HIGH COURT OF AUSTRALIA

Bell

Vs.

Stewart

(Knox C.J., Isaacs, Gavan Duffy, Rich and Starke JJ.)

5 November 1920

Knox C.J.,

Gavan Duffy and Starke JJ.

Two informations were laid before the Court of Petty Sessions at Melbourne under the *Commonwealth Conciliation and Arbitration Act 1904-1918*, sec. 83, charging that the defendant, George Bell, was guilty of a wilful contempt of the Commonwealth Court of Conciliation and Arbitration in printing and publishing in the *Argus* newspaper certain words, and that he did by writing published in the *Argus* newspaper use words calculated to bring the said Court into disrepute. The words were as follows:—"Mr. Justice Higgins is not satisfied that slowing down is practised in industry. Several employers are quite satisfied that it is practised, and corroborative evidence of the employers' view could be found in the utterances of the militants among the unionists. The lack of judicial knowledge of facts well known to the parties is not unknown in cases outside industrial matters, and, although the Court can take no cognizance of notorious facts, there is nothing in the law to forbid the public from feeling amused at this display of innocence from the Bench. A contractor who knows a great deal about bricklaying furnished in Sydney recently precise figures as to the number of bricks laid each day now compared with an earlier period. His evidence showed that the work had fallen by nearly 50 per cent. An employer in the Arbitration Court yesterday had emphatic opinions on the subject also. The detachment of the Arbitration Court from the facts of industrial life explains, in some measure, why industrial life is rapidly detaching itself from the Court." Bell is the printer and publisher of the newspaper. The Court of Petty Sessions convicted him on both informations, and inflicted a penalty.

The present proceedings come before this Court on appeal from the Petty Sessions by means of orders *nisi* to review pursuant to the provisions of the Constitution, sec. 73, and the Appellate Rules of this Court, Sec. IV., relating to appeals from the decisions of inferior Courts.

It is unnecessary to determine, in the present case, whether both convictions can be supported for the publication of the same words. It may be that all the ihibitions contained in sec. 83 are but different statements of the same offence, viz., contempt of the Court. But it is desirable before dealing with the substance of the case to dispose of one argument put forward on behalf of the informant. It was said that this Court could only deal with this case on the same conditions as are prescribed by the law of the State for bringing appeals from the Court of Petty Sessions to the Supreme Court in like matters (Appeal Rules, Sec. IV., rule 1). And it was suggested that, on orders *nisi* to review orders made by Courts of Petty Sessions, the Supreme Court would not, on appeals on questions of fact, reconsider the evidence and give its own independent judgment, but would uphold

the decision of the Court below if the decision were such as a reasonable man might give. The argument is based upon a misunderstanding of the Appellate Rules. The right of appeal is given by the Constitution, and the Appellate Rules do not limit that right, but merely regulate the procedure by which the appeal is brought. It follows that it is the duty of this Court in the present case to give its own judgment according to its own opinion in the same manner as on appeals from a Judge sitting without a jury (*Dearman v. Dearman*[1]).

Coming, therefore, to the substance of the matter, the question is whether the publication contravenes the provisions of sec. 83. The section is, so far as material, in the following words: "No person shall wilfully ... by writing or speech use words calculated ... to bring the Court into disrepute, or be guilty in any manner of any wilful contempt of the Court." For the appellant it was urged that in order to secure a conviction it must be shown that he was aware that the newspaper which he published contained the words complained of. The argument is, of course, based upon the use of the words "wilfully" and "wilful" in sec. 83, but it is not necessary to consider the state of Bell's mind in this particular case. The main argument was that the words published could not, in the mind of any reasonable man, bring the Court into disrepute, or, to use synonyms, disesteem, discredit, disgrace or dishonour, or be regarded as a contempt of the Court. And this argument is right. The section is not based on "any exaggerated notion of the dignity of individuals," nor is it intended to stifle criticism; but it is designed for the protection of the public, and to ensure that the due administration of the arbitration law shall not be obstructed or interfered with, and that proper decency and decorum shall be preserved in the Court (*cf. In re Johnson*[2], per *Bowen* L.J.; *Hunt v. Clarke*[3]; *R. v. Payne*[4]; *Bahama Islands' Case*[5]). It is ridiculous to suppose that the arbitration law was, or could, in the hands of the President, be, in any way obstructed or interfered with by the published words. So the case must rest upon the words being calculated to lessen or discredit the authority or prestige of the Court in the minds of reasonable people. No reasonable man could attribute any charge of "false play" or injustice to the learned President on the words used. The words assume, rightly or wrongly, that "slowing down" is notoriously practised in industry, and satirical comments are then made upon the refusal of judicial officers, and in particular the learned President of the Arbitration Court, following the accepted practice of all British Courts, to assume any facts of their own personal knowledge, with some special exceptions, without due proof. It is difficult indeed to believe that any such comment would sap or undermine the authority of any Court in the mind of any reasonable person. Indeed, amongst reasoning men, we believe that the practice of the Court would rather be supported and seen to be well calculated to ensure a proper and just administration of the law free from the prejudices or want of knowledge of any particular officer.

The orders *nisi* must be made absolute, the convictions set aside, and the informant must pay the costs both here and below.

Isaacs and Rich JJ. (delivered by Isaacs J.).

We agree in the conclusion that these appeals should be allowed, but not altogether for the same reasons.

The contention that the only duty of this Court on an order to review in Victoria is to determine, not whether the judgment appealed from was right, but whether the Court appealed from could reasonably arrive at its conclusions, is really not arguable (see *Prentice's Case*[6] and *London Bank of Australia v. Kendall*[7]).

Regarding the appeals themselves, there is, in our opinion, a great distinction between them.

The conviction for wilfully using words calculated to bring the Court of Conciliation and Arbitration into disrepute cannot be sustained, because, whatever be the force of the word "wilfully" in that connection, there are no words which could reasonably be construed to have the necessary meaning. Words calculated to bring a Court into disrepute are words imputing to it, not erroneous judgments or a mistaken view of the subject it deals with, but, as in the case of individuals, conduct or character that, if true, would forfeit the respect of the community. So far, we are in substantial accord with the rest of our learned brethren.

But, in dealing with the second charge, we feel compelled to approach the matter differently, because it appears to us to involve the general question—so important to the administration of justice—as to how far it is permissible to comment publicly on pending litigation. We are of opinion that this part of the case turns both on the word "wilful" as to its meaning and legal effect in the first place, and as to how far the evidence supports it in the second, and also on what is the proper test to guide the Court in determining whether published references to pending litigation constitute a contempt or not. In order to make our meaning clear as to the first point, it is necessary to observe how the word "wilfully" and its corresponding adjective "wilful" dominate the section. The whole of the subject matter dealt with by the section is what is ordinarily understood as "contempt." and sub-sec. 2 preserves what the Legislature intended to be the common law power of the "Court" as to contempt, that is, contempt *simpliciter*, not necessarily "wilful contempt." But in creating a new statutory offence and conferring upon Courts of Petty Sessions and similar tribunals jurisdiction to punish it, the Legislature specifically insisted that the offence must be "wilful." A mere technical contempt which the new Court of Record—as it was understood to be—administered by a High Court Justice, whose decisions were to be without appeal, was left to deal with, was not treated as an offence to be decided and punished by Courts of Petty Sessions. It is clear to our minds that the word "wilfully" does more than negative "accidentally" or "unconsciously." The Legislature was, of course, not simply excluding acts done in sleep or hypnosis or under compulsion. To speak of a person "wilfully insulting or disturbing the Court" means that he intended to insult or disturb the Court, and not in the sense that his volition impelled the word or the act, but that his purpose was that his word or his act should have the effect of conveying the insult or causing the disturbance. And similarly with all the matters governed by the word "wilfully." Then comes that portion of the section referring to contempt. As to that, the section reads thus: "No person shall ... be guilty in any manner of any wilful contempt of the Court."

We have referred to the fact that the section observes a distinction between "contempt" and "wilful contempt." Decided cases are numerous where that distinction is emphasized by Courts. One instance is *Mungean v. Wheatley*[8], per *Parke, Alderson* and *Martin* BB. Another is *In re Martindale*[9], a case of publication, per *North* J. At p. 201 the learned Judge says: "In the present case I do not believe that any contempt of Court was intended, though this in itself would be no excuse for contempt actually committed." At p. 203 he indicates what he means by using the phrase "a deliberate contempt." A third instance is *R. v. Daye*[10], per Lord *Alverstone* C.J. We then have to see whether the words published are—apart from the word "wilful"—such as amount in the circumstances to a "contempt," that is, in law, a technical contempt such as the Supreme Court or this Court would have jurisdiction to deal with as such, however it might in the circumstances think fit to exercise its discretion. As pointed out in *Halsbury's Laws of England*, vol. *vii.*, at p. 280, "contempt of Court is either (1) criminal contempt, consisting in words or acts obstructing, or tending to obstruct, the administration of justice, or (2) contempt in procedure, consisting in disobedience to the judgments, orders, or other process of the Court, and involving a private injury."

The second class is irrelevant here, except that deliberate disobedience of a judgment resembles the first class, because, as *Lindley* L.J. says in *Seaward v. Paterson*[11], it becomes a matter of public interest that the Court's authority shall be enforced.

The first class—criminal contempt—may arise in various ways, as by contempt in the face of the Court, or obstructing its officers or the parties or witnesses, or (among other instances) what the Privy Council, in *McLeod v. St. Aubyn*[12], calls "comments on cases pending in the Courts," specially relevant to this case. The only justification for the summary process of a Court punishing a person for contempt is to protect the public by guarding the administration of justice from any obstruction or interference which might affect its purity, its impartiality or its effectiveness. It is not the personal feelings of the Judge that are to be regarded, nor is it even the dignity of the Court that is a proper subject of solicitude: it is the public welfare only, and that is to be sought in maintaining the proper administration of justice. Modern conditions have—as the Privy Council said in the case referred to—rendered obsolete in England the summary procedure of the Court for that species of contempt which consists in "scandalizing it." We do not say that occasions may not occur where even in that case the jurisdiction may properly be exercised, because, as the same tribunal said in the Indian case of *Sashi Bhushan Sarbadhicary in 1906*[13], "it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity." But the occasions would be exceptional. And that is because usually that species of contempt—for it is a contempt, as is said in the last mentioned case—is primarily abuse only from which the good sense of the community is ordinarily a sufficient safeguard, and, such contempt not touching any pending proceeding, its effect on the administration of justice must generally be remote.

Contempts by comments on cases pending in the Courts stand in a totally different position. They are included in the contempts which Lord *Hardwicke* L.C., in the *St. James Evening Post Case*[14], describes as those "prejudicing mankind against persons before the cause is heard." This class of contempt must of necessity be jealously watched by any Court that desires to maintain evenly the balance of justice between the parties. It is not obsolete, and never can be while justice is to prevail.

Many cases were cited to us, but several were irrelevant because they related only to the other species of contempt or to the circumstances in which the Court would exercise its power. The case of *Hunt v. Clarke*[15] is the leading case of the law as to this branch of contempt. There, while a civil action for misrepresentation as to companies was pending and the trial approaching, a newspaper article appeared. A motion was made by one of the parties to commit the publisher for contempt. The primary Court (*Mathew* and *Grantham* JJ.) dismissed the motion on the ground that, although the article made some observations adverse to the party moving, there was no contempt in the article inasmuch as it was not likely to influence the Judge or jury. There was an appeal, which came before *Cotton, Fry* and *Lopes* L.JJ. They dismissed the appeal, but on a different ground. They held that the article was technically a contempt because it had a *tendency* to prejudice the party, whether in the actual circumstances it was likely to do so or not. But as in the circumstances they also thought it was "not likely to cause any substantial prejudice to the party in the conduct of the action or to the due administration of justice"[16], they dismissed the appeal. After pointing out that these were two distinct questions, *Cotton* L.J. said[17]: "In my opinion, it does technically become a contempt if pending a cause, or before a cause even has begun, any observations are made or published to the world which tend in any way to prejudice the parties in the case, and it may be that in such a case whoever is guilty of such an act would be liable to be committed." That established the technical offence, and gave the Court a right to interfere if it thought fit. But then came the question whether the *party* had any substantial right to invoke the Court's interference in his own

interests. As to that, the Lord Justice said: "I express my opinion that if a thing is done wilfully which really will prejudice the parties to the cause before it comes on, I should not hesitate to commit to prison any one who so offended, but, of course, that jurisdiction by the Court is one which is only to be exercised in extreme cases." Where the act is wilful and the party clearly *will* be prejudiced, that is the extreme case. But *Cotton* L.J. also recognized in the following observations the cases of an intermediate character. He said: "No doubt there may very well be observations made of such a character as that not only would they be technically a contempt, but such as that the Court, in order to secure causes being properly tried before it, ought to interfere." Observe the word "secure." He continues:—"If any one discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the Court should come to the conclusion that a Judge or a jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct." That is, if, besides having the "tendency" which constitutes it a technical contempt, the publication is of such a character as makes it "calculated," that is, "likely," to prejudice the defendant, the Court does interfere, and according to the circumstances awards a remedy. It may be observed in passing that his view is followed in *R. v. Payne*[18] and *Higgins v. Richards*[19]. Then *Cotton* L.J. proceeded to apply these principles he had stated to the case before him in these words[20]: "In my opinion, although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the Court in interfering by this summary and arbitrary process." The other Lords Justices delivered opinions in accordance. In *R. v. Davies*[21] *Wills* J. (for the Court) said, quoting from a previous case: "The reason why the publication of articles like those with which we have to deal" (*i.e.*, comments on pending cases) "is treated as a contempt of Court is because their tendency and sometimes their object is to deprive the Court of the power of doing that which is the end for which it exists—namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it."

As to the effect of the word "tendency," that is fully established judicially both by the evident meaning of the judgments quoted, and by decisions on another branch of the law—unlawful contracts.

In *Egerton v. Brownlow*[22] Lord *Lyndhurst* said:—"Any contract or engagement having a tendency, however slight, to affect the administration of justice, is illegal and void. The character of the Judge, however upright and pure, does not vary the case." In *Horne v. Barber*[23] the learned Chief Justice, for himself and our brother *Gavan Duffy*, said of a contract relating to a member of Parliament, and quoting Lord *Truro* in the House of Lords, "the law in such a case looks not to the probability of public mischief occurring in the particular instance, but to the general tendency of the transaction"; and also quoting these words of Lord *Lyndhurst*, "the tendency is alone to be considered, and unless the possibility is so remote as to justify us in affirming that there is no tendency at all, the point is conceded."

The tendency of an article, therefore, means that the *nature* of it—as distinct from its actual or even probable force in the specific circumstances—is such that prejudice *might result*.

We summarize the law thus: (1) A publication referring to pending litigation is a technical contempt if it is one having *a tendency* to influence the result—this gives the Court jurisdiction to interfere; (2) the Court will not exercise its summary power of interference at the instance of a party unless,

besides the tendency, the publication is *likely* to influence the result; (3) the Court adapts and proportions its remedy to the circumstances, wilfulness being for this purpose important, and imprisonment is reserved for extreme cases only.

Now, to apply the law to the facts of this case in order to ascertain whether there was the objectionable tendency in the article complained of:—The article complained of was published on 16th April 1920. An arbitration had been for some days proceeding, and was still proceeding, before the Court of Conciliation and Arbitration before *Higgins* J. in which the Australian Timber Workers' Association was claiming from the employers (*inter alia*) that "the week's work shall consist of forty-four hours for all wage-earners and pieceworkers." On 15th April a discussion took place in Court as to whether in fact there was any "slowing down." So far as one legal representative of the respondents was concerned, he, for certain reasons, abandoned the suggestion that there was "slowing down." But the question still remained, and evidence was taken on the subject, and, to put it shortly, that question was still one of the matters, and apparently a very important matter, to be considered and dealt with by the Court in fixing the terms of the award as to the number of hours of work. There is no room for debate as to the duty of the arbitrator under the Act. He is not bound to take strictly legal evidence: he may inform his mind as he thinks best, by witnesses on oath or in any other way he considers reliable and informative (sec. 25). His objective is to make an award just to both parties and the community. Whether the question of "slowing down" was insisted on by a party or not, if the Court thought it existed it could not exclude the matter from its consideration. That question, therefore, was still clearly one for his determination, a matter to be considered, possibly proved or disproved by witnesses, and decided, just as much as the guilt of a prisoner on trial or the rights of a plaintiff or defendant in an ordinary pending litigation. In one respect it concerned the community much more than any ordinary individual proceeding could concern it. It directly concerned from their individual standpoint the interests of a large number of the actual litigants in different States, and it concerned—as all such cases must concern—the community at large, whose interest it is to have industrial services continue uninterrupted but on fair terms. The Judge of the arbitration tribunal cannot have recourse to any fixed standards to which he can cling and justify his action as other Judges can: it is his discretion and his conscience which must guide him, and these are not examinable, nor are his decisions open to appeal.

Clearly the pending case was one where the public tribunal ought to have been left uninfluenced by outside pressure or suggestion or ridicule. A Judge is only human, and may, particularly in the position of an arbitration Judge, even unconsciously, be affected by public statements as to alleged "notorious facts." It is the right of the parties to have the judgment of the arbitrator unswayed irregularly by newspaper or other outside comments, the publishers by such comments constituting themselves unsworn witnesses, without being subject to cross-examination. It is the right of the public to maintain in its full usefulness the tribunal it has set up for its own purposes, and that usefulness cannot be maintained if newspaper discussion as to the merits of pending cases can be entered upon and yet be considered negligible.

It was with reference to litigation thus pending and to the tribunal thus constituted that the article complained of appeared. It referred to the fact that *Higgins* J. was not "satisfied" as to the slowing down; it stated that several employers were quite "satisfied" that it is practised, and that some utterances of unionists corroborated the employers. It referred to the attitude of *Higgins* J. as "innocence"; it stated that a Sydney contractor had given specific information on the subject showing a falling off of nearly 50 per cent, of work in bricklaying, and it referred to the evidence of an employer's representative of the day before in the Arbitration Court in the very proceedings. Then it wound up with a statement as to what it termed "the detachment of the Arbitration Court

from the facts of industrial life."

A distinguished Victorian Judge (*Holroyd* J.), in *In re Syme; Ex parte Worthington*[24], said of procedure for contempt that it was "a short, sharp, and prompt remedy, necessary for the fair administration of justice, to check all interference from outside, whether in the form of advice or menace or suggestion, with the members of the tribunal to which the decision has been by law entrusted." With that statement we entirely agree, and we ask ourselves how can it be doubted that the article we are considering was technically a contempt—how can it be doubted that it had a "tendency" to weigh with the Judge and with witnesses who might be called to state their opinion on the subject. Witnesses for the employer might easily find themselves more emphatic than they otherwise would have been. Witnesses for the employees might as easily hesitate to state their views as confidently as they otherwise would. Intending witnesses might be deterred altogether. Whether that would happen we cannot tell; it might reasonably occur, and that determines the "tendency." Test the matter. Suppose a private letter in those terms had been written to the Judge or to witnesses: could it have been said it had not the necessary "tendency"? And is it any the less of that tendency because it is published by the thousand to the Judge and all who may be witnesses, as well as to the general public? We cannot think so, and we are of opinion that, if it were a case of a superior Court having to deal with it as an alleged contempt, the Court would be bound to say, as the Court of Appeal said in *Hunt v. Clarke*[25], that there was technically a contempt.

But there remains in the present instance a further necessary question. The Court of Petty Sessions has no jurisdiction unless the contempt is more than technical, and more even than "calculated" to prejudice a party: it must be "wilful." We think the circumstances appearing are not sufficient to support the belief that it was. The publisher of a newspaper must accept the full responsibility, the proprietors may, if they think right; or the writer, whoever he may be, may think it right to admit personal responsibility. But the publisher cannot escape it. Treating him, in the absence of evidence to the contrary, as fully controlling the actual publication and therefore as responsible as if he were the actual writer, but, at the same time, having regard to the doctrines of reasonable doubt in the case of an accused person, we think on the whole the article, notwithstanding its tendency and possible effect, indicates that the *intention* was, not to influence the decision in that particular case, but to combat from a general standpoint the notion that "slowing down" does not take place, and to rebuke by attempted irony the so-called "innocence" of the learned Judge who presided, because he did not take judicial notice of what the writer thought was a notorious fact. The language does not indicate to us a suggestion that the particular case should be decided that way so much as a general statement as to "slowing down" of industry and a criticism of the Court and its methods illustrated by that asserted instance. We are far from saying that the Police Magistrate acted unreasonably in arriving at his conclusion on this charge. But, having to form our own opinion, we think that the defendant, in publishing the article, was not, in the words of the Act, "guilty of wilful contempt."

On this ground only we concur in allowing the appeal, but without costs.

Appeal allowed. Conviction set aside. Respondent to pay costs of appeal and in Court of Petty Sessions.

Solicitors for the appellant, Blake & Riggall.

Solicitors for the respondent, Gordon H. Castle, Crown Solicitor for the Commonwealth.

[1] [1908] HCA 84; 7 C.L.R., 549.

[2] 20 Q.B.D., 68, at p. 74.

[3] 58 L.J. Q.B., 490.

[4] (1896) 1 Q.B., 577.

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

[6] 15 C.L.R., at p. 238.

[7] Ante, 401, at pp. 406 et seqq.

[8] [1851] EngR 195; 6 Ex., 88, at pp. 100, 101, 102.

[9] (1894) 3 Ch., 193.

[10] (1908) 2 K.B., 333, at p. 339.

[11] (1897) 1 Ch., 545, at p. 556.

[12] (1899) A.C., at p. 561.

[13] 29 All., at p. 108; 23 T.L.R., at p. 182.

[14] [1742] EngR 142; 2 Atk., 469, at p. 471.

[15] 58 L.J. Q.B., 490.

[16] 58 L.J. Q.B., per Cotton L.J., at p. 492.

[17] 58 L.J. Q.B., at pp. 491-492.

[18] (1896) 1 Q.B., 577.

[19] 28 T.L.R., 202.

[20] 58 L.J. Q.B., at p. 493.

[21] (1906) 1 K.B., 1, at p. 163.

[22] [1853] EngR 885; 4 H.L.C., 1, at p. 163.

[23] [1920] HCA 33; 27 C.L.R., 494, at p. 499.

[24] 28 V.L.R., 552, at p. 556; 24 A.L.T., 123, at p. 124.

[25] 58 L.J. Q.B., 490.

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