

# HIGH COURT OF AUSTRALIA

King

Vs.

Martin

(Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.)

19 December 1939

Latham C.J.

I propose to say very little indeed in relation to this appeal. In the case of *R. v. Connare; Ex parte Wawn*[1] I have expressed my opinion upon all matters which have been argued, and my reasons for judgment in that case may be regarded as expressing my view in the present case. Consistently with those views I think that the appeal should be allowed. I desire to say that in any event I would not be prepared to give costs to an intervener.

Rich J.

I adhere to what I said in *Connare's Case*[2]. I would not allow costs to the intervener.

Starke J.

*Connare's Case*[3] governs this case. No costs should be allowed to the intervener.

Dixon J.

In *R. v. Connare; Ex parte Wawn*[4] I limited the grounds of my decision to two considerations which arose upon the facts of the case and in combination appeared to me sufficient to support the conclusion. Those considerations were, first, that the actual transaction then in question was not of an inter-State character, and, second, that, apart from the State lottery and permitted charitable raffles, the legislation suppressed uniformly the sale in New South Wales of all lottery tickets. My decision does not, I think, necessarily govern the present case, where the facts have been carefully chosen because the transaction made the subject of the prosecution is of an inter-State character. The offence now charged is accepting money in respect of the purchase of a ticket in a foreign lottery. The money was accepted for transmission to another State, Tasmania, whence the lottery ticket was to be sent. To entrust money to an agent in New South Wales for transmission to another State for the purpose of obtaining an instrument or contract to be transmitted thence into New South Wales appears to me to be a transaction of an inter-State character. Accordingly, in the present case, one of the two matters disappears which I thought combined in *R. v. Connare; Ex parte Wawn*[5] to support the conclusion that the defendant was properly convicted of offering for sale in Sydney a ticket in a foreign lottery. But I begin the consideration of the present case with the second proposition upon which I then relied, namely, that the *Lotteries and Art Unions Act 1901-1929* N.S.W. suppresses uniformly throughout the State lotteries and lottery transactions whether domestic or foreign, subject to the exception in favour of the State lottery and of permitted raffles for charity. In saying this I do not overlook the difference in the amount of the maximum penalties named in the different

sections. The discrepancy is not great, and when the content of the law is uniform I do not think that an insubstantial variation in the sanctions imposed for breaches of different parts of the law is enough to work a discrimination.

Treating the law, subject to the two specific exceptions, as a uniform or undiscriminating suppression of lotteries, I am of opinion, notwithstanding the inter-State character of the transaction, that sec. 21 of the *Lotteries and Art Unions Act* validly operates to forbid the transaction and make it penal. The reason for my opinion is that the application of the law does not depend upon any characteristic of lotteries or lottery transactions in virtue of which they are trade or commerce or intercourse nor upon any inter-State element in their nature. The only criterion of its operation is the aleatory description of the acts which it forbids. There is no prohibition or restraint placed upon any act in connection with a lottery because either the act or the lottery is or involves commerce or trade or intercourse or movement into or out of New South Wales or communication between that State and another State. When [sec. 92](#) of the [Constitution](#) says that trade, commerce and intercourse among the States shall be absolutely free it describes human activities in a specific aspect. It singles out attributes which acts or transactions may wear and makes the freedom which it confers depend upon those attributes. When a constitutional provision takes given attributes or characteristics as a description of a form of activity or transaction and under that description says it shall be free, I should understand it as meaning that the possession of those characteristics or attributes must not be burdened or restricted. To say that inter-State trade, commerce and intercourse shall be free, means, I think, that no restraint or burden shall be placed upon an act falling under that description because it is trade or commerce or intercourse or involves inter-State movement or communication. I believe that I am at liberty in the present case to give effect to this view because the conclusion to which it leads is not inconsistent with any previous decision of the court and, as I understand, no one sees any objection to my acting upon my own opinion. If, as I think, [sec. 92](#) gives no protection to a transaction against a law the application of which is independent of any characteristic which enters into the description of trade, of commerce or of intercourse and of any element of inter-State movement or communication, then it appears to me to follow that sec. 21 of the *Lotteries and Art Unions Act* has a valid operation. For the criterion of its application is the specific gambling nature of the transactions which it penalizes, and not anything which brings them under the description of trade, of commerce or of intercourse or makes them inter-State in their nature.

For these reasons I think that the appeal should be dismissed.

We are not, I believe, in a position to give costs to the intervener, little as I wish to discourage intervention in such cases as this.

Evatt J.

This case is governed in principle by the case of *R. v. Connare; Ex parte Wawn*[\[6\]](#). I need repeat only one sentence from the judgment I delivered in that case: "I am of opinion that the guarantee contained in sec. 92 has nothing whatever to say on the topic of inter-State lotteries and cannot be invoked to prevent either the suppression or the restriction in the public interest of the practice of gambling or investing in such lotteries"[\[7\]](#). This broad principle completely covers this case. The headnote to *R. v. Connare; Ex parte Wawn*[\[8\]](#) correctly expresses the decision.

With regard to costs, I regret that the court cannot order them to be paid by the appellant, because I am of opinion that the prosecution has been organized and the criminal law invoked by arrangement between the prosecutor and the appellant. (I say nothing whatever about their legal advisers.) In the

present case, as in the case of *Wawn* decided in May last, the prosecution has again failed to endeavour to support the conviction he obtained at the police court. But for the intervention of the State of New South Wales, the result would have been that on both occasions the appellant would have been able to present an argument to this court without the disadvantage of having anyone to answer it. It is for these reasons I regret we cannot order costs in favour of the intervener and against the appellant.

The appeal should be dismissed.

McTiernan J.

I think the case is governed by the reasons I gave for my judgment in the case of *R. v. Connare; Ex parte Wawn*<sup>[9]</sup>.

There should be no order for the payment of the intervener's costs, but I should add that the State of New South Wales acted properly in applying to intervene in this case.

Appeal dismissed. Order *nisi* discharged. No order as to intervener's costs.

Solicitors for the appellant, T. T. Henery & Co.

Solicitor for the State of New South Wales (intervening), J. E. Clark, Crown Solicitor for New South Wales.

[1] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[2] (1939) 61 C.L.R., at pp. 612, 613.

[3] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[4] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[5] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[6] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[7] (1939) 61 C.L.R., at p. 621.

[8] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

[9] [\[1939\] HCA 18; \(1939\) 61 C.L.R. 596.](#)

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