

[HIGH COURT OF AUSTRALIA.]

THE KING APPELLANT ;

AND

JUDD RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Criminal Law—Indictment—Attorney-General—Minister acting for or on behalf of*
1919.

SYDNEY,
April 28.

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

Attorney-General—Contrary intention—War Precautions Act 1914-1916 (No. 10 of 1914—No. 3 of 1916), sec. 6 (3A)—Acts Interpretation Act 1901-1918 (No. 2 of 1901—No. 8 of 1918), sec. 19—Judiciary Act 1903-1915 (No. 6 of 1903—No. 4 of 1915), sec. 69—Crimes Act 1914-1915 (No. 12 of 1914—No. 6 of 1915), sec. 13.

Sec. 6 (3A) of the *War Precautions Act 1914-1916* provides that an offence against the Act shall not be prosecuted upon indictment except in the name of the Attorney-General. Sec. 19 of the *Acts Interpretation Act 1901-1918* provides that where in any Act any Minister is referred to, such reference shall unless the contrary intention appears be deemed to include any Minister or member of the Executive Council for the time being acting for or on behalf of such Minister.

Held, that an offence against the *War Precautions Act* may be prosecuted on indictment in the name of the Minister for the time being acting for or on behalf of the Attorney-General.

Decision of the Supreme Court of New South Wales : *R. v. Judd*, 19 S.R. (N.S.W.), 59, reversed.

APPEAL from the Supreme Court of New South Wales.

On the trial of Edward Ernest Judd at the Central Criminal Court, Sydney, *Ferguson J.* stated a case for the opinion of the Full Court of the Supreme Court which, so far as is material, was as follows :—

1. The prisoner was arraigned before me in the Central Criminal Court at Sydney on 3rd December 1918 on an indictment containing three counts, each charging him with making statements likely to prejudice the recruiting of His Majesty's Forces in contravention of reg. 28 (1) (b) under the *War Precautions Act*. The indictment was in the name of "The Honourable Littleton Ernest Groom, being the Minister for the time being acting for and on behalf of His Majesty's Attorney-General for the Commonwealth of Australia, who by virtue of an appointment made to him for such purpose prosecuted for His Majesty in this behalf."

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2. Before plea, counsel for the accused objected to the indictment on the ground that it was not in the name of the Attorney-General in accordance with sec. 6 (3A) of the *War Precautions Act* 1914-1915. I overruled the objection. The accused then pleaded not guilty.

3. Evidence was given that the Honourable Littleton Ernest Groom is Minister for Works and Railways, that the indictment was signed by him and that he was at that time and still is acting for and on behalf of the Attorney-General. No evidence was given of his appointment to prosecute.

7. The jury, on 5th December instant, convicted the accused on the first and second counts, with a strong recommendation to mercy, and by my direction returned a verdict of not guilty on the third count.

8. On the application of counsel for the accused made before verdict, I reserved the following questions:—

(1) Whether I was right in overruling the objection to the indictment.

[The other question asked is not material to this report.]

The Full Court by a majority (*Cullen C.J.* and *Pring J.*, *Gordon J.* dissenting) answered the above question in the negative: *R. v. Judd* (1).

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

Leverrier K.C. (with him *Bathgate*), for the appellant. The effect

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of sec. 19 of the *Acts Interpretation Act* 1901-1918 is that, where by an Act a particular Minister is designated to do an act, then, unless the contrary intention appears, that act may be done by any other Minister who is acting for or on behalf of the designated Minister in his office.

[GRIFFITH C.J. Secs. 32 and 33 (2) of the *Acts Interpretation Act* support that view.]

Sec. 19 appears to be taken from sec. 7 of the Victorian *Acts Interpretation Act* 1890, but it omits the very words which exclude the application of the section to the Attorney-General, namely, the words "not being a law officer." No contrary intention can be gathered from sec. 6 (3A) of the *War Precautions Act*. Sec. 69 of the *Judiciary Act* permits indictable offences to be prosecuted either in the name of the Attorney-General or in the name of a person appointed in that behalf by commission, and the object of sec. 6 (3A) is to substitute for a person appointed by commission a Minister acting for or on behalf of the Attorney-General. That explains the negative form of sec. 6 (3A).

[ISAACS J. referred to sec. 13 of the *Crimes Act* 1914-1915.]

Mack K.C. (with him *J. J. Watkins*), for the respondent. Sec. 19 of the *Acts Interpretation Act* only applies to a case where one Minister may act for another, and that section does not itself authorize one Minister to act for another. There is no authority for any other Minister to act for the Attorney-General. If that view is not correct, a contrary intention appears in sec. 6 (3A) of the *War Precautions Act*. The negative form of the enactment shows a contrary intention. The effect of the *War Precautions Act* is to create new offences, and it should not be assumed that the powers of the Attorney-General would, in respect of them, be widened; they would rather be curtailed. The rights of the subject should be very jealously guarded, and it is to be assumed that the Legislature did not intend to take away the safeguards. The word "Minister" in sec. 19 of the *Acts Interpretation Act* is limited to a Minister exercising executive functions, and does not include the Attorney-General exercising his function of filing indictments. There is no express power given by the Constitution to file indictments, but the power is implied

in sec. 80. That power is not part of the executive power of the Commonwealth, but is part of the judicial power, and it must be exercised either by a grand jury or by the Attorney-General exercising his judicial functions. If sec. 6 (3A) has the meaning contended for by the appellant, the mention in that section of the Minister for Defence would be superfluous, and is an indication of a contrary intention. The *Solicitor-General Act* 1916 also indicates a contrary intention, for it enables the Attorney-General to delegate any of his powers to the Solicitor-General—showing that the Legislature thought that without that Act no one could act for the Attorney-General. Sec. 6 (3A) is *ultra vires* the Constitution, for the power of filing indictments which is implied in sec. 80 of the Constitution must be exercised by a grand jury.

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[PER CURIAM. This point is not open on proceedings by special case.]

GRIFFITH C.J. I can express what I have to say in a very few words. I am unable to find any indication of an intention contrary to the express words of sec. 19 of the *Acts Interpretation Act*. The question is entirely one of construction. We have to find the contrary intention in the language of the Legislature. I can see no indication whatever in the *War Precautions Act* of any contrary intention. The only ground suggested for saying that a contrary intention appears is that a wiser Legislature might have enacted differently. But that is no business of ours. We have only to consider the language which the Legislature has used.

I think, therefore, that the appeal should be allowed.

BARTON J. I am of the same opinion. I see no evidence of a "contrary intention" in sec. 6 (3A). I think that sec. 19 of the *Acts Interpretation Act* not only can, but must, apply in the circumstances, for sec. 19 of the Interpretation Act is absolutely general, and there is nothing in sec. 6 (3A) by which its application can be restricted. I also think that support for this view of the intention of Parliament is obtained from secs. 32 and 33 of the *Acts Interpretation Act*.

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ISAACS J.

ISAACS J. I think the appeal should be allowed. My reasons are shortly these :—We have to find in the *War Precautions Act* some intention contrary to that expressed in sec. 19 of the *Acts Interpretation Act*. That contrary intention is certainly not expressed, but it is said that it is to be implied from the fact that sec. 6 (3A) is couched in negative terms. But when the Commonwealth legislation existing at the time sec. 6 (3A) was passed is looked at, a reason is found for the form in which sec. 6 (3A) is enacted. The legislation then existing related both to summary procedure and to procedure by way of indictment. As to summary procedure, that was provided for by sec. 13 of the *Crimes Act* 1914, which allowed any person to institute proceedings; and as to indictment, that was found in sec. 69 of the *Judiciary Act*, which provided that indictments should be in the name of the Attorney-General or of some person commissioned by the Governor-General. When the Act No. 39 of 1915 was passed, the law was amended in a way which allowed the Executive to take steps for the safety of the Commonwealth and of the Empire which might be of a very drastic character, and the enforcement of regulations made under that Act might involve a great deal of discretion on the part of the public authority. The Legislature, while giving those powers, provided by sec. 6 (3A) a safeguard to the individual in this way, that no prosecution should be instituted either summarily or by indictment, except by executive authority. To carry that out, they provided that summary procedure should be with the written consent of a Minister of State, either the Attorney-General or the Minister for Defence, specially named, or some person under the written authority of one of those Ministers of State; and that in the case of an indictment it should be in the name of the Attorney-General, cutting out for the purpose of the Act the provision in sec. 69 of the *Judiciary Act* as to a person who was commissioned by the Governor-General. That left the whole thing really in the hands of the Executive Government. But, that having been done, there is no reason why the power should be confined to any particular member of the Executive Government, and therefore there is no reason why sec. 19 of the *Acts Interpretation Act* should be annulled for that purpose. It is quite consistent with what was done that “Attorney-General” and “Minister for Defence” should

continue to connote any Minister acting for or on behalf of those Ministers. I can find, therefore, no reason for implying an intention contrary to sec. 19.

The objection as to the Attorney-General not being for this purpose a Minister is untenable.

For these reasons I think the appeal should be allowed.

GAVAN DUFFY J. The only question for our consideration is whether the indictment on which the respondent was tried was bad because it was not in the name of the Attorney-General as provided by sec. 6 (3A) of the *War Precautions Act* 1914-1915.

The power of the Attorney-General to prosecute by indictment is to be found in sec. 69 (1) of the *Judiciary Act* 1903, which is as follows: "Indictable offences against the laws of the Commonwealth shall be prosecuted by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General appoints in that behalf."

Sec. 71A (1), which is inserted by sec. 3 of the *Judiciary Act* 1915, permits the Attorney-General to prosecute by indictment without a preliminary examination or commitment for trial. It is as follows: "Notwithstanding anything contained in this Part, or any provision of any State law, the Attorney-General of the Commonwealth may file an indictment for any indictable offence against the laws of the Commonwealth in the High Court or the Supreme Court of a State, without examination or commitment for trial."

Sec. 6 (3A) of the *War Precautions Act* 1914-1915 gives no new power to the Attorney General, but in certain cases forbids prosecution by indictment in the name of any person other than the Attorney-General.

The indictment here was in the name of the Honourable Littleton Ernest Groom, Minister for Works and Railways, and was signed by him, and he was at that time acting for and on behalf of the Attorney-General. The real question to be determined therefore is whether the expression "Attorney-General" in sec. 69 of the *Judiciary Act* 1903 included Mr. Groom because of sec. 19 of the *Acts Interpretation Act* 1901. First it is said that sec. 19 does not apply to the present case

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 THE KING v. JUDD. *Judiciary Act* 1903 and sec. 6 (3A) of the *War Precautions Act*
 1914-1915 does not mean the Attorney-General as "one of the
 King's Ministers of State for the Commonwealth" (*Acts Interpretation*
Act 1901, sec. 17), but the Attorney-General in some other capacity.

Gavan Duffy J.

In my opinion the power to prosecute by indictment is given to, and exercised by, the Attorney-General as the King's Minister of State, and in no other capacity. Next it is said that a "contrary intention appears" within the meaning of sec. 19. I agree with what has already been said on this point. I can see nothing in any Act of Parliament which indicates that a Minister acting for or on behalf of the Attorney-General should not be at liberty to act for him in prosecuting by indictment as well as in any other matter.

In my opinion the objection was rightly overruled, and the appeal should be allowed.

RICH J. I agree that the appeal should be allowed for the reasons stated by my brother *Isaacs*.

*Appeal allowed. Order appealed from discharged.
 Question answered in the affirmative. The
 prisoner to appear at the next sittings of the
 Supreme Court in its criminal jurisdiction
 for sentence in accordance with his bond.*

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

Solicitor for the respondent, *Albert C. Roberts*.

B. L.