HIGH COURT OF AUSTRALIA

The King

Vs.

Nicholls

(Griffith C.J., Barton and O'Connor JJ.)

7th June 1911

Griffith C.J.

This motion asks for the committal of the respondent for his contempt of this Court or, in the alternative, for his contempt of the Commonwealth Court of Conciliation and Arbitration, in respect of the publication of an article in the Hobart *Mercury* of 7th April. The article is of some length. The text of it is an episode alleged to have taken place in the Arbitration Court of which my brother *Higgins* is the President. Whether it is a correct report or not we do not know. That was the subject matter. The article was prefaced by the heading "A Modest Judge," and began:—"Mr. Justice Higgins is, we believe, a political Judge, that is, he was appointed because he had well served a political party. He, moreover, seems to know his position, and does not mean to allow any reflections on those to whom he may be said to be indebted for his judgeship." The article went on to refer to an episode in which it is suggested that he said that counsel was not entitled to speak disrespectfully of "those above us," and to discuss the question whether the learned Judge meant by the words "those above us" the Government, or the Broken Hill Unions, or the labour organization, or what is called the "caucus." So that the subject of the article was a reference which the learned Judge had made to "those above us"—if he said it—whatever that may mean, and which the writer took to mean the Government or the "caucus." If the application which we have to deal with was in reference to that comment, and the question were whether that comment was calculated to bring the Arbitration Court into contempt, it would be necessary to consider the whole of the article carefully. But that part of the motion is not pressed. Possibly the Attorney-General saw the difficulty of contending that this Court and the Arbitration Court are the same. The application is now limited to the two introductory sentences I have read.

The proposition upon which Mr. *Weigall* relied is that any publication calculated to bring a Judge into contempt or to lower his authority is a contempt of the Court. He says that *Higgins* J. is a Judge of the High Court, that this publication is calculated to bring him into contempt or lower his authority, and, therefore, that the respondent is guilty of a contempt of the High Court. In my opinion this proposition cannot be supported in the large sense which is contended for. Mr. *Weigall* relies upon the language by Lord *Russell of Killowen*, C.J., in *Reg. v. Gray*[1] where he said:—"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke L.C. characterized as scandalizing a Court or a Judge. (In re Read and Huggonson), 12 Atk., 469, at p. 471.. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or

expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published."

With regard to what Lord *Hardwicke* L.C. characterized as "scandalizing a Court or a Judge" it was pointed out by my brother *O'Connor* that in *McLeod v. St. Aubyn*[3] Lord *Morris* stated that prosecutions for that class of contempt are practically obsolete in England. The article in question in *Reg. v. Gray*[4] was of a very gross character, and the case might very well have been put under the other heading. In one sense, no doubt, every defamatory publication concerning a Judge may be said to bring him into contempt as that term is used in the law of libel, but it does not follow that everything said of a Judge calculated to bring him into contempt in that sense amounts to contempt of Court. That distinction was pointed out by a Committee of the Privy Council to which the question was referred by the Secretary of State in 1892. The case is reported as *In the matter of a Special Reference from the Bahama Islands*[5]. In that case a man had, in a letter published in a newspaper, held up the Chief Justice of a Colony to public ridicule in the grossest manner, representing him as an utterly incompetent Judge, and a shirker of his work, and suggesting that it would be a providential thing if he were to die. The Board, consisting of eleven members of the Judicial Committee, did not give a formal judgment—it is not the practice in such cases to do so—but reported that the letter complained of, though it might have been made the subject of proceedings for libel, was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of Court. That is the question to be determined in this case. Are these two paragraphs which I have read calculated to obstruct or interfere with the course of justice in the High Court or the due administration of the law by the High Court? I think it is impossible to answer that question in the affirmative. The words taken by themselves are capable of an innocent meaning and, when taken in conjunction with the rest of the article, they clearly refer to an episode which took place in the Arbitration Court.

It is said by Mr. *Weigall* that they suggest a want of impartiality, but we do not find that in them, and I am not prepared to accede to the proposition that an imputation of want of impartiality to a Judge is necessarily a contempt of Court. On the contrary, I think that, if any Judge of this Court or of any other Court were to make a public utterance of such character as to be likely to impair the confidence of the public, or of suitors or any class of suitors in the impartiality of the Court in any matter likely to be brought before it, any public comment on such an utterance, if it were a fair comment, would, so far from being a contempt of Court, be for the public benefit, and would be entitled to similar protection to that which comment upon matters of public interest is entitled under the law of libel.

The only question for us to determine here is whether these words are calculated to obstruct or interfere with the course of justice or the due administration of the law in this Court. It being impossible to answer that question in the affirmative, no order should be made upon the motion.

The respondent has very properly expressed his regret for having used language which is said to be capable of being construed as disrespectful comment which he did not intend. He has very properly withdrawn any such imputation. But that, of course, does not render him guilty of an offence which he has not committed. The motion will be dismissed.

Motion dismissed.

Solicitor, for the Attorney-General, Charles Powers, Commonwealth Crown Solicitor.

Solicitors, for the respondent, Moule, Hamilton & Kiddle.

[1] (1900) 2 Q.B., 36, at p. 40.

[2] [1742] EngR 142; 2 Atk., 469, at p. 471.

[3] (1899) A.C., 549, at p. 561.

[4] (1900) 2 Q.B., 36.

[5] (1893) A.C., 138.

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