“Let Me See That Thong,” Males Sporting A Brief (Really Brief Brief) May Produce Alarm Or Shock!!

In **Commonwealth v. Quinn,** ___Mass.___(2003), the SJC was confronted with the issue of whether or not a male could be convicted of open and gross lewdness for sporting a thong clad buttocks in public and displaying it to minors. The defendant argued that before he could be convicted undere the statute that the Commonwealth had to prove that he exposed his genitalia and that, notwithstanding the latter, he did not have fair notice that exposure of ‘thong’ clad buttocks could be prosecuted as an open and gross lewdness. The SJC stated that they had “no difficulty in concluding that a fact finder could find that the exposure of buttocks may in some circumstances alarm or shock in violation of G. L. c. 272, § 16.”

Facts of the Matter

At about 3 P.M., four young girls, aged thirteen years, were walking behind their parochial school, presumably at the end of their school day. The defendant, whose automobile was parked on a nearby street, was standing outside the school, and, as one of the young girls described, he “pulled down his pants as the girls walked by exposing his buttocks along with a pair of red ‘thong’ underwear.” A boy alerted a police officer on patrol in the area that there was a man behind the school “pulling his pants down showing a group of girls his ‘thong’ underwear.” From the boy’s description of the perpetrator, the officer located the defendant and saw the young girls walking away from him. At the scene, the police officer placed the defendant under arrest for “open and gross lewdness.” After receiving **Miranda** warnings, the defendant stated, “You stupid mother fucker you don’t have indecent exposure. I didn’t pull my prick out. I only pulled down my pants. It’s not against the law to pull your pants down and show people your thongs.”

Interpretation of The Open & Gross Statute

The offense of “indecent exposure,” G. L. c. 272, § 53, is “closely similar” to the offense of “open and gross lewdness,” G. L. c. 272, § 16. The exposure of genitalia has been defined by judicial interpretation as an essential element of the offense of indecent exposure. The defendant argues that we should require the same limitation as an essential element of G. L. c. 272, § 16. We conclude that the exposure of genitalia is not an essential element of the crime of open and gross lewdness: a defendant may be convicted under G. L. c. 272, § 16, for exposing his buttocks provided, of course, that the other elements of that crime are proved beyond a reasonable doubt.

Although the two statutes, “open and gross lewdness,” G. L. c. 272, § 16, and “indecent exposure,” G. L. c. 272, § 53, are similar, they have different elements, reflecting (in part) their different origins. The “open and gross lewdness” statute was first enacted in 1784, and, for over 200 years, has remained essentially unchanged. In contrast, the crime of “indecent exposure” was not codified until 1943, although it was recognized as an offense at common law.

The two statutes prohibit different conduct. Any intentional exposure of genitalia may be prosecuted as a misdemeanor under G. L. c. 272, § 53. Conviction of “open and gross lewdness,” G. L. c. 272, § 16, on the other hand, requires the Commonwealth to prove, among other elements, intention, manner (done in such a way as to produce alarm or shock), and impact (does in fact alarm or shock). The requirement that the defendant must engage in conduct such as actually to alarm or shock another has remained unchanged since 1880. Whichever “private parts of one’s body,” is intentionally exposed, the fact finder must be persuaded beyond a reasonable doubt that the defendant acted in such a way as to alarm or shock. In contrast, to sustain a conviction of indecent exposure, G. L. c. 272, § 53, the Commonwealth is not required to prove the elements of alarm or shock. Greater precision of the offensive conduct (exposure of genitalia) is therefore necessary under that statute to give a defendant constitutionally adequate notice of the circumscribed offensive conduct.

The defendant notes that in Commonwealth v. Arthur, we commented that convictions of “open and gross lewdness” pursuant to G. L. c. 272, § 16, “invariably have involved exposure of the genitalia.” While such conduct is surely sufficient to support a conviction under G. L. c. 272, § 16, the court did not suggest that “lewd and lascivious behavior” is confined to exposure of genitals. The sudden exposure of buttocks by dropping one’s pants in front of children in an area (school) where such conduct would be wholly unexpected may alarm or shock, as surely as revealing one’s penis. A woman approaching a group of school children suddenly opening her blouse to expose her breasts may alarm or shock as surely as a man masturbating in a passing automobile. If the conduct is intentionally committed such as to produce alarm or shock, it may be prohibited.

Pointing to the number of people who are seen wearing “thongs” on public beaches, the defendant argues that unless limited to exposure of genitalia, our statute outlawing lewd and lascivious conduct will be cast adrift in the “shifting community notions of good taste.” A woman revealing her knees in public in 1890 may have offended the then community notions of good taste. But the issue then, as now, is not whether a defendant’s conduct offends “good taste,” but whether the conduct is such that it causes alarm or shock. Today, society may tolerate far greater displays of nudity, including the exposure of genitalia on public beaches. But the defendant does not

argue that the crime of "open and gross lewd and lascivious behavior" has become obsolete such that all public displays of nudity, no matter how alarming or shocking, must be tolerated. In his view, it is simply a matter of degree: exposure of genitalia, but not breasts or buttocks, may be prosecuted. We see no reason to restrict the definition of open and gross lewdness in the manner he urges, and have no difficulty in concluding that a fact finder could find that the exposure of buttocks may in some circumstances alarm or shock in violation of G. L. c. 272, § 16.

Fair Notice

While the exposure of buttocks can be prosecuted under G. L. c. 272, § 16, we agree with the defendant that he was not provided with fair notice that deliberately exposing his thong-clad buttocks may be illegal. The statute is therefore unconstitutionally vague as applied to him.

"An essential principle of due process is that a statute may not proscribe conduct 'in terms so vague that [persons] of common intelligence must necessarily guess at its meaning.'" A vague statute offends due process because of "its lack of reasonably clear guidelines for law enforcement and its consequent encouragement of arbitrary and erratic arrests and prosecutions." A statute, the terms of which do not themselves provide clear guidelines, may nonetheless be sufficiently definite because of "judicial construction, common law meaning, or the statutory history of particular terms," Commonwealth v. Gallant, 373 Mass. 577, 581 (1977), and such a statute may be rendered "constitutionally definite by giving it a reasonable construction."

The language of G. L. c. 272, § 16, "open and gross lewdness and lascivious behavior," neither mentions exposure of the buttocks nor, without further judicial construction, informs a person precisely which private body parts may not be exposed. In ordinary usage, "lewdness" or "lascivious behavior" convey no more specific meaning than the terms "lewd" and "wanton," which we have said failed to reference sufficiently definite conduct, and applied only "broadly to conduct which the speaker considers beyond the bounds of propriety."

As to judicial construction, our decisions have made clear that the exposure of genitalia may be prohibited by G. L. c. 272, § 16. And while some decisions have indicated that exposure of "buttocks" is encompassed within the zone of conduct prohibited by statutes outlawing "lewd" or "lascivious" behavior, those decisions did not interpret G. L. c. 272, § 16, and could not have provided notice to the defendant that his behavior would violate that statute. In short, with the exception of the exposure of genitalia, no "longstanding judicial interpretation [of G. L. c. 272, § 16] clearly conveys sufficiently definite warning as to the proscribed conduct. This defendant cannot be prosecuted for exposing his buttocks.

Conclusion

In order to satisfy the constitutional standard of specificity, we construe G. L. c. 272, § 16, to prohibit the intentional exposure of genitalia, buttocks, or female breasts to one or more persons. The Commonwealth must prove beyond a reasonable doubt:

(1) the defendant exposed his or her, genitals, buttocks, or female breasts to one or more persons;
(2) the defendant did so intentionally;
(3) the defendant did so "openly," that is, either he or she intended public exposure, or he or she recklessly disregarded a substantial risk of public exposure, to others who might be offended by such conduct;
(4) the defendant's act was done in such a way as to produce alarm or shock; and
(5) one or more persons were in fact alarmed or shocked by the defendant's exposing himself or herself

Our answers to the reported questions are:

1. Exposure or attempted exposure of genitalia is not an essential element of an open and gross lewdness offense prosecuted under G. L. c. 272, § 16.

2. The defendant did not have fair notice that exposure of "thong" clad buttocks could be prosecuted as an open and gross lewdness offense under G. L. c. 272, § 16.

end.