

Dist  
R v  
Thompson  
(1911) 38  
ACrimR 81

[HIGH COURT OF AUSTRALIA.]

McDONNELL

INFORMANT,

APPELLANT ;

AND

SMITH

DEFENDANT,

RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

War Precautions—Offence—Summary prosecution—Consent to prosecution, when to  
be obtained—War Precautions Act 1914-1916 (No. 10 of 1914—No. 3 of 1916),  
sec. 6.

H. C. OF A.  
1918.

Sec. 6 of the *War Precautions Act 1914-1916* provides, by sub-sec. 1, that any person who contravenes, or fails to comply with, any provision of any regulation or order made in pursuance of the Act shall be guilty of an offence against the Act ; by sub-sec. 2, that an offence against the Act may be prosecuted either summarily or upon indictment ; and by sub-sec. 3A, that an offence against the Act shall not be prosecuted summarily without the written consent of the Attorney-General or the Minister for Defence, or a person authorized in writing by the Attorney-General or the Minister for Defence, and that an offence against the Act shall not be prosecuted upon indictment except in the name of the Attorney-General.

SYDNEY,  
May 3.  
Barton,  
Gavan Duffy and  
Rich JJ.

*Held*, that the consent required by sub-sec. 3A must be obtained before a prosecution under the section is initiated, that is, before the information is laid.

Decision of the Supreme Court of New South Wales (*Ferguson J.*) : *Ex parte Smith*, 35 N.S.W.W.N., 54, affirmed.

APPEAL from the Supreme Court of New South Wales.  
On 21st December 1917 an information was laid by John Percy McDonnell against William Henry Smith under reg. 44 of the *War*



H. C. OF A. *Precautions (Military Service Referendum) Regulations* 1917 (Statutory Rules 1917, No. 290—No. 326), complaining that on 13th 1918.  
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 McDONNELL December 1917 he did at Candelo in the State of New South Wales, at a public meeting then and there being held in relation to the Referendum, wilfully disturb the said meeting. A summons was duly served upon the defendant to appear before a justice or justices on 14th January 1918. He appeared on that date before a Police Magistrate, but the hearing of the summons was adjourned until 11th February 1918, when, on the application of the informant, a further adjournment was granted to 19th February 1918 on the ground that certain documents necessary for the prosecution were not then in the informant's possession. On 19th February 1918 the defendant again appeared before the Magistrate and the matter came on for hearing, and it then appeared that the consent prescribed by sec. 6, sub-sec. 3A, of the *War Precautions Act* 1914-1916 had only been obtained on 14th February 1918. His solicitor moved that the information be dismissed on that ground, but the Magistrate convicted the respondent, and fined him £5 with 6s. costs, in default two months' hard labour, holding that the consent could be obtained at any time before the hearing. On 10th April 1918 the Supreme Court of New South Wales (*Ferguson J.*) granted a rule absolute directed to the informant and the Magistrate restraining them from further proceeding upon the conviction: *Ex parte Smith* (1).

From that decision the informant now, by special leave, appealed to the High Court.

*Knox K.C.* and *H. E. Manning*, for the appellant. Under the *War Precautions Act* it is open to the Crown to take proceedings summarily or by indictment. If the Crown elects to take proceedings by indictment, no consent is required before the presentation of the indictment, and the preliminary proceedings, if any, may be taken without any consent. The *Justices Act* 1902 (N.S.W.) provides that justices shall deal with matters summarily or by indictment. By sec. 80 of that Act, on hearing the parties and taking evidence, the justices are required to determine the whole matter, provided that if it appears to the justices to be a proper



case for indictment they may not proceed further, but must commit the accused for trial. Until the close of the prosecutor's case it is impossible to say whether the matter is to proceed summarily or by indictment. In the case of a preliminary inquiry the consent prescribed is unnecessary if eventually the prosecution is to be by way of indictment. That suggests that the consent need not in any case be obtained before the hearing.

[RICH J. The necessity for getting the prescribed consent to a prosecution is a check on irresponsible persons who might heatedly, although from patriotic motives, institute proceedings. The mischief aimed at by sub-sec. 3A is the harassing of people by frivolous prosecutions. Must not the initial stage of the proceeding be sanctioned by some responsible person? (He referred to *Thorpe v. Priestnall* (1); *Beardsley v. Giddings* (2); *Brooks v. Bagshaw* (3)).

[GAVAN DUFFY J. A prosecution begins as soon as the first step is taken, and continues until completion.]

The latest moment when consent may be given is immediately before the end of the hearing. The Legislature has, in sub-sec. 3A, departed from the usual phrase, "No prosecution shall be instituted without consent." See *Trading with the Enemy Act* 1914-1916, sec. 3 (6). The issue of a summons is a matter of procedure, and not a judicial exercise of jurisdiction (*Donohoe v. Chew Ying* (4)). The intention here was to prevent the exercise of any judicial jurisdiction without consent, not to prevent ministerial proceedings; otherwise a Special Magistrate or a Stipendiary or Police Magistrate would have to issue the summons, for jurisdiction cannot be judicially exercised except by a Special Magistrate or a Stipendiary or Police Magistrate (*Judiciary Act* 1903-1915, sec. 68 (3)).

*Blackett K.C.* and *Alec Thomson*, for the respondent. The prescribed consent not having been given, there was no jurisdiction. The consent must be given before the prosecution. The word "prosecuted" in sub-sec. 3A cannot be turned into "dealt with." See *Thorpe v. Priestnall* (1). Laying the information before the

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(1) (1897) 1 Q.B., 159.

(2) (1904) 1 K.B., 847.

(3) (1904) 2 K.B., 798, at p. 801.

(4) 16 C.L.R., 364.

H. C. OF A. Magistrate is the commencement of the prosecution. Three persons  
1918. are named who may give consents, and one of them should consider  
MCDONNELL the matter before proceedings are taken.

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PER CURIAM. This appeal must be dismissed. The cases mentioned by *Rich J.* are apposite. A difficulty in the way of the appellant is that if his argument is to prevail the words "prosecuted summarily" in sub-sec. 3A must be read as being equivalent to "dealt with." The Legislature when it said "prosecuted" did not mean "dealt with." What the Legislature has said means that a prosecution shall not be begun without the prescribed consent, and the prosecution is begun when the information is laid. The decision of *Ferguson J.* was right, and the appeal must be dismissed with costs.

*Appeal dismissed with costs.*

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

Solicitor for the respondent, *E. R. Abigail*.

C. A. W.