

1970

## **Salt Lake City v. Stephen M. Jones : Brief of Appellant**

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# In the Supreme Court of the State of Utah

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Salt Lake City,

*plaintiff,*

vs.

Stephen M. Jones,

*defendant.*

Case No.  
11673

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

The defendant was charged and convicted for "knowingly and with a criminal intent selling and offering for sale any obscene material" pursuant to §32-2-10 of the UTAH CODE ANN. (1953). The defendant challenged this decision alleging a violation of his First and Fourteenth amendment rights.

### DISPOSITION OF THE CASE BY THE LOWER COURT

The trial court convicted the defendant, Stephen W. Jones, for violation of UTAH CODE ANN. §32-2-10 (1953). He was sentenced to twenty days in jail and fined \$100. The jail sentence was to be suspended upon payment of the fine.

## RELIEF SOUGHT ON APPEAL

This appeal seeks to have this Court reverse the decision of the trial court and hold that the material in question is constitutionally protected by the First and Fourteenth Amendments of the Constitution of the United States.

## STATEMENT OF FACTS

Stephen M. Jones leased and operated a shop at 875 East 9th South. His business was selling various types of posters, jewelry, magazines and a variety of other things.

The Salt Lake Police Department's vice squad picked up certain pictures and calendars from the store, and pursuant to UTAH CODE ANN. § 32-2-10 (1953), they brought a criminal action against Mr. Jones for selling obscene material. The charge was brought against one item, i.e., a calendar with pictures of sculptured metal images depicting a man and a woman in various types of sexual play. Other items were received into evidence over the objection of defense attorney for the purpose of showing criminal intent and "pandering".

The defendant testified that he sold various types of posters, jewelry and other items, not all of which were dealing with sex. (TR. 27-28, L. 8, 1). The calendar in

question, known as the Kama Sutra Calendar, was just one of several items being sold by the defendant. Not all the items were of the type confiscated by the police and introduced by the prosecution. (TR. 28, L. 1).

The defendant's expert witness, Mr. Earl M. Jones, who holds a Master's Degree in Fine Arts, testified that the calendar in question had artistic value.

Q. (by Mr. Ross) Would you state what that artistic value is?

A. Well, it's a creation. It is a vivid creation and an individual's interpretation, and I think by definition, it's art. You can't call it anything else.

Q. What type of medium is this?

A. It's welded steel.

Q. Is this a difficult medium to work with?

A. It's a craft, and one has to know the craft in order to do it. It's a craft that is an industrial craft as well as an artistic craft and it was an industrial craft first, but there is a great deal of contemporary art being done with welded steel. It's a very popular and accepted medium. (TR. 45, L. 2).

The testimony further indicates that the idea for the calendar was taken from Indian philosophy in the 1700's. (TR. 60, L. 25). The objects in the calendar are contemporary interpretations of this ancient philosophy. (TR. 61, L. 20).

Mr. Jones was tried in Third District Court of the State of Utah before the Honorable Judge Frank D. Wilkins. He was found guilty of violating UTAH CODE ANN. §32-2-10 (1953), and sentenced to twenty days in jail and a \$100.00 fine, with the sentence to be suspended upon payment of the fine.

The defendant appeals this decision alleging a violation of the First and Fourteenth amendments of the Constitution of the United States.

## ARGUMENT

### I. THE KAMA SUTRA CALENDAR IS A FORM OF EXPRESSION WITHIN THE MEANING OF THE FIRST AMENDMENT.

Books, pictures, magazines, films and other forms of expression are all "speech" within the meaning of the constitutional protection. The First Amendment embodies the commitment of the United States to the principle of free speech. It's guarantee of liberty of expression is nearly absolute. It protects the unpopular equally with

the revered, and the despised minority as fully as the dominant majority. It is critical to note that the constitutional protection of free expression extends to any idea. It applies to ideas about morality, love, family life, sex, or any other concern of man. Thus the right to portray and even advocate as desirable what most people regard as sexual immorality, e.g. adultery, is expressly upheld by the Supreme Court. *Kingsley Int. Pictures Corp. v. Regents*, 360 U.S. 684 (1959). And the manner in which ideas are expressed or embodied is of no consequence for constitutional purposes. Expression which many would find offensive or revolting, the use of four letter words, for example, or the graphic description of sexual episodes, is protected. *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (1964).

The Kama Sutra Calendar is such an example of constitutionally protected expression. It meets the constitutional standards as set down by the Supreme Court. It is constitutionally protected for the following reasons:

1. The sculptures have social value in the expression of ideas. The sculptures themselves are an art form. (TR. 45, L. 4) They are inspired by an ancient Indian classic, the Kama Sutra, which sets forth a substantial part of the Hindu Religion. (TR. 61, L. 20) Such ideas are entitled to metal as well as literary expression.

2. The sculptures have artistic value. The artist's use of material is imaginative and successful; the form is sophisticated, and for many critics they achieve a high degree of artistic merit. (TR. 45, L. 10)

3. The calendars dominant theme is not an appeal to prurient interest, but an appeal to the eye of the beholder. That the abstract, sheet metal sculptured figures are shown in erotic poses does not change this. Sex and love are not forbidden subjects.

4. The calendar is not patently offensive and rests within the community limits of candor in depicting such matters. For centuries the accepted limits of candor in art have embraced works such as this.

II. THE DEFINITION OF "OBSCENE" IN UTAH CODE ANN. §32-2-10 (1953) IS THE DEFINITION SET DOWN BY THE SUPREME COURT OF THE UNITED STATES.

Although the Supreme Court Justices remain divided on the obscenity doctrine, certain rules defining the First Amendment's impact on state obscenity prosecutions are abundantly clear. On May 7, 1967, the Court wrote down its views in a single opinion the cases of *Redrup v. New York*, *Austin v. Kentucky*, and *Gent v. Arkansas*, 386 U.S. 767 (1967). In reversing all three convictions on the basic ground that the publications in question were

constitutionally protected, the Court summed up the present status of the law of obscenity. Two members of the court continued to adhere to the view that the state is utterly without power to suppress, control, or punish the distribution of any writings, or pictures upon the ground of their obscenity. Another member of the Court states that the states' power is narrowly limited to a distinct and clearly identifiable class of material.

The majority opinion is that the State may not inhibit the distribution of material unless

(a) The dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) The material is patently offensive because it affronts contemporary community standards relating to the description or representations of sexual matters; and (c) the material is *utterly* without redeeming social value. These three elements must coalesce. 386 U.S. at 768.

Before the state may properly inhibit the distribution of material under §32-2-10 this definition of obscene must be met. The state may not "censor" any First amendment expression on grounds of obscenity unless these three elements coalesce.

III. THE KAMA SUTRA CALENDAR IS NOT OBSCENE.  
AND THE STATE CANNOT INHIBIT ITS DISTRIBUTION.

The city cannot totally prohibit a work as to the entire public, unless it proves beyond a reasonable doubt that:

1. The dominant theme of the material taken as a whole is an appeal to prurient interest. "Prurient" means itching, longing, that is, sexual desire. *Roth v. United States*, 354 U.S. 476. It does not extend to all material which explicitly portrays sex or uses language popularly considered "obscene" or which may strike the courts and juries as disgusting or revolting. *U.S. v. Klaw*, 350 F. 2d 155 (Id Cir. 1965).

The Kama Sutra calendar's dominant theme is not an appeal to the prurient interest, but an appeal to the eye and mind of the beholder. The figures are metal abstracts, and even though shown in erotic poses, the dominant theme is not an appeal to prurient interest. The sculptures are art (TR. 45, L. 4). Sex and love are not forbidden subjects of the artist.

2. The prosecution must also prove that the sculptures are patently offensive in substantially exceeding the community limits of candor in depicting sex. These are extremely broad. In *Mounce v. U.S.*, 355 U.S. 180 (1967), the material in question was an imported collection of nudists; student publications containing many nude photographs. The Court held the material was not obscene. In *One inc. v. Olesen*, 355 U.S. 371 (1968), the

work in question was a periodical entitled *One—The Homosexual Magazine*. It included such matters as a story about a young girl who gave up a normal married life to live with a lesbian. Again the Court said it did not affront the community limits of candor in depicting sex. In *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958), the offending works were *Sunshine and Health* and *Sun Magazine*. Both magazines contained nude photographs clearly showing male and female genitalia and pubic areas. Again the court held that they were not obscene. These three cases, not exhaustive by any means, make clear that neither the explicit depiction of sex nor portrayals of nudity, nor depiction of sexual deviation, nor the use of disgusting or revolting descriptions and language constitute obscenity which alone could be proscribed under the constitution. The community standard required is a national rather than a local one. *Jacobellis v. Ohio*, 378 U.S. 184 (1964). The Kama Sutra Calendar is not patently offensive and rests within the community limits of candor in depicting sex. The sculptures resemble such works as the many paintings inspired by the Greek legend of Leda and the Swan. For centuries the accepted limits of candor in art have embraced works such as this.

3. The most difficult test for the prosecution is to show that the material is *utterly* without any redeeming social value. The material must be utterly without artistic, literary, scientific or social value of any kind. If it has *any* such value, even the slightest amount, it is fully

protected regardless of its potent offensiveness and the other qualities. *Memoirs v. Mass*, 383 U.S. 413 (1966), *Jacobellis v. Ohio*, supra, *Ginzburg v. United States*, 383 U.S. 463 (1966). The sculptures do have social value (TR. 45, L. 20). The social or artistic value of a work need not be felt by everyone. The work is protected if such value is perceived by any substantial part of the national community. This is implicit in the courts repeated reversals of convictions involving "girlie" magazines and other materials which a majority would consider wholly worthless. *Redrup v. New York*, supra. The deified sect of love in India is depicted upon the Hindu Temple. (TR. 62, L. 22). These sculptures are contemporary interpretations of this Indian culture. The use of the metal is imaginative and successful. They achieve a high degree of artistic merit.

The Kama Sutra Calendar has been before another trial court in the State of Washington. In the Superior Court of the State of Washington in and for the County of King, the state attempted to inhibit the distribution of the calendar in question. The court held in *Washington v. Tuft and Herold*, Numbers 46276 & 46275, that the calendar was not obscene and could not be inhibited by the state.

With reference to Exhibit 3, abstractions, sculpture, metallic, no trier of the fact with this and this alone could make a finding that it is utterly devoid of artistic value. There is no showing that would support such a finding. *Id. at 2*

The court further stated that there was no indication that the articles were pandered or were the subject of any wholesale appeal to selling pornography. The facts of the present case fall within the ambit of this Washington decision. Even though it is not controlling before this court it is nevertheless persuasive in that it points to the very calendar here in question.

The prosecution has failed to show beyond a reasonable doubt that the Kama Sutra Calendar is obscene within the tests set down by the Supreme Court. The calendar is not obscene and, the city cannot inhibit its distribution.

A. THERE IS NO QUESTION IN THIS CASE OF DISTRIBUTION TO MINORS.

The present prosecution attempts to ban the distribution of the calendar entirely; that is, to prevent distribution to all members of the public, no matter how mature or educated. There is no question in this case of distribution to minors. There is no question that the state may constitutionally undertake regulation of the distribution of materials to minors. *Jacobellis supra, Redrup, supra*. But they have not chosen to do so. Whether the materials, here in question, are but for minors is thus immaterial. General regulation of materials must not have the effect of reducing the adult population to reading only what is fit for minors. *Butler v. Michigan*, 352 U.S. 300 (1957). Under a general obscenity statute only

materials which are "obscene" to all persons under the strict standards set forth above may give use to conviction.

B. THE SALE OF THE KAMA SUTRA AND OTHER MATERIALS DOES NOT CONSTITUTE "PANDERING" WITHIN THE SUPREME COURT'S MEANING.

It is clear that "pandering" refers only to situations where

. . . the accused publication was originated or sold as stock in trade of the sordid business of pandering—the business of purveying textual or graphic matter *openly advertised* to appeal to the erotic interest of their customers. *Ginzberg v. United States*, 383 U.S. at 467, (Emphasis added).

The pandering concept makes evidence of advertising and distribution methods admissible, but implies no change in the strict obscenity standards. *Ginzburg*, 383 U.S. at 475. The Kama Sutra Calendar and the other materials received into evidence by the trial court were not "pandered" in the sense that *Ginzburg* was attacking. The pandering test is used only in "close" cases, cases where something other than hard core pornography is involved. The conduct of the defendant is the central issue, not the obscenity of a book or picture. 383 U.S. 474, 475. In *Ginzburg*, the pandering was obvious.

The defendant sought mailing privileges from the postmasters of Intercourse and Blue Ball Pennsylvania. These hamlets were chosen only for the value their names would have in furthering defendant's efforts to sell their publications on the basis of salacious appeal; . . . Several million circulars soliciting subscriptions were mailed. The circulars sent stressed the sexual candor of the respective publications and openly boasted that the publications would take full advantage of what they regarded as an unrestricted license allowed in law in the expression of sex and sex matters. *Id.* at 468.

Clearly the facts of the present case do not fall within the pandering test as expressed in *Ginzburg*. The appellant did not solicit his materials by mailing out circulars stressing the erotic aspects of the materials in question. To say that hanging the calendar and posters in his show room is pandering is to destroy the very test of *Ginzburg*, i.e., "where the purveyor's sole emphasis is on the sexually provocative aspects of his publications . . ." 383 U.S. at 476. This test must be viewed in light of the facts of *Ginzburg* as set out above. Clearly the facts of this case do not fall within that test. The appellant testified that he sold various items in his shop (TR. 27, L. 8). Actually the sale of the Kama Sutra Calendar was not different than selling sexual magazines at an ordinary newsstand. This is not "openly advertised" material within the meaning of *Ginzburg*. The sale of the calendar does not constitute "pandering" within the Supreme Court's meaning. The trial court erred in basing its decision on this test in light of the facts of this case.

## CONCLUSION

Based upon the forgoing facts and conclusions, it is clear that the Kama Sutra Calendar is not constitutionally obscene. The city may not inhibit its distribution under the general provisions of §32-2-10 without first showing beyond a reasonable doubt that the material is obscene. The prosecution has not shown beyond a reasonable doubt that the Kama Sutra Calendar has met the tests of obscenity as set down by the Supreme Court of the United States.

Respectfully submitted,

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