

HIGH COURT OF AUSTRALIA

Sickerdick

Vs.

Ashton Defendant, Respondent.

(Barton, Isaacs, Gavan Duffy and Rich JJ.)

26 September 1918

Barton J.

In this case the defendant was charged with having printed a publication, to wit, a pamphlet entitled "Peace," in which statements are made likely to prejudice the recruiting of His Majesty's Forces. At the outset two points were taken concerning the validity of the *War Precautions Act* and the Regulations made under that Act. It was first contended that the regulation was *ultra vires* of the [Constitution](#). As to this point I do not desire to say any more than that the case of *Farey v. Burvett*^[1] completely disposes of it. It is absurd to suggest that the defence power of the Commonwealth extends only so far as to authorize measures of defence within the territorial limits of the Commonwealth. The judgments in *Farey v. Burvett* cannot be read without seeing that cases are conceivable—indeed, will probably arise—in which this country must necessarily be defended beyond its boundaries, and in which effective defence would be quite impossible unless its Forces were sent beyond the seas.

As to the contention that the regulation in question is *ultra vires* of the *War Precautions Act* No. 39 of 1915, the argument really amounted to this: that if it were established that the regulation was not within the terms of some one of the paragraphs of sec. 4 (1) it was therefore not warranted at all. Sec. 4 (1) empowers the Governor-General in Council to make regulations "for securing the public safety and the defence of the Commonwealth." Then it specifies (without restricting the generality of that initial power) certain classes of cases in particular as coming, in the judgment of Parliament, within the purpose indicated. Pars. (a) to (f) comprise those classes. It must be borne in mind that the regulations sought to be authorized by that sub-section were regulations for "the public safety and the defence of the Commonwealth." Now, when we come to reg. 28 (1) we read: "No person shall, by word of mouth, or in writing, or in any newspaper, periodical, book, circular, or other printed publication ... (b) spread reports or make statements likely to prejudice the recruiting, training, discipline, or administration of any of His Majesty's Forces." Another regulation (see Statutory Rule No. 207 of 1917) prescribes that the printer or publisher of (*inter alia*) any printed publication in which a statement is spread or made in contravention of the principal regulation shall be guilty of an offence against the Act. The provision is palpably and essentially a regulation for securing the public safety and the defence of the Commonwealth. It would be a waste of words to say more for the purpose of showing that it is within the power granted.

Both of the preliminary objections therefore fail.

We have nothing to say as to the wisdom or otherwise of any regulation: that is a matter for the Legislature. We have said this on many occasions—it may as well be said once more—that any

objection to the propriety of any regulation is quite beside the question. This Court is not concerned with any such matters. It is concerned only with the question of legality. Questions of propriety and wisdom are for Parliament. The Court's duty is simply to consider the regulation and the evidence.

The root of the voluntary system is that it is open to the citizen to make his choice whether he will enlist or not. He is under no legal compulsion. It is for him to decide whether or not, by reason of the exigency of the occasion, or his love for his country, or the pressure on his conscience, it is his moral duty to enlist. If he is persuaded that the proper course is for the Empire to seek peace at once, he may assure himself that it is not his duty to aid in the prosecution of the War. It is the view of many that the War should be continued to a victorious end, on the ground that such a course is the only means of securing a just and lasting, as distinguished from a makeshift and precarious, peace; that thus and thus only can the Empire with its allies, and, indeed, humanity, be rendered safe. There are others who oppose and even deride this view, and urge immediate negotiation and the making of the best terms now possible. Looking at this pamphlet, that is the view of those who promote such a publication. Is this not calculated to dissuade men from thinking it to be their duty to enlist? The regulation is issued by the Executive, the authority appointed by the Act to make and issue it, on the view that recruiting is urgent and should not be impeded. Is the pamphlet or any part of it, when the whole is fairly read together, likely (*i.e.*, calculated, see *Catts v. Murdoch*^[2]) to prejudice recruiting? It is not for us to decide on the urgency of recruiting or whether it may be justly opposed. That is for the law-making authority. The Courts do not interfere to say that a law is just or unjust. It has been made law that recruiting must not be impeded, and that nothing shall be done which is likely to impede it. Is the pamphlet calculated to impede it; and, if so, is there any evidence the other way? The question rests on the construction of the pamphlet. There is no other evidence, and no evidence was called for the defence.

The pamphlet contains the following statements among others; and I may say there are other passages in it of the same character as those to which I shall refer. But it is enough if there is contained in the pamphlet any statement which, read fairly with its context, is likely to prejudice recruiting. Here is one passage:—"The awful fact is that if a sincere effort was made last year an honourable peace could have been secured, and all the bloodshed and misery that have occurred since would have been averted. Speaking at Maryborough on 18th October 1917 Senator Pearce said:—Germany wanted peace, and any one in Australia who talked peace to-day was playing the game of Germany. ... Senator Pearce, drawing his fat salary, preaches war, for, so long as the people keep their thoughts on war, so long will they neglect to have a reckoning with him and his bungling, incompetent crowd." That is a statement that the Minister of Defence desires to prolong the War so that the day of reckoning which awaits him with others at the hands of the electors may be postponed. That is a statement which should appear to any reasonable mind as being likely to prejudice recruiting. Here is another passage:—"We could have had peace last year, Senator Pearce said, but peace would not suit his book, so let the slaughter go on! ... There still remains many to be slaughtered, so let the slaughter go on." Well, that surely means that the Minister of Defence, who in the opinion of the writer is largely responsible for the prosecution of the War, desires the War to go on as long as there are still men to be slaughtered. No two opinions can be held as to this passage:—"What has the failure to talk and act peace during the last two years accomplished? Killing! more killing! What has the truculent demand that the war must continue brought about? Killing! more killing!" That means that killing will go on indefinitely unless peace is made soon, and that the responsibility lies with those who do not ask Germany for peace. The duty of defence against aggression is not hinted at either in this or any other passage of the pamphlet. It is written as if the Germans and their allies were the injured party and the fault that of Britain and her allies. Here again:—"The German people were ready for peace. In response, we preached war." That means that

the side of the writer's country was responsible for the continuance of the War, which we could bring to an end by accepting peace at the hands of the Germans. The direct implication is that we could have had a just peace by asking for it—unless it be suggested that the authors of this pamphlet were recommending that we should accept a peace neither just nor honourable. The pamphlet continues:—"Last year and the year before, after the terrible lesson they had, if honourable peace terms had been granted, the German people would have dealt with their military overlords as the Allies could never deal with them." Does that not mean that the Allies were unwilling to grant an honourable peace? "The German people believe that the Allies have left them no resource but to fight to the last, to keep on killing and being killed. That is the appalling situation brought about because we allowed the cry of Peace to be strangled." There the same thing is conveyed in other words. "The blood-guiltiness of the last couple of years does not all lie at Germany's door." What can this possibly mean except that at the door of the British Empire and its allies lies this awful guilt? and, if that is its meaning, then it implies that the British Empire has been guilty of conduct base to the very depth of turpitude, and how can it be doubted that such an implication against our country is not only calculated to prejudice recruiting, but, if it is believed, is certain to have that effect?

But it would be idle to prolong quotations from a publication of which the character and, if that were necessary to be proved, the intention are so palpable. As I have said, people are entitled to their opinion as to whether they ought to enlist or not, and as to whether there should be recruiting or not; but the law has said that they must not make statements which are likely to be prejudicial to recruiting.

The statements which I have read have a very obvious meaning, and I see nothing in the context to alter their meaning. The context, indeed, tends to accentuate it. The question is: Are these statements calculated to cause any who believe them to decide not to enlist? If so, they are likely to prejudice recruiting. I have no doubt in my mind as to the probable effect of such statements on the mind of a person who was considering the question as to whether he should or should not enlist. It is not to the purpose to consider what the respondent desired or intended to be the effect of his statements. The question is not whether he intended to prejudice recruiting, but whether he printed something containing statements likely, that is, calculated or tending, to prejudice recruiting. That question cannot be answered in the negative by any reasonable person. It may be enough for us to say that our view of the facts is that the thing printed is of such a kind. My opinion is not only that it is, but, further, that if the question of fact were left to a jury only one reasonable conclusion would be open to them.

The appeal must be allowed, and the order made absolute, with costs here and in the Court below.

My brother *Gavan Duffy* desires me to say that he concurs with the other members of the Bench in thinking that the point raised at the Bar by Mr. *Lazarus* as to the validity of the *War Precautions Act* under the [Constitution](#), or alternatively as to the validity of reg. 28 (1) (b) in relation to the *War Precautions Act* itself, cannot be supported.

Isaacs J.

Reg. 28 of the *War Precautions Regulations*, so far as material to this case, provides as follows: "No person shall ... in any ... circular, or other printed publication ... (b) ... make statements likely to prejudice the recruiting ... of any of His Majesty's Forces"; and "if any person contravenes this regulation, he shall be guilty of an offence against the Act." The respondent was prosecuted for

printing a pamphlet of which 10,000 were struck off, the contention of the prosecution being that it contained statements in contravention of the regulation. The Police Magistrate dismissed the information as he considered that it did not contain any statement likely to prejudice recruiting. This appeal is brought on the ground that the decision was wrong, inasmuch as the language of the pamphlet was clearly calculated to prejudice recruiting.

The respondent's contentions were: (1) that reg. 28 was *ultra vires* of the *War Precautions Act*; and (2) that, if the regulation was justified by the Act, the Act itself was *pro tanto* invalid as being beyond the constitutional power of defence—the contention being that the power of defence does not extend beyond the limits of Australia; and (3) that the Magistrate's decision was right, and should be sustained.

As to the regulation in relation to the Act, it is provided by sec. 4 of the *War Precautions Act* (No. 2) 1915 that all regulations made prior to that Act, purporting to be regulations under the Principal Act, shall be deemed, as from the date of the making thereof, to be of equal validity as if they had been enacted in the Principal Act. The first objection, therefore, must fail.

As to the Act itself, the objection has no merit. It is absurd to limit the effectual defence of Australia or any country to operations on its own territory. Imagine the Navy confined to the three mile limit!

It comes down to a question of fact as to whether the pamphlet contains any statement likely to prejudice recruiting. That is determined one way or the other by the mere reading of the document. I have nothing to do as a Judge with the policy of the regulation: I have only to interpret it, applying the facts so as to see if the regulation was contravened. To determine this question I have to ask myself what effect the pamphlet would have on a man who was deliberating whether he would or would not enlist. There are men who are moved to enter the ranks only if convinced of the justice of our cause. This war is a gigantic struggle for ideals; for irreconcilable ideals. The German ideal is world mastery, and its ideal method of attaining its end is terrorism, inspired by ruthless and cynical disregard of all human rights and sufferings and of all national honour. We are fighting for the ideal of a world in which every nation can call its soul its own, and where all people on earth may pursue their lives in peaceful development; and when that ideal is secured we shall gladly welcome peace. This pamphlet—whatever it means in other portions—does in one portion depreciate our present conduct and policy in relation to the War; it attributes to us blood-guiltiness; it elevates Germany as a country seeking peace, without adding to the statement the only terms on which the enemy will at present have it. Such statements must, in all human reason, weigh in the mind of such a man as I have mentioned, when he is deliberating whether he will enlist or not. It follows that the finding of the Police Magistrate cannot be supported, and the appeal must be allowed.

Rich J.

The question raised by my brother *Duffy* as to the nature and scope of the proceeding before us was not argued at the Bar, and, in the opinion I have formed of the facts, I find it unnecessary to pass upon it. A careful perusal of the pamphlet as a whole must lead anyone to the conclusion that there are statements in it which are likely to prejudice recruiting. I therefore consider that the Magistrate's finding was erroneous.

I agree that the constitutional point is untenable, and that reg. 28 (1) (b) is authorized by the *War Precautions Act*, sec. 4 (1) (i.).

Appeal allowed. Order of dismissal discharged. Case remitted to Court of Petty Sessions to be dealt with in accordance with judgment of this Court. Respondent to pay costs of appeal and £2 2s. costs of proceedings below.

Solicitor for the appellant, Gordon H. Castle, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, Mark Lazarus.

[1] [\[1916\] HCA 36; 21 C.L.R., 433.](#)

[2] [\[1917\] HCA 71; 24 C.L.R., 160.](#)

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