

[HIGH COURT OF AUSTRALIA.]

ROSS APPELLANT ;

DEFENDANT,

AND

SICKERDICK RESPONDENT.

COMPLAINANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF
VICTORIA.

War Precautions—Regulations—Publication of matter relating to the War—Mens
rea—Construction—Ejusdem generis—War Precautions Act 1914-1916 (No. 10
of 1914—No. 3 of 1916), secs. 4, 6, 7—War Precautions Regulations 1915,
reg. 28A (Statutory Rules 1916, No. 48).

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MELBOURNE,
Oct. 24.

Reg. 28A of the *War Precautions Regulations* 1915 (as amended by Statutory Rules 1916, No. 48) provides that “(1) The Chief of the General Staff . . . may by order in writing require the editor or printer or publisher of any newspaper or periodical, or the author or printer or publisher of any matter intended to be printed and published, to submit before publication to any person named in the order any matter (whether in manuscript or print) intended for publication which relates or refers to the present war or to any subject connected therewith or arising therefrom or to any of the subjects mentioned in reg. 19, or the publication of which would be an offence under reg. 28”; and that “(3) Any person who fails to comply with an order given under this regulation shall be guilty of an offence against the Act.”

Held, that the matters to which the regulation applies are not limited to matters *ejusdem generis* with the subjects mentioned in reg. 19 or reg. 28.

Held, also, that where a person has published matter which relates to the War it is not a defence to a prosecution for failure to comply with an order given under the regulation, that the defendant *bonâ fide* believed that the matter published did not come within the terms of the regulation.

Griffith C.J.,
Barton, Isaacs,
Gavan Duffy
and Rich JJ.

H. C. OF A. APPEAL from a Court of Petty Sessions of Victoria.

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At the Court of Petty Sessions at Melbourne an information was heard by which Frederick William Sickerdick charged that Robert Samuel Ross on or about 16th June 1916 "did fail to comply with a provision of reg. 28A made under the *War Precautions Act* 1914-1916, in that he being the editor of a certain newspaper, to wit, *The Socialist*, did fail to comply with an order in writing given to him on 17th April 1916 under the said regulation requiring him to submit before publication to Francis S. Newell, a person named in the said order, any matter (whether in manuscript or print) intended for publication in the said newspaper which relates or refers to the present war or to any subject connected therewith or arising therefrom or to any of the subjects mentioned in reg. 19, or the publication of which would be an offence under reg. 28 of the *War Precautions Regulations* 1915. The said defendant, being the editor of the said newspaper, failed to comply with the said order by failing to submit to the said Francis S. Newell before the publication thereof in the said newspaper on 16th June 1916 the matter or article headed 'R. S. Ross in Court.' "

Reg. 28A of the *War Precautions Regulations* 1915 (as amended by Statutory Rules 1916, No. 48) provides (*inter alia*) as follows:—
 "(1) The Chief of the General Staff . . . may by order in writing require the editor or printer or publisher of any newspaper or periodical, or the author or printer or publisher of any matter intended to be printed and published, to submit before publication to any person named in the order any matter (whether in manuscript or print) intended for publication which relates or refers to the present war or to any subject connected therewith or arising therefrom or to any of the subjects mentioned in reg. 19, or the publication of which would be an offence under reg. 28. . . .
 (3) Any person who fails to comply with an order given under this regulation shall be guilty of an offence against the Act."

It appeared that the defendant had, on a previous occasion, been charged with an offence against reg. 28A, when it was alleged that he had published certain matter to which the regulation applied without having first submitted it to the Censor. That complaint was dismissed. The matter or article headed "R. S. Ross in Court "

now complained of purported to be a report of the proceedings in the Court of Petty Sessions on that occasion, and contained a repetition of the matter then complained of. The defendant in his evidence said that the matter or article complained of was a fair and accurate report of the proceedings in the Court of Petty Sessions, that he had no intention of offending against the law, and that he did not believe that the publication of the article without submitting it to the Censor was forbidden by law.

The Magistrate convicted the defendant, but stated that he was clear that the offence was not deliberate.

From the conviction the defendant now appealed to the High Court by way of order to review.

Schutt (with him *Foster*), for the appellant. *Mens rea* is necessary to constitute an offence against reg. 28A, and it is a good defence to show that the defendant *bonâ fide* believed that the regulation did not apply to the particular matter published. Under sec. 6 of the *War Precautions Act* an offence against the Act is indictable, and the consequences of a conviction are very serious. Those considerations, and the provisions of sec. 7 as to aiding and abetting, show that *mens rea* is a necessary ingredient of the offence. See *R. v. Erson* (1); *R. v. Tolson* (2).

[GRIFFITH C.J. referred to *Sherras v. De Rutzen* (3).

ISAACS J. referred to *Bank of New South Wales v. Piper* (4).

RICH J. referred to *Coppen v. Moore* [No. 2] (5).]

Reg. 28A originally applied only to matter "which relates to any of the subjects mentioned in reg. 19, or the publication of which would be an offence under reg. 28." The insertion in the regulation of matter "which relates or refers to the present war or to any subject connected therewith or arising therefrom" while still retaining the original words, shows that the matter which relates to the present war, &c., must be matter *ejusdem generis* with that mentioned in regs. 19 and 28. Otherwise the retention of the original words is useless, for the matter they refer to is included in the newly added words.

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(1) (1914) V.L.R., 144; 35 A.L.T., 117.

(2) 23 Q.B.D., 168.

(3) (1895) 1 Q.B., 918, at p. 922.

(4) (1897) A.C., 383, at p. 389.

(5) (1898) 2 Q.B., 306, at p. 312.

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GRIFFITH C.J. This is an appeal from the conviction of the appellant on a charge that on or about 16th June 1916 he failed to comply with a provision of reg. 28A made under the *War Precautions Act* 1914-1916, in that he, being the editor of a certain newspaper, to wit, *The Socialist*, did fail to comply with an order in writing given to him on 17th April 1916 under the said regulation requiring him to submit before publication to a person named in the order any matter (whether in manuscript or print) intended for publication in the said newspaper which relates or refers to the present war or to any subject connected therewith or arising therefrom. All the facts alleged were proved. The appellant had previously been charged with publishing in a leaflet certain matter contrary to a similar regulation. He succeeded on that occasion on the ground that he was not proved to have published it. He thereupon deliberately published a report of the proceedings, and set out therein all the matter with the publication of which he had been previously charged. There is no doubt whatever that he published the matter alleged.

Two points have been taken. One is that reg. 28A did not cover such a case. There was previously in existence a regulation which might or might not have covered it. That regulation was apparently thought to be insufficient, and it was amended by inserting the words "which relates or refers to the present war or to any subject connected therewith or arising therefrom." The suggestion is that, those words having been inserted, the words "matter intended for publication" must be held to be limited to the subjects referred to in the regulation as it stood before amendment. The proposition answers itself. The other point taken is that a person who falls exactly within the terms of the regulation is not guilty unless something which is called *mens rea* is proved. Few expressions in the law have given rise to more confusion than *mens rea*. The real test is, as was pointed out by Lord Russell of Killowen C.J. in the case referred to by my brother Rich (*Coppen v. Moore* [No. 2] (1)), what was the intention of the Legislature? Did they intend to prohibit

the act under all circumstances? If they did, the question of *mens rea* does not arise. The only question then is: Did the accused person know what he was doing in fact? If he thought that what he did was lawful, that is a misapprehension of the law, and is no answer.

I have dealt with the matter at greater length than it deserves.

The appeal must be dismissed.

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BARTON J. Having regard to the nature of the Statute and its objects, to the effect of acts of the character prohibited, with what intent soever they may be done, and to the terms of the regulation which relates to the case, I cannot see how there can be any doubt that the mere commission of an act of this kind was intended to be subject to conviction and punishment. It is not necessary in this case to go any further.

ISAACS J. I agree that the appeal should be dismissed. The case is one which gives rise to very important questions of law both with direct relevance to precautions for the public safety and also with reference to the general common law principle that no one shall be convicted of a crime unless he has a guilty mind. Mr. *Schutt* has made the best of his case, and has presented his arguments with his customary care and clearness and with the firmness accompanied by the utmost deference for the Court which is always to be expected from members of the Bar. But the case, in my opinion, is hopeless. Mr. *Schutt's* principal point was that the appellant did not really think that the matter which he published was matter which ought not to be published without permission, having regard to reg. 28A. When that regulation is looked at, it appears to me that its very words cut away such an argument and for this reason:—The regulation says, amongst other things, that “any matter (whether in manuscript or print) intended for publication which relates or refers to the present war,” &c., must, before publication, be submitted to the Censor or proper officer authorized by him. What does that mean? It means that a person who intends to publish anything relating to the War is not to exercise his own judgment as to whether it ought to be published or not, and rest content with that. He is to submit the matter proposed

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to be published to the proper officer, and is to be controlled as to publication by the judgment of that officer; and, inasmuch as the regulation tells the intending publisher that he is not to depend on the exercise of his own judgment, it surely cannot be an answer to a charge that he did amply exercise his judgment and did come to the conclusion that the matter might be published. Seeing that that is the very thing which is struck at by the regulation, it seems to me hopeless to argue that the point taken can be a sufficient answer.

GAVAN DUFFY J. I agree with what has been said by my brother *Isaacs* as to the argument of Mr. *Schutt*, but he has failed to convince me. I think the appeal must be discharged.

RICH J. I agree. Mr. *Schutt* has argued the case with his usual clearness and conciseness, but, notwithstanding what he has urged, the case appears to me to fall amongst that class of cases "where, it being the object of the Legislature to forbid a particular act from being done at all, the Statute is so framed as to forbid the commission of the act absolutely, quite independently of any question of *mens rea*, and where consequently, however innocently the forbidden act is done, the person doing it must be convicted, although he had no *mens rea* at all": *Per Channell J. in Christie, Manson & Woods v. Cooper* (1).

Appeal dismissed with costs.

Solicitors for the appellant, *Loughrey & Douglas*.

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

B. L.