[HIGH COURT OF AUSTRALIA.]

FRANCIS . . . . . APPELLANT;
COMPLAINANT,

AND

ROWAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF SUMMARY JURISDICTION OF SOUTH AUSTRALIA.

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MELBOURNE, *March* 6, 28.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Criminal Law—Mens rea—National security—Endeavouring to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war—Nature of intention to found offence—National Security Act 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *sec.* 10—*National Security* (*General*) *Regulations* (*S.R.* 1939 *No.* 87), *reg.* 42*.

To establish a charge of endeavouring "orally . . . to influence public opinion . . . in a manner likely to be prejudicial to . . . the efficient prosecution of the war," contrary to the provisions of reg. 42 of the *National Security* (*General*) *Regulations*, it is sufficient to show that the person charged consciously made a public speech which was likely to be prejudicial to the efficient prosecution of the war, and it is immaterial that in making the speech he did not intend to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war.

APPEAL from a Court of Summary Jurisdiction of South Australia.

On 23rd September 1940, on the complaint of Ernest Leslie Francis in the Court of Summary Jurisdiction at Adelaide, Francis Rowan was charged that he "endeavoured on 26th June 1940 orally to influence public opinion (to wit—the opinion of a section of the

* Reg. 42 of the *National Security* (*General*) *Regulations* provides:—"(1) A person shall not—(*a*) endeavour, whether orally or otherwise, to influence public opinion (whether in Australia or elsewhere) in a manner likely to be prejudicial to the defence of the Commonwealth, or the efficient prosecution of the war . . . (4) In this regulation—(*a*) The expression 'public opinion' includes the opinion of any section of the public."

public attending a meeting at the Prospect Town Hall called a meeting of the League Against Conscription) in a manner likely to be prejudicial to the efficient prosecution of the war contrary to the provisions of reg. 42 of the *National Security (General) Regulations* and sec. 10 of the *National Security Act* 1939-1940." On the hearing before the magistrate, it appeared that Rowan at a public meeting convened by the League Against Conscription at the Prospect Town Hall on 26th June 1940 had made a speech during the course of which he made certain remarks which were derogatory to the then Government of the Commonwealth, its members, and also its policy. Examples of the remarks made by Rowan are set out in the judgment of *Rich* A.C.J. hereunder. The magistrate who tried the complaint found as a fact that what Rowan had said was likely to be prejudicial to the efficient prosecution of the war, but that he had never intended to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. Proceeding to construe reg. 42, the magistrate then held that there must be a conscious effort or endeavour on the part of the person charged to influence the public in a manner likely to be prejudicial to the efficient prosecution of the war, and, as on his finding of fact Rowan had not such an intention, he dismissed the complaint.

The complainant appealed to the High Court.

Dean, for the appellant. The interpretation of reg. 42 of the *National Security (General) Regulations* by the magistrate was erroneous. The essence of the charge was that the defendant should endeavour "orally . . . to influence public opinion . . . in a manner likely to be prejudicial to . . . the efficient prosecution of the war." By sub-reg. 4 (*a*) the expression "public opinion" included the opinion of any section of the public. The magistrate found that the defendant endeavoured to influence public opinion and that his speech was likely to prejudice the efficient prosecution of the war, but dismissed the information because the defendant did not appreciate that his statements would prejudicially affect the prosecution of the war. This is quite erroneous, because the question whether what the defendant said was likely to be prejudicial to the efficient prosecution of the war cannot be determined by ascertaining the mental attitude of the person making the statement. That is opposed to the policy of the regulation.

J. V. Barry (with him *G. L. Morris*), for the respondent. The words used by the defendant were not likely to be prejudicial to the effective conduct of the war. It was a mere political criticism

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of the present Government. If the statements were prejudicial, then the rule is that *mens rea* is an essential ingredient in the offence charged, unless it is excluded by express language or the scope and purpose of the enactment. The offence with which Rowan was charged was triable either summarily or on indictment (*National Security Act* 1939, sec. 10). The regulation introduced a new offence into an existing system which was covered by a coherent theory of criminal law, and *mens rea* should be required to establish guilt (*Thomas* v. *The King* (1), per *Dixon* J.). The nature of the offence is that it is something in the nature of a sedition, causing unrest. [He referred to sec. 34 of the *Crimes Act* 1914-1932.] It must be shown that the defendant intended to produce the result complained of. " Endeavour " means to work for an end. On its obvious grammatical construction the regulation prohibits the " endeavour " to achieve the prohibited end, and not the result. The subversive intent is what is condemned. Reg. 42A (Statutory Rules 1941 No. 2) may be compared and contrasted. The words used there strike at both the intention and likelihood, and that regulation speaks of acts " intended or likely " to produce prohibited ends. The defendant must know that his words will be likely to prejudice public opinion in the prohibited manner (*Pankhurst, Suter and Baines* v. *Porter* (2); *Sickerdick* v. *Ashton* (3)). The regulation involved excluded any necessity for *mens rea*. To be guilty of an offence against the regulation, the defendant must intend not only the act, but also all the evil consequences of it.

Dean, in reply. The word " endeavour " is part only of a composite phrase " endeavour to influence public opinion." The second limb of the regulation defines the character or description of the influence that is prohibited. There is no necessity for the defendant to intend that his statement should prejudice the war effort; it is sufficient to convict him, if he intentionally makes a statement which is likely to influence public opinion.

Cur. adv. vult.

March 28. The following written judgments were delivered :—

RICH A.C.J. The respondent was charged on a complaint for that he endeavoured orally to influence public opinion (to wit, the opinion of a section of the public attending a meeting at the Prospect Town Hall, called a meeting of the League Against Conscription) in a manner likely to be prejudicial to the efficient prosecution of the

(1) (1937) 59 C.L.R. 279, at pp. 304, 305.

(2) (1917) 23 C.L.R. 504.

(3) (1918) 25 C.L.R. 506.

war, contrary to the provisions of reg. 42 of the *National Security (General) Regulations* (Commonwealth) and sec. 10 of the *National Security Act* 1939-1940 (Commonwealth).

The regulation, as far as material, is in these terms :—" 42. (1) A person shall not—(*a*) endeavour, whether orally or otherwise, to influence public opinion (whether in Australia or elsewhere) in a manner likely to be prejudicial to the defence of the Commonwealth, or the efficient prosecution of the war ; or (*b*) do any act, or have any article in his possession, with a view to making, or facilitating the making of, any such endeavour. (2) A prosecution in respect of a contravention of this regulation shall not be instituted except with the consent of the Attorney-General. . . . (4) In this regulation—(*a*) The expression ' public opinion ' includes the opinion of any section of the public."

The complaint was indorsed with the consent of the Attorney-General. The magistrate dismissed the complaint, and the appellant now appeals to this court.

The evidence before the magistrate consisted of that of the shorthand writer, who gave evidence for the complainant, and that of the respondent and another witness. The magistrate found that on the whole the shorthand writer gave " an accurate picture of the appellant's speech." I have very carefully read the whole of this speech and have no doubt that it is likely to be prejudicial to the efficient prosecution of the war. And I think that the magistrate held this opinion, because he says at the end of his judgment : —" I may sum up my views in this way. I am satisfied that the defendant endeavoured to influence public opinion, and I am satisfied that in so doing the defendant used arguments likely to be prejudicial to the efficient prosecution of the war." He would, I think, but for the construction he placed on the regulation, have convicted the appellant. He considered, however, that the word " endeavour " in the context " involved a conscious attempt on the part of the person charged and that it must be a conscious intention to influence public opinion in the manner which the regulation prohibits. The full force of the word ' endeavour ' must be given to the whole " regulation " and on the evidence before me I think it probable that the defendant did not endeavour to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. The full force of the sense of conscious effort implied by the word ' endeavour ' governs the whole clause." I am unable to agree with this construction of the regulation. Adapting what was said by *Kennedy* L.J. in *Hobbs* v. *Winchester Corporation* (1), " it is

(1) (1910) 2 K.B. 471, at p. 483.

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necessary to look at the object of each Act" (regulation) "that is under consideration to see whether and how far knowledge is of the essence of the offence created." The regulation in question is one of a series enacted in wartime for the purpose of safeguarding the community and the public interest. No doubt, the word "endeavour" implies purpose; but the question is to what the purpose is to be directed. Clearly, to the influencing of public opinion. Must it also be directed to prejudicing the efficient prosecution of the war? I think not. It is enough if the public opinion it is sought to produce would if brought into existence be prejudicial to the efficient prosecution of the war. Turning now to the evidence in the case, it appears that under the guise of a speech against conscription the appellant attacked "the Government, Menzies, and his followers," and introduced into his speech matter which even some of his hearers considered to be irrelevant. For instance, interjectors said:—"What bearing has that got on conscription?," "Get on with it you mug, we want to hear something about conscription not the tripe you are giving us." Many similar remarks were made by members of the audience. The nature of these "irrelevancies" may be illustrated by the following quotations:—"The men in control of this country form a minority government which is controlled by the big combines and industries and monopolies in this country, who by reason of their smoothness of tongue and suave manners have tricked the people of this country and have lulled them into a sense of false security. Also because I know that the people of this country have been tricked and robbed and forced into things by false statements and promises which have never been carried out. I consider it my duty to speak to you to-night to oppose conscription which Menzies and his followers wish to introduce into this country." "Before going any further I will read you an article which was published in the news regarding the debacle of France, showing that it was the people in the high places who by their treachery and graft sold out France and it is the same in Australia. It is not the people below that I fear it is the people above that I fear." "As was done in France so will it occur in Australia unless steps are taken to guard against it. In France the home of conscription the people of that country were sold out by traitors who put their personal avarice before that of their country and as a result hundreds of thousands of the sons of France were slaughtered and their blood spilt in vain. In Australia I fear the Government will do the same as was done in France." "Now I appeal to you and should think this will appeal to my soldier friends on the right to wake up from your pipe dreams and realize

that men like Essington Lewis and other leaders of the big combines are preying upon the working class the same as the people in France and in every country in the world the same little clique praying upon the masses. I ask you ladies and gentlemen who financed Germany's rearmament, Wall Street and the Bank of England of course." "Here in Australia the Government headed by such men as Eric Campbell, Essington Lewis," and other names. "I am deeply suspicious of the people who control this country, their record makes me suspicious."

The effect on some of the audience by the appellant's speech is evidenced by the following remark of an interjector: "It is men like you that are stopping the proper preparation of this country for war." It is unnecessary to multiply a quotation from the speech. Reading it as a whole, I have no doubt that it is likely (calculated—*Sickerdick* v. *Ashton* (1)) to deter men from enlisting, slacken, or defeat the efforts not only of the men in the Forces but also of those civilians who are actively engaged in war efforts and to undermine the morale of the community. The magistrate's construction of the regulation has so affected his ultimate finding of fact as to warrant the court in overruling it.

The appeal should be allowed. Ordinarily the matter would be remitted to the magistrate, but, as the parties wish us to deal with it, I think that, as the regulation has not been construed before, we should treat the appellant as a first offender and impose a lighter penalty than would otherwise be imposed. Accordingly, I think a fine of £25 is a fitting punishment.

STARKE J. The respondent was charged in the Adelaide Police Court under the *National Security (General) Regulations*, 1939 No. 87, for that he endeavoured orally to influence public opinion (to wit, the opinion of a section of the public attending a meeting of the League Against Conscription) in a manner likely to be prejudicial to the efficient prosecution of the war.

Reg. 42 (1) provides: "A person shall not—(*a*) endeavour whether orally or otherwise to influence public opinion (whether in Australia or elsewhere) in a manner likely to be prejudicial to . . . the efficient prosecution of the war." The expression "public opinion" includes the opinion of any section of the public (reg. 42 (4) (*a*)).

The stipendiary magistrate who heard the charge found that what the respondent had said was likely to be prejudicial to the efficient prosecution of the war. There is ample evidence to support this

(1) (1918) 25 C.L.R., at p. 513.

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finding, and it cannot be disturbed. But he held, upon the proper construction of the regulation, that there must be a conscious effort or endeavour on the part of a person charged under the regulation to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war, and he found as a fact that the respondent never intended to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war.

So the question is : What mental element is necessary to constitute the offence ? Must the intention be to produce the particular evil which it is the purpose of the regulation to suppress, or is it enough that an intention exists to do the act which constitutes the offence, or, in other words, that the act which constitutes the offence described in the regulation is done voluntarily or of the accused person's own volition ? It is true enough that intention is a constituent element of most, if not all, offences, and sometimes the intention necessary to constitute the offence is specified in the definition of the offence. In the present case, no particular intent is specified, and the nature of the offence is such that an intent to produce the particular evil mentioned in the regulation cannot be implied. Indeed, so to construe the regulation would destroy its purpose and its efficacy.

The magistrate was wrong in his view that the regulation requires a conscious effort on the part of an accused person to influence public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. It is enough that the person charged, of his own volition, did the act constituting the offence described in the regulation.

The magistrate's finding that the respondent never intended to prejudice the efficient prosecution of the war is somewhat surprising in the face of the statements that the respondent made. The practical way of discovering a man's intention is by looking at what he said and did and considering " what must have appeared to him at the time the natural consequence of his conduct." But I should not be prepared to overrule the magistrate's finding on the matter, for he saw and heard the respondent, and it is possible that the respondent was a stupid and blundering man, who, in the excitement of the moment, made statements the effect of which he did not appreciate.

However, for the reasons given, the respondent should have been convicted of the offence charged against him. Both parties to the appeal desire that the court should deal finally with the charge. The respondent should be convicted and fined.

McTiernan J. The question in this case is whether a complaint charging an offence under reg. 42 (1) (*a*) of the *National Security Regulations* was rightly dismissed or not. It is unnecessary to repeat the complaint. The question also involves the construction of the regulation, and it arises upon a number of findings made by the magistrate who tried the case. The ground of the appeal is that, upon the facts which he found, the magistrate ought to have convicted the defendant, but that he erred in his construction of the regulation.

The findings were in effect as follows: (1) The defendant endeavoured orally to influence public opinion; (2) in this endeavour he used arguments which would have the effect of influencing public opinion in a manner likely to be prejudicial to the efficient prosecution of the war; (3) but, although the defendant used such arguments, it is probable that he had not the intention of influencing public opinion in a manner likely to be prejudicial to the efficient prosecution of the war. It was because of the last finding that the magistrate dismissed the complaint. The view that he took of the regulation was that upon its proper construction it was essential to the commission of the offence created by the regulation that the defendant should have realized not only that the oral or other action charged against him was an endeavour to influence public opinion but also that by such action he was endeavouring to influence public opinion in a manner prejudicial to the efficient prosecution of the war.

The question of what are the elements of the offence depends upon the intention which is to be inferred from the words of the regulation. In form the regulation is an absolute prohibition. The act prohibited is an endeavour, whether made orally or not, to exert on public opinion influence of a prescribed character. Such influence is that which is likely to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war. If that act can be imputed to the defendant, he is guilty of a breach of the regulation. The act of endeavouring to exert influence on public opinion is clearly to be imputed to the defendant. It was with that intention that he addressed the meeting. Then, was the influence which he endeavoured to exert of the prescribed character? The magistrate held that such influence would flow from the arguments which the defendant used in addressing the meeting. If the evidence supports that finding, and in my opinion it clearly does support it, the proof of the commission of the offence was complete even if it be correct, as the magistrate found, that the defendant did not realize that his arguments were of that character.

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In my opinion the defendant ought to have been convicted of the offence charged in the complaint.

The appeal should be allowed. I agree with the order proposed by the Acting Chief Justice.

WILLIAMS J. In my opinion the magistrate fell into error when he considered that, in order to constitute the offence created by the regulation, it was necessary for the prosecution to establish that the defendant was consciously attempting to influence public opinion in a manner which he knew to be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.

To construe the regulation in this manner would defeat the object for which it was passed. This was to prevent anyone endeavouring to influence public opinion in the manner mentioned.

In time of war the necessity to protect the safety of the realm is paramount and must take priority over individual rights. The creation of such a state of public opinion would be just as prejudicial to this paramount necessity, whether it was brought about by a person who had a genuine belief that the statements he was making would not influence public opinion in this way, or by some one who was in the pay of the enemy and was deliberately attempting to do so.

In *Russell* on *Crimes*, 9th ed. (1936), p. 45, the learned author, in discussing the rule expressed in the phrase *actus non facit reum nisi mens sit rea*, says :—" A late and it would seem a perfectly correct statement of the law on this subject is : ' There is a presumption that *mens rea*, a knowledge of the facts which render the act unlawful, is an essential ingredient in every criminal offence. That presumption is, however, liable to be displaced by the words of the statute creating the offence or the subject matter with which it deals, and both must be considered " (*Toppen* v. *Marcus* (1), per *Palles* C.B., adopting in substance the opinion of *Wright* J. in *Sherras* v. *de Rutzen* (2))—See also *R.* v. *Wheat and Stocks* (3) ; *R.* v. *Duke of Leinster* (4). The subject matter of the regulation in the present case plainly displaces the presumption.

The defendant must of course be conscious that he is endeavouring to influence public opinion. Making a speech at a public meeting, broadcasting an address, circulating pamphlets, or writing to a newspaper would be evidence of such an endeavour. The offence would be committed if the statements he then made were capable of influencing public opinion in the forbidden direction irrespective of any *mens rea* on his part.

(1) (1908) 2 I.R. 423, at p. 425.
(2) (1895) 1 Q.B. 918, at p 921.
(3) (1921) 2 K.B. 119.
(4) (1924) 1 K.B. 311.

The evidence in the present case shows that, under the guise of addressing a public meeting on the question whether the defence of the country could be best effectuated by voluntary or compulsory enlistment, the defendant was making a number of statements calculated to create mistrust in the minds of his hearers as to the bona fides of the Government, suggesting that it was a minority government acting in the interests of one class of the community to the detriment of the general public, that it had fascist tendencies and that the army under its control would be more of a menace than an asset to the country. The magistrate found that what the defendant said was likely directly to discourage men from enlisting, at least so long as the Menzies Government was in power, and was likely directly to cause lack of enthusiasm in those already in training, so that, in his opinion, what was said was likely to be prejudicial to the efficient prosecution of the war. The defendant's remarks at the meeting amply warranted this finding of the magistrate (*Sickerdick* v. *Ashton* (1)).

The defendant gave evidence that he never intended to interfere with the efficient prosecution of the war, and the magistrate accepted this evidence.

It is possible, therefore, that the defendant's subversive remarks were made in the heat of the moment and under the influence of considerable but well-justified heckling. This only shows that at times like the present persons who cannot control their remarks under such circumstances would be well advised to refrain from public utterances.

I agree that the appeal should be allowed.

Appeal allowed. Order of magistrate discharged. Defendant convicted and fined £25. *As the parties have made an agreement as to the costs of this appeal, no order is made as to such costs.*

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *G. L. Morris*, Adelaide, by *Slater & Gordon*.

O. J. G.

(1) (1918) 25 C.L.R. 506.