

12-8-71
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In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinciale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

THE PUBLICATIONS CONTROL BOARD

Appellant,

versus

REPUBLICATIONS PUBLICATIONS (PTY) LTD.

Respondent

Appellant's Attorney
Prokureur vir Appellant

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on

Op die rol geplaas vir verhoor op

2-9-1971

1 2 3-7-9

Common Cause (Pretoria) v. Roodhooft-Balke
The State of Natal v. A.

(D.C.L.D.)

9-45 am - 11-00 am
11-15 am - 12-45 pm
2-15 pm - 3-15 pm

E. A. V.

24-9-71. The four appellants' appeal is dismissed with costs.

[Signature]

21-8-71

Bills Taxed.—Kosterekenings Getakseer.			
Date. Datum.	Amount. Bedrag.	Initials. Paraaf.	
Writ issued Lasbrief uitgereik			
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

THE PUBLICATIONS CONTROL BOARD

Appellant

and

REPUBLICAN PUBLICATIONS

(PROPRIETARY) LTD.

Respondent

CORAM: OGILVIE THOMPSON, C.J., RUMPF, BOTHA, TROLLIP
et MULLER, J.J.A.

HEARD: 2nd September 1971.

DELIVERED: 24th Sept. 1971.

J U D G M E N T

RUMPF, J.A. :

For the reasons set out in the judgment of the learned Chief Justice, I agree that the appeal should be dismissed with costs. I only want to add that when applying sec. 6 (1) (a) and (b) of the Act, I think that a court should consider what the effect of the publication would be on "the average modern reader with a healthy mind" rather than on "a substantial number of likely readers". When applying sec. 6 (1) (a) and (b) of the Act, one does not consider the psyche

of/.....

of the totality of a number of people - if that were possible -
but one attempts to diagnose the psyche of a man or a woman
who is considered to be the average modern reader of the book,
including, in the present case, the average modern teenager
of healthy mind.



RUMPF, J.A.

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the matter of:

THE PUBLICATIONS CONTROL BOARD Appellant

and

REPUBLICAN PUBLICATIONS

(PROPRIETARY) LTD. Respondent

Coram: OGILVIE THOMPSON, C.J., RUMPF, BOTHA,
TROLLIP et MULLER, JJ.A.

Heard: 2nd September 1971. Delivered: 24th Sept. 1971.

J U D G M E N T.

OGILVIE THOMPSON, C.J.:

In the Government Gazette of 14th August 1970 appellant, acting under the provisions of sec. 8 of the Publications and Entertainments Act, 1963 (Act No. 26 of 1963, hereinafter referred to as "the Act"), declared two issues of the magazine Scope to be undesirable publications. The issues in question were those of 26th June 1970 and 10th July 1970, being respectively Nos. 12 and 13 of Volume 5. The magazine Scope is published in the Republic fortnightly

by...../

by respondent. Its retail selling price is 15 cents per issue and it is said to have a circulation of approximately 150000. On appeal to the Durban and Coast Local Division, brought by way of motion proceedings, respondent succeeded in having the aforementioned declaration set aside. Against this decision the appellant now appeals, pursuant to the provisions of sec. 14 (3) of the Act, by consent direct to this Court.

Appellant's complaint against the aforementioned two issues of Scope is solely based upon an article entitled "The Affair", which, in two parts, appeared in those issues, and to which I shall presently more fully refer.

Section 5(1)(a) of the Act prohibits, inter alia, the printing or publication of "any undesirable publication", and in sec. 5(2) various categories of publication are enumerated which "shall be deemed to be undesirable". The subsection relevant to the present proceedings is 5(2)(a) which provides that:

"A publication or object shall be deemed to be undesirable if it or any part of it is indecent or obscene or is offensive or harmful to public morals".

The generality of that provision is, however, elaborated by the further deeming provisions contained in sec. 6 of the Act. Omitting, as having no application in the present case, some forty of the formidable list of subjects mentioned in sub-sec. 6(1)(c), sec. 6 reads:

"6(1) If in any legal proceedings under this Act the question arises whether any matter is indecent or obscene or is offensive ^{or harmful} to public morals, that matter shall be deemed to be -

- (a) indecent or obscene if, in the opinion of the court, it has the tendency to deprave or to corrupt the minds of persons who are likely to be exposed to the effect or influence thereof; or
- (b) offensive to public morals if in the opinion of the court it is likely to be outrageous or disgusting to persons who are likely to read or see it; or
- (c) harmful to public morals if in the opinion of the court it deals in an improper manner with sexual intercourse, ... promiscuity ... marital infidelity ... adultery ...; or
- (d) indecent or obscene or offensive or harmful to public morals if in the opinion of the court it is in any other manner subversive of morality.

(2) In determining whether any matter is indecent or obscene or is offensive or harmful to public morals within the meaning of sub section (1), no regard shall be had to the purpose of the persons by whom that matter was printed, published, manufactured, made, produced, distributed, displayed, exhibited, sold or offered or kept for sale."

The words "or any part of it" ("of 'n deel daarvan") occurring in the opening sentence of sec. 5 (2)

make it plain that for the above-cited provisions to apply it ~~is not essential that the whole of the "publication or object"~~ should be "indecent or obscene": the part may vitiate the whole. For instance, the inclusion in an otherwise entirely unobjectionable book of a single outrageously lewd picture will ordinarily suffice to render the book itself "indecent or obscene" within the meaning of the Act. Where, however, the enquiry revolves around the written word, it is, in my judgment, inappropriate and incorrect to have regard solely to a particular challenged passage - that is, to apply the so-called criterion of the isolated passage - without any reference whatever to the context in which that passage appears.

General principles of construction call, in my opinion, for a contextual approach in any such enquiry. To interpret the words "or any part of it" ("of 'n deel daarvan") occurring in the opening sentence of sec. 5(2) as importing the isolated passage criterion, would, in my opinion, be to confer upon appellant Board powers even more far-reaching than those which Parliament manifestly intended the Board to have.

Nor do I find anything to the contrary in the only prior decision of this Court which bears on that question, namely, Publications Control Board v. William Heinemann Ltd., 1965 (4) S.A. 137. It was suggested by counsel for respondent in the present case that, contrary to the view which I have expressed above, the majority judgment in the Heinemann case wrongly adopted the criterion of the isolated passage. Although counsel for appellant in the present case dissociated himself from that suggestion, certain passages - more especially those appearing at 147 D and 154 of the report - do occur in the aforementioned majority judgment which, if read alone, are susceptible of being advanced in support of it. Indeed, the majority judgment was so read - albeit without their concurrence - by the learned authors of Die Suid-Afrikaanse Persreg at p. 113 - 114; and, although a contrary view was expressed by Professor Ellison Kahn at p. 321 of an instructive and comprehensive article to be found in 1966 S.A.L.J., what was said in S.A. Magazine Co. (Pty.) Ltd. v. Publications Control Board, 1966 (2) S.A. 148 (T) at 151 G. is liable to be construed as lending some colour to the above-mentioned suggestion. Moreover,

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the conclusion reached at page 154 of the report of the

~~majority judgment in the Heinemann case is expressed in lan-~~
 guage which, if divorced from earlier portions of the judg-
 ment, is readily susceptible of being regarded as affirmation
 of the isolated passage criterion. The portions of that
 conclusion material to the issue presently under consideration
 read:

"Making due allowance for the trends of our times, these passages are, I consider, calculated to incite lustful thoughts and to stimulate sexual desire in at least a substantial number of the persons, ordinary men and women, of normal mind and reactions, including some of the younger generation, who will be the probable readers of this book The presentation of these episodes leaves the impression that such conduct is quite normal and natural, satisfying and right. They might well have the effect of inclining susceptible minds to the acceptance of the view that there is nothing really wrong with such behaviour. In that way also it may be said that these passages tend to deprave or corrupt".

To avoid any further misconception, it is, therefore, desirable that the matter be clarified. I accordingly now address myself to that end.

In the Heinemann case a book - entitled "When the Lion Feeds" - had been declared "indecent, obscene and objectionable". In the ensuing litigation, the Board

relied...../

relied upon grounds which substantially repeated the provisions of sec. 6 of the Act and also referred to nineteen different passages in the book by which, considered "in the context of the book read as a whole", the Board's decision had been motivated. Immediately after mentioning this, and at a stage when he was outlining the provisions of the Act - as distinct from considering the passages in the book complained of - Steyn, C.J., went on to say at p. 147 C-D of the report:

"In terms the Board's decision was not confined to particular parts of the book. Its decision was that the book was indecent, obscene or objectionable. But even if, in fact, only particular parts of the book come within that description, as amplified by sec. 5 (2) (a) as applied mutatis mutandis, and sec. 6 of the 1963 Act, the book as such would, as explicitly provided in sec. 5 (2) (a), as so applied, be deemed to be indecent, obscene or objectionable."

I am unable to regard this language, which was essentially of an introductory character to questions posed later in the judgment, as an intentional adoption of the "isolated passage" criterion. For when, several pages later, the learned Chief Justice proceeded - vide page 151 in fine -

to...../

to examine the specific issues before the Court in the light of his earlier remarks relating to the provisions of the statute, the enquiry which he posed was whether the probable readers of the book, or any substantial number of them, "would be affected or influenced by the passages complained of in this book, or how they would react to those passages, read in the context of the book as a whole" (vide p. 152 E). Later, after summarising the passages in the book relating to the three episodes upon which the majority judgment was founded, Steyn, C.J., made specific mention of both "the general context" and "the more immediate context" of those episodes (vide p. 153 F-G). It is in the light of these contexts that the conclusion, expressed on p. 154 of the report and which I have cited above, must, in my judgment, be read. The Heinemann case cannot, therefore, in my opinion rightly be said to have adopted the isolated passage criterion.

We were invited by counsel for respondent to say that the majority judgment in the Heinemann case erred

in..../

in endorsing the finding of the Provincial Division in that case rejecting certain evidence - vide pp. 148 - 150 of the report. Quite apart from the fact that it is only in very exceptional circumstances that this Court will ~~overrule~~ ^{overrule} its own prior decision (Harris & Others v. Minister of the Interior and Another, 1952 (2) S.A. 428 at 452 - 458), in the present case no evidence was led or tendered in the court below. I accordingly do not propose either to examine, or to express any opinion upon, the question thus raised by counsel.

Counsel for respondent also submitted that the majority judgment in the Heinemann case erred in regarding secs. 6 (1)(a) and (b) of the Act as importing the standard of "a substantial number of likely readers", thereby impliedly rejecting the standard of the "average modern reader", advocated by Rumpff, J.A., in his dissenting judgment, or that of "a person with average sex instincts" adopted by United States District Judge Woolsey in the Ulysses case, 5 Supp. 182 (S.D., N.Y.) 1953. The submission thus advanced vitally depends upon the citation, with approval, by Steyn, C.J. (vide pp. 150 - 151 of the report) of a well-known passage from the judgment of

Cockburn, C.J., in Q v. Hicklin & Anr., L.R. 3 Q.B. 360 at 371

which reads:

"The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall".

Although this passage has undoubtedly sometimes been regarded as affirming the proposition that even if only an immature or defective intelligence might be depraved and corrupted by a publication, it necessarily follows that that publication should be considered to be "obscene", later cases have pointed away from so strict an assessment (see, e.g., 1966 S.A.L.J. at p. 321 and the decisions there cited). However that may be, it is, in my opinion, clear that Steyn, C.J., did not adopt the above-stated proposition. For, although the learned Chief Justice, when considering the true meaning of "a tendency to deprave or corrupt" in sec. 6 (1) (a) of the Act, certainly (~~vide p. 151 of the report~~) mentioned with approval the views which had been expressed, almost a hundred years earlier, by Cockburn, C.J., concerning the import of "obscenity", it is

important...../

important to appreciate that, before referring to Q. v. Hicklin

(supra) at all, Steyn, C.J., had already, when dealing with the word "likely" as it appears in sec. 6 (1) (a) and (b), propounded the standard of "a substantial number of likely readers", with, however, the added qualification that

"what the Legislature had in mind in these paragraphs is the effect or influence upon or the reactions of the ordinary reader who is neither a prude nor a libertine" (see p. 150 F-H).

While the concept of "a substantial number of likely readers" may itself not be entirely beyond criticism (see, e.g., 1966 S.A.L.J. p. 322), it nevertheless affords, in my opinion, a reasonably workable standard. In my view, no sufficient grounds exist which would warrant this Court in now departing from that standard as propounded in the majority judgment in the Heinemann case. I shall accordingly apply it in the present case.

~~Appellant's reasons, as supplied in a letter~~
from the Deputy State Attorney, for banning the aforementioned

issues...../

issues of Scope were that the article entitled "The Affair"

- (i) ~~"is harmful to public morals in that it deals in an improper manner with promiscuity, marital infidelity and adultery. The spirit in which the article is handled, makes it offensive. It also encourages promiscuity, adultery and marital infidelity and elaborates on the technique of deceit;~~
- (ii) "is indecent or obscene in that it has the tendency to deprave or to corrupt the minds of persons who are likely to be exposed to the effect or influence thereof, especially younger people and children. The magazine is a popular one which is available to all, including youth."

In opposing the proceedings in the court below, appellant, while confirming the above reasons, added, in amplification, that that portion of the article which appeared in the issue of Scope of 26th June 1970 and "to a somewhat lesser extent" the article in the issue of 10th July 1970,

"Suggest, under the guise of a scientific study,

- (a) that it is or may be quite normal, satisfactory and right for many married couples to commit adultery or indulge in promiscuity and marital infidelity;
- (b) that marriage is an outmoded institution which usually, if not inevitably, leads to boredom and frustration for its participants;

(c)..../

- (c) techniques to be followed by the guilty spouse to deceive the innocent spouse with regard to the former's adultery or marital infidelity".

The second of the above-stated reasons is virtually a restatement of sec. 6(1)(a) of the Act coupled with specific reference to youthful readers. The first reason is based upon the provisions of sec. 6(1)(c) of the Act. The opening words of the supplementary reason lettered (a) are derived from the majority judgment in Heinemann's case (supra: at p. 154 E), and all three lettered reasons are, indeed, but amplification of the complaint, made in the first of the above-cited reasons, based upon sec. 6(1)(c) of the Act. It will be observed that no special reliance was placed upon the provisions of ~~the~~-sections 6 (1) (b) and (d) of the Act. It accordingly suffices to say that I am satisfied that those ~~the~~-sections have no direct application in the present case.

Inasmuch as the article under consideration appeared in two separate issues of Scope it is clear, and was, indeed, common cause at the hearing before us, that the two issues must be independently considered. For, if either of

the two portions of the article, or if any part - in the sense ~~explained earlier in this judgment - of either portion, be~~ found to be "indecent or obscene" within the meaning of the Act, the issue of Scope carrying such portion was rightly banned.

The general tenor of the article "The Affair", as also a considerable amount of its content, appears from the full report of the case in the Court a quo (vide: Republican Publications (Pty.) Ltd. v. Publications Control Board (2) 1971 (2) S.A. 162 (N)). I shall accordingly refer only to so much of the article as is necessary in order to deal with the arguments raised before us. In the very nature of things, however, some measure of repetition will be unavoidable.

The article in question opens in the issue of Scope of 26th June 1970 with what may be termed a "banner heading" extending over two pages. The whole of the left-hand page of this heading is taken up with the words "THE AFFAIR" appearing between the fully clothed figures of a man and a woman. Above that portion of the heading which occupies

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1. The first part of the document is a list of names and addresses. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

2. The second part of the document is a list of names and addresses, similar to the first part. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

3. The third part of the document is a list of names and addresses, similar to the first two parts. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

4. The fourth part of the document is a list of names and addresses, similar to the first three parts. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

5. The fifth part of the document is a list of names and addresses, similar to the first four parts. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

6. The sixth part of the document is a list of names and addresses, similar to the first five parts. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

7. The seventh part of the document is a list of names and addresses, similar to the first six parts. The names are written in a cursive script, and the addresses are in a standard font. The list is organized in a columnar format, with names in the first column and addresses in the second column.

the right-hand page is a caption, in heavy type, which reads: "FIRST OF TWO PARTS by MORTON HUNT". Within the heading itself on this page, there appears in bold lettering the statement that:

"This astonishing new study of unfaithful husbands and wives is the result of three years of research by best-selling author Morton Hunt. It is as fascinating as a novel - with one vital difference: every word is fact, every man and woman is real."

Next to this is a photograph of the author, and adjacent thereto, still within the heading, there appears the following:

"Morton Hunt, 50, a wartime bomber pilot, examined 300 extra-marital love affairs in depth to produce his brilliant book The Affair. It is already a best-seller in America, as were his earlier studies of love and marriage."

Each of the two opening pages of the article contains five columns of print. Below the abovementioned "banner heading" there appears, on the right-hand page, a sub-heading extending over some four of those columns. This sub-heading, which appears next to the representation of a partially eaten apple, is in heavy type approximately half a centimetre high and reads:

"THE PEOPLE WHO HAVE AFFAIRS AND
HOW LONG THEY LAST".

This..../

1. The first part of the document is a list of names and titles, including the names of the authors and the titles of their respective works. This list is organized in a structured manner, likely for reference or archival purposes.

2. The second part of the document contains a detailed description of the contents of the works listed. This section provides information about the scope, objectives, and key findings of each study, allowing readers to quickly identify relevant research.

3. The third part of the document is a list of references or sources cited in the works. This section is crucial for verifying the accuracy of the information and for further exploration of the topics discussed in the document.

4. The fourth part of the document is a list of authors and their affiliations. This section provides contact information for the authors, which is useful for inquiries or collaborations related to the research.

5. The fifth part of the document is a list of titles and subtitles of the works. This section provides a clear overview of the specific topics and sub-topics covered in the document.

6. The sixth part of the document is a list of keywords and terms used in the works. This section helps in understanding the terminology and concepts used throughout the research, facilitating a deeper understanding of the subject matter.

7. The seventh part of the document is a list of dates and times associated with the works. This section provides a chronological context for the research, highlighting the progression of the field over time.

8. The eighth part of the document is a list of locations where the works were conducted or published. This section provides geographical context for the research, which may be relevant for certain studies or fields.

9. The ninth part of the document is a list of other related works or sources. This section provides additional resources for readers interested in the topics discussed in the document, offering a broader perspective on the research.

10. The tenth part of the document is a list of other related works or sources. This section provides additional resources for readers interested in the topics discussed in the document, offering a broader perspective on the research.

This is followed by four questions, the first of which reads:

"WHAT sort of man or woman embarks on an
extra-marital affair? . Could it be YOU?"

After some elaboration of this question, answers, emanating from Morton Hunt's aforementioned book, are furnished. The three remaining questions then follow, to which answers, likewise derived from the said book, are furnished. These three questions are:

"How many men and women engage in sex outside marriage?"

"How long does it take most husbands and wives, in their first affair, to proceed from beginning to bedroom?"

"How long - from giving chase to jumping clear - does an affair last?"

The effect of the abovementioned headings is at the outset to direct the attention of the reader to the general nature of the article. The same obtains in relation to the second portion of the article which appears in the issue of Scope of July 10th, 1970. There the banner headline again extends over two pages. The right-hand page is taken

up..../

up with small Boxes (a term presently to be explained), each ~~containing the aforementioned, but now further consumed, apple~~ emblem, and what may be termed a terse and arresting headline relating to the case histories, also derived from Morton Hunt's work, which are printed adjacent to their respective Boxes. The left-hand page bears, in heavy type, the words "THE AFFAIR Part 2 by MORTON HUNT" and next to this, also in prominent type, there appears the following:

"There are numerous kinds of affairs men or women find themselves going into - from the purely platonic to the totally involved. But they are seldom completely satisfying and hardly ever do they end in marriage".

The text of the article itself occupies several pages of the magazine in both issues under consideration. On each of these pages in the first portion of the article, and on most of the pages in the second portion, there appear one or more insets, conveniently called "Boxes". The content of these Boxes, while apparently also deriving from Morton Hunt's book, do not form part of the continuous narrative of the article itself but constitute what Friedman, J., in

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the court below aptly described as self-contained episodes designed to be read as such. Apart from the Boxes, the text of the first portion of the article, after some introductory passages in general keeping with the theme indicated in the abovementioned headings, proceeds to recount what purport to be a series of brief case histories as ascertained by the author Hunt, linked together by observations of a pseudo-philosophical nature. Whether these observations are reproductions or paraphrases of what appears in Morton Hunt's aforementioned work is not stated; but that they derive therefrom would appear to be beyond question. Solely by way of illustration, I cite one of these observations, viz:

"The male human being would, in fact, always behave polygamously were it not for social restraint. As for the female, her somewhat weaker polygamous inclination is a matter of social conditioning, rather than of instinctual nature".

This general pattern of case histories linked together with observations of the nature mentioned above is also followed in the second portion of the article. Although, as already mentioned, the two portions of the article fall

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to be separately considered in relation to the inquiry into whether either portion can rightly be regarded as "indecent or obscene" or "offensive or harmful to public morals", they are in fact so similar in pattern that they must stand or fall together. Accordingly I shall, in what follows, primarily address myself to the first portion of the article without, however, omitting some mention of particular parts of the second portion of the article which appeared in the issue of Scope of 10th July 1970.

Having regard to the price and general availability of the magazine Scope - it is sold at bookshops, cafes, airports, etc. - it is undoubtedly readily accessible to the young. Neither portion of the article - and here I include the Boxes as well - however contains anything which is, in my opinion, "calculated to incite lustful thoughts and to stimulate sexual desire" (Heinemann's case, supra at p. 154 A - B): nor, indeed, was this seriously disputed by counsel for appellant, who mainly founded his submissions upon sec. 6(1)(c) of the Act. Having regard to the general nature and presentation of the article,

I greatly doubt whether modern youth, of whatever age, would trouble to read it at all. ~~However that may be, I am, after~~ full consideration of what appears in both issues of Scope and the arguments addressed to us, of opinion that the article entitled "The Affair" (including the Boxes) would not have "the tendency to deprave or to corrupt", within the meaning of that phrase as used in sec. 6 (1) (a) of the Act, the minds of any substantial number of likely readers.

As appears from the wording of sec. 6 (1) (c) of the Act and as was indicated in the Heinemann case (supra) at p. 148 G, the circumstance that the article deals with sexual intercourse, promiscuity, marital infidelity and adultery does not in itself suffice to bring it within the ambit of the statute. The vital question for decision is whether these subjects, or any of them, have been dealt with "in an improper manner".

The very nature of these subjects is such as inevitably to be liable to evoke some divergence of opinion

as...../

as to whether or not any particular writing or dissertation concerning them falls within or without the boundaries sanctioned by the statute. What some may regard as an objective writing on the subject of adultery, for instance, may well appear to others to constitute writing about it "in an improper manner" ("op 'n onbetaamlike wyse") within the meaning of sec. 6 (1) (c) of the Act. In terms of the statute, the ultimate criterion is, however, the opinion of the court.

In urging us to reverse the decision of the court below, counsel for appellant, emphasising the numerous case histories - some relating to persons of seemingly otherwise good social standing - which appear in both portions of the article linked together by the intervening comment, submitted that these subtly convey to the likely reader that marital infidelity is not only very prevalent but is an exciting adventure which, provided only that it be circumspectly conducted, is both pleasurable and unreprehensible. The tenor of both portions of the article, read together with the Boxes, is,

submitted...../

submitted counsel for appellant, likely to promote the commission of adultery by reassuring already married readers who might be contemplating infidelity, and by encouraging both them and those about to enter upon matrimony to regard adultery as a commonplace and unimportant incident of married life.

It would be idle to suggest that adultery, which has existed throughout the ages, is any less prevalent today than formerly. Without in any way attempting to define what, in a so-called permissive age, is to be regarded as permitted by the Act, it is at least beyond dispute that, whatever may have obtained in Victorian times, the subject of adultery cannot be wholly excluded from the field of contemporary writing. Moreover, by reason of their direct association with, and menace to, the fundamental institution of monogamous marriage, the causes and effects of adultery cannot, in my view, be said to be subjects which lie outside the legitimate range of interests of decent men and women. Read as a whole, the article "The Affair" appearing in the issue of Scope of 26th

June...../

June 1970 sets out, in my opinion, to give some account of the aforementioned causes and effects as reflected in Morton Hunt's book; and that account is, in my view, continued in the second portion of the article which appears in the issue of Scope of 10th July 1970. As already indicated, Hunt's book is claimed to be the result of research in the field outlined by the above-cited headings of the article, as they appear in both issues of the magazine.

The case histories serve to illustrate diverse causes which, in the view of the author Morton Hunt, lead to matrimonial infidelity. I do not consider that these case histories constitute - as was, in effect, submitted by counsel for appellant - an endeavour by calculated repetition to induce in the likely reader either encouragement to commit adultery or admiration for adulterers. Nor do I think that the case histories would have any such tendencies in relation to any significant number of likely readers, whether adult or adolescent. The modern adolescent is far from unaware

of...../

of the incidence of adultery as one of the realities of life.

Even if, contrary to the view I have expressed earlier, any appreciable number of adolescents were to trouble to read the article (or either portion of it), I do not think that any significant segment whatever of that number would in consequence be at all likely to form an admiration for adulterers or to be thereby encouraged themselves thereafter to transgress the seventh commandment. No doubt some of the case histories are expressed in terms of questionable taste; to cite a single illustration selected at random:

"It was strictly fun and games, no strings, just once a week for a couple of hours".

But, as already emphasised, both the case histories and the linking observations are devoid of any salacious detail; and neither portion of the article contains any passages which either expressly advocate, or directly suggest that Morton Hunt favours, marital infidelity.

So far as concerns appellant's contention that the article "elaborates on the technique of deceit", it may

be...../

be that the contents of the Boxes, respectively headed

"Suspicion - How One Wife Avoids It" and "Telephone Tactics", appearing in the first portion of the article and which are fully cited at page 169 C - F of the report of the judgment in the court a quo, could conceivably be regarded as constituting advice upon the "technique of deceit" complained of by appellant. Similarly as regards some of what appears on page 41 of the second portion of the article, which purports to give further advice regarding telephonic and written communications. Should the "lover's spouse" answer the telephone, the reader is there told:

"Don't hang up. This arouses suspicion in the unsuspecting..... Pretend it was the deceived spouse you were calling".

In relation to letters it is said:

"Use a post-office box rather than risk letters falling into the hands of your lover's spouse. Burning love-letters, or tearing them up and flushing them down the toilet, is painful - but keeping them is sheer folly".

I greatly doubt, however, whether these, or any similar, portions of the article would in fact be regarded by any but

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the most naive of individuals as conveying anything not already fully appreciated as being manifestly obvious aspects of the "technique of deceit". In any event, I find it difficult to think that what is said in any such portions would be likely to play any material part in promoting the matrimonial infidelity of any but a most insignificant number of readers. Moreover, in assessing the significance of any particular passage either in the article or the Boxes which, read in isolation, might conceivably be regarded as advancing the "technique of deceit", it must be borne in mind that, as both portions of the article make plain in various passages, deceit is inherently the inseparable concomitant of marital infidelity. Indeed, as one sentence which occurs in the issue of July 10th crisply puts it: "Lying and deception are inherent in infidelity".

Nor does the article fail to record that feelings of guilt are frequently associated with marital infidelity.

For instance, one of the Boxes appearing on page 28 of the issue of 26th June 1970 is exclusively devoted to that aspect of the matter. Inter alia, it is there stated, with illustrations..../

trations from case histories, that conscious guilt resulting from marital infidelity may be the root cause of various named physical ills, but that "unconscious guilt is considerably more serious and its victims are haunted more subtly". Again, the concluding paragraphs of the article in the issue of 26th June 1970 read:

"In some people, the morning-after syndrome leads to a headlong flight from the adulterous relationship.
.....

Even when there is little danger of discovery, guilt feelings may create an unconscious sense of impending doom;

But affairs do flourish. Some, even, result in marriage".

Further, apart from the incidence of guilt discernible in several of the case histories appearing in the issue of Scope of 10th July 1970, no less than a whole half-page of the article in that issue is devoted to the topic of "The Victims Left At The End of It All". As this subtitle indicates, what there appears is, in my view, anything but an encouragement of promiscuity and adultery.

Finally, appellant's complaint that the tenor

of...../

of the article is to suggest that "marriage is an outmoded institution" is, I consider, refuted by the concluding paragraphs of the article as they appear on page 48 of the issue of July 10th. These read:

"And marriage itself?

We hear every day that it is obsolete, dying, virtually extinct. That it will soon give way to common-law unions or to five-year-renewable marriage contracts.
.....

But the fact is we have nothing to warrant a funeral notice of marriage.

Affairs may come and go, but marriage is here to stay".

The various features I have mentioned lead me to the conclusion that the article does not deal with its subject matter "in an improper manner" within the meaning of sec. 6(1)(c) of the Act.

It may well be that as recently as a few decades ago this article would have been considered to be wholly unsuitable for publication in a magazine of this nature.

~~I can readily appreciate that even today the article may~~
be regarded as distasteful by a large section of such readers as might persevere to read the article or any

substantial...../

substantial portion of it. For myself, I confess that the reading and re-reading of the article necessary for the decision of this case was a burdensome task. The issue before us must, however, be determined in the light of present day conditions and the provisions of the Act. What is distasteful is not necessarily indecent or obscene or harmful to public morals. Throughout bearing in mind that the criterion is not that of the sophisticated reader but that, on the contrary, regard must be had, not only to the effect of the article upon a substantial number of likely readers, but also to its general impact upon public morals, I remain unpersuaded that the decision in the court below was wrong. For, after due consideration, in the light of "contemporary standards of morality and current thought" (Heinemann's case, supra p. 150 A), of all the arguments addressed to us, I am of opinion that the article "The Affair" cannot rightly be regarded as being "indecent or obscene" or as being "offensive or harmful to public morals" within the meaning of sec. 6 of the Act.

For..../

For the foregoing reasons, the appeal is

dismissed with costs.

N. B. ...

BOTHA, J.A. }
TROLLIP, J.A. } Concur.
MULLER, J.A. }