Knuller (Publishing, Printing and Promotions) Ltd v DPP [1973] AC 435 (HL)

Lord Reid: My Lords, the accused took part in publishing a magazine which contained a wide variety of material thought to be of interest to those holding 'progressive' views. Much of this material is unobjectionable. Some would be distasteful to many people, some is more objectionable. In this case we are only concerned with some columns of advertisements appearing on inner pages of the magazine. These columns are headed 'Males'. In most cases these advertisements were inserted by homosexuals and their express purpose was to attract answers from persons who would indulge in homosexual practices with the advertisers. Sometimes persons answering the advertisements were to communicate directly with the advertisers. Sometimes they were to send their answers to the magazine and the answers were then forwarded to the advertisers ...

The first count charges a conspiracy to corrupt public morals. The particulars given are that between January and May 1969 the accused conspired together and with persons inserting the advertisements by means of the advertisements 'to induce readers thereof to meet those persons inserting such advertisements for the purpose of sexual practices taking place between male persons and to encourage readers thereof to indulge in such practices, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen'.

It was decided by this House in Shaw v DPP [1962] AC 220 that conspiracy to corrupt public morals is a crime known to the law of England. So if the appellants are to succeed on this count, either this House must reverse that decision or there must be sufficient grounds for distinguishing this case. The appellants' main argument is that we should reconsider that decision; alternatively they submit that it can and should be distinguished.

I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act. We were informed that there had been at least 30 and probably many more convictions of this new crime in the 10 years which have elapsed since Shaw's case was decided, and it does not appear that there has been manifest injustice or that any attempt has been made to widen the scope of the new crime. I do not regard our refusal to reconsider Shaw's case as in any way justifying any attempt to widen the scope of the decision and I would oppose any attempt to do so. But I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.

I hold that opinion the more strongly in this case by reason of the nature of the subject-matter we are dealing with. I said in Shaw's case [1962] AC 220, 275 and I repeat that Parliament and Parliament alone is the proper authority to change the law with regard to the punishment of immoral acts. Rightly or wrongly the law was determined by the decision in Shaw. Any alteration of the law as so determined must in my view be left to Parliament ...

Although I would not support reconsidering Shaw's case I think that we ought to clarify one or two matters. In the first place conspiracy to corrupt public morals is something of a misnomer. It really means to corrupt the morals of such members of the public as may be influenced by the matter published by the accused.

Next I think that the meaning of the word 'corrupt' requires some clarification. One of my objections to the Shaw decision is that it leaves too much to the jury. I recognise that in the end it must be for the jury to say whether the matter published is likely to lead to corruption. But juries, unlike judges, are not expected to be experts in the use of the English language and I think that they ought to be given some assistance ...

... I think that the jury should be told in one way or another that although in the end the question whether matter is corrupting is for them, they should keep in mind the current standards of ordinary decent people.

I can now turn to the appellants' second argument. They say that homosexual acts between adult males in private are now lawful so it is unreasonable and cannot be the law that other persons are guilty of an offence if they merely put in touch with one another two males who wish to indulge in such acts. But there is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense. Prostitution and gaming afford examples of this difference ...

I find nothing in the Act to indicate that Parliament thought or intended to lay down that indulgence in these practices is not corrupting. I read the Act as saying that, even though it may be corrupting, if people choose to corrupt themselves in this way that is their affair and the law will not interfere. But no licence is given to others to encourage the practice. So if one accepts Shaw's case as rightly decided it must be left to each jury to decide in the circumstances of each case whether people were likely to be corrupted. In this case the jury were properly directed and it is impossible to say that they reached a wrong conclusion. It is not for us to say whether or not we agree with it. So I should dismiss the appeal as regards the first count.

The second count is conspiracy to outrage public decency, the particulars, based on the same facts, being that the accused conspired with persons inserting lewd disgusting and offensive advertisements in the magazine 'by means of the publication of the said magazine containing the said advertisements to outrage public decency'.

The crucial question here is whether in this generalised form this is an offence known to the law. There are a number of particular offences well-known to the law which involve indecency in various ways but none of them covers the facts of this case. We were informed that a charge of this character has never been brought with regard to printed matter on sale to the public. The recognised offences with regard to such matter are based on its being obscene, ie likely to corrupt or deprave. The basis of the new offence, if it is one, is quite different. It is that ordinary decent-minded people who are not likely to become corrupted or depraved will be outraged or utterly disgusted by what they read. To my mind questions of public policy of the utmost importance are at stake here.

I think that the objections to the creation of this generalised offence are similar in character to but even greater than the objections to the generalised offence of conspiracy to corrupt public morals.

In upholding the decision in Shaw's case we are, in my view, in no way affirming or lending any support to the doctrine that the courts still have some general or residual power either to create new offences or so to widen existing offences as to make punishable conduct of a type hitherto not subject to punishment. Apart from some statutory offences of limited application, there appears to be neither precedent nor authority of any kind for punishing the publication of written or printed matter on the ground that it is indecent as distinct from being obscene. To say that published matter offends against public decency adds nothing to saying that it is indecent. To say, as is said in this charge, that it outrages public decency adds a new factor: it seems to me to mean no more than that the degree of indecency is such that decent members of the public who read material will not merely feel shocked or disgusted but will feel outraged. If this charge is an attempt to introduce something new into the criminal law it cannot be saved because it is limited to what a jury might think to be a high degree of indecency ...

I must now consider what the effect would be if this new generalised crime were held to exist. If there were in any book, new or old, a few pages or even a few sentences which any jury could find to be outrageously indecent, those who took part in its publication and sale would risk conviction. I can see no way of denying to juries the free hand which Shaw's case gives them in cases of conspiracy to corrupt public morals. There would be no defence based on literary, artistic or scientific merit. The undertaking given in Parliament with regard to obscene publications would not apply to this quite different crime. Notoriously many old words, commonly regarded as classics of the highest merit, contain passages which many a juryman might regard as outrageously indecent. It has been generally supposed that the days for bowdlerising the classics were long past, but the introduction of this new crime might make publishers of such works think twice. It may be said that no prosecution would ever be brought except in a very bad case. But I have expressed on previous occasions my opinion that a bad law is not defensible on the ground that it will be judiciously administered. To recognise this new crime would go contrary to the whole trend of public policy followed by Parliament in recent times. I have no hesitation in saying that in my opinion the conviction of the accused on the second count must be quashed ...

Lord Morris of Borth-y-Gest: ... The point of law which the Court of Appeal certified as being of general importance was:

whether an agreement by two or more persons to insert advertisements in a magazine whereby adult male advertisers seek replies from other adult males who are prepared to consent to commit homosexual acts with them in private, is capable of amounting to the offence of conspiracy to corrupt public morals ...

I agree ... with Fenton Atkinson LJ when he said in the Court of Appeal [1972] 2 QB 179, 187 that:

it was for the jury to say whether by present-day standards, which they were there to represent, these advertisements were in their view corrupting of public morals even though Parliament had provided that acts of this kind between consulting male adults should no longer be a crime.

I pass, then, to consider the second main submission on behalf of the appellants. It was urged that Shaw's case [1962] AC 220 should now be reconsidered. I reject this submission primarily because, in my view, Shaw's case was correctly decided. Even had I been of a different opinion I would nevertheless consider it wholly

inappropriate now to review the decision. Such a course would not, in my view, be warranted or desirable within the ambit of the statement made in this House on 26 July 1966 [Practice Statement (Judicial Precedent) [1966] 1 WLR 1234]. That statement drew attention to the especial need for certainty as to the criminal law. It was clearly held in Shaw's case that there had been and that there continued to be as part of the criminal law of England the offence of conspiracy to corrupt public morals. The decision established that fact with certainty. If any person had previously had doubts as to this their doubts were removed. There are some who regret that there should be such an offence and who would wish to change the law: their course is to persuade Parliament to change it. Once this House in its judicial capacity was satisfied that the offence was known to and existed as part of the law it would neither have been proper nor would it have been within its judicial province to proclaim or to suggest that the law should be forgotten or ignored or that its force should be denied. The decision in Shaw's case was made nearly 11 years ago. We were told that in one period of four years since that time there had been over 30 prosecutions for conspiracy to corrupt public morals: we do not know how many in total there have been. Those prosecutions were for an offence which this House had authoritatively laid down to be a part of our criminal law. It is accepted that all relevant authorities were examined before this House came to its decision. There comes a stage when further disputation should cease ...

It has sometimes been asserted that in his speech in Shaw's case Viscount Simonds was proclaiming that the courts had power to extend the sphere of the law by devising new extensions of the operations of the criminal law; his use of the words 'residual power' is pointed to as a basis of what is asserted. In my view, the sustained reasoning of his speech refutes the assertion. In the first place, he expressly and firmly repudiated any notion that there is in the judges a right to create new criminal offences. He held, in agreement with Lord Tucker, that the offence of conspiracy to corrupt public morals was an offence known to the common law. He then proceeded to demonstrate that if offending acts do reveal a conspiracy to corrupt public morals it is not to be said that no offence has been committed merely because the particular acts are novel or unprovided for or are unprecedented. He pointed out that Parliament from time to time by legislative acts alters the common law but that yet there are 'unravished remnants' of it. The residual power to which he referred is the power 'where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare' ([1962] AC 220, 268). The reasoning is directed to the enforcement of the common law to the extent that its power may reach: the reasoning disclaims the existence of an arbitrary power to refashion the common law ...

Lord Simon of Glaisdale: ... It follows, in my view, that your Lordships should follow Shaw v DPP on the matter as to which it constituted a direct authority: namely, that the offence of conspiracy to corrupt public morals is part of the criminal law of England ... [T]here are some suggestions in the speeches in Shaw v DPP that the courts have still some role to play in the way of general superintendence of morals. This was a phrase used in various 18th and 19th century cases, 'superintendence of' meaning 'jurisdiction over'. Whatever may have been the position in the 18th century – and there is more than one clear indication that the courts of common law then assumed that they were fitted for

and bound to exercise such a role – I do not myself believe that such is any part of their present function. As will appear, I do not think that 'conspiracy to corrupt public morals' invites a general tangling with codes of morality ... [I]t has [also] been suggested that the speeches in Shaw v DPP indicated that the courts retain a residual power to create new offences. I do not think they did so. Certainly, it is my view that the courts have no more power to create new offences than they have to abolish those already established in the law; both tasks are for Parliament. What the courts can and should do (as was truly laid down in Shaw v DPP) is to recognise the applicability of established offences to new circumstances to which they are relevant. [Next] I have already indicated my view that Shaw v DPP is not authority for the proposition that male homosexualism, or even its facilitation or encouragement, are themselves as a matter of law corrupting of public morals. It is for the jury to decide as a matter of fact whether the conduct alleged to be the subject-matter of the conspiracy charged is in any particular case corrupting of public morals. Last, it was suggested in argument before your Lordships that, if Shaw v DPP were not overruled, it would be open to juries to convict if they thought that the conduct in question was liable to 'lead morally astray'. But all that was decided in Shaw v DPP was that, in the general context of the whole of the summing up in that case, the use of the phrase 'lead morally astray' was not a misdirection. Shaw v DPP must not be taken as an authority that 'corrupt public morals' and 'lead morally astray' are interchangeable expressions. On the contrary, 'corrupt' is a strong word. The Book of Common Prayer, following the Gospel, has '... where rust and moth doth corrupt'. The words 'corrupt public morals' suggest conduct which a jury might find to be destructive of the very fabric of society ...

Turning to the second count, conspiracy to outrage public decency, Lord Simon said:

The following questions, therefore, arise on this part of the case: (1) is there a general common law offence of outraging public decency, or only the particular offences which the cases establish? (2) Is there a common law offence of conspiring to outrage public decency? ...

His Lordship reviewed the authorities and said:

I think that the authorities establish a common law offence of conduct which outrages public decency.

If there is a common law offence of conduct which outrages public decency, a conspiracy to outrage public decency is also a common law offence, as an agreement to do an illegal act. In Shaw v DPP [1962] AC 220, 267, Viscount Simonds seems to have considered that the conduct there in question was indictable also as a conspiracy 'to affront public decency'.

In my view, counsel for the appellants was right to concede that there is a common law offence of conspiring to outrage public decency ...