[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

ARCHDALL AND ROSKRUGE;

Ex Parte CARRIGAN.

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Ex Parte BROWN.

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Brisbane, *June* 22, 25, 26, 29.

Sydney, *Aug* 8.

Knox C J, Isaacs, Higgins, Gavan Duffy, Powers and Starke JJ.

Criminal Law—Hindering the provision of a public service—"Boycott"—Reasonable cause or excuse—Indictable offence—Offence punishable summarily—Conflict between Crimes Act and Constitution—Evidence—Wrongful admission and rejection—Jurisdiction to award costs—Crimes Act 1914-1926 (*No.* 12 *of* 1914—*No.* 9 *of* 1926), *secs.* 12, 12A, 30K, 30R—*Acts Interpretation Act* 1904 (*No.* 1 *of* 1904), *sec.* 4—*The Constitution* (63 & 64 *Vict.* c. 12), *sec.* 80—*Judiciary Act* 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *secs.* 68, 79—*Justices Act* 1886 (Q.) (50 *Vict. No.* 17).

By sec. 12 of the *Crimes Act* 1914-1926 it is provided: "(1) Offences against this Act, other than indictable offences, shall be punishable either on indictment or on summary conviction"; and "(3) A Court of summary jurisdiction may not impose a longer period of imprisonment than one year in respect of any one offence against this Act." By sec. 30K it is provided that "whoever, . . . without reasonable cause or excuse, by boycott of . . . property . . . hinders the provision of any public service by the Commonwealth . . . shall be guilty of an offence. Penalty: Imprisonment for one

year." By sec. 4 of the *Acts Interpretation Act* 1904 it is provided that "offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears in the Act, be indictable offences."

Held, that the offence created by sec. 30K of the *Crimes Act* 1914-1926 was not an indictable offence, and that the offence could be tried in a Court of summary jurisdiction, the *Crimes Act* showing an intention contrary to sec. 4 of the *Acts Interpretation Act* 1904.

Sec. 80 of the Constitution provides that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury."

Held, that the *Crimes Act* did not conflict with sec. 80 of the Constitution, and that Parliament could make the offence under sec. 30K punishable summarily.

The secretaries of two unions, who were separately charged with the offence of having without reasonable cause or excuse by boycott of property hindered the provision of a public service by the Commonwealth, were each convicted and ordered to pay a fine and costs by a police magistrate sitting in a Court of Petty Sessions.

Held, by the High Court, (1) that there was evidence before the magistrate that each of the defendants had committed an offence under sec. 30K of the *Crimes Act* 1914-1926; (2) that the rules of one of the unions, which had been tendered in evidence on behalf of its secretary, had been rightly rejected; (3) that the magistrate had jurisdiction to award costs; and (4) that, consequently, the conviction and order of the magistrate should not be set aside.

Meaning of the word "boycott" discussed.

RULES NISI for quashing orders, prohibition, or certiorari.

Separate complaints were made by Norman Gerald Roskruge, Deputy Director of Navigation and Lighthouses, alleging that Herbert George Carrigan, secretary of the Brisbane branch of the Federated Seamen's Union of Australasia, and Andrew Brown, secretary of the Brisbane branch of the Waterside Workers' Federation of Australia, were by act directly knowingly concerned in the commission of an offence against sec. 30K of the *Crimes Act* 1914-1926, committed at Brisbane between 7th and 23rd March 1928 by members of the Waterside Workers' Federation of Australia and members of the Federated Seamen's Union of Australasia, namely, the offence of having without reasonable cause or excuse by boycott of property, to wit the s.s. *Cape York*, hindered the provision of a public service by the Commonwealth, to wit the

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Lighthouse Service established and maintained by the Commonwealth under the *Lighthouses Act* 1911-1919.

The averments contained in the complaints were substantially as follows:—The provision and maintenance of lighthouses in Australia is a public service by the Commonwealth. The s.s. *Cape York* is and has been at all material times exclusively employed in connection with the provision of the said public service. In the course of its employment as aforesaid the s.s. *Cape York* arrived in Brisbane to receive on board stores and building material required for lighthouse purposes. Prior to 7th March 1928 public notice had been given of the intention of the Commonwealth to man its lighthouse steamships with crews employed as public servants. On 7th March 1928 Carrigan addressed the Waterside Workers' Federation at a meeting in support of a resolution, which was carried, that the Federation pledged itself to refrain from working ships manned by Commonwealth public servants. On the same day Carrigan presided over a meeting of the Trades and Labour Council at which it was resolved that the Council pledged itself to support the Seamen's Union in its endeavours to prevent the Lighthouse Department from placing its vessels under the Public Service. On 7th, 8th and 9th March 1928, seamen and waterside workers were employed on the s.s. *Cape York* preparing the vessel for sea, and no person was employed under the provisions of the *Public Service Acts*. On the morning of 9th March 1928 Carrigan informed the chief officer of the s.s. *Cape York* that he was going to take the seamen off the vessel and would have the waterside workers also taken off the ship. Later in the morning Carrigan informed the wharf manager that he was going to Captain Roskruge to get a guarantee that the men on board would take the ship to sea, and failing the guarantee he would withdraw them. Early in the afternoon Carrigan demanded of Roskruge an undertaking that the members of the unions then employed on the ship would be engaged to take the ship to sea, and that it was not the intention of the Lighthouse Department to send the ship to sea manned by public servants. He informed Roskruge that if it were the intention of the Department to man the ship with public servants before sailing he intended to call out the seamen and waterside workers then employed on the ship.

Roskruge refused to give the undertaking and Carrigan thereupon informed him that he (Carrigan) was going down to the ship immediately to call out the seamen and waterside workers. Shortly afterwards Carrigan and Brown caused the waterside workers then employed on the ship to withdraw from the ship and assemble in a shed on the wharf, where they addressed the workers regarding the continuance of work. In consequence of the addresses the waterside workers returned to the ship, put on the hatches and then left the ship, Brown having told them to carry out the resolution of 7th March 1928. About the same time Carrigan withdrew the seamen from the vessel. On the next morning, 10th March 1928, calls were made for labour in the hearing of members of the Waterside Workers' Federation, but no member of the Federation offered himself for employment. A letter was immediately sent to Brown, the secretary of the Federation, requesting him to supply the necessary labour. No reply was received and no members of the Federation offered themselves for employment on the s.s. *Cape York*. About 13th March 1928, at a meeting in Brisbane of delegates of the transport unions, comprising the Brisbane branches of the Waterside Workers' Federation and the Federated Seamen's Union, a resolution was carried declaring " black " the s.s. *Cape York*. Subsequently members of the Seamen's Union refused to work a tug, which was to assist the s.s. *Cape York* to berth at another wharf, and members of the Carpenters and Joiners' Union refused to handle the building material on board the ship, on the ground that the s.s. *Cape York* had been declared " black." On 19th March 1928, in reply to a question by Captain Roskruge, Carrigan admitted that he called the wharf labourers off the s.s. *Cape York*. On 22nd March 1928 Carrigan presided at a meeting of the Seamen's, Waterside Workers' and other unions, and a resolution was passed supporting the Seamen's Union in declaring the s.s. *Cape York* " black," and calling on all unions having members employed on the lighthouse steamers to withdraw them until such time as the unions arrive at a further decision.

At the hearing of the complaints (which were heard separately before Mr. H. L. Archdall, a police magistrate at Brisbane) evidence was given in support of the averments. Both Carrigan and Brown

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in evidence denied the allegations made against them. Counsel for the prosecution during cross-examination read extracts from a report printed in a newspaper, but no evidence was called as to the correctness of the report. In *Brown's Case* the rules of the Seamen's Union were tendered by the defence to show that Brown acted with reasonable cause or excuse. The rules were rejected. The defendants were each convicted and ordered to pay £100 fine and £150 professional costs, in default levy and distress, and in default of distress imprisonment for six months.

Each defendant obtained a rule nisi calling on the informant to show cause before the High Court why the conviction and order should not be quashed, or why a writ of prohibition should not be issued prohibiting further proceedings under the conviction, or why a writ of certiorari should not be issued to bring up and quash the conviction and order, on the grounds (*inter alia*) that

(1) The police magistrate acted without jurisdiction and in excess of jurisdiction;

(2) There was no evidence to support the convictions;

(3) The conviction was against the evidence and the weight of evidence;

(4) The conviction was contrary to and wrong in law;

(5) Evidence was wrongly admitted;

(6) Evidence was wrongly rejected;

(7) Secs. 12, 12A, 30K and 30R of the *Crimes Act* 1914-1926 are *ultra vires* of the Parliament and contrary to the Constitution of the Commonwealth;

(8) The defendants were entitled to have the question of their guilt or innocence determined by a jury on a trial on indictment, and were wrongly and unlawfully denied such trial by the police magistrate.

(9) The police magistrate imposed on the defendants penalties in excess of those authorized by law;

(10) The police magistrate had no jurisdiction to award and acted in excess of jurisdiction in ordering the defendants to pay costs.

The prosecutors now applied to have the rules nisi made absolute.

Walsh, for the prosecutors. The defendants had a right to have the charges tried before a Judge and jury, because sec. 12 (1) of the *Crimes Act* 1914-1926 in referring to indictable offences is governed by sec. 4 of the *Acts Interpretation Act* 1918, which prescribes that all offences punishable by imprisonment for more than six months are indictable offences, unless a contrary intention is shown. Sec. 30K of the *Crimes Act* permits imprisonment for twelve months and, as there is no contrary intention, all offences under sec. 30K are indictable. If the *Crimes Act* does permit offences under sec. 30K to be dealt with summarily, it is *ultra vires* of Parliament by reason of sec. 80 of the Constitution, which preserves to the subject the right of trial by jury. To ascertain what are indictable offences within the meaning of sec. 80 of the Constitution, regard must be had to the law as it stood when the *Constitution Act* was enacted, and such offences as were then regarded as indictable cannot be declared by Parliament to be other than indictable. The commencing words of sec. 30K of the *Crimes Act* were intended to be read distributively with the sub-sections of that section. The word "boycott" does not apply to sub-sec. (*a*), which commences with the words "obstructs or hinders," as these words imply something more than a refusal to do something, which is the main idea expressed in the word "boycott." Therefore there was no offence. The magistrate was wrong in rejecting the rules of the Seamen's Union tendered in evidence: they were admissible on the question as to whether there was reasonable cause or excuse. Inadmissible evidence was allowed to be given by the magistrate inasmuch as he permitted counsel for the prosecution to read extracts from reports appearing in a newspaper without calling evidence to show that the report was correct. The Commonwealth was not hindered. The Union merely refused to assist. Members of the Union have a right not to work, and refusal to work could not reasonably be regarded as a boycott. As to the meaning of "boycott," see *Oxford Dictionary*, vol. I., p. 1040. Hindering is active opposition as distinct from passive resistance (see *Hardie & Lane Ltd.* v. *Chilton* (1); *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (2). Sec. 30K contemplates that there may be reasonable cause or excuse. The fact that members of the unions

(1) (1928) 44 T.L.R. 470.

(2) (1892) A.C. 25.

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were defending a union principle, i.e., the right to refuse labour under conditions which would necessitate those so offering ceasing to be members of the union afforded reasonable cause or excuse. The right of the individual to give or refuse labour is as great a right as that of personal security. Brown's action was dictated by genuine belief on his part that the waterside workers were incurring additional risk by working on the vessel after the seamen had left. Carrigan and Brown were not seamen or waterside workers. They were the channel of communication, and did not belong to that class of persons who would offer their labour. Therefore they were not directly concerned within the meaning of sec. 30K of the *Crimes Act*. The power given to the magistrate to deal summarily with the offence and impose a fine limited to £100 did not justify him in imposing that fine and in addition ordering the defendants to pay £150 costs. Costs are part of the penalty and the magistrate had no jurisdiction then to order payment of more than £100 in all.

Macgregor (with him *Henchman*), for the respondents. There is ample evidence on which the magistrate could convict. There is nothing in the evidence to connect the rules of the Union in such a way that they could become relevant to matters in issue. Unless the evidence wrongly admitted must influence the decision, the conviction stands (see *Irvine* v. *Gagliardi* (1)).

[THE COURT desired to hear counsel only on the question of the jurisdiction of the magistrate to try the cases summarily.]

The *Crimes Act* indicates an intention contrary to the *Acts Interpretation Act*. The Act itself distinguishes between indictable and other offences. Those expressly declared to be indictable are covered by sec. 12A of the *Crimes Act*. The others are provided for by sec. 12 of that Act. Sec. 12 (2) gives the magistrate the power to deal with offences as distinct from indictable offences either by committal or by dismissal or in a summary method. There is no conflict with sec. 80 of the Constitution (see *R.* v. *Bernasconi* (2)).

Walsh, in reply, referred to *Bell v. Stewart* (3).

Cur. adv. vult.

(1) (1895) 6 Q.L.J. 155.
(2) (1915) 19 C.L.R. 629, at p 634.
(3) (1920) 28 C.L.R. 419.

THE COURT. The rules nisi will be discharged with costs. Reasons will be given later.

The following written judgments were delivered:—

KNOX C.J., ISAACS, GAVAN DUFFY AND POWERS JJ. *Carrigan's Case.*—Mr. *Walsh* presented his case temperately and well, but some of his points were sufficiently dealt with during the argument.

We propose to state our reasons for the opinion we have formed as to the rest. The first is as to the magistrate's jurisdiction to convict summarily. The main section of the *Crimes Act* involved in this case is 30K, which declares certain conduct "an offence" simply, not an indictable offence. But, as the penalty may be imprisonment for one year, it was contended that by force of sec. 4 of the *Acts Interpretation Act* of 1904, the offence is by law an indictable offence only, and therefore not punishable summarily. If the contrary intention does not appear in the *Crimes Act*, the contention must prevail. The scheme of secs. 4 and 5 of the *Acts Interpretation Act* is to divide all offences not declared by an Act to be indictable into three distinct categories: those are offences punishable by imprisonment exceeding six months, those punishable by imprisonment not exceeding six months, and those punishable otherwise than by imprisonment. The first category is declared by sec. 4 to be indictable, and the other two are by sec. 5 declared to be punishable on summary conviction. But the *Crimes Act* by secs. 12 and 12A adopts a different scheme which involves a contrary intention: offences against that Act are divided into two categories, those declared indictable (sec. 12A) and those not indictable, that is, not declared by sections other than sec. 12 to be indictable. The first-mentioned class need not be further referred to. The second are by sec. 12 itself declared to be both indictable and punishable summarily. A Court of summary jurisdiction, however, cannot impose a sentence of imprisonment longer than one year (see, for instance, secs. 29A and 29B, where the maximum penalties are five years and two years respectively). But it is on the face of the matter that sub-sec. 3 of sec. 12 is wholly inconsistent with sec. 4 of the *Acts Interpretation Act*. There is consequently an obvious contrary intention with reference to sec. 4 of the *Acts Interpretation Act*, and that section does not apply.

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The suggestion that the Parliament, by reason of sec. 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition.

On the main point of law, the question is: What is the nature of the offence postulated by par. (*a*) of sec. 30K of the *Crimes Act*? As applied to this case, it is: "Whoever, without reasonable cause or excuse, by boycott or threat of boycott of person or property, hinders the provision of any public service by the Commonwealth." That there was a hindrance in fact cannot be doubted. It was argued there was no boycott. The word "boycott" has acquired a signification which is now generally recognized in common speech. It connotes a concerted withdrawal of intercourse of some kind. Manifestly no exhaustive definition can be formulated, but, without attempting that, it may be said that the intercourse withdrawn may be of a social, commercial, professional or industrial nature, and may be with reference to a person or his property or his employees or any of his interests. A boycott does not connote a pre-existing contractual relation: it means withdrawal from such intercourse as would naturally and reasonably be expected to take place between the parties concerned as members of the community in normal circumstances. There was unquestionably a boycott of property in the present case on the part of the seamen and waterside workers in this case. Then, was this hindrance by boycott (which we shall call by the hyphened term "boycott-hindrance" to avoid unnecessary discussion) "without reasonable cause or excuse"? Parliament has recognized that even in the case of a boycott having the effect of obstructing or hindering Commonwealth public services, the boycott may conceivably be justified by a reasonable cause or excuse. But it must be "reasonable." Reasonableness is relative, and must be proportioned to the circumstances of the case considered as a whole. The position cannot in broad principle be better stated than it was by *Romer* L.J. in *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1) in relation to a contract broken, in these words:— "I respectfully agree with what *Bowen* L.J. said in the *Mogul Case* (2), when considering the difficulty that might arise whether there was sufficient justification or not: 'The good sense of the tribunal

(1) (1903) 2 K.B. 545, at p. 574.

(2) (1889) 23 Q.B.D. 598, at p. 618.

which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell.' I will only add that, in analysing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach." We have in this case to substitute for "contract" par. (*a*) of sec. 30K, and generally to adapt the terminology. (See also *Brimelow* v. *Casson* (1).) Now, the "cause or excuse" relied on in *Carrigan's Case* appears in the defendant's evidence. It was that members of the Seamen's Union could not under the constitution of the Union, have accepted employment as Commonwealth public servants and still remain members of the Union. Whatever may be said in favour of such a rule of the Union in other circumstances, the question is whether applying the observations of *Romer* L.J., when adapted to the circumstances of this case, the cause or excuse suggested was reasonable. The magistrate held it was not, and we agree with him. When there is placed in one scale of the balance all the personal interests of the seamen under the rule they adopted, and when, in the other scale, there are placed all the public interests of Government, that is, of the general community, all the perils to life and property possible from a disorganization of the lighthouse system, no hesitation can be entertained for a moment that the cause or excuse acted on was wholly unreasonable. As to whether Carrigan was concerned in the unlawful boycott-hindrance the evidence is more than sufficient to establish this, if once we remember that so much depends on the impressions produced on the primary tribunal, hearing the oral testimony. The magistrate's conclusions so arrived at, no appellate tribunal not having the advantage of seeing and hearing the witnesses can disturb.

Finally it was suggested, somewhat faintly, that material evidence had been rejected, namely the Union Rules. They were tendered in bulk as rules without any suggestion that any particular rule had relevance. They were objected to in that form and rightly rejected.

(1) (1924) 1 Ch. 302, at p. 311.

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The only rule that could possibly affect the matter, as far as suggested is the one actually proved by the defendant and above referred to.

In our opinion the appeal should be dismissed.

Brown's Case.—The only feature distinguishing this case from *Carrigan's Case* is the nature of the "cause or excuse" relied on. It was urged for the defence that it had been established that the waterside workers had joined in the boycott to avoid personal danger to themselves arising from the withdrawal of the seamen. The answer to the contention is that the magistrate, having heard the oral testimony, came to the conclusion that danger was not the real cause of the part taken in the boycott by the waterside workers, and that Brown did not believe it was. This Court is not in a position to reverse that finding, which depends, in view of the conflicting testimony, on the evidence given to the witnesses. There was, to say the least, ample evidence to sustain the magistrate's finding.

The result is that this appeal also must be dismissed.

HIGGINS J. It should be clearly understood that in these orders nisi to quash we have confined our attention to the grounds stated in the orders and urged by counsel for the accused.

The first ground is as to jurisdiction. It is contended (*a*) that the *Crimes Act* 1914-1926 does not confer on a Court of summary jurisdiction the right to convict; and (*b*) that if it does it conflicts with sec. 80 of the Constitution.

As to (*a*), sec. 12 (1) of the Act provides: "Offences against this Act, *other than indictable offences*, shall be punishable either on indictment or on summary conviction." This seems to mean that non-indictable offences may be punished by either process. But it is provided by sec. 4 of the *Acts Interpretation Act* 1904—a general Act, applicable to the meaning of Acts generally: "Offences against any Act which are punishable by imprisonment for a period exceeding six months shall, unless the contrary intention appears in the Act be indictable offences." Now, the offence charged in these cases, under sec. 30K of the *Crimes Act*, is punishable by imprisonment for one year; and at first sight the conclusion appears to be irresistible, as expressed by Mr. *Walsh*, that the offence is an indictable offence,

and therefore excluded from sec. 12 (1) and from summary jurisdiction. But what is the meaning of "indictable offences" in sec. 12 (1)? Do the words mean offences that the Act calls indictable? We find throughout the Act, which is evidently meant to deal with Commonwealth crimes as a kind of code, that the six months' criterion of the Act of 1904 is ignored. In many sections offences are expressed to be indictable where the penalty exceeds six months' imprisonment (e.g., secs. 24, 24C, 24D, 25-27, 30K, 32, 33, 35, 37, 41, 42, 46, 52-60, 65 (1), 66, 67, 69, 72, 78, 83, 86). We also find that in many sections offences where the penalty exceeds six months are not expressed to be indictable—they are simply called "offences" (e.g. secs. 28-29B, 30, 30C, 30D, 30F, 30J, 30K, 30Q, 34, 36, 38-40, 43-45, 47-50, 61, 62, 65 (2), 68, 70, 71, 73-76, 79, 81, 87-90). In effect, in framing the *Crimes Act*, Parliament says: "We mean this Act to say expressly what offences are to be indictable and what are not, for the purposes of this Act." Probably the draughtsman had forgotten the provisions of the Act of 1904; but we have to assume that Parliament knew of that Act; and Parliament was entitled to say that whatever it had prescribed for general purposes, it was prescribing specifically which offences were to be indictable or not, for the specific purpose of the *Crimes Act*. That Parliament meant by "indictable offences" in sec. 12 (1) offences which the Act itself declared to be indictable is confirmed by the provisions of sec. 12A introduced by amendment in 1926; but the fact of this meaning is now obscured by the amendments made in the (present) secs. 9, 10, 18, &c., in 1926. In other words, to find whether an offence is indictable or not, for the purpose of the present Act, we have to look only at the provision of this Act; and thus this Act shows a "contrary intention" under sec. 4 of the *Acts Interpretation Act* 1904: *Generalia specialibus non derogant.*

As for the contention (*b*), that the *Crimes Act* conflicts with sec. 80 of the Constitution in prescribing a trial by a Court of summary jurisdiction, instead of by indictment, I think that we are bound to reject it. Sec. 80 merely says: "The trial on indictment of any offence against any law of the Commonwealth shall be by jury"—that is to say, if there be an indictment, there must be a jury; but

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there is nothing to compel procedure by indictment (and see *R.* v. *Bernasconi* (1)).

As to the offence and the evidence.—The offence charged against Carrigan is under sec. 30K, the offence of having without reasonable cause or excuse by boycott of the s.s. *Cape York* hindered the provision of lighthouse services under the *Lighthouse Act* 1911-1919; and sec. 30K has to be read with sec. 5 as to aiders and abettors. Counsel for the accused has reviewed the evidence against Carrigan, who is the secretary of the Brisbane branch of the Federated Seamen's Union of Australasia, contending that the offence is not proved; but I am of opinion that there was ample evidence to support the conviction. It is not out of any disrespect for counsel's closely reasoned arguments that I refrain from discussing all the arguments in detail; as time goes on, I feel that there is actually more harm done generally than guidance given for future cases by exhaustive pronouncements on the particular facts.

But it is necessary to say something as to "reasonable cause or excuse" for the boycott. If there was a reasonable cause or excuse the offence charged was not committed. As so often happens in recent legislation, such an issue as "reasonableness" is left to the tribunal, without any guidance from the Legislature; and the tribunal has to weigh all the circumstances in order to decide the issue for itself in each particular case. It is not a question of law: it is rather a question of general social standards. Now, I do not think that, as a Court of appeal, we should, without very strong grounds, take upon ourselves to differ from the tribunal below on such a subject; for that is the tribunal which has heard the witnesses and has had the opportunity of gauging the character and the motives of the witnesses. Nor do I think that the tests of reasonableness applied by other Courts in relation to the breaking of a contract, as in the *Mogul Case* (2) and in the *Glamorgan Case* (3), are necessarily or safely to be applied to such a case as the present, the boycott of a Government ship carrying on a service which is essential to the safety of the public and their property. Here, the effort was to stop the lighthouse service on the Australian coast, so far as the

(1) (1915) 19 C.L.R. 629.
(2) (1892) A.C. 25.
(3) (1903) 2 K.B. 545.

unions concerned could stop it, in order to compel the Government to alter its determination to employ its own permanent employees instead of, as theretofore, members of the Seamen's Union. Even assuming that the Government's change of practice was arbitrary, unfair, hurtful to the men of the Seamen's Union; even assuming that the Government ought not in reason to have made such a change knowing of the opposition of the Union without bringing the dispute before the Commonwealth Court of Conciliation and Arbitration—the machinery devised by Parliament: the question still remains, was it reasonable on the part of these unions to take the extreme step of boycotting the lighthouse ships, endangering lives and property at sea, without submitting the dispute to that Court? Such a step might be the only remedy in countries where there is no provision for such a Court, where the "right to strike" has to be treated as within the law. But, in my opinion, the existence of such a Court in Australia, affording the opportunity for the play of reason instead of force, constitutes, in my opinion, a very relevant fact in the discussion as to the reasonableness of this boycott; and no explanation has been offered of the failure of the Seamen's Union to take the dispute to the Court. It is to be regretted that the Government did not set an example to the unions by seeking the sanction of that Court to such a drastic change in the long established practice; but this omission of the Government does not, in my opinion, prevent the conduct of the unions, in boycotting and thereby hindering this essential public service, under the circumstances, from being "without reasonable cause or excuse."

The grounds for the order nisi which have caused me most hesitation are (1) that evidence was wrongly admitted and (2) that evidence was wrongly rejected.

As to (1), Carrigan was being cross-examined with regard to an allegation in a newspaper that he supported a resolution of the waterside workers' sub-branch in favour of refraining from working any ship manned by Commonwealth public servants. Carrigan denied that he had "supported" the resolution. The report in the newspaper was being read out to him, sentence by sentence, and Carrigan denied that it was correct. The reporter had not been called to give his evidence on oath. The defendant's counsel objected

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to counsel for the prosecution reading out the report, saying that "the effect of reading the report would be that matters that might not receive his (Carrigan's) indorsement would be put before the magistrate and before the press and the public as newspaper evidence of the matters in issue." It does not need much experience of juries to know that there is practical form in this objection; but I cannot think that it has the same force in a proceeding before a police magistrate, a trained man who would know that the allegations of the newspaper had not been proved and should be disregarded by him. Moreover, as a matter of strict law, the prosecuting counsel was entitled to cross-examine the witnesses on (unproved) allegations; and, if counsel should ever abuse this right, the tribunal is not powerless. It turns out that the newspaper was wrong in saying that Carrigan *supported* the resolution; but he addressed the men *before* the resolution. Under the circumstances, it is not probable that the magistrate was influenced by the fine distinction.

Point (2) appears to be more serious, and to involve a subject of deep importance to men who want to be loyal to their union but to be loyal to the country also. Counsel for the defendant produced the rules of the Seamen's Union, and tendered them. Counsel for the prosecution opposed the admission of the rules as evidence, on the ground that they were "irrelevant"—saying that they were not connected with the defence; and the magistrate refused to admit the rules. It is now urged that the rules ought to have been admitted on the issue of "without reasonable cause or excuse" —an issue which is vital to the offence charged. The witness had said that if the Union declared a ship "black" by resolution it was his duty to carry out the resolution. It was, therefore, material to know what the rules were precisely, if the duty of the officers of the Union to the Union could be treated as possibly showing a reasonable cause or excuse for the act charged—if obedience to the rules of the Union could in any way be treated as justifying disobedience to the law of the country. In my opinion, they cannot be so treated. Under our system of law, the law of the country is supreme for the purposes of the Courts. Loyalty to the country, to the laws made by the Parliament of the country, whether right or wrong, ethically transcends all the other loyalties—in the eyes of

the Courts: and the more clearly this position is apprehended, the better. The law of this country allows unions—even facilitates, encourages the organization of unions (see *Commonwealth Conciliation and Arbitration Act* 1904-1920, sec. 2); but no Court can treat any rule of unions as affording any countenance for disobedience to a valid law of the Commonwealth.

It would probably have been wiser to have admitted the rules in evidence subject to the objection, and to have reserved the question of admissibility; but it is easy to be wise after the event. There is, however, another reason for not giving effect to these objections as to evidence. The procedure adopted by the appellants here is under the Queensland *Justices Act* of 1886 (sec. 209)—an order to show cause why the convictions should not be quashed; and, by sec. 210, if the Court (of appeal), "*after inquiry into the matter and consideration of the evidence adduced before the justices, thinks that the conviction . . . cannot be supported*, the Court may direct it to be quashed, and may make such further order in the premises as is just and the circumstances require." This section was considered by the Full Court of Queensland in 1895 in *Irvine* v. *Gagliardi* (1); and it was held that where evidence has been wrongfully admitted, a conviction by justices will not necessarily be set aside on that ground, if the appeal Court is of opinion that there is sufficient other evidence to support the conviction, and that the evidence wrongfully admitted did not influence the decision. It is not contended that this decision of more than thirty years' standing is unsound or inapplicable; and I think that it is our duty, even if evidence was wrongfully admitted, to follow the decision in the interpretation of this Queensland Act; and, being of opinion aforesaid, I think that the error (if any) as to the evidence should be disregarded.

As for the objection that the costs awarded against the defendant (£150) are beyond the jurisdiction of the magistrate to order, on the ground that they are in reality an increase of the penalty allowed (£100), I cannot treat the objection as valid. It is not contended that there was no jurisdiction to award costs.

In my opinion, the order nisi as to Carrigan must be discharged.

The charge against Brown, secretary of the Brisbane sub-branch

(1) (1895) 6 Q.L.J. 155.

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of the Waterside Workers' Federation, is practically the same, *mutatis mutandis*, as against Carrigan. But in the averment numbered 16 in the complaint against Brown appear the additional words: "After the said A. Brown had told the said waterside workers to carry out Wednesday's resolution" (the resolution pledging the sub-branch to refrain from working any ship manned by the Commonwealth public servants). Brown denies that he told the men as alleged, and there is no evidence to contradict him. But Brown says: "I told them it would be dangerous to work after the seamen had left." He reminded them of the resolution, stated that the position had not yet arisen; "but as the firemen and seamen, eight in number, had left their jobs, they had to consider the danger element to themselves." There is no evidence adduced of any danger; or evidence as to the proposed new seamen and firemen, or of their qualifications. The police magistrate treated the allegation of danger as a "pitiable pretence and simulation"; and it is impossible for me to say, on the evidence, that he was wrong in rejecting the excuse.

In my opinion, both the appeals should be dismissed and both orders nisi discharged.

STARKE J. The defendants, Carrigan and Brown, were each charged under the *Crimes Act* 1914-1926 with being directly knowingly concerned in the commission of an offence against the Act, namely, that members of the Federated Seamen's Union of Australasia and the Waterside Workers' Federation of Australia without reasonable cause or excuse by boycott of the s.s. *Cape York* hindered the provision of the lighthouse service of the Commonwealth (see secs. 5 and 30K). The averments made in the information pursuant to sec. 30R of the Act and the evidence given orally on the hearing of the charges afforded ample material for the following conclusions of fact by the magistrate who heard the charges: (1) that an organized refusal on the part of the members of the Seamen's Union to take the s.s. *Cape York* to sea or to man her, and on the part of the members of the Waterside Workers' Federation to load or unload her, unless the Commonwealth Government abandoned its policy of manning the ships with crews employed as

public servants; (2) that the ship *Cape York* was engaged in the Lighthouse Service of the Commonwealth and that the provision of that Service was delayed and obstructed by reason of the refusal of the members of the Seamen's Union and the Waterside Workers' Federation to man and work the ship; (3) that Carrigan instigated and encouraged the members of the Seamen's Union to refuse to take the ship to sea or to man her unless the Government abandoned its policy; (4) that both Carrigan and Brown encouraged the members of the Waterside Workers' Federation to refuse to load or unload the ship unless the Government abandoned its policy.

The various elements of the charge may now be examined. The hindrance to the provision of the Lighthouse Service of the Commonwealth is plain enough. Whether it was "by boycott of property" requires some consideration. The word "boycott" is loosely used and has not yet acquired any very definite meaning. In *Murray's Oxford Dictionary* we find "boycott" thus explained: "To combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour) on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." An exhaustive definition of the phrase "boycott of property" would be undesirable and, perhaps, impossible, and it is enough for present purposes to say that an organized refusal of workmen to man and load a ship or ships on account of some industrial difference in order to coerce employers into abandoning the position taken up by them in relation to the dispute falls well within the expression. Consequently it was proved in these cases that the hindrance to the provision of the lighthouse service was by means of a "boycott of property." And the defendants in instigating, encouraging or procuring these acts were directly knowingly concerned in them.

The Act, however, prescribes that only those who, "*without reasonable cause or excuse*, by boycott . . . of . . . property . . . hinder the provision of any public service by the Commonwealth" are guilty of an offence. The words "without reasonable cause or excuse" are vague; but I suppose, to adapt the words of *Bowen* L.J. in the *Mogul Case* (1), the good sense of the tribunal which has to decide

(1) (1889) 23 Q.B.D., at p. 618.

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must analyse the circumstances and discover on which side of the line each case falls. In my opinion the action can never be justified if it involves the doing of unlawful acts; as, for instance, where men leave their ships in breach of contracts of service or do anything in the nature of a strike contrary to the Arbitration Act 1904-1928. A difficult question, however, arises when the action taken involves no unlawful acts but a "conflict between two rights equally regarded by the law"—the right of workmen to safeguard and protect themselves against conditions inimical to the welfare of their craft or occupation, and the right of employers to carry on their businesses or undertakings as seems best to them. In such cases the action can never, in my opinion, constitute a reasonable cause or excuse if it be prejudicial to the welfare and interest of the public.

I turn now to the cause or excuse suggested in these cases as a justification for the action taken by the waterside workers and the seamen. As to the waterside workers, they refused to work alleging that it was dangerous to do so unless the Seamen's Union men were on board ship. That excuse was a palpable falsehood or as the magistrate says "a pitiable pretence and simulation." The waterside workers' action was taken simply in sympathy with and in support of the seamen. As to the seamen they refused to man the ship because they objected to the Government of the Commonwealth manning the ships with men employed as public servants whether members of the Seamen's Union or not. Apparently the seamen feared that such action would weaken their union and render crews on lighthouse service ships more amenable to the discipline of the employers. The action of the seamen and the waterside workers possibly constituted an unlawful strike; but this aspect of the matter was not really investigated, and I therefore pass it by. Clearly, however, the seamen who left their employment on the ship were guilty of breaches of their contracts of service. Apart from unlawful acts such as these, the action of the seamen and the waterside workers must be examined from the standpoint of the public interest. The importance of maintaining a regular and efficient lighthouse service on the coasts of Australia, including the coast of Queensland, need not be stressed. The waterside workers proposed to, and did, dislocate this service so far as they could, not

in protection of any right or interest of their own but in mere sympathy or support of the seamen. The seamen proposed to and did dislocate the service not because the Commonwealth Government proposed to exclude members of their union from employment in the lighthouse service of the Commonwealth but simply because the Government proposed, in the interest of discipline and efficient service, that seamen in the service should be placed on a permanent footing in the public service of the Commonwealth. It is not surprising, in these circumstances, that the magistrate found that the action of the waterside workers and the seamen was without reasonable cause or excuse. In my opinion no other conclusion was possible, in point of law or fact. "Solidarity of interest" is all very well, but when workmen combine and act together to compel action or inaction on the part of employers greater than is necessary for their own protection then, in my opinion, their action is without reasonable cause or excuse, so far as sec. 30K of the *Crimes Act* is concerned, whether the acts done be lawful or unlawful.

Lastly it was contended that the informations were not triable summarily and that there was no jurisdiction to award costs against the defendants. The provision of sec. 12A of the *Crimes Act* on its proper construction renders the former argument untenable and the provisions of the *Judiciary Act*, secs. 68 and 79, coupled with the *Justices Act* 1886 of Queensland, destroy the latter.

Both orders nisi must be discharged and the appeals thereby dismissed.

Rules nisi discharged with costs.

Solicitors for the appellants, *McLaughlin, Kennedy & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Chambers, McNab & McNab.*

B. J. J.