

1 IN THE SUMMARY COURT OF THE CAYMAN ISLANDS
2 HOLDEN AT CAYMAN BRAC
3 BEFORE HON MAGISTRATE GUNN
4

5 R

7 v

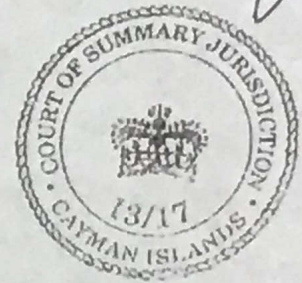
9 RONALD GREGORY KYNES

11 BC00023/2017 Possession of obscene objects

13 **Appearances:** DDPP Mr P. Moran for the Prosecution
14 The Defendant in person
15 **Hearing dates:** 26th and 27th April 2018 and 27th June 2018
16 **Further Submissions:** 14th June 2018 (Prosecution) 25th June 2018 (Defendant)
17 **Verdict:** 27th June 2018
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19
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21 **VERDICT JUDGMENT**
22

- 23 1. The Defendant is an artist and a resident of Cayman Brac. He is charged that
24 on or before 18th July 2017 he had in his possession obscene objects or
25 objects tending to corrupt morals for the purposes of public exhibition.
26
27 2. Section 157 (a) of the Penal Code (2017 Revision) ("the Law") provides
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29 *"A person commits an offence if ... for the purpose ... of public*
30 *exhibition, makes, produces or has in his possession any one or more ...*
31 *obscene objects or any object tending to corrupt morals."*
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1 3. The items in question are 4 statues -

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3 (1) "**Isis**" - a female figure sitting on top of a plinth like structure. The
4 Prosecution alleges that this statue is indecent and is sexual
5 imagery.

6
7 (2) "**Eva and Eve**" - two female figures, one taller than the other. The
8 figures are facing each other. The Prosecution alleges that this
9 statue depicts a sexual act, namely one figure kissing/sucking the
10 breast of the other.

11
12 (3) "**LGBT**" - Two female figures. One is standing. Only the head of
13 the other figure is visible. The Prosecution alleges that this statue
14 depicts the act of oral sex.

15
16 (4) "**Hecate**" - A female figure with no arms. A glass skull protrudes
17 from her body. The Prosecution alleges that this statue is sexual
18 imagery.

19
20 4. From the outset of these proceedings the Defendant has asserted that the
21 prosecution was contrary to his constitutionally protected right to freedom
22 of expression. The trial lasted 2 days (and the addition of one exhibit today)
23 and included a site visit. On the recommendation of the Deputy Director of
24 Public Prosecutions who prosecutes this matter, I agreed to rule on whether
25 the statues were obscene and/or tend to corrupt morals before hearing the
26 constitutional arguments. Only if I find that one or more of them offend the
27 law, would it be necessary to proceed to those arguments. A factual finding
28 that none of the statues are obscene or tend to corrupt morals would bring
29 the proceedings to an end, as the Defendant would have to be acquitted.
30
31

1 5. It is not disputed that these statues are located on the Defendant's property
2 adjacent to a main road. Neither is it disputed that the statues are easily
3 visible by pedestrians and from passing cars, nor that those people likely to
4 see the statues will include young children.
5

6 6. There are other statues on the property. All of the witnesses, including the
7 Defendant, referenced the other statues and that there is a history of conflict
8 between the Defendant and a number of Brac residents concerning his art.
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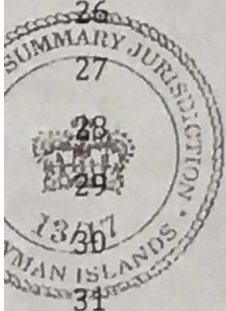
10 7. The Defendant accepts that the land is used to exhibit his art and that he
11 encourages members of the public to view his work. Possession of the
12 objects for public exhibition is therefore not in issue.
13

14 8. I have had the benefit of photographs and examining all but one of the
15 statues up close. I have also viewed the close-up video footage of the statue
16 "Eva and Eve" currently in private ownership and out of sight of the public.
17
18
19

20 THE LAW

21

22 9. Whether an item is obscene or not depends on the item itself, not the
23 intention of the maker/possessor (*R v Hicklin* (1868) QB 360; *Shaw v DPP*
24 [1960] AC 220; *R v Calder & Boyars Ltd* [1969] 1 QB 151 and *R v Elliott*
25 [1996] 1 Cr.App.R. 432 *Kneller (Publishing, Printing and Promotions)*
26 *Ltd v DPP* (1972) 56 Cr.App.R 633). For that reason the vast majority of Mr
27 Kynes' exculpatory interview and evidence as to what he intended these
28 statues to depict is not relevant.
29
30
31



1 10. All four statues are named in the sole count before the court. The
2 Prosecution submits that I can consider the statutes individually, but also the
3 four together, to determine whether one or more of the statues contravene
4 the Law.

5
6
7 *OBSCENE*
8

9 11. At a preliminary hearing the Prosecution sought to argue that it could call
10 witnesses to give their opinion as to whether the statues were obscene. The
11 Prosecution, quite rightly, abandoned that contention as the authorities are
12 clear that civilian or even expert evidence is not admissible (see **Calder and**
13 **Boyars** (*ibid*) and **R v Anderson** (1972) 56 Cr.App.R 115 for full
14 discussion).

15
16 12. The question of whether an object is obscene or not is a factual one. The
17 tribunal of fact represents the general body of the public. The standards of
18 morals and decency will change from generation to generation and it is for
19 the tribunal of fact to decide what the current public standard is. I am that
20 tribunal in these Summary Court proceedings. My own personal views are
21 not relevant. I must consider the views of the general public, which is not
22 limited to those residing in the Cayman Brac, but the entire population of the
23 Cayman Islands.
24
25



1 13. I did permit the Prosecution witnesses to express their reactions and
2 opinions of the statues at trial for the purposes of efficiency. In the event that
3 I found one or more of the statues to be obscene or corrupting, the trial
4 would proceed to consideration of the Defendant's submission that his art is
5 protected by the Constitution (Freedom of expression). At that stage the
6 witnesses' opinions and feelings may become relevant when balancing the
7 Defendant's rights with those of the public, in particular those of the
8 witnesses.

10 14. Neither the parties, nor I, have any recollection of another prosecution of a
11 section 157 offence. There are no local authorities as to the definition of
12 obscene or corrupting morals. It is therefore necessary to look to UK for
13 authorities, although many concern offences under the Obscene Publications
14 Act 1959 ("the OPA") which has a statutory definition of "obscene"¹.

16 15. One of the oldest common law tests was enunciated by Cockburn CJ in
17 **Hicklin** (*ibid*). An object is obscene if "*the tendency of the matter.... is to*
18 *deprave and corrupt those whose minds are open to such immoral influences,*
19 *and into whose hands a publication of this sort may fall.*" (at page 371)

21 16. In **Anderson** (*ibid*) the Court concluded that, in the absence of a statutory
22 definition, "obscene" has its ordinary or "dictionary" meaning and includes
23 things which are shocking, lewd, indecent etc.

25 17. Given the lack of statutory definition in the Penal Code, the common law as
26 pronounced in **Hicklin** and **Anderson** must be applied. In any event the
27 OPA's definition is closely aligned to the definition in **Hicklin**.

¹ Section 1(1) "For the purpose of this Act and 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 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."

1 18. The next questions are "who?" and "how many people?" must consider the
2 object(s) to be obscene or be corrupted. This was considered by the House of
3 Lords in **DPP v Whyte [1972] AC 849** which was a case concerning offences
4 under the OPA. Lord Wilberforce at 863B said -
5

6 *"The Act is not merely concerned with the once and for all*
7 *corruption of the wholly innocent; it equally protects the less*
8 *innocent from further corruption, the addict from feeding or*
9 *increasing his addiction. To say this is not to negate the principle of*
10 *relative "obscenity": certainly the tendency to deprave and corrupt is*
11 *not to be estimated in relation to some assumed standard of purity*
12 *of some reasonable average man. It is the likely reader. And to*
13 *apply different tests to teenagers, members of men's clubs or men in*
14 *various occupations or localities would be a matter of common*
15 *sense."*
16

17 19. Lord Pearson at 864H said -

18 *"...there is no requirement [in the Obscene Publications Act] as to the*
19 *number of persons, or as to the proportion of its readers, which the*
20 *article will tend to corrupt and deprave. The word "persons" is*
21 *plural, but it may include the singular. I think in some cases the rule*
22 *de minimis non curat lex² would suitably be applied."*
23

24 20. Lords Simon, Cross and Salmon accepted that the "significant proportion of
25 persons test" enunciated by the Court in **Calder and Boyars (ibid)** should
26 apply. Lord Cross expanding on this concluded that *"a significant proportion*
27 *of a class means a part which is not numerically negligible but which may be*
28 *less than half"* (at 870C).
29

² "The law does not concern itself with trifles"



1 21. Additionally, the Court in **R v Clayton [1963] 1 QB 163** held that the degree
2 of inherent obscenity is very relevant, but it must be related to the
3 susceptibility of the viewer.
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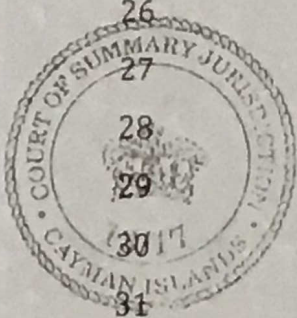
5 22. In the course of these proceedings the Defendant has referenced other
6 statues, some of which appear in art books and museums around the world.
7 He asks me to draw comparisons in order to determine whether his work is
8 obscene or not. It has long been established that, in cases of this nature,
9 conducting an analysis or examination of other material available is not
10 appropriate (see **Reiter (1954) 38 Cr.App.R 62** and **R v Elliott (ibid)**).
11
12

13 *TENDING TO CORRUPT MORALS*
14

15 23. According to Byrne J in the "Lady Chatterley" case (**R v Penguin Books Ltd**
16 **[1961] Crim.L.R 176 at 177**) *"to 'corrupt' means to render morally unsound*
17 *or rotten, to destroy the moral purity or chastity, to pervert or ruin a good*
18 *quality, to debase, to defile."*
19

20 24. Lord Reid in **Kneller (Publishing, Printing and Promotions) Ltd v DPP**
21 **(1972) 56 Cr.App.R 633** said -
22

23 *"[To "corrupt"] really means to corrupt the morals of such members*
24 *of the public as may be influenced by the matter published by the*
25 *accused... "Corrupt" is a strong word and the jury ought to be*
26 *reminded of that... The Obscene Publications Act appears to use the*
27 *words "deprave" and "corrupt" as synonymous, as I think they are...*
28 *but I doubt whether even the most staunch defender of a better age*
29 *would maintain that all or even most of those who have at one time*
30 *or in one way been led astray morally have thereby become*
31 *depraved or corrupt.*



ANALYSIS

25. I keep in mind the people's intentions as expressed in our Constitution –

The Cayman Islands are –

- "A God-fearing country based on traditional Christian values..."
- "A country in which religion finds its expression in moral living and social justice"
- "A caring community based on mutual respect for all individuals and their basic human rights."
- "A country committed to the democratic values of human dignity, equality and freedom."

26. Without a doubt, any object or behaviour in public which explicitly depicts sexual acts would be considered lewd and indecent and likely obscene. It would also tend to corrupt morals. I take judicial notice that every year our Islands hosts several carnivals, both in Grand Cayman and Cayman Brac, sponsored by the Department of Tourism, in which a significant number of participants are simulating sexual acts as they pass children and adults alike who line the streets to watch. Rather than considered obscene, such lewd and indecent behaviour is acceptable to, and encouraged by, the large majority of the public in our Islands who participate and attend such events. Our Constitution and the carnivals are only 2 examples of things that set the tone of the moral standards of our Islands.



1 27. The Prosecution has the burden of proving the case against the Defendant
2 beyond a reasonable doubt. In order to consider whether any of the statues
3 offend the Law I must first make findings of fact as to what each depicts.
4 Having done that, I then apply the law and so come to a conclusion. I may
5 look at the statues individually and collectively in order to determine
6 whether they are obscene or tending to corrupt morals. I must be sure of my
7 conclusions beyond a reasonable doubt.

8
9 28. The witnesses have given their descriptions of the items. I have been
10 provided with photographs and I have also had the opportunity to inspect
11 the statues myself. As the tribunal of fact, it is for me to decide what these
12 statues in fact depict and whether they offend the law. I may take into
13 consideration the description of the witnesses if I find them helpful to my
14 determination. As will become evident shortly, their descriptions of the "Eva
15 and Eve" and "LGBT" statues are not accurate. I do not believe that any of
16 the witnesses intended to mislead the court. Their conclusions may have
17 been as a result of only seeing the statues while driving past rather than a
18 closer examination of the objects. Their own beliefs, life experiences,
19 personality traits and even faith, as well as the history of animosity between
20 the Defendant and parts of the community is likely to have subconsciously
21 influence their perceptions and ultimate conclusions. In this case perception
22 is critical.

23
24 29. Having examined the statues, I make the following findings and conclusions-

25

26

(1) "Isis"

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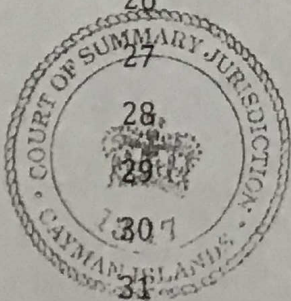
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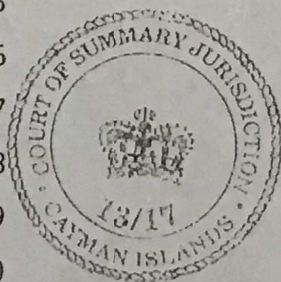
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This statue depicts a female figure with a head dress sitting on top of a plinth
or boulder like structure. The figure has no arms. The breasts are exposed
and the nipples are clearly defined. A green rectangular object covers the
pubic area. A skull/animal head is positioned in the area of statue's thighs.
There are multiple heads positioned around the middle of the plinth.



1 I do not find this statue to be obscene or that it tends to corrupt morals. The
2 pubic area is covered so no complaint can be made in that respect. I do not
3 think that the general public would find exposed breasts on a statute to be
4 inherently obscene; or that it would tend to corrupt morals. The biological
5 function of breasts is to produce milk for infants. Breasts are therefore not
6 inherently sexual organs. A good comparison is a woman breastfeeding a
7 child. To a right-thinking person of any age, that is not sexual, indecent, lewd,
8 shocking or corrupting. It is a natural biological process which is
9 encouraged.

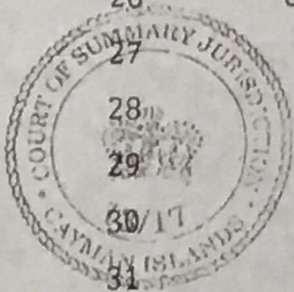
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11 Children are not born with an understanding of sexuality; it is something
12 they learn as they grow older. I have in mind that for many adults breasts
13 also have a sexual association. A person exposing their breasts in public
14 (other than to breastfeed) may be shocking and lewd to some people. But it
15 must be born in mind that the statue "Isis" is an inanimate object. I do not
16 think that seeing breast on a statue would cause the general public to
17 consider it to have sexual meaning, or that it would corrupt children or
18 adults. Breasts on a statue do not inherently depict sexuality or are indecent,
19 shocking, lewd, save for a very few very prudish individuals. This is an
20 occasion when the *de minimis* principle is applicable. This statue is neither
21 obscene, nor does it tend to corrupt morals. This statue does not offend the
22 law.



1 (2) "Eva and Eve"

2 This statue is of two female figures, one taller than the other. The
3 figures are facing each other and appear to be in an embrace. The face
4 of the shorter figure is *between* the breasts of the taller figure. The
5 two Prosecution witnesses who describe the shorter figure as
6 "kissing" or "sucking" the breast of the taller figure are clearly
7 mistaken. Without any criticism of PC Tahal, the angles of the
8 photographs give the impression that the lips are at or on the nipple
9 when they are not. Both figures have a female silhouette and what
10 appears to be long hair that covers their arms in the embrace.
11 Although the figures have a female form, there is nothing to suggest
12 that they are naked and/or engaged in a sexual act. The bodily form of
13 the two figures is very similar to that of a shop mannequin: a neutral
14 inoffensive silhouette.

15
16 In opening the case for the Prosecution the Deputy Director of Public
17 Prosecutions made it clear that the gender of the figures is irrelevant,
18 but he did challenge the Defendant's assertion that one of the figures
19 was a child. This statue depicts an embrace. It is not shocking, lewd,
20 indecent or in any other way obscene or corrupting. For the purposes
21 of completeness, I will state that I concur with the Prosecution's
22 position that the gender of the figures is immaterial. The fact that it
23 depicts 2 females rather than a male and female does not change the
24 nature of an embrace to being obscene or likely to corrupt when
25 otherwise it would not. The purported age of the figures would not
26 change my conclusion either.

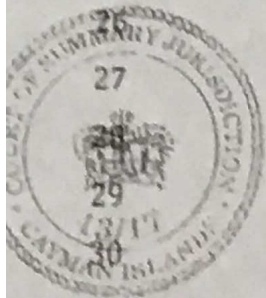


1 (3) "LGBT"

2 This statue has caused the greatest concern to all of the Prosecution
3 witnesses. The Prosecution asserts, as do the witnesses, that it
4 depicts the act of oral sex. This statute is of two female figures. One is
5 standing and the body is, again, only a general female shape. Only the
6 head of the other figure is visible. The face of the second figure is
7 looking upwards and the mouth is in the area of the groin of the
8 standing figure. The photographs only provide a two dimensional
9 view. I can appreciate how, once the suggestion is made that the
10 statue depicts oral sex, someone might conclude that this is what the
11 photographs capture or what they see driving past. Without a doubt,
12 a statue explicitly depicting such an act would offend section 157(a).
13 However, having had the opportunity to see the statue, it is apparent
14 that the witnesses fell into error. It was apparent to me when I
15 viewed the close up that –

- 16
- 17 (a) the pubic area is not defined so as to depict genitalia;
 - 18 (b) neither the mouth, nor any other part of the head, is in contact
 - 19 with the pubic area of the standing figure; and
 - 20 (c) there is nothing else that indicates that a sexual act is being
 - 21 performed.
- 22

23 I must consider the statue as it is, without reference to the
24 interpretations or suggestions of others as to what it may depict,
25 including the Defendant's professed intentions. I find as a fact that the
26 statue does not depict the performance of a sexual act.



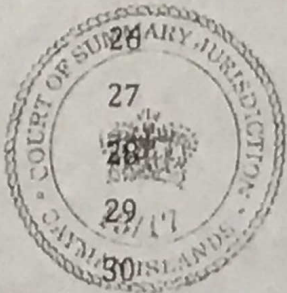
1 I have considered whether the position of the head and/or reference
2 to LGBT are sufficient to imply a sexual act so as to make the statue
3 obscene (whether lewd, indecent, shocking or otherwise) or that it
4 tends to corrupt. I find that they do not. It is only the very few whose
5 mind would cause them to see the statue as having sexual
6 connotations because of their own beliefs and experiences and the
7 other factors I have mentioned already. Once again, it is appropriate
8 to apply the *de minimis* principle. I am sure that the overwhelming
9 majority of the public who saw this statue up close, without outside
10 suggestions as to what it might depict, would not find it to be obscene
11 or tending to corrupt morals.
12

13 (d) "Hecate"

14 This is a statue of a female figure with no arms. A glass skull protrudes from
15 the area of the naval. Like "Eva and Eve", this statue has the silhouette of a
16 female similar to a store mannequin. There is no obvious nakedness. The
17 glass skull at her navel has no obvious sexual connotations. I find that this
18 statue is not sexual imagery. It is neither obscene nor does it tend to corrupt
19 morals.
20

21 30. I have also considered the statues as a group and find that even taken
22 together, they are not obscene nor do they tend to corrupt morals.
23

24 31. Given my findings it is not necessary to hear the parties on the constitutional
25 matters which were flagged up at the Case Management Hearing.
26



1 32. The Defendant is acquitted.

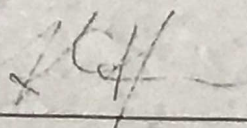
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Mrs Kirsty-Ann Gunn

8 Honourable Magistrate of the Summary Court

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