EXHIBIT 5

People v. Solomon, Unpublished Memorandum Decision
of the Intermediate Appellate Term,
First Judicial Dept. (Feb. 19, 1968).

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

against

HOWARD L. SOLOMON,

Defendant-Respondent.

PEOPLE-APPELLANT'S APPENDIX

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Order Appealed From

At an Appellate Term of the Supreme Court, First Department, held on the County Court House, Borough of Manhattan, City of New York, on the 16th day of February, 1968

Present:

Hon. Saul S. Streit, J.P.
Hon. Saul M. Gold
Hon. Samuel A. Hofstadter (dissenting) Justices

Sept. #351

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

vs.

HOWARD SOLOMON,

Defendant-Appellant

An appeal having been taken to this court by defendant from a judgment of conviction of the Criminal Court of the City of New York, County of New York, after trial before Hons. Murtagh, Creel (dissenting), Phipps, on the 4th day of November, 1964, upon the charge of violation

of §1140-a of the Penal Law on two counts, and having been sentenced by Hons. Murtagh, Creel (dissenting), Phipps on the 21st day of December, 1964, as follows:

$500 or 30 days on each count,

and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby reversed on the law and the facts, and informations dismissed.

Enter

SSS

Justice Appellate Term
Supreme Court, First Department

Memorandum Decision of the Appellate Term

New York Law Journal, February 19, 1968

351, PEOPLE, &C., res, v. HOWARD SOLOMON, def-ap—While the performance presented by the defendant contained coarse, vulgar and profane language which went beyond the bounds of usual candor "basic principles of jurisprudence, however, command us to put to one side all personal predilections, including our distaste for commercial exploitation of sensuality" (People v. Richmond County News, 9 N. Y. 2d 578, 588). And it is the law that to constitute obscenity "it must be established that (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 representation of sexual matters; and (c) the material is utterly without redeeming social value. * * * A book cannot be proscribed unless it is found to be utterly without redeeming social value" (Memoirs v. Massachusetts, 383 U. S. 413, 419).

In our opinion, the proof failed to meet these requirements. The court below found that the monologues were "not erotic" and "not lust-inciting" (cf. People v. Wendling, 258 N. Y. 451, 453). Moreover, integral parts of the performance included comments on problems of contemporary society. Religious hypocrisy, racial and religious prejudices, the obscenity laws and human tensions were all subjects of comment. Therefore, it was error to hold that the performances were without social importance (People v. Bruce, 31 Ill. 2d 459, 202 N. W. 2d 497; Roth v. U. S., 354 U. S. 476; Manual Enterprises v. Day, 370 U. S. 478).

Judgment of conviction reversed on the law and the facts and informations dismissed.

Streit and Gold, JJ., concur. Hofstadter, J., dissents in the following dissenting memorandum and votes to affirm:

Dissenting Memorandum of the Appellate Term

New York Law Journal, February 19, 1968

351, PEOPLE, &C., res, v. HOWARD SOLOMON def-ap. This appeal involves a public performance. In this aspect it is to be distinguished from the sale of a magazine (People v. Richmond County News, 9 N. Y. 2d 578); a book (Memoirs v. Massachusetts, 383 U. S. 413); or the sale of film (Robert v. New York, 87 Sup. Ct. 2092, rev'g 15 N. Y. 1020; People v. Revo, 15 N. Y. 2d 743). The right of the People to regulate *public conduct* under the police power of the state is of greater scope (Bennett v. California, —— Cal. ——, April 12, 1967, cert. denied 36 L. W. 3222 [see also N. Y. L. J., December 5, 1967, p. 4]; Trans-Lux Dist. v. Board of Regents, 14 N. Y. 2d 88, 92-95, 97-98, rev'd on other grounds 380 U.S. 259). The statute before us (Penal Law, sec. 1140-a) proscribes presentation of an "obscene, indecent, immoral or impure * * * show * * * which would tend to the corruption of the morals of youth or others." It suffices that parts of the show are obscene and lewd (People v. Richmond County News, 9 N. Y. 2d 578, 587). The trial court found the Bruce performance "obscene, indecent, immoral and impure. The monologue contained little or no literary or artistic merit. They were merely a device to enable Bruce to exploit the use of obscene language." I see no reason to reverse these findings and would, as urged by the district attorney, affirm.