

[HIGH COURT OF AUSTRALIA.]

BIRD . . . . . APPLICANT ;  
INFORMANT,  
  
AND  
  
COLONIAL SPARK PLUGS PROPRIETARY }  
LIMITED . . . . . } RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
VICTORIA.

*National Security—Offence—Summary prosecution—Consent—Attorney-General—  
Solicitor-General—Delegation of power—National Security Act 1939-1940 (No.  
15 of 1939—No. 44 of 1940), sec. 10 (4)—Solicitor-General Act 1916 (No. 28  
of 1916), secs. 2 (2), 3 (1).*

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—  
MELBOURNE,  
June 1, 5.  
—  
Rich, Starke  
and  
McTiernan JJ.

A delegation under the *Solicitor-General Act 1916* of the Attorney-General's powers under sec. 10 (4) of the *National Security Act 1939-1940* empowers the Solicitor-General to authorize another person to consent to the summary prosecution of offences against the last-mentioned Act.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

Two informations were laid by Henry Scorer Bird against Colonial Spark Plugs Pty. Ltd. charging it with contraventions of reg. 19 (3A) of the *National Security (Supplementary) Regulations* in that it closed its premises on part of certain days when the regulations required that they should not be closed.

These prosecutions were consented to in writing by Francis Felix Clausen, Deputy Crown Solicitor for the State of Victoria, in pursuance of an authority in writing given by the Solicitor-General to consent to such prosecutions, the Attorney-General having, by virtue of sec. 2 (2) of the *Solicitor-General Act 1916*, delegated to the Solicitor-General the powers conferred upon him by sec. 10 (4) of the *National Security Act 1939-1940*.



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The company was convicted and fined in respect of each information.

Orders *nisi* to review the decisions of the magistrate were obtained by the company from the Supreme Court of Victoria. Upon the return of the orders *nisi* Lowe J. made them absolute, quashed the convictions and set aside the informations on the ground that the prosecutions were not authorized by sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940. His Honour held that it was unnecessary to consider the provisions of the *Solicitor-General Act* 1916, especially sec. 3 thereof.

The informant applied to the High Court for special leave to appeal against these decisions. The Court directed that notice of the motion should be served on the company so that if special leave were granted the appeal might be disposed of without delay.

Upon the hearing of the application the Court was informed on behalf of the informant that he desired an expression of opinion on the legal question involved.

*Fullagar* K.C. and *Tait*, for the applicant.

*Ellis*, for the respondent.

*Cur. adv. vult.*

June 5.

The following written judgments were delivered :—

RICH J. In this matter two informations were laid against the defendant company charging it with a contravention of a provision of the *National Security Regulations*. The company was convicted and then applied for and obtained orders *nisi* to review based on two grounds. Of these grounds the first forms the subject of this motion for special leave to appeal. The second ground, which is concerned with the merits, was not pressed or argued. The Court directed notice of the motion to be served on the defendant company, so that if the special leave were granted the appeal might be disposed of without delay. On the return of the rules *nisi* Lowe J. made the orders absolute, quashed the convictions and set aside the informations. His Honour held that the prosecutions in question were not authorized by sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940 and thought it unnecessary to consider the provisions of the *Solicitor-General Act* 1916, especially sec. 3. It appears from the documents put in evidence that the Attorney-General delegated to the Solicitor-General “the powers of the Attorney-General under sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940.” It further appears that “in pursuance of sub-sec. 4



of sec. 10 of the *National Security Act* 1939-1940 and the *Solicitor-General Act* 1916, and of a delegation given by the Attorney-General of the Commonwealth of Australia in accordance with the provisions of the last-mentioned Act" the Solicitor-General authorized the Deputy Crown Solicitor for the State of Victoria to consent to the summary prosecution of the offences mentioned in the informations in the present case, which were offences against the *National Security Act* 1939-1940. The answer to the question submitted to us depends upon the construction of certain sections of two Federal Acts. They are sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940 and sub-sec. 2 of sec. 2 and sub-sec. 1 of sec. 3 of the *Solicitor-General Act* 1916. Sub-sec. 4 of sec. 10 of the former Act reads as follows:—"An offence against this Act shall not be prosecuted summarily without the written consent of the Attorney-General, or the Minister or a person thereto authorized in writing by the Attorney-General or the Minister, and an offence against this Act shall not be prosecuted upon indictment except in the name of the Attorney-General." And sub-sec. 2 of sec. 2 and sub-sec. 1 of sec. 3 of the *Solicitor-General Act* 1916 are expressed as follows:—Sec. 2 (2): "The Solicitor-General shall have such duties and functions as are prescribed by or under any Act, or as are delegated to him by the Attorney-General in pursuance of this Act." Sec. 3 (1): "The Attorney-General may by writing under his hand delegate any of his powers or functions under any Act (except this power of delegation) so that the delegated powers may be exercised by the Solicitor-General as fully and effectually as by the Attorney-General." Under sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940 two courses are open to the Attorney-General. He may himself consent or authorize a person to consent in writing. If the matter had rested there the objection taken on behalf of the defendant would have been unanswerable. But I think that the effect of secs. 2 and 3 of the *Solicitor-General Act* 1916 is to give to the Solicitor-General the powers or functions which the Attorney-General himself has *under any Act* (the italics are mine). These words are wide enough to include the *National Security Act*.

In my opinion the only exception to the general delegation of any of the Attorney-General's powers and functions provided in sec. 3 (1) of the *Solicitor-General Act* 1916 is contained in the words "except this power of delegation." Thus the maxim *delegata potestas non potest delegari* is observed and no power of redelegation is committed to the Solicitor-General. He alone is the surrogate of the power to authorize a third person to consent but may not redelegate that power.

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As the applicant's counsel did not ask for more than an expression of opinion on the legal question argued before us we do not propose to grant special leave or to interfere with the order made by *Lowe J.* As the matter is one of general importance the costs of this application should be paid by the applicant.

STARKE J. Motion for special leave to appeal on the part of Bird, who had prosecuted Colonial Spark Plugs Pty. Ltd. summarily for an offence against the provisions of the *National Security Act* 1939-1940.

By sec. 10 (4) of that Act :—" An offence against this Act shall not be prosecuted summarily without the written consent of the Attorney-General . . . or a person authorized thereto in writing by the Attorney-General . . . "

The *Solicitor-General Act* 1916, No. 28, provides by sec. 3 (1) that :—" The Attorney-General may by writing under his hand delegate any of his powers or functions under any Act (except this power of delegation) so that the delegated powers may be exercised by the Solicitor-General as fully and effectually as by the Attorney-General."

The Attorney-General did by writing under his hand delegate his powers and functions under sec. 10 of the *National Security Act* 1939-1940 to the Solicitor-General in words which so far as material were :—Now therefore I, the Attorney-General of the Commonwealth of Australia, do hereby delegate to the Solicitor-General of the Commonwealth the powers of the Attorney-General under sub-sec. 4 of sec. 10 of the *National Security Act*.

The Solicitor-General then authorized the Deputy Crown Solicitor, in writing, to consent to the prosecution, which, so far as material, was in these words :—I, the Solicitor-General of the Commonwealth of Australia, *Hereby Authorize* Francis Felix Clausen, Deputy Crown Solicitor for the State of Victoria, to consent to the summary prosecution of the offence against the first-mentioned Act arising by reason of the person specified in the first column of the schedule hereunder having contravened or failed to comply with the regulation specified in the second column of the said schedule opposite the name of that person.

The respondent's name was set forth in the schedule and the contravention alleged was of the *National Security (Supplementary) Regulations*, reg. 19 (3A).

A suggestion that the provisions of the *Solicitor-General Act* are inapplicable to the provisions of sec. 10 of the *National Security Act* because that Act makes a special and exclusive provision, is



untenable. The *Solicitor-General Act* is clear and explicit that the Attorney-General may delegate his powers and functions "under any Act"; there is nothing in the *National Security Act* to cut down this provision. And the argument that the Solicitor-General cannot, by writing, authorize a person to give the consent required by sec. 10 of the *National Security Act* cannot, I think, be sustained. It is part of the power or function of the Attorney-General under sec. 10 to authorize such a person to give the consent and the *Solicitor-General Act* is again explicit that the Attorney-General's powers and functions may be exercised as fully and effectually as by the Attorney-General. In my opinion, the words excepting from the operation of sec. 3 of the *Solicitor-General Act* 1916 "this power of delegation" refer to the act of delegation—to the appointment of the delegate or substitute for the Attorney-General, and not to the various acts or things which the delegate may do in pursuance of his appointment.

But having expressed our views as to the proper construction of the statutes in question here for the guidance of judicial and other authorities in other cases, special leave to appeal, should, nevertheless, be refused in this trumpety prosecution, and the mover ordered to pay to the respondent its costs of the motion.

MCTIERNAN J. These were summary prosecutions for alleged contraventions of a provision of the *National Security (Supplementary) Regulations* and hence for offences against the *National Security Act* 1939-1940: See sec. 10 (1) of this Act. The prosecutions succeeded in the Court of Petty Sessions, but the convictions were set aside by the Supreme Court of Victoria (*Lowe J.*), who held that the prosecutions of the offences took place without the consent required by sec. 10 (4) of the *National Security Act* 1939-1940. Upon this application for special leave to appeal the only question argued was whether the convictions should have been set aside on that ground. The offences were not prosecuted with the written consent of the Attorney-General or the Minister, but with the written consent of the Deputy Crown Solicitor. The question is whether he was "a person thereto authorized in writing by the Attorney-General" for the purposes of sec. 10 (4). The Solicitor-General, not the Attorney-General, authorized the Deputy Crown Solicitor in writing to consent to the summary prosecution of the defendant for the particular contraventions of the *National Security (Supplementary) Regulations* charged in the informations. The Solicitor-General's authority to the Deputy Crown Solicitor purported to be given in pursuance of sec. 10 (4) of the *National Security Act* 1939-1940,

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the *Solicitor-General Act* 1916 and a delegation given by the Attorney-General in accordance with the provisions of this Act. The *Solicitor-General Act* constitutes the office of Solicitor-General and provides that he shall have such duties and functions as are prescribed by or under any Act or as are delegated to him by the Attorney-General in pursuance of the Act. The power of delegation is given by sec. 3 (1). It applies to any of the Attorney-General's powers or functions under any Act except the power of delegation given by the sub-section. The sub-section provides that the effect of the delegation is that the delegated powers may be exercised by the Solicitor-General as fully and effectually as by the Attorney-General. The Attorney-General, purporting to act under the *Solicitor-General Act* 1916, delegated to the Solicitor-General the Attorney-General's powers under sub-sec. 4 of sec. 10 of the *National Security Act* 1939-1940. The delegation is limited to the powers—not being expressed to extend to the functions—of the Attorney-General under that sub-section. The question arises whether sec. 3 (1) of the *Solicitor-General Act* applies to the Attorney-General's powers under sec. 10 (4) of the *National Security Act* 1939-1940. Sec. 3 (1) is expressed to apply to any powers or functions of the Attorney-General under any Act. The only exception is "this power of delegation." In the *National Security Act* there is nothing which excludes the application of sec. 3 (1) of the *Solicitor-General Act* to the powers of the Attorney-General under sec. 10 (4). The former sub-section applies to the powers of the Attorney-General under the latter sub-section. The Attorney-General's powers under sec. 10 (4) are :—(1) To consent in writing to the summary prosecution of an offence against the *National Security Act* ; and (2) To authorize a person in writing to give such consent. As regards the first of these powers, the Solicitor-General, acting under the delegation, might have given his written consent to these prosecutions, and this would have satisfied the requirement of sec. 10 (4) as fully and effectually as if the Attorney-General had given it. Presumably for reasons of administration, the Solicitor-General did not give such consent. Acting under the delegation from the Attorney-General he purported to exercise the Attorney-General's power under sec. 10 (4) to authorize a person to give the consent. The Solicitor-General's authorization of the Deputy Crown Solicitor to consent also satisfied the requirement of sec. 10 (4) as fully and effectually as if the Attorney-General had authorized him.

The delegation to the Solicitor-General was lawfully made under sec. 3 (1) and the authorization which he gave to the Deputy Crown Solicitor was justified by the delegation. The Solicitor-General did



not purport to delegate to the Deputy Crown Solicitor any power to authorize another person to consent to the prosecutions. What the Solicitor-General did was to authorize the Deputy Crown Solicitor himself to consent.

In my opinion the convictions should not have been upset on the ground that there was a failure to comply with sec. 10 (4) of the *National Security Act* 1939-1940. Although the disposal of this application involves the decision of the point argued, the case is not one in which special leave to appeal should be granted. In my opinion it should be refused with costs.

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*Special leave refused. Applicant to pay costs of the motions.*

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

Solicitors for the respondent, *Moule, Hamilton & Derham*.

J. B.