reproductions from Indian temples as obscene or debasing to them.

The legal question for the Court below as indeed again in this Court is whether the objects in question are in law obscene. Obscenity is a question of law for the Court. The two extracts quoted hereunder from the learned Magistrate's judgment show how the matter was approached there:

"The only question this Court has to decide is, has it been proved that the plates that were seized from Accused 1's shop are obscene in law. "Obscene" means "having a tendency to corrupt" in the legal sense. The popular sense is irrelevant: it does not matter that the offending article is offensive, indecent, filthy, disgusting, repulsive, revolting, lewd, loathsome or many another adjective one can think of. The sole test in law is whether the article in question "has a tendency to corrupt" those persons into whose hands the article is likely to fall, or as in this case, those likely to see it. "Corrupt", according to the Oxford English Dictionary means to "render impure", or, to debase morally. Nothing else matters. It follows that, from the defence point of view, it cannot avail them to say that no particular person was in fact corrupted. Only a tendency need be proved. Nor is it any defence that it was not the intention or motive on the part of Accused to corrupt: the mens rea required is knowingly and intentionally being in possession or conveying the articles in question: see R. v. Hicklin (1868) L.R. 3 Q.B. 360."

"Now there has been no evidence on the point, but it seems to me that I am entitled - indeed obliged - to take judicial notice of the fact that Fiji is a multi-racial community. If the population were 100% Indian, my decision might well be different. But Indians form only about half of the Fijian community, and this is an important consideration, for, on the basis of Mr. Patel's evidence, I doubt if it would be right to hold that the casts have a tendency to corrupt members of a Hindu Community. However, in D.P.P. v. Whyte (1972) 3 All E.R. 12 it was held that only if the number of

" readers likely to be corrupted is so small as to be negligible is the article not obscene. It is certainly obscene if it has a tendency to corrupt a significant population of those likely to see it: and as I have already implied I have to consider members of those non-Indian races - Fijians, European, Chinese and so on - who make up a sizeable proportion of the population of Fiji. I also have to consider - and herein lies the crux of this case - the possible and very real effect on children of these plates. It will be recalled that the casts were in the shop window, about two feet from the ground."

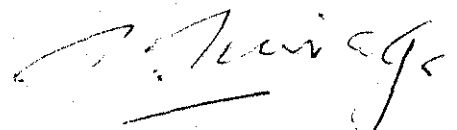
With respect I agree with the learned Magistrate's statement of the legal position and its application to this case. I think the fallacy in the argument advanced on behalf of the respondents is that the objects put forward as art are not strictly so because, as I understand it, they are merely depictions in cast form taken out of context from a larger and intricate sculpture work of high quality. It comes as no surprise that the so-called art objects chosen for exportation to Fiji were wholly erotic in theme and no doubt done with an eye to their sale potential. When viewed in isolation from the parent or original work the so-called art aspect of these objects becomes rather negligible if not totally absent. In my opinion in these circumstances such objects cannot properly be described as artistic work in the ordinary sense of the expression. Accordingly I would reject the claim that these objects are artistic in nature merely because they bear resemblance to parts of the original sculpture work in certain temples in India.

When stripped of their pretensions at being art work the articles in question will be seen as nothing more than ordinary shop wares which the respondents have brought into the country for sale at a profit to themselves. It follows that I am not convinced that the main purpose of the importation of these articles was to advance the cultural interest of the Indian community in Fiji. The basic question

in this case is whether the articles in question "have a tendency to deprave those persons into whose hands the articles are likely to fall". If the answer is in the affirmative, then clearly the articles must as a matter of law be characterised as obscene. The learned Magistrate has answered the question in the affirmative and I can find no strong reason to differ from him in the matter. I am satisfied that because of their crude and extravagantly erotic flavour the articles in question would very likely deprave those members of the community who are impressionable and sensitive. Of such persons Fiji is fairly well abound. I agree with the learned Magistrate that the articles in question are obscene and should not be allowed to be imported for sale in this country. Accordingly I would dismiss the cross-appeal.

With regard to the appeal on behalf of the Director of Public Prosecutions against sentence I do not think I ought to interfere. I am satisfied that the respondents may well have honestly believed that the laws of Fiji would permit the entry and sale of these articles.

On the other hand, it is a little puzzling that following his finding of obscenity against the articles in question the learned Magistrate did not see fit to order their forfeiture and destruction in accordance with the law. I would therefore allow this part of the Director's appeal and order forfeiture and destruction of the offending articles.



(T. U. Tuivaga)
Chief Justice

Suva,
31st October 1980.