R v **Gibson and another**

COURT OF APPEAL, CRIMINAL DIVISION

[1991] 1 All ER 439, [1990] 2 QB 619, [1990] 3 WLR 595, [1990] Crim LR 738, 91 Cr App Rep 341, 155 JP 126

HEARING-DATES: 9, 10 JULY 1990

Criminal law - Public decency - Act outraging public decency - Common law offence - Essence of offence - Obscenity - Whether offence of outraging public decency involving obscenity - Whether prosecution for common law offence barred - Obscene Publications Act 1959, ss 1(1), 2(4).

Criminal law - Public decency - Act outraging public decency - Mens rea - Whether prosecution required to prove intention or recklessness on charge of outraging public decency.

Criminal law - Public decency - Act outraging public decency - Public decency - Whether prosecution required to prove defendant drew public attention to offensive item.

HEADNOTE:

The first defendant exhibited at an exhibition in a commercial art gallery run by the second defendant a model's head to which were attached earrings made out of freeze-dried human foetuses. The exhibit was entitled 'Human Earrings'. The gallery was open to, and was visited by, members of the public. The defendants were charged with, and convicted of, outraging public decency contrary to common law. They appealed on the grounds (i) that the essence of the offence was obscenity and therefore the Crown was precluded from charging the offence at common law by s 2(4) [a] of the Obscene Publications Act 1959, which provided that a person could not be proceeded against for an offence at common law consisting of the publication of an article where the essence of the offence was that the article was obscene, (ii) that the Crown was required, and had failed, to prove mens rea by showing that the defendants had intended to outrage public decency or had been aware that there was a risk of doing so but had nevertheless decided to take that risk and (iii) that the jury had not been directed to consider the element of publicity required to constitute the offence, ie whether the attention of the public had been drawn to the offensive item.

a Section 2(4) is set out at p 441 g h, post

Held - The appeal would be dismissed for the following reasons-

(1) Since 'obscenity' was defined in s 1(1) [b] of the 1959 Act as a tendency to deprave and corrupt it followed that s 2(4) of that Act only precluded prosecutions at common law where the essence of what was alleged was a tendency to corrupt public morals. It followed that the charging of the common law offence of outraging public decency, which was distinct from, and did not depend on proof of, a tendency to corrupt public morals, was not barred by s 2(4) (see p 442 f, p 443 c j, p 444 b and p 448 g, post); dicta of Lord Reid in Shaw v DPP [1961] 2 All ER 446 at 460 and of Lord Morris in Knuller (Publishing Printing and Promotions) Ltd v DPP [1972] 2 All ER 898 at 913 applied.

b Section 1(1) is set out at p 442 e, post

(2) The Crown did not have to prove intention or recklessness on a charge of

outraging public decency, since what had to be shown was that the defendant intended and did a deliberate act which was found by the jury to have in fact outraged public decency and it could be no defence that the defendant himself did not consider that the act would do so (see p 447 e f h j and p 448 g, post); R v Lemon [1979] 1 All ER 898 applied; R v Hicklin (1868) LR 3 QB 360 considered.

(4) The invitation to the public to attend the gallery where the object was displayed for all to see as they came in was sufficient to satisfy the element of outraging 'public' decency and there was no requirement that the defendants should have done anything to draw particular attention to the exhibit (see p 448 f g, post).

NOTES:
Notes

For outraging public decency, see 11(1) Halsbury's Laws (4th edn reissue) para 372.

For Obscene Publications Act 1959, ss 1, 2, see 12 Halsbury's Statutes (4th edn) (1989 reissue) 292, 293.

CASES-REF-TO:
Cases referred to in judgment

Knuller (Publishing Printing and Promotions) Ltd v DPP [1972] 2 All ER 898, [1973] AC 435, [1972] 3 WLR 143, HL.

Lim Chin Aik v R [1963] 1 All ER 223, [1963] AC 160, [1963] 2 WLR 42, PC.

R v Aldred (1909) 76 JP 55, CCC.

R v Caunt (17 November 1947, unreported), Assizes.

R v Crunden (1809) 2 Camp 89, 170 ER 1091.

R v Dixon (1814) 3 M & S 11, 105 ER 516, NP.

R v Hicklin (1868) LR 3 QB 360.

R v Lemon [1979] 1 All ER 898, [1979] AC 617, [1979] 2 WLR 281, HL.

Shaw v DPP [1961] 2 All ER 446, [1962] AC 220, [1961] 2 WLR 897, HL; affg sub nom R v Shaw [1961] 1 All ER 330, [1962] AC 220, [1961] 2 WLR 897, CCA.

Cases also cited

R v Anderson [1971] 3 All ER 1152, [1972] 1 QB 304, CA.

R v Barraclough [1906] 1 KB 201, CCR.

R v Calder & Boyars Ltd [1968] 3 All ER 644, [1969] 1 QB 151, CA.

R v Clark (1883) 15 Cox CC 171, Assizes.

R v De Montalk (1932) 23 Cr App R 182, CCA.

R v Lynn (1788) 2 Term Rep 733, 100 ER 394.

R v Mayling [1963] 1 All ER 687, [1963] 2 QB 717, CCA.

R v Saunders (1875) 1 QBD 15, CCR.

R v Stanley [1965] 1 All ER 1035, [1965] 2 QB 327, CCA.

R v Thompson (1900) 64 JP 456.

R v Wellard (1884) 14 QBD 63, [1881-5] All ER Rep 1018, CCR.

Sunday Times v UK (1979) 2 EHRR 245, E Ct HR.

INTRODUCTION:
Appeal against conviction

Richard Norman Gibson and Peter Sebastian Sylveire appealed with the leave of the Court of Appeal against their conviction by a majority of 10 to 2 on 9 February 1989 in the Central Criminal Court before Judge Smedley QC and a jury on a count of outraging public decency contrary to common law, for which Gibson was sentenced to a fine of £ 500 to be paid at £ 25 a week or 28 days' imprisonment in default and Sylveire to a fine of £ 350 with 21 days' imprisonment in default. The facts are set out in the judgment of the court.

COUNSEL:
Geoffrey Robertson QC and Michelle Strange for the appellants.; Michael Worsley QC and Martin Bowyer for the Crown.

10 July 1990. The following judgment was delivered.

10 July 1990

Solicitors: Stephens Innocent; Crown Prosecution Service, Headquarters.

N P Metcalfe Esq Barrister.

PANEL: LORD LANE CJ, ROSE AND GARLAND JJ

JUDGMENTBY-1: LORD LANE CJ

JUDGMENT-1:
LORD LANE CJ

delivered the following judgment of the court. On 9 February 1989 before Judge Smedley QC and a jury in the Central Criminal Court, these two applicants, Richard Norman Gibson and Peter Sebastian Sylveire, were convicted on the first count of an indictment which contained two counts. That was a charge of outraging public decency, contrary to common law. Gibson was fined £ 500 or 28 days' imprisonment in default, Sylveire was fined £ 350 with 21 days' imprisonment in default. They were acquitted by direction of the judge on the second count, which had alleged a public nuisance.

The facts of the case were unusual, but simple. Sylveire ran an art gallery called the Young Unknowns Gallery in The Cut, London SE1. Displayed in that gallery was an article which had been assembled by Gibson. The article consisted of a model's head to each ear of which was attached an earring. The earring was made out of a freeze-dried human foetus of three or four months' gestation. The

foetus was attached to the ear by means of a ring fitting tapped into the skull of the foetus, and the upper end of that fitting was attached to the lobe of the model's ear. The gallery was in a parade of shops. The general public was invited to and had access to the gallery during the exhibition. No payment was required for entry. Gibson had, apparently unknown to his co-defendant, done some advertising promotion of this particular article, with the result that the police and press were on the scene not long after the exhibition had opened its doors. The gallery charged a commission on any works which were sold to members of the public.

The article in question was one of 41 items which had been selected for display out of a much larger number by Sylveire. It was exhibit number 9, and was described in the catalogue as 'Human Earrings'.

Although it was not suggested that Sylveire had taken active steps to publicise this particular exhibit, there was no doubt that the more people who attended the gallery, the better pleased Sylveire would be, and the greater would be the likelihood of selling exhibits.

Now by leave of this court these two men appeal against their convictions.

Three points are argued on behalf of the appellants by Mr Robertson QC, to whom we are indebted for the way in which he has researched the authorities and presented the case to this court.

The first ground is that the prosecution were precluded from proceeding on count 1, on which the appellants were eventually convicted, by s 2(4) of the Obscene Publications Act 1959. That subsection reads as follows:

'A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene.'

The first question to decide then is whether there is an offence at common law of outraging public decency. The answer to that question is to be found in the speech of Lord Simon of Glaisdale in the well-known case of Knuller (Publishing Printing and Promotions) Ltd v DPP [1972] 2 All ER 898 at 935, [1973] AC 435 at 493:

'Fourthly, my noble and learned friend, Lord Morris of Borth-y-Gest, in [Shaw v DPP] [1961] 2 All ER 446 at 467, [1962] AC 220 at 292, where, though there was no count of conspiracy to outrage public decency, most of the cases were reviewed, said: "The cases afford examples of the conduct of individuals which has been punished because it outraged public decency ... " And my noble and learned friend, Lord Reid, though dissenting on the main issue, said ([1961] 2 All ER 446 at 460, [1962] AC 220 at 281): "I think that they [the authorities] establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it."'

Lord Morris of Borth-y-Gest and Lord Kilbrandon seem to have agreed with that view.

The point is not taken before us that no such offence exists. We respectfully agree with their Lordships in Knuller that it does.

The next question is: what is meant by the word 'obscene' in s 2(4), which I have

just read? There are two possibilities. The first is the broad meaning of the word in common everyday speech and in some statutes, namely something which constitutes a serious breach of recognised standards of propriety on account of its tendency to corrupt morals or on account of its indecent appearance or its tendency to engender revulsion or disgust or outrage.

There is no doubt that, if that is the correct meaning of the word 'obscene' in s 2(4), then, as Mr Worsley himself concedes, this prosecution is plainly barred, because the essence of the instant offence as alleged is the tendency of the article to engender revulsion or disgust and so to outrage.

The second possible interpretation is to be found in the 1959 Act itself. Section 1(1), with the sidenote 'Test of obscenity', reads as follows:

'For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.'

There are, it seems to us, two broad types of offence involving obscenity. On the one hand are those involving the corruption of public morals, and on the other hand, and distinct from the former, are those which involve an outrage on public decency, whether or not public morals are involved.

That distinction is clear, in our judgment, from the speeches of their Lordships in Knuller. Lord Morris of Borth-y-Gest said ([1972] 2 All ER 898 at 913, [1973] AC 435 at 468):

'It may well be that in this present case it would have been sufficient to prefer only count 1. But the conceptions of the two counts are different. Count 1 alleges an intention to debauch and corrupt. Count 2 raises the issue not whether people might be corrupted but whether the sense of decency of members of the public would be outraged. It is to be observed that it is not suggested that publication of the advertisements in the magazines could be said to have been justified as being for the public good on the ground that the advertisements were in the interests of science or literature or art or learning or of other objects of general concern. Although the assurance given to the House of Commons in 1964 was in reference to a charge of conspiracy to corrupt public morals the spirit and intendment of the assurance would clearly apply in reference to a charge of conspiracy to outrage public decency.'

In Shaw v DPP [1961] 2 All ER 446 at 460, [1962] AC 220 at 281 Lord Reid said:

'I shall not examine the authorities, because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it.'

We do not overlook the passage in Knuller [1972] 2 All ER 898 at 914-915, [1973] AC 435 at 469 to which Mr Robertson drew our attention this morning, where Lord Diplock in his minority speech said:

'For my part, I am unable to draw the distinction which has commended itself to some of your Lordships between a "conspiracy to corrupt public morals", which is the subject of the first count against the appellants, and a "conspiracy to outrage public decency" which is the subject of the second count.'

There is no suggestion here that anyone is likely to be corrupted by the exhibiting of these earrings. It seems to us that the two types of offence are both factually and morally distinct. It is clear from s 1(1) of the 1959 Act that it is the former of the two meanings which is adopted by the draftsman. If that is the meaning which the word 'obscene' in s 2(4) bears, then this ground of appeal must fail, as in his turn Mr Robertson concedes.

The argument unsuccessfully put forward before Judge Smedley in the Central Criminal Court and repeated before this court on behalf of the appellants is this. The Obscene Publications Act 1959 was the result very largely of some powerful influences from the artistic and literary world. For the first time there was provided by s 4 of that Act a particular defence for anyone charged with publishing an obscene matter, namely that the publication was justified, or might be justified, as being for the public good.

Section 4 reads as follows:

'(1) A person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground.'

That was an advance.

It is submitted by Mr Robertson that, if one confines the meaning of 'obscene' in the way that the prosecution submit one should in the present case, that would mean that the praiseworthy liberalising effect of the 1959 Act would be gravely restricted, which cannot, it is submitted, have been the object of Parliament in passing it. It is submitted further that such an interpretation would result in the liberalising purposes of the 1959 Act being circumvented. By charging an offence under common law the special defences under s 4 of the 1959 Act which I have read, would be made inapplicable. The obligation to consider the matter as a whole the defence of public good and so on, could be avoided.

We note the somewhat unusual wording of s 1(1), and in particular the use of the word 'deemed'. That seems to indicate that the restricted meaning shall apply in the 1959 Act, whatever other meanings may exist elsewhere.

The result of our consideration of the various arguments is this. We have come to the conclusion that, despite Mr Robertson's carefully marshalled arguments, the plain wording of this part of the 1959 Act is uncontrovertible. We have come to the conclusion that the arguments are insufficient to outweigh those plain words, and that the definition set out in s 1(1) of obscenity is the one that must govern the meaning of 'obscene' in s 2(4).

If we were to hold the contrary, it would mean that in s 2, where the word 'obscene' is used three times, two of those occasions would have the restricted meaning, and one of those occasions, namely s 2(4) alone, would have a meaning quite different.

We are unable to find any justification for such a radical departure from the

ordinary canons of construction. We think that the learned judge was right in his conclusion on this aspect of the case. We should perhaps add that in this type of case, which is likely to be the subject of prosecution at common law, if this construction is correct it is unlikely that a defence of public good could possibly arise.

So much for the first proposition put forward by Mr Robertson, which, for reasons I have endeavoured to explain, must fail.

The second submission is as follows: in order to succeed in bringing home this charge the prosecution must prove a specific form of mens rea. The way in which Mr Robertson put this part of his submission varied from time to time (and no discredit to him for that), but eventually it came to this: the prosecution must prove an intent to outrage public decency or at least an appreciation on the part of the defendant that there was a risk of such outrage coupled with a determination nevertheless to run that risk.

The judge did not agree with that submission. He sets out his reasons, which it is not necessary for us to read, and he dealt with the matter in his summing up in accordance with his determination on the submission, as follows:

'... members of the jury, my direction to you is that the intention of the accused in the sense of their motive or their purpose in exhibiting these earrings is irrelevant ... as I have reminded you, the burden of proof is on the Crown and you have to be satisfied so as to be sure of each of the elements of the offence before you convict-this question: am I sure that each of these two men was a party to the doing of an act which outrages public decency? If the answer is No, or I am not sure, in respect of either, then you find that accused not guilty. If the answer to the question is Yes, I am sure that each did what amounted to an act of outraging public decency by putting this article on display in the place and in the circumstances where it was exhibited, then that would mean he is guilty. It is entirely, as I have pointed out, for you to set the standards.'

We have been referred to a large number of authorities on this point, not all of which are easy to reconcile. Mr Worsley placed great reliance on the well-known case of R v Hicklin (1868) LR 3 QB 360. In that case the defendant had published a pamphlet which was undoubtedly obscene. His defence however was that his motive was to expose what he regarded as being objectionable practices in the Roman Catholic church. Such a motive was held to be no defence. Motive was irrelevant.

Mr Worsley cites this case as support for his contention that the prosecution merely have to prove an intention to publish an article which is in fact obscene, whatever the author himself may think its likely effect may be. Although R v Hicklin seems to us to be rather an early manifestation of what today is a more familiar concept, namely that a person may very well intend to bring about a result which (a) he does not wish to bring about and (b) is not his primary object, yet nevertheless there was in R v Hicklin a finding that there was no intention to corrupt.

I read a passage from the judgment of Cockburn CJ (at 373):

'I hold that, where a man publishes a work manifestly obscene, he must be taken to have had the intention which is implied from that act; and that, as soon as you have an illegal act thus established, quoad the intention and quoad the act, it does not lie in the mouth of the man who does it to say, "Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose."'

Blackburn J said (at 375):

'I take the rule of law to be, as stated by Lord Ellenborough in Rex v. Dixon ((1814) 3 M & S 11 at 15, 105 ER 516 at 517), in the shortest and clearest manner: "It is a universal principle that when a man is charged with doing an act" (that is a wrongful act, without any legal justification) "of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act." And although the appellant may have had another object in view, he must be taken to have intended that which is the natural consequence of the act. If he does an act which is illegal, it does not make it legal that he did it with some other object. That is not a legal excuse, unless the object was such as under the circumstances rendered the particular act lawful.'

That judgment was picked up and emphasised by Lord Scarman in R v Lemon [1979] 1 All ER 898 at 926-927, [1979] AC 617 at 664 as follows:

'For these reasons I am of the opinion that historically the law has required no more than an intention to publish words found by the jury to be blasphemous. Yet I recognise that another view, such as that developed by my noble and learned friend, Lord Edmund-Davies, has great persuasive force. Indeed, it has the formidable support of my noble and learned friend, Lord Diplock. The issue is, therefore, one of legal policy in the society of today. There is some force in the lawyer's conceptual argument that in the matter of mens rea all four species of criminal libel (seditious, blasphemous, obscene and defamatory) should be the same. It is said that an intention to stir up sedition is necessary to constitute the crime of seditious libel. I am not sure that it is or ought to be: contrast R v Aldred (1909) 76 JP 55 with Birkett J's direction in R v Caunt (17 November 1947, unreported). Prior to the enactment of the Obscene Publications Act 1959 it was not necessary to establish an intention to deprave and corrupt in order to prove an obscene libel: R v Hicklin (1868) LR 3 QB 360. At worst, the common law may be said to have become fragmented in this area of public order offences; at best, it may be said (as I believe to be true) to be moving towards a position in which people, who know what they are doing, will be criminally liable if the words they choose to publish are such as to cause grave offence to the religious feelings of some of their fellow citizens or are such as to tend to deprave and corrupt persons who are likely to read them.'

Mr Worsley points out, and points out correctly, that the object of the common law offence is to protect the public from suffering feelings of outrage by such exhibition. Thus, if a defendant intentionally does an act which in fact outrages public decency, the public will suffer outrage whatever the defendant's state of mind may be. If the defendant's state of mind is a critical factor, then, he submits, a man could escape liability by the very baseness of his own standards.

Mr Robertson on the other hand makes the following points. In general, as I have indicated, common law crimes require proof of a guilty intent. He mentions in his skeleton argument, although he did not draw our attention to it, nor was there any need to, Lim Chin Aik v R [1963] 1 All ER 223, [1963] AC 160, a Privy Council case, where that point is made clear.

He points out next that in R v Shaw [1961] 1 All ER 330 at 333, [1962] AC 220 at 227 in the Court of Criminal Appeal Ashworth J said, albeit obiter:

'If these proceedings had been brought before the passing of the Obscene Publications Act, 1959, in the form of a prosecution at common law for publishing

an obscene libel, it would no doubt have been necessary to establish an intention to corrupt.'

Mr Robertson also drew our attention to a number of authorities, many of them elderly, and they are largely, we fear, contradictory or ambivalent-an expression which Lord Russell of Killowen used in a speech I am about to cite-on the question of whether an intention to corrupt is a necessary ingredient in the cognate offence of criminal libel.

The authorities on the question of exhibition outraging public decency are few and far between. One of the very few which it has been possible to trace is R v Crunden (1809) 2 Camp 89, 170 ER 1091. That was a case where a gentleman was bathing in the nude at Brighton. It is a brief report, and M'Donald CB said (2 Camp 89 at 90, 170 ER 1091 at 1091-1092):

'I can entertain no doubt that the defendant, by exposing his naked person on the occasion alluded to, was guilty of a misdemeanour. The law will not tolerate such an exhibition. Whatever his intention might be, the necessary tendency of his conduct was to outrage decency, and to corrupt the public morals. Nor is it any justification that bathing at this spot might a few years ago be innocent. For any thing that I know, a man might a few years ago have harmlessly danced naked in the fields beyond Montague house; but it will scarcely be said by the learned counsel for the defendant, that any one might now do so with impunity in Russell Square. Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. The defendant was found guilty; and when he was brought up for judgment, the Court of K.B. expressed a clear opinion, that the offence imputed to him was a misdemeanour, and that he had been properly convicted.'

The result, in our judgment, seems to be this. First of all the requirements with regard to mens rea should be the same in this offence as they are in the cognate offence of obscene libel. That is borne out by what Lord Scarman said in R v Lemon [1979] 1 All ER 898, [1979] AC 617. If that is so, then the decision of the House of Lords in R v Lemon, albeit by a majority, indicates that the submissions of the prosecution in this case are to be preferred to those of the appellants'.

One turns then to examine in a little more detail the speeches of their Lordships in that case. They are most conveniently summarised by Lord Russell of Killowen, where he said, in his usual trenchant and felicitous language ([1979] 1 All ER 898 at 921, [1979] AC 617 at 657-658):

'So I return to the question of intent. The authorities embrace an abundance of apparently contradictory or ambivalent comments. There is no authority in your Lordships' House on the point. The question is open for decision. I do not, with all respect to the speech of my noble and learned friend, Lord DIplock, consider that the question is whether this is an offence of strict liability. It is necessary that the editor or publisher should be aware of that which he publishes. Indeed that was the function of Lord Campbell's Act (Libel Act 1843), which assumed the law to be that an intention in the accused to blaspheme was not an ingredient of the offence, since it removed by statute a vicarious liability for an act of publication done by another without authority. Why then should this House, faced with a deliberate publication of that which a jury with every justification has held to be a blasphemous libel, consider that it should be for the prosecution to prove, presumably beyond reasonable doubt, that the accused recognised and intended it to be such or regarded it as immaterial whether it was? I see no ground for that. It does not to my mind make sense: and I consider that sense should retain a function in our criminal law. The reason why the law considers that the

publication of a blasphemous libel is an offence is that the law considers that such publication should not take place. And if it takes place, and the publication is deliberate, I see no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with a jury on the true nature of the publication.'

Lord Scarman agreed with that and so did Viscount Dilhorne (see [1979] 1 All ER 898 at 927, 907, 910, [1979] AC 617 at 655, 640, 645). There is no reason in this judgment to cite those passages, which can be read from the reports themselves.

Moreover, R v Lemon, as will have been clear from the passages which we have cited, was an allegation of an outrage on the public on a religious basis rather than a general basis, which is the case in the instant appeal. But outrage it certainly was, and the same considerations in logic should apply to this case as applied to the religious outrage in R v Lemon. That is the submission to us this morning of Mr Worsley, and we find that a cogent argument.

The result is this. Those passages, and the argument of Mr Worsley to which I have just made reference, lead us to the conclusion that, where the charge is one of outraging public decency, there is no requirement that the prosecution should prove an intention to outrage or such recklessness as is submitted by Mr Robertson. If the publication takes place, and if it is deliberate, there is, in the words of Lord Russell-

'no justification for holding that there is no offence when the publisher is incapable for some reason particular to himself of agreeing with the jury on the true nature of the publication.'

Perhaps one should add this, before leaving this particular topic and this ground of appeal. One reason why the authorities are of little assistance on this aspect is no doubt the existence prior to the Criminal Justice Act 1967 of the presumption that a man intends the natural and probable consequence of his actions. Where therefore a defendant had in the context of this type of case published something which was patently obscene or outrageously indecent, it was but a very small step indeed from there to finding that he had intended to produce the effect which in fact resulted.

Although that presumption which I have just mentioned no longer of course exists, nevertheless, where one has a display of, such as, foetus earrings in the instant case, once the outrage is established to the satisfaction of the jury, the defendant is scarcely likely to be believed if he says that he was not aware of the danger he was running of causing offence and outrage to the public. Indeed, had the judge in the present case directed the jury along the lines it is suggested he should have directed them, there can be no doubt, in our minds, that in the case of each appellant the result would have been the same, and a conviction would have been recorded.

In short, whether there is a requirement that intent be proved or not makes in the end very little difference in practice. Accordingly the second ground of appeal fails.

The final ground of appeal can be dealt with more shortly. It is that the jury were not directed to consider the element of publicity required to constitute the offence. Two passages in the summing up are criticised. The first is:

'Firstly, it has to be proved against each of these two men, considered separately,

that he was a party to the doing of an act which it is alleged outraged public decency. The act alleged is the exhibiting of exhibit 9 consisting, as it does, of a model's head to which are attached two earrings, each made out of a human foetus in an exhibition at 82 The Cut to which the public have access.'

The second is:

'It is perfectly clear, is it not, from the evidence that Mr Sylveire, according both to the evidence of Mr Underwood and Chief Insp Eva, and indeed his own evidence in the witness box in front of you, knew perfectly well the nature of the article. Although he said to the police that he did not think it very attractive, he knew that the earrings were in fact human foetuses and he said to the police: "Why, is that wrong?" Well, you may think, therefore-it is a matter entirely for you-that the answer to the first question, namely: was each of these two a party to the exhibiting of the object?, is clearly Yes.'

It is submitted that the jury were not in those circumstances sufficiently directed to consider the element of publicity required to constitute the offence. Mr Robertson submits that the judge should have directed the jury to the effect that they had to be satisfied that the object was projected 'so as to have an impact on the public, so as to focus public attention on it. There must be something to draw the attention of the public to the allegedly offensive item'.

So far as Gibson is concerned, he undoubtedly by his action had all too effectively drawn the attention of the public to his creation, and this submission cannot possibly apply to him.

Sylveire on the other hand had done nothing in particular with regard to this exhibit so far as publicity was concerned.

We do not consider that there was any bar to his conviction by reason of what the judge said or did not say. Sylveire was inviting the public to attend the gallery where there was display of this object, as he well knew, for all who came onto the premises to see. The judge's directions on this aspect were, in our view, correct. There was no requirement that Sylveire should have done something to draw particular attention to this exhibit before he could be convicted upon this charge.

The third ground of appeal therefore likewise fails, and these appeals consequently must be dismissed.

DISPOSITION:
Appeal dismissed. Leave to appeal to the House of Lords refused. Certificate under s 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision refused.