IN THE

Supreme Court of the United States

October Term 1956

No. 582

SAMUEL ROTH,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

Opinion Below

The opinion of the Court of Appeals (Pet. App.) is now reported in 237 F. 2d 796.

Argument

A citizen of the United States is threatened in his liberty. He contends that the rights guaranteed to him under the First, Fourth, Fifth, Ninth and Tenth Amendments were violated. He claims that the Federal Obscenity Statute violated the freedom of the press, the due process clause of the Fifth Amendment, in that he was denied a fair trial and in that the statute was vague and indefinite;

that it violated the Tenth Amendment by reason of the fact that it improperly invaded the powers reserved to the states and to the people; and that it was a violation of the Fourth Amendment against searches without warrants, without proper cause.

1. The Government admits (p. 8 Brief in Opposition) that the petitioner's request for a writ cannot be considered frivolous and with justifiable frankness admits that dissenting opinions and labored discussions have frequently been put forward as grounds justifying a reappraisal of constitutional issues. A priori, questions raised by Judge Frank in his 50-page concurence herein, Judge Bok, Judge Hand and Judge Woolsey indicate a difficulty which learned jurists have had with this question in the past.

The objection to have this Court review the question because it involves legislation of 75 years' standing was similarly overruled in *Winters* v. *New York,* 333 U. S. 507, where this Court struck down an enactment that had been part of the laws of New York for more than 60 years and was on the statute books of perhaps half the States. Because its application is so widespread is a basis on which the writ should be granted.

2. The court certainly has a right to inspect all the publications to see whether as a matter of law they are not obscene. It is the petitioner's contention that the publications were not obscene, nevertheless, however coarse, however obnoxious, however vulgar they may be to any segment of the population, they are not obscene as a matter of law.

In *U. S.* v. *Kennerly,* Judge Learned Hand pointed out that obscenity is the present critical point in the compromise between candor and shame at which the community may have arrived here and now. The problem is to find a possible compromise between opposing interests.

The petitioner contends that nothing objectionable is to be found in the text of the publications involved in this case when judged in their entirety.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. It is necessary to determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and we may not consider detached or separate portions in reaching a conclusion. It is necessary to judge the circulars, pictures and publications by present-day standards of the community; do they offend the common conscience of the community by present-day standards.

The book upon which the defendant was found guilty would have to have been read by the jury to determine whether it was obscene. This was not done or permitted.

It was physically impossible for the jury to have read the entire book and circulars. There was only one copy of each exhibit for the entire jury, and that this book (Government's Exhibit 10) consisting of 256 printed pages, contained over and beyond the passages complained of in the trial, sections on literary history, poetry, short stories, and the entire book "Twilight of the Nymphs" by Pierre Louys. The petitioner contends that the book, as a matter of law, was not obscene.

The Government had the burden of presenting affirmative proof of obscenity; that proof as to obscenity and the standards by which it can be recognized are available and presentable; indeed such proof was adduced by the defendant in his trial; that the Government's failure to adduce such proof placed upon the defendant the burden of proving his innocence.

3. There is no justice in gathering counts not related to each other and picking out some which are calculated to arouse and incite the jury instead of to ex lain the charge.

The indictment contained in all twenty-six counts. Three counts, Nos. 12, 25 and 26 were dismissed and the case was submitted to the jury on twenty-three counts. The defendant was found guilty only on four counts, Nos. 10, 13, 17 and 24.

The Government called in all some twenty-three witnesses of whom only four, including a postal inspector and postmaster were heard as to the four counts on which the *defendant was found guilty. Nineteen of the Government's* witnesses testified as to other matters but their testimony played an important part in the summation and consideration by the jury. In addition to the witnesses the Government put in evidence some 35 exhibits which were read in whole or in part to the jury and had in fact an adverse cumulative effect upon the jury, although only seven of the exhibits were in any way related to the counts on which *the defendant* was found guilty.

4. There is nothing in this record whatsoever from beginning to end upon which the postal inspector or the Government can claim any *probable cause* as to violation of the postal laws by the defendant Roth; there was no *warrant* justifying the Government's action; there was no evidence or foundation laid for the Government's conduct; the application for relief under the Fourth and Fifth Amendments was timely and properly made; no bill of particulars had been granted to defendant; the indictment failed to set forth and give notice to the defendant the obscene matter referred to therein; and the defendant was *peremptorily* shut off in his application and denied his rights under the Fourth and Fifth Amendments of the United States Constitution and was denied *hearing* or *relief* by the *summary* and *peremptory* denial of the Judge.

The evidence obtained by the Post Office officials by forgery and trickery was obtained *prior* to any other evidence.

One of the safeguards around the right of search and seizure is the previous existence of probable cause. In the instant case this was supplied neither by the Government witnesses who obtained the evidence, nor by their knowledge of previous evidence of probable cause in the hands of others.

The law is established in *Heath* v. *United States,* 169 F. 2d 1007, 1010:

> "It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

In the absence of such foundation the motion to suppress the evidence should have been granted.

5. The use in cross-examination and in summation of the book "Aubrey Beardsley" by Haldane McFall, was unfair, prejudicial, inflammatory and incitative. It created an atmosphere of unfairness to the petitioner and on the purely hearsay evidence read from it, a man's liberty was lost.

No proof was ever introduced in evidence that the hearsay mentioned in this book was the *truth.* No other evidence was given in the case to show that *any of the facts* mentioned in this book about Beardsley were true.

The witness, Lorge, had never read the book. The defendant had not read the book. There was no evidence in

the record at all to show that he ever knew this book existed or ever read any of its contents.

There was not the slightest evidence in the case that the defendant knew that Under The Hill was another title *for Venus and Tannhauser.*

The use made of this book by the prosecutor in his cross-examinations and in his summation were highly improper, inflammatory, incitative and incompetent, but helped foul the atmosphere so that the defendant never had his day in court.

This plus the Prosecuting Attorney's inflammatory remarks *denied the defendant a fair trial.*

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be granted.

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