Appl
Major Tracey, Re; Ex parte Ryan 16 ALD 730
Appl
Tracey, Re; Ex parte Ryan 84 ALR 1
Cons
Tracey, Re; Ex parte Ryan 166 CLR 518
Appl
Tracey, Re; Ex parte Ryan 63 ALJR 250
Cons
Paterson v Public Service Disciplinary Appeals Tribunal [1994] 1 VR 229
Appl
Vasiljkovic v Commonwealth (2006) 80 ALJR 1399

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

COX AND OTHERS;

EX PARTE SMITH.

H. C. OF A. 1945.

SYDNEY, *July* 25, 27; *Aug.* 20.

Latham C.J. Rich, Starke, Dixon and Williams JJ.

Defence—Army—Mutiny—"Joins in . . . any mutiny in . . . His Majesty's military forces"—Persons "subject to military law"—Member of forces sentenced by court-martial to detention and discharge from forces—Discharge effected—Detention thereafter at military detention barracks—Other confinees similarly sentenced, discharged and detained—Attempt to break out of barracks by force—Whether mutiny—Charge—Jurisdiction of court-martial—Ruling by Judge Advocate-General—Effect—Prohibition—Judicial power of Commonwealth—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 71, 75 (*v.*)—*Defence Act* 1903-1941 (*No.* 20 *of* 1903—*No.* 4 *of* 1941), *ss.* 4, 55—*Army Act* (*Imp.*) (44 & 45 *Vict. c.* 58—7 & 8 *Geo. VI. c.* 18), *ss.* 7 (3), 158 (2)—*Australian Military Regulations* (*S.R.* 1927 *No.* 149—1945 *No.* 68), *regs.* 196A (1), 575 (10)—*National Security* (*Military Forces*) *Regulations* (*S.R.* 1941 *No.* 1—1945 *No.* 30), *reg.* 14.

Held:—

(1) By the whole Court, that the effect of s. 158 (2) of the *Army Act* (Imp.) is that a soldier who has been convicted by court-martial and discharged as well as sentenced to undergo detention is, during the term of his detention, subject to all the provisions of the *Army Act* (Imp.) relevant to his status and situation.

(2) By *Latham* C.J., *Rich*, *Dixon* and *Williams* JJ., that a charge cannot be maintained under s. 7 (3) of the *Army Act* (Imp.) in respect of a disturbance or defiance of authority by confinees all of whom have been discharged from the forces as well as sentenced.

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH.

Held, further, by *Rich*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *Starke* J. dissenting), that prohibition lies to the members of a court-martial to prohibit them from proceeding with a charge under s. 7 (3) in respect of a disturbance or defiance of authority by confinees all of whom have been discharged from the forces as well as sentenced.

Per Latham C.J., *Dixon* and *Williams* JJ.:—The provisions of the *Defence Act* 1903-1941 which result in empowering a court-martial to hear and determine charges against persons discharged from the forces do not contravene s. 71 of the Constitution.

R. v. *Bevan*; *Ex parte Elias and Gordon*, (1942) 66 C.L.R. 452, applied.

ORDER NISI for prohibition.

Bruce Malcolm Smith, when Private No. NX 201,585 in the Defence Forces of the Commonwealth, was charged before a district court-martial with the offence of absence without leave, was convicted and was sentenced to undergo imprisonment with hard labour for one year, and to be discharged from the defence forces: *Defence Act* 1903-1941, s. 97 (*a*). This sentence was varied to a sentence to undergo detention for one year and to be discharged from the forces. On 19th October 1944, by certificate No. 59,604, Smith was so discharged, the discharge taking effect from that date. Smith was kept in detention at detention barracks at Tamworth, New South Wales. It was alleged that, on 29th May 1945, he joined in a mutiny in His Majesty's Forces at the barracks, and he was charged with that offence under s. 7 (3) of the *Army Act* (Imp.). The other persons who were alleged to have joined in the mutiny were persons who had been sentenced by court-martial and were serving terms of detention and as part of the sentence so passed upon them had been discharged from the forces.

The charge against Smith was stated in the charge sheet in the following terms:—"The accused Bruce Malcolm Smith a person subject to military law under AA158 (2) is charged with having during the term of a sentence of detention imposed upon him by court martial while No. NX 201,585 Private Bruce Malcolm Smith committed the following offence—AA7 (3)—JOINING IN A MUTINY IN HIS MAJESTY'S MILITARY FORCES—in that he at about 1120 hours on 29 May '45 joined in a mutiny by combining with other confinees of 14 Aust. Detention Barracks, Tamworth, being persons subject to military law in a concerted attempt to break out of the said barracks by force and violence."

When Smith was called upon to plead before a general court-martial, counsel on his behalf objected to the jurisdiction of the court-martial, and the court adjourned the proceedings.

Upon an application made on behalf of Smith, an order nisi for prohibition was granted by *Rich* J. calling upon Major E. R. Cox, Smith's Commanding Officer, Major-General E. C. Plant, the General Officer Commanding New South Wales Lines of Communications, Brigadier B. E. Klein, Lieutenant-Colonel J. Moyes, Major C. M. Howie, Major J. L. Maroney and Captain D. C. Black, members of the general court-martial, to show cause why a writ of prohibition should not issue to them and each of them prohibiting them and each of them from further proceeding upon the trial of Smith at the general court-martial. The grounds upon which the order nisi was issued were :—1. That the general court-martial had no jurisdiction to try Smith on the charge laid against him ; 2. That the charge was bad in law and did not disclose any offence for which Smith could be tried or punished by court-martial ; 3. That if and in so far as the *Defence Act* 1903-1941 and the regulations made thereunder purported to confer jurisdiction upon courts-martial over Smith in respect of the said offence or at all the said Act and regulations were contrary to s. 71 of the Constitution of the Commonwealth of Australia and invalid ; and, 4. That the general court-martial was not bound by certain rulings of the Judge Advocate-General upon which it proposed to act in accordance with *Australian Military Regulations*, reg. 575 (10), and that the said rulings had no legal effect in connection with the trial of Smith or in connection with the validity of the charge laid against him or the conferring or existence of jurisdiction upon or in the said court-martial.

Section 55 of the *Defence Act* 1903-1941 contains the following provision :—" The Military Forces shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the Army Act save so far as it is inconsistent with this Act and subject to such modifications and adaptations as are prescribed."

It was not disputed that Smith was on war service up to 19th October 1944, when he was discharged from the forces : See *Defence Act*, s. 4—definition of " War Service " ; *National Security* (*Military Forces*) *Regulations*, reg. 14 ; proclamation of the Governor-General of 14th April 1942.

Further material facts and relevant statutory provisions and rules and regulations appear in the judgments hereunder.

Bradley K.C. and *Sugerman* K.C. (with them *Henry* and *Snelling*), for the prosecutor.

Bradley K.C. The general court-martial had no jurisdiction to try the prosecutor on the charge upon which he was before that

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH.

court. At the time of the alleged commission of the offence charged, the prosecutor was not a person subject to military law. He was no longer a member of the defence forces of the Commonwealth, nor was he a member of His Majesty's Forces or liable as such in any way. He had returned to his civilian status. By reason of his discharge from the forces and as such civilian, he was not amenable to trial by a court-martial upon the offence charged. Neither the prosecutor nor the other confinees, being civilians, were legally capable of committing the offence of mutiny under s. 7 of the *Army Act*, or at all. Section 158 (2) of that Act does not apply to a person who has been discharged from the military forces of the Commonwealth. The *Army Act* only becomes applicable to Australian soldiers during a time of war and literally in terms of s. 55 of the *Defence Act*. The *Defence Act* makes it applicable only to members of the military forces, and only while they are on war service. The prosecutor was neither a member of the military forces nor was he on war service. The *Army Act* becomes applicable to persons serving in the military forces of the Commonwealth only by reason of the provisions of s. 55 of the *Defence Act*. Section 158 (2) of the *Army Act* does not authorize the bringing of a charge of mutiny against a person who is under sentence and has been discharged from the military forces. The true meaning of that sub-section is that, although a person has been discharged from the military forces, he can be continued in detention. Support for this view is to be found in the words "and punished accordingly" and "accordingly" in that sub-section, which mean in accordance with the *Army Act*, that is in accordance with the sentence imposed by the original court-martial.

[WILLIAMS J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 592.]

Australian Military Regulations, reg. 575, is *ultra vires*; therefore the rulings by the Judge Advocate-General were not binding on the general court-martial. In any event, those rulings are not binding on this Court.

LATHAM C.J. The Court does not desire to hear further argument on this point. The rulings by the Judge Advocate-General do not in any way bind this Court.

Sugerman K.C. If this Court holds that the general court-martial had jurisdiction, it is submitted that what was involved in the exercise of the cumulative power against the prosecutor in the circumstances of this case was an exercise of the judicial power

of the Commonwealth. *R.* v. *Bevan*; *Ex parte Elias and Gordon* (1), in which this Court held that courts-martial derive their authority from the defence power and not from Chapter III. of the Constitution, was a decision limited to the dealing by courts-martial with offences by persons who are actually serving members of the forces, and does not extend to a civilian in the situation of the prosecutor. *Ex parte Milligan* (2), referred to in *Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. 3, pp. 1548-1550, was such an extraordinary case that it seems to have no bearing on the problem now before this Court. *Bevan's Case* (1) points to a rather anomalous exception from the Judicial Chapter of the Constitution and raises the question as to what are the limits of the exception supported by that decision. The matter rests, ultimately, on practical considerations. The exception is something which should be restrained within the narrowest points necessary. Although the prosecutor may be subject to military law, he cannot be subject to a court-martial. Sections 101 and 102 of the *Defence Act* and regs. 197, 203 and 215 of the *Australian Military Regulations* provide a complete code for dealing with the prosecutor by the civil courts. The only mutiny referred to in s. 7 of the *Army Act* which is caused, or conspired, or joined in is a mutiny in the forces. That is a prohibition point. A court-martial, in the view of this Court, is a court of limited statutory jurisdiction and it is well settled that an inferior court exercising criminal jurisdiction has jurisdiction only to deal with and punish offences known to the law, and known to the law *qua* the particular defendant over whom it is sought to exercise jurisdiction, that is to say the existence of the offence and the liability of the particular party to be arraigned for the offence by the court is a point of jurisdiction and not merely a point within jurisdiction. The defect on the face of the information appears in the particulars of the charge. The expression "subject to military law" does not appear in the *Defence Act* but does appear in the *Army Act* and is defined therein by ss. 175 and 176. Under reg. 197 of the *Australian Military Regulations*, the words "subject to military law" merely operate to attract to a person not subject to the *Army Act* the subsequent provisions of the military law and jurisdiction in such cases in the *Defence Act* itself. It is not suggested that the *Defence Act*, or the regulations thereunder, or other legislation incorporated by reference, may not constitutionally create substantive offences of which civilians may be guilty. They can not validly subject civilians to the jurisdiction of courts-martial because of the infringement thereby involved of s. 71 of the Constitution. Legislation supported only under the defence

(1) (1942) 66 C.L.R. 452. (2) (1866) 4 Wall. 2 [18 Law. Ed. 281].

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH.

power purporting to confer judicial power upon bodies which did not comply with the requirements of s. 71 was held invalid in *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria* (1); see also *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (2). The exception made in *R.* v. *Bevan*; *Ex parte Elias and Gordon* (3) from the decisions of this Court that the defence power is subject to the judicial power is limited and should be kept limited. That case was decided largely on grounds of practical necessity. It could not be suggested that, consistently with the Judicature Chapter of the Constitution, civilians could be made punishable by court-martial for offences which appertain to military law and yet are validly created under the defence power.

Ferguson K.C. (with him *Stephen*), for the respondents. Broadly speaking, the *Army Act* applies in war-time and the *Defence Act* in peace-time. In the absence of a penal code in the *Defence Act*, the penal code which applied under the *Army Act* was substantially reproduced in regulations made under the *Defence Act*. Regulation 197, which applies in peace-time, should be contrasted with s. 158 (2) of the *Army Act*, which applies in war-time. Limitation to peace-time is achieved by the use of the words "when not subject to the *Army Act*." Regulation 197 regulates the position as to members of the Australian forces when they are not on war service, though it be a time of war. Section 158 (2) of the *Army Act* comes into operation only when the provisions of s. 55 of the *Defence Act* are applicable. Both Acts contemplate that people who are sentenced by court-martial to detention, or penal servitude, or imprisonment may also be discharged at the same time. The meaning of sub-s. 2 of s. 158 is clear. Attention is invited to the words "during the term . . . as if he continued to be subject to military law." When a person subject to military law is sentenced by court-martial to penal servitude, imprisonment or detention, the sub-section provides that the Act shall apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be "kept during the term," "removed during the term," "made to undergo detention during the term" or "punished during the term." The word "punished" most clearly indicates the intention of the legislature. The words "punished accordingly" can only mean "according to the Act as if he continued to be subject to military law." The meaning of the sub-section is made clear by substituting

(1) (1943) 67 C.L.R. 1. (2) (1943) 67 C.L.R. 25.
(3) (1942) 66 C.L.R. 452.

for the words " a person subject to military law " wherever occurring, the words " soldier on war service." It is part of and inherent in the sentence passed under the Act upon a soldier that he shall serve it and shall be deemed to be a soldier on war service, and, under those circumstances, he is subject to punishment for all military offences that may be committed by him during his detention. He is deemed under s. 158 (2) to be a member of the military forces on war service and as such is subject to all the provisions of the *Army Act* that apply to a soldier on war service. With reference to the words " whilst on war service," the view is that, if soldiers are on war service, the *Army Act* attaches to them, then anything which is done under that Act, such as the imposing of a sentence, is a liability they have incurred and the provisions of the Act continue to apply notwithstanding that the soldiers concerned have ceased to be on war service.

[WILLIAMS J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 28, p. 592, par. 1219.]

The meaning of the words " any mutiny . . . in any such force " in s. 7 (3) of the *Army Act* is not a matter that can be raised by prohibition. It cannot be so raised because it depends upon the charge or the terms of the charge that has been laid. Whether or not it was a good charge is not a question for this Court, it was a question for the tribunal, that is the general court-martial, before which the charge was heard. It is not a jurisdictional point. In any event, the charge, which is a charge of a military offence, is supported by the evidence. Every person who is subject to military law, whether he be a soldier or not, is a soldier within the meaning of that word as defined in s. 4 of the *Defence Act*. Even if it be a jurisdictional point which could come before this Court, the offence is one which could be committed by the prosecutor in so far as he must be deemed to be a soldier and thus liable to be tried by court-martial. The offence charged was fully proved on the facts in evidence. The detention camp was part of His Majesty's Forces. The discharged men are deemed to be members of the military forces and are deemed to be soldiers on war service. The position is, therefore, that there has been organized resistance to authority in His Majesty's Forces, thus bringing the case exactly within s. 7 (3) of the *Army Act*. It follows that the men who are deemed to be members of the forces may be sentenced for any offence that can be committed by any other member of the forces who is there and for the same offence.

Bradley K.C., in reply. The charge as laid against the prosecutor is at variance with and is a total departure from the directions and

H. C. OF A. 1945.

THE KING v. COX; EX PARTE SMITH.

procedure prescribed in the *Manual of Military Law* (1941) Aust. ed., at pp. 549, 550, 628, 629, 632. The charge is not sanctioned by the *Army Act*. Section 117A of the *Defence Act* is very different from ss. 158 and 184 of the *Army Act*. Section 184 does not apply to the prosecutor, it deals with an entirely different class, that is civilians who never were and were not at the relevant time members of His Majesty's Forces. The words " punished accordingly " in s. 158 (2) mean punished as provided by the Act itself while the persons concerned are undergoing detention : See *Army Act*, s. 132. The provision that members of the forces shall be deemed to be persons subject to military law implies a negative, namely that persons who are not members of the forces are not persons subject to military law.

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered :—

LATHAM C.J. The prosecutor in these proceedings for a writ of prohibition is Bruce Malcolm Smith, formerly private No. NX 201,585 in the defence forces of the Commonwealth. The respondents are the convening officer and the members of a general court-martial. Smith has been charged before the court-martial with the offence of joining in a mutiny in His Majesty's Forces—*Army Act* (Imp.), s. 7 (3). At the time when the alleged mutiny took place, he was serving a sentence of detention under a conviction by a district court-martial for the offence of absence without leave—*Army Act*, s. 15. He had also been sentenced to be discharged from the forces and had actually been discharged. The other persons who are alleged to have joined in the mutiny were other military prisoners also discharged from the forces. When Smith was called upon to plead, counsel on his behalf objected to the jurisdiction of the court. The court adjourned the proceedings and an order nisi for prohibition was granted by my brother *Rich*. The contentions for the prosecutor are :—(1) that the court-martial had no jurisdiction to try the prosecutor on the charge laid against him, for the reason that he had been discharged from the forces, was no longer subject to military law, and was in the same position as any civilian ; (2) that the charge was bad in law as disclosing no offence because the mutiny was alleged to have consisted in combined action by persons who were discharged from the forces, and that such persons could not join in a mutiny in the forces ; (3) that the conferring of jurisdiction upon courts-martial to deal in any way with persons who were not members of the military forces involved an exercise of judicial power in relation to those persons, that such power could be exercised only by courts

created, or invested with jurisdiction, under the Commonwealth Constitution, s. 71, that the court-martial was obviously not such a court, and that the decision in *R.* v. *Bevan*; *Ex parte Elias and Gordon* (1), which upheld the constitutionality of courts-martial, did not apply to authorize the prosecution before a court-martial of a person not a member of the forces; (4) that the court-martial proposed to act in accordance with *Australian Military Regulations*, reg. 575 (10), which provides that all members of the Australian Military Forces shall be bound by the rulings and opinions on questions of military law given by the Judge Advocate-General. The Judge Advocate-General had given rulings contrary to the contentions raised for the accused. It was said that the regulation was invalid. Such a regulation is doubtless a reasonable provision in relation to many matters of administration, but, as at present advised, I see no reason for regarding it as displacing the statutory provisions which impose upon courts-martial the special duty of deciding questions of law, as well as questions of fact, in proceedings before them. But the question of the validity of the regulation was not argued, because it is obvious that the regulation does not bind or even purport to bind this Court, which is bound to determine any relevant question of law independently of the opinion of the Judge Advocate-General.

Smith, when a member of the forces, was charged before a district court martial with the offence of absence without leave, was convicted, and was sentenced to undergo imprisonment with hard labour for one year, and to be discharged from the defence forces: *Defence Act*, s. 97 (*a*). This sentence was varied to a sentence to undergo detention for one year and to be discharged from the forces. On 19th October 1944, by certificate 59,604, Smith was so discharged, the discharge taking effect from that date.

Smith was kept in detention at detention barracks at Tamworth. It is alleged that, on 29th May 1945, he joined in a mutiny in His Majesty's Forces at the barracks, and he was charged with that offence under the *Army Act*, s. 7 (3).

The charge against Smith was stated in the charge sheet in the following terms:—

> "The accused Bruce Malcolm Smith a person subject to military law under AA 158 (2) is charged with having during the term of a sentence of detention imposed upon him by court martial while No. NX 201,585 Pte. Bruce Malcolm Smith, committed the following offence.

(1) (1942) 66 C.L.R. 452.

H. C. OF A. 1945.

THE KING v. COX; EX PARTE SMITH.

Latham C.J.

AA 7 (3)

JOINING IN A MUTINY IN HIS MAJESTY'S MILITARY FORCES

in that he at about 1120 hours on 29 May '45 joined in a mutiny by combining with other confinees of 14 Aust. Detention Barracks Tamworth being persons subject to military law in a concerted attempt to break out of the said barracks by force and violence."

The charge was laid in the precise terms set out in the rules of procedure under the *Army Act*, namely " joining in a mutiny in His Majesty's military forces." The particulars of the charge show that it is alleged that Smith (though no longer a member of the forces, having been discharged therefrom) was subject to military law under the *Army Act*, s. 158 (2), and that the alleged mutiny consisted in combining with persons described as " other confinees," being persons subject to military law, in a concerted attempt to break out of barracks by force and violence.

Section 55 of the *Defence Act* contains the following provision :— " The Military Forces shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the Army Act save so far as it is inconsistent with this Act and subject to such modifications and adaptations as are prescribed."

Smith (when he was absent without leave) was a member of the military forces. It is not disputed that he was on war service up to 19th October 1944, when he was discharged from the forces (*Defence Act* 1903-1941, s. 4—definition of " War Service " : *National Security* (*Military Forces*) *Regulations*, reg. 14 : proclamation of Governor-General of 14th April 1942). Thus, before 19th October 1944, Smith was, by virtue of s. 55, subject to the *Army Act*. As a person subject to the *Army Act*, he was liable to be tried for the offence under the *Army Act*, s. 15, of being absent without leave, and if found guilty to be sentenced in accordance with the *Army Act* for that offence. He was found guilty and was so sentenced. Smith, when sentenced, was " a person subject to military law " by reason of *Australian Military Regulations*, reg. 196A (1), which is as follows :—" The Military Forces and the members thereof shall for the purposes of the application to and in relation to them of the provisions of the Army Act, be deemed to be ' persons subject to military law ' within the meaning of that expression as used in those provisions."

Smith therefore was a person subject to military law for the purpose of the application to him of the *Army Act*.

Section 158 (2) of the *Army Act* is in the following terms :— " Where a person subject to military law is sentenced by court-martial to penal servitude, imprisonment, or detention, this Act shall

apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly as if he continued to be subject to military law."

Several consequences followed from the fact that, by virtue of s. 55 of the *Defence Act*, Smith was subject to the *Army Act* when he was absent without leave. The first consequence was that he could be tried for and convicted of an offence against the *Army Act*—the offence of being absent without leave. The next consequence was that he could be sentenced to be discharged from the forces as part of his punishment. Another consequence was that, being a person subject to military law (*Australian Military Regulations*, reg. 196A) when sentenced to detention, s. 158 (2) authorized his detention under the sentence of the court, notwithstanding the fact that he had been discharged from the forces. It was contended for Smith that, because he was discharged from the forces, s. 158 (2) could not apply to him. But the truth is that that sub-section is brought into operation by reason of the very fact of discharge from the forces.

But it was contended, in effect, for the prosecutor that s. 158 (2) meant no more than that, where a member of the forces had been sentenced and discharged, the sentence could lawfully be carried out, and that it did not mean that he could be punished according to military law for a new military offence committed during the period of his sentence. In my opinion, no provision is really necessary for the former purpose, though s. 158 (2) does achieve that purpose. The *Army Act* gives authority to impose certain penalties, and discharge from the Army may be added as a penalty in certain cases. It would be a strange result if the addition of the element of discharge to any other penalty imposed made it impossible to enforce the sentence of which that element was a part. Section 158 (2), in my opinion, goes further than merely to preclude such a result. That provision, dealing with the case of a discharged person serving a sentence as a military prisoner, says in plain terms " this Act shall apply to him." These words, in my opinion, continued the application of the *Army Act* to Smith during his detention, so that he was capable of committing new offences against the Act. But, apart from the words " this Act shall apply to him," s. 158 (2) also provides that a military prisoner may be " punished accordingly as if he continued to be subject to military law." Thus such a person is treated as if he were subject to military law throughout the term of his detention, and he may be punished for an offence against military law in accordance with the *Army Act*. In my opinion, the legal

H. C. OF A. 1945.

THE KING v. COX; EX PARTE SMITH.

Latham C.J.

position is accurately stated in the note to the *Manual of Military Law* 1941, p. 504, in the following terms :—" Sub-section (2) deals with the case of a person who is tried and sentenced whilst still subject to military law. Under this enactment the Act applies to the offender during the term of his sentence, notwithstanding that his discharge or dismissal from the service has been formally carried out, or that he has otherwise ceased to be subject to military law. Consequently he may be tried by court-martial for an offence committed by him at any time before his sentence is completed." I am of opinion that the court should reject the contention that Smith should be regarded as being merely a civilian, and as not being subject to military law and liable to court-martial proceedings.

The offence with which Smith was charged under s. 7 (3) of the *Army Act* is the offence of " joining in a mutiny in His Majesty's military forces." Section 7 provides that every person subject to military law who commits any of the following offences, that is to say, " (1) Causes or conspires with any other persons to cause any mutiny or sedition in any of His Majesty's military, naval, or air forces (including any Dominion force) ; or (2) Endeavours to seduce any person in any such force as aforesaid from allegiance to His Majesty, or to persuade any person in any such force as aforesaid, to join in any mutiny or sedition ; or (3) Joins in, or being present does not use his utmost endeavours to suppress, any mutiny or sedition in any such force as aforesaid shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned."

The words " in any such force " in sub-s. 3 refer to His Majesty's military, naval, or air forces mentioned in sub-s. 1. Accordingly, the offence is essentially an offence of joining in a mutiny " in His Majesty's forces." It is contended that, as military prisoners who have been discharged from the forces are no longer members of His Majesty's forces, they are incapable of committing an offence under s. 7 (3).

A person joins in a mutiny if he takes part in it. A civilian might join in a mutiny—but unless he were a civilian subject to military law he could not be prosecuted before a court-martial for an offence under s. 7 because that section applies only to persons subject to military law. But a person such as Smith, who is subject to military law, and to whom the *Army Act* is expressly made applicable, is subject to such proceedings if he takes part in a mutiny in the forces. Similarly, other military prisoners under detention, though discharged from the forces, may also commit that offence. Accordingly, in my opinion, the charge sheet does allege an offence which the court-martial has jurisdiction to try.

But the mutiny must be a mutiny "in His Majesty's forces." Unless the combined resistance to discipline takes place in the forces, there is no mutiny in the forces, and therefore there can be no offence of joining in such a mutiny. The particulars of the charge refer to "other confinees." If any of these other persons were members of the forces who took part in a mutiny and Smith took part in it, he could properly be convicted of an offence under the *Army Act*, s. 7 (3). But it is agreed that the "other confinees" were persons in the same position as Smith—i.e. prisoners serving sentences for military offences, but discharged from the forces. They were all persons subject to military law, but they were no longer in His Majesty's forces. Upon these facts, there is no evidence of any mutiny "in His Majesty's forces" and therefore no person could properly be convicted of the offence of joining in such a mutiny.

But, in my opinion, the result only is that Smith should not be convicted upon this particular charge—not that the court-martial has no jurisdiction to try him. The facts show that Smith has a good defence—not that he cannot be tried. The fact that a person who is subject to the jurisdiction has a good defence is not a ground for prohibition.

The jurisdiction of the court-martial depends upon whether Smith was a person subject to military law and upon whether the offence charged is an offence against the *Army Act*. These conditions are satisfied. In the exercise of that jurisdiction, the court-martial must adjudicate upon the question whether a mutiny in the forces has been proved. But the establishment of the fact of a mutiny is not a condition of jurisdiction—it is one of the issues which it is the duty of the court-martial to determine. If the court-martial for any reason (e.g. an erroneous opinion of the Judge Advocate-General) came to a wrong decision upon this question, this would be a ground upon which any appellate or revising authority provided for by law should set aside the conviction. But such an actual (or probable) error is no ground for prohibition.

Finally, it is contended that, although it was decided in *R.* v. *Bevan*; *Ex parte Elias and Gordon* (1) that the provisions of the Judicature Chapter of the Commonwealth Constitution do not prevent the establishment and operation of courts-martial, that decision was based upon the nature of the defence power, the necessity of preserving discipline in the armed forces, and the functions of a court-martial as what might be called part of the apparatus of discipline. It is argued that the principle upon which the decision

(1) (1942) 66 C.L.R. 452.

H. C. OF A. 1945.

THE KING v. COX; EX PARTE SMITH.

Latham C.J.

is based does not apply so as to make it possible to try by court-martial persons who are no longer members of the forces.

In my opinion, this argument should not be accepted. A soldier who has been convicted of an offence and sentenced to detention without discharge is liable to trial by court-martial for a new offence, and a provision to this effect is within the defence power. A provision that other soldiers, convicted of an offence and sentenced to detention, but because of disgraceful circumstances also sentenced to be discharged from the army, should be subject to equivalent disciplinary measures, is equally within the defence power. The necessities of maintaining discipline are, in my opinion, as pressing and urgent in the case of military prisoners who have been discharged from the forces as in the case of continuing members of the forces, and the principle of the decision in *R.* v. *Bevan* ; *Ex parte Elias and Gordon* (1) therefore applies so as to authorize the jurisdiction claimed for the court-martial in the present case.

In my opinion, the order nisi should be discharged.

RICH J. The prosecutor in this application, while serving as a member of the Australian Military Forces, was sentenced to detention and was discharged from the Army. He thereupon became both in fact and in law a civilian. If no more appeared, he might have been freed from all military control. But, to meet the position, s. 158 (2) of the *Army Act* provides as follows :—" Where a person subject to military law is sentenced by court-martial to penal servitude, imprisonment, or detention, this Act shall apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly as if he continued to be subject to military law." I construe this to mean, not that he becomes a soldier in contemplation of law, but that the *Army Act*, and not the whole of the military law, shall apply to him as if he had continued under military law. I put on one side the construction contended for that he is to be subject to the *Army Act* only in respect of the serving of his sentence. But, on the other hand, I think it is quite clear that it does not mean that the *Army Act* applies to him on the footing that he is a member of the forces. Its very basis is that he is not a member of the forces, and for that reason he must be specially provided for. Now this is most material when the charge upon which he was brought before the court-martial comes to be examined. He was charged under s. 7 (3) of the *Army Act* with

(1) (1942) 66 C.L.R. 452

joining in a mutiny in His Majesty's Forces. The alleged mutiny in which he joined was among civilians—former members of the forces who, like him, had been discharged. No soldier took part in the act said to constitute a mutiny. The charge is, therefore, quite outside s. 7 (3) of the *Army Act*. It could only be brought within s. 7 (3) if s. 158 (2) were given the construction I reject and interpreted as meaning, not merely that the *Army Act* should apply to the men, but that they should be deemed to be soldiers. The court-martial have adopted this erroneous interpretation of s. 158 (2), not by reason of their own opinion or that of the Judge Advocate, but under what was regarded as the obligatory force of the ruling of the Judge Advocate-General. It appears that, under a military regulation, all members of the forces are bound by such ruling and all members of the court-martial are of course members of the forces. A doubt is raised, however, as to the existence of any remedy to prevent the court-martial wrongly convicting the prosecutor. The doubt is based upon the view that it is a matter for the court-martial to decide and that, if they misconstrue s. 158 (2), there is no help for it. I think that their jurisdiction over the man and the charge depends upon s. 158 (2) and, as under the direction of the Judge Advocate-General the court-martial is proceeding upon a construction which is, in my opinion, erroneous, the remedy is available and appropriate. In my opinion, the order nisi should be made absolute.

STARKE J. Rule nisi for a writ of prohibition directed to the members of a general court-martial to show cause why they should not be prohibited from further proceeding with the trial of the prosecutor on a charge that, being a person subject to military law under the *Army Act*, s. 158 (2), he, during the term of a sentence of detention imposed upon him by court-martial, joined in a mutiny in His Majesty's Military Forces in that on 29th May 1945, he combined with other confinees in certain detention barracks, being persons subject to military law, in a concerted attempt to break out of the barracks by force and violence. At the time of the acts charged against the prosecutor, he was undergoing detention for one year commencing on 22nd September 1944 pursuant to sentence of court-martial, as varied by the confirming authority, which also directed that he be discharged from the Defence Force of the Commonwealth.

The *Defence Act* 1903-1941 of the Commonwealth provides, so far as material to this case, that the military forces shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the *Army Act*. The military forces of the Commonwealth were on war service during all times relevant to

H. C. OF A. 1945.

THE KING v. COX; EX PARTE SMITH.

Starke J.

this case (*Defence Act*, s. 4, "War Service," "Active Service," *National Security* (*Military Forces*) *Regulations*, reg. 14 and proclamation dated 14th April 1942), and therefore became subject to the *Army Act*. And s. 158 (2) of the *Army Act* provides:—"Where a person subject to military law is sentenced by court-martial to . . . detention, this Act shall apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly as if he continued to be subject to military law."

The prosecutor was such a person.

It is clear, I think, that the section does not restore the prosecutor to his status as a member of the military forces but it leaves him nevertheless during the term of his sentence subject to military law. It is said, however, that this means for the purpose of executing and carrying out his sentence. But the words of the section are:—"this Act shall apply to him," not only that he may undergo detention &c., but that he may be punished accordingly as if he continued to be subject to military law. Or, in other words, that the Act applies to him so that he may, during the term of his sentence, be punished for an offence for which a person subject to military law would be punishable. And the *Army Act* by s. 7 also provides:—"Every person subject to military law who commits any of the following offences; that is to say, (1) Causes or conspires with any other persons to cause any mutiny or sedition in any of His Majesty's military, naval, or air forces (including any Dominion force), or . . . (3) Joins in . . . any mutiny or sedition in any such force as aforesaid shall, on conviction by court-martial, be liable to suffer death or such less punishment as is in this Act mentioned."

The prosecutor was, as appears from what has already been stated, a person subject to military law. And the charge against him is that he joined in a mutiny in that he combined with other confinees in a detention barracks under military control, in a concerted attempt to break out of the barracks by force and violence. Acts, such as are here charged, by members of the military forces would constitute, I apprehend, the offence of joining in a mutiny in His Majesty's military forces. The prosecutor continues subject to military law during the term of his sentence and is therefore, during that term, a person subject to military law. The words of the Act are clear and explicit that, if a person, subject to military law, joins in a mutiny in His Majesty's military forces, then he is guilty of an offence. The enactment is not that members of His Majesty's forces joining in a mutiny shall be guilty of an offence, but that every person subject to military law

joining in a mutiny in those forces shall be guilty of an offence. Otherwise, if persons in detention camps under sentence or detention revolted against military authority or joined in what might be described as a mutiny, though all were subject to military law, only those who had not been discharged or dismissed from the force could be charged with joining in a mutiny in His Majesty's forces.

Other sections of the *Army Act* were referred to such as ss. 7 (2), 12 (*a*) and 63. But ss. 7 (2) and 12 (*a*) explicitly refer to persons, members of the forces, and not to persons who have been dismissed or discharged. And all I need say as to s. 63 is that it may well be that a revolt against the authorities of a civil prison has not the characteristics of a mutiny or of a combined resistance of lawful military authority.

In my judgment, the general court-martial constituted by the persons showing cause on this rule have authority to hear and determine the charge made against the prosecutor and the rule nisi should be discharged.

DIXON J. This is an application for a prerogative writ of prohibition against the members of a general court-martial restraining them from further proceeding with the hearing and determination of a charge of joining in a mutiny in His Majesty's forces preferred against a discharged soldier undergoing detention.

The writ is applied for by the person charged whom it will be convenient to call the prisoner. He had been a soldier of the Australian Military Forces, but he had been convicted by a court-martial of having while on war service committed the offence of being absent without leave and he had been sentenced to undergo detention for one year and to be discharged from the Defence Forces.

Apparently the discharge was considered effective from the imposition of the sentence.

While he was undergoing detention in the 14th Australian Detention Barracks at Tamworth, New South Wales, he and a number of other former soldiers detained there so behaved that they were charged with mutiny. All the men concerned had been discharged from the forces as part of the sentence in pursuance of which they were undergoing detention.

The charge is made under s. 7 (3) of the *Army Act* which, among other things, provides that every person subject to military law who joins in any mutiny in any forces belonging to any of His Majesty's military, naval, or air forces shall, on conviction by court-martial, be liable to suffer death or such less punishment as is in the Act mentioned.

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Dixon J.

The prisoner says that, as he had been discharged, he was no longer subject to military law and, as all the persons concerned in the acts alleged to amount to a mutiny were no longer soldiers, it could not be a mutiny in any forces belonging &c. within the meaning of the section.

In answer to these contentions, counsel for the officer convening the court-martial and the officer applying that it should be convened relied upon s. 158 (2) of the *Army Act*, which provides that, when a person subject to military law is sentenced by court-martial to penal servitude, imprisonment or detention, the *Army Act* shall apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly as if he continued to be subject to military law.

On behalf of the prisoner, it is denied that this provision has the effect claimed for it, but it is contended that, in any case, the *Army Act* in its entirety ceased to apply to him when he was discharged from the forces and, therefore, that he is not under the operation of s. 158 (2). It is convenient first to deal with this contention. The foundation upon which it rests is supplied by the manner in which s. 55 of the Commonwealth *Defence Act* 1903-1941 is expressed. It is s. 55 which applies the *Army Act* to the Australian Military Forces, but it does so only during war service. The words of the section material to the contention are :—" The Military Forces shall at all times, whilst on war service . . . be subject to the Army Act."

It is said that, as the prisoner at the time of the acts with which he is charged, was no longer a member of the military forces and was not on war service (an expression defined by s. 4), two conditions of the application of the *Army Act* to him were wanting.

I think that this contention fails to recognize that the operation of s. 158 (2) depends upon the application of the *Army Act* at an anterior date, namely at the time of the original sentence by the court-martial of imprisonment or detention. At that date, the prisoner was subject to the *Army Act* and incurred the liabilities and acquired the status which resulted from his conviction and sentence under that Act. Section 55 of the *Defence Act* does not mean that the continuing rights, duties and liabilities bestowed or imposed by the *Army Act* upon a soldier and relating to a period after discharge shall disappear immediately either of the conditions by reason of which he became subject to the *Army Act* ceases, viz. if his war service ceases or if he is no longer a member of the military forces. It is enough that he fulfilled the two conditions when the facts

occurred which brought into operation upon his case the relevant provision of the *Army Act*, which here is s. 158 (2). It is, therefore, necessary to return to s. 158 (2) of the *Army Act*, the interpretation of which must govern the case, subject, of course, to the Commonwealth Constitution.

Two questions arise upon s. 158 (2). The first relates to the scope of the liabilities to which it subjects the prisoner. In applying the *Army Act* to the member of the forces who has been discharged or dismissed as well as sentenced, is the operation of the sub-section confined to what may be compendiously described as his disposal and treatment while under sentence ? Or does its operation extend further and make applicable all the provisions of the *Army Act* relevant to his status and situation ? If it is confined to his disposal and treatment while under sentence, then he is not amenable to court-martial.

The second question arises only if the wider operation is ascribed to the provision. It is whether it can have the further operation of requiring that, for the purpose of s. 7, members of the forces so discharged or dismissed as well as sentenced should be considered to form part of His Majesty's military, naval or air forces. Not without hesitation, I have come to the conclusion that the first of these questions should be answered that, during the term of his sentence, the discharged soldier is governed by those provisions of the *Army Act* that are applicable to his status and situation. But I am clearly of opinion that the sub-section cannot have the effect of putting him notionally back into His Majesty's military, naval or air forces for the purposes of s. 7.

Upon the first of these two questions, different views appear to have been taken in the office of the Judge Advocate-General in England at different periods ; and it is indeed a difficult matter. It appears to me to depend upon the effect to be given to the words " this Act shall apply to him." If these words are given the full effect which, if they stood alone, their natural meaning would require, then they are wide enough to subject the dismissed officer or discharged soldier to all material provisions of the Act during the term of his sentence. If, on the other hand, the words " this Act shall apply to him . . . notwithstanding " &c. are understood as introductory only to that part of the sub-section which provides that he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly, then I should regard the provision as confined to what in a broad sense might be described as the treatment and disposal of the prisoner. For, on that assumption, I am unable to think that the words " punished accordingly " would be enough to

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Dixon J.

subject the prisoner to responsibility for any fresh offence under the *Army Act* and to make him triable by court-martial. The word "punished" would be construed *ejusdem generis* with what precedes, the word "accordingly" modifying the whole phrase. But I think the words "this Act shall apply to him" should not be read as introductory to, and limited to, what follows. On the contrary, they should be given their full natural meaning. I so read them because neither in the context nor in the purpose of the provision do I see any reason for adopting the restricted meaning.

But it appears to me that to say that the *Army Act* applies to a man falls far short of saying that he must be considered a member of the forces. There are many people to whom the Act applies who nevertheless are not in the forces. The sub-section says that it shall apply notwithstanding dismissal or discharge. It does not say that the Act shall apply as if the man had not been dismissed or discharged. It should be noticed too that it does not go the full length of saying that discharged men under sentence shall be under military law, only that the *Army Act* should apply to them. Under sub-s. 2 of s. 7, it is an offence triable by court-martial for a person who is subject to military law to persuade any person in any of His Majesty's military, naval, or air forces to join in any mutiny or sedition. Suppose a soldier undoubtedly subject to military law were charged with having persuaded the prosecutor in the present case to commit the acts said to be mutiny. Would it be possible to sustain the allegation that the prosecutor was a person in His Majesty's Military Forces? Is it not clear that he has been discharged from them and that s. 158 (2) places him specially under the operation of the *Army Act* for the very reason that he is not in the Royal Forces and is not deemed to be in the Royal Forces? Under s. 7 (2), it is also an offence to endeavour to seduce any person in the Royal Forces from his allegiance. Surely a man discharged but serving a sentence imposed by court-martial is not such a person. Knowledge that the man to be seduced was in the service has long been regarded as essential to this offence (*R.* v. *Fuller* (1)). And, though a seaman, in hospital, unpaid and not liable to a court-martial if offending, may yet be serving (*R.* v. *Tierney* (2)), a discharged man is outside the mischief aimed at by the legislation creating the offence now embodied in sub-s. 2 of s. 7.

I am, therefore, of opinion that an officer dismissed or a soldier discharged but still undergoing sentence is subject to all the provisions of the *Army Act* which are applicable and that he may, therefore, be

(1) (1797) 2 Leach 790, at p. 798 [168 E.R. 495, at pp. 498, 499].

(2) (1804) Russ. & Ry. 74 [168 E.R. 691].

liable to a court-martial for what he does, but that, for the purpose, he neither is nor is deemed to be a member of the military forces.

The qualification means that, though amenable to court-martial, there are offences under the *Army Act* for which he could not be charged. An obvious and conspicuous example is desertion. He could not, in the language of s. 12 (*a*), " desert His Majesty's service." Could then a charge be maintained under s. 7 (3) in respect of a resistance to authority by men under detention who had been discharged from the service ? In my opinion, clearly it could not. A disturbance or defiance of authority confined to such persons could not be described as a mutiny in forces belonging to His Majesty's military, naval, or air forces. It does not follow that other charges would not lie, charges not depending on a military status. But, upon a charge under s. 7 (3), all the alleged mutineers being out of the army, I do not think that the prisoner in the present case is liable to conviction by a court-martial.

It is objected, however, that this conclusion is not a ground for granting a writ of prohibition. But I think the objection overlooks the particular features of the case.

It is not always easy to disentangle from a statutory description of conditions of liability to penal consequences, which a tribunal is authorized to impose, those elements going to the authority or jurisdiction of the tribunal and those relating only to the guilt of the party. The difficulty will appear from a comparison of *Parisienne Basket Shoes Pty. Ltd.* v. *Whyte* (1) with *R.* v. *Longe* (2), per *R. S. Wright* J. See further *Ex parte Mullen* ; *Re Hood* (3), per *Jordan* C.J. and *Ex parte Malouf* ; *Re Gee* (4).

In s. 7 of the *Army Act*, offences are described, the punishment is affixed to the offences, the tribunal is indicated and the persons amenable are defined. They are defined by the opening words " every person subject to military law."

Now, if the question in the present case depended upon the facts satisfying the description of the offence contained in s. 7 (3), there would be much strength in the contention that none of the elements expressed in the description is a condition of jurisdiction. Just as the question whether conduct occurred amounting to a mutiny would be considered an issue of mixed fact and law for the court-martial to decide in the exercise of its jurisdiction and not a condition of its jurisdiction, so (it might be said) would be the question, which could hardly be anything but a question of fact, whether the mutiny

(1) (1938) 59 C.L.R. 369.
(2) (1897) 66 L.J. Q.B. 278, at pp. 279, 280.
(3) (1935) 35 S.R. (N.S.W.) 289, at p. 298.
(4) (1943) 43 S.R. (N.S.W.) 195 ; 60 W.N. 134.

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Dixon J.

was " in any of His Majesty's military &c. forces." But the fact is admitted on all hands that the mutiny was by discharged men under detention, which means that it was not " in any of His Majesty's military &c. forces " within the meaning of those words in s. 7 (3). It is admitted that all the participants in the alleged resistance to or defiance of military authority had been discharged from the forces. The whole question depends upon the meaning and effect of s. 158 (2). For the question is whether that provision requires the assumption, an artificial assumption, that the men, though not in fact in His Majesty's forces, are in the forces for the purposes of the law.

It may be pointed out too that, in the same way, the question whether they are subject to military law, which I take clearly to go to jurisdiction over the person, depends wholly on s. 158 (2). What, therefore, has to be considered is whether the alleged operation of s. 158 (2) to bring within the authority of a court-martial the punishment of an alleged mutiny otherwise outside it altogether is a matter which the court-martial can itself conclusively pass upon. In my opinion, the operation of s. 158 (2) forms a condition of its authority and, by erroneously ascribing to that sub-section the effect of requiring that the men in question should be deemed soldiers, it could not obtain authority to punish them as if their conduct fell within s. 7 (3). But, when the matter is examined, the case for prohibition is not dependent only upon this view of the matter. For the court-martial has not undertaken to decide any such question. All it will do is to conform to the directions of the Judge Advocate-General who has ruled upon the interpretation and operation of s. 158 (2). Regulation 575 (10) of the *Australian Military Regulations* is expressed to make his rulings conclusive—" All members of the Australian Military Forces shall be bound by the rulings and opinions on questions of military law given by the Judge Advocate-General." Upon production of a ruling by him covering the contentions advanced on behalf of the prisoner, a ruling adverse to these contentions in all respects, the court-martial, after a reference to the convening authority, announced the direction of the convening authority that the members of the court-martial were bound by the rulings of the Judge Advocate-General and proceeded to act upon them.

In some respects, the Judge Advocate advising the court-martial had adopted the contrary view and, on his interpretation of s. 158 (2), the prisoner would have been discharged as not subject to s. 7. Further, the Judge Advocate was of opinion that reg. 575 (10) was void. No doubt it was for this reason that the officers composing the court-martial consulted the convening authority. In the result,

they regarded themselves as bound by the regulation and automatically went on to give effect to the Judge Advocate-General's ruling or direction without deciding anything for themselves. Accordingly, the case is not one where a court-martial assumes to decide a question of law upon which the fate of the charge before it depends. No-one suggests that the law laid down by the Judge Advocate-General is binding outside the Army. We are bound to administer the law as we ourselves ascertain it and independently of the rulings of the Judge Advocate-General. The case is, therefore, one in which, upon the view I take of s. 158 (2), the court-martial assumes to deal with the charge acting, not upon its own decision, but upon the direction of the Judge Advocate-General, a direction with which on this point I am unable to agree. Thus, the court-martial does not undertake to decide judicially that the prisoner is to be deemed to be a member of the forces and, accordingly, liable under s. 7 (3). It proceeds as a result of reg. 575 (10) on the hypothesis that it is so. The hypothesis is basal to the proceedings and, as it is erroneous, according to the interpretation I place upon s. 158 (2), it appears to me to follow that a writ of prohibition should issue restraining the court-martial from proceeding further with the particular charge.

It is desirable to notice a further objection that was urged on the part of the prisoner to the jurisdiction of the court-martial over him. The objection is that, because he is now a civilian, to allow a court-martial to exercise jurisdiction over him would be contrary to the principles of Chapter III. of the Commonwealth Constitution which confides the judicial power of the Commonwealth exclusively to courts of justice.

In the case of the armed forces, an apparent exception is admitted and the administration of military justice by courts-martial is considered constitutional (*R.* v. *Bevan* (1)). The exception is not real. To ensure that discipline is just, tribunals acting judicially are essential to the organization of an army or navy or air force. But they do not form part of the judicial system administering the law of the land. It is not uniformly true that the authority of courts-martial is restricted to members of the Royal forces. It may extend to others who fall under the same general military authority, as for instance those who accompany the armed forces in a civilian capacity. To include them with members of the armed forces as liable to court-martial would involve no infringement upon the judicial power of the Commonwealth. In the same way, I should think that to subject discharged men held in a detention camp or barracks to the authority of a court-martial would be warranted by the same considerations,

(1) (1942) 66 C.L.R., at pp. 467, 468, 481

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Dixon J.

founded upon the necessity of a just discipline, as apply to the army itself. But it is said that the provisions of the *Army Act* upon which reliance must be placed for the purpose do not stop at discharged soldiers under military detention. They are said, on the construction of s. 158 (2) adopted, to extend to long sentence prisoners handed over to the civilian authorities after discharge and serving their sentences in civilian gaols with other civilian prisoners. If this were so, some difficulty might exist in holding that so much of the provisions as might be considered to be consistent with the Commonwealth Constitution were severable from those that went beyond what is warranted. But I think that the assumption upon which this view rests is mistaken. For, under s. 62 and s. 67, military prisoners in civil prisons are to be dealt with in the same manner as an ordinary prisoner under like sentence. It is difficult to see how, in these circumstances, anything done by the prisoner in a civil prison could make him liable to military court-martial. But, on the view that I take, these matters need not be decided.

In my opinion, the order nisi for prohibition should be made absolute in respect of the charge of mutiny under s. 7 of the *Army Act*.

WILLIAMS J. In September 1944 the prosecutor, having been convicted by a district court-martial of being absent without leave, was sentenced to undergo detention for one year and to be discharged from the defence force of the Commonwealth. Whilst being detained, pursuant to the sentence, in Number 14 Australian Detention Barracks, Tamworth, he was charged before a general court-martial with having committed the offence under the *Army Act*, s. 7 (3), of joining in a mutiny in His Majesty's forces on 29th May 1945 by combining with other confinees of 14 Australian Detention Barracks, Tamworth, being persons subject to military law, in a concerted attempt to break out of the said barracks by force and violence.

When the trial commenced, objection was taken to the jurisdiction of the general court-martial on several grounds, and the court adjourned in order to give the prosecutor an opportunity of testing their validity by applying to this Court for a rule nisi for a prohibition under s. 75 (v) of the Constitution. At the hearing of the application to make the rule nisi absolute, several contentions were raised on behalf of the prosecutor. They may be summarized as follows.

(1) Section 55 of the Commonwealth *Defence Act* 1903-1941 provides that the military forces shall at all times, whilst on war service, whether within or without the limits of the Commonwealth, be subject to the *Army Act* save so far as it is inconsistent with this

Act and subject to such modifications and adaptations as are prescribed. It was admitted that, at the date of the sentence, the military forces were on war service and that the prosecutor was then subject to the provisions of the *Army Act*. But it was submitted that, as part of the sentence of the district court-martial was that the prosecutor should be discharged from the defence force, he was no longer a member of that force or on war service on 29th May 1945, but a civilian and therefore no longer subject to the *Army Act*. The *Army Act*, s. 158 (2), provides that where a person subject to military law is sentenced by court-martial to penal servitude, imprisonment, or detention, the Act shall apply to him during the term of his sentence, notwithstanding that he is discharged or dismissed from His Majesty's service, or has otherwise ceased to be subject to military law, and he may be kept, removed, imprisoned, made to undergo detention, and punished accordingly as if he continued to be subject to military law. As the prosecutor was subject to the *Army Act* at the date that he was sentenced to be detained and discharged, he thereupon became liable to all the statutory consequences attaching to such a punishment, save so far as they were inconsistent with the *Defence Act*. One of these consequences was to subject him to the provisions of s. 158 (2) during his detention.

(2) That, assuming that the prosecutor was subject to s. 158 (2), the sub-section on its true construction only applies to an existing sentence of penal servitude, imprisonment, or detention imposed on a soldier prior to his discharge, and does not make him liable to be tried by a court-martial for a further offence committed during the serving of his sentence. But the sub-section states that the Act is to apply to him during the term of his sentence and that he can be punished accordingly (which must mean in accordance with the Act) as if he continued to be subject to military law, and it seems to me that the *Manual of Military Law* 1941, Aust. Ed., which corresponds with the statement in *Halsbury's Laws of England* 2nd ed., vol. 28, p. 592, correctly states the meaning of the sub-section. The footnote is that "under this enactment the Act applies to the offender during the term of his sentence, notwithstanding that his discharge or dismissal from the service has been formally carried out, or that he has otherwise ceased to be subject to military law. Consequently he may be tried by court-martial for an offence committed by him at any time before his sentence is completed."

(3) That, assuming that the prosecutor was subject to the provisions of s. 158 (2) of the *Army Act*, the charge does not disclose any offence for which he could be tried under that Act. Section 7 deals with the offences of mutiny and sedition. The offence described in

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Williams J.

par. 3 is committed by persons subject to military law who join in, or being present do not use their utmost endeavours to suppress, any mutiny or sedition in any of His Majesty's military, naval, or air forces (including any Dominion force). Offences under s. 7 are tried by court-martial and on conviction the accused is liable to suffer death or such less punishment as is in the Act mentioned. The section as modified by *Australian Military Regulations*, reg. 202 (*c*) contains a proviso that a member of the Military Forces of the Commonwealth of Australia shall not be sentenced to death under the section, except for the offence of joining in such a mutiny as is mentioned in par. 3. It is admitted that the other confinees referred to in the particulars are all men who, at the date of the alleged offence, had, like the prosecutor, been discharged from the defence force, and it was submitted that collective insubordination by such confinees could not be mutiny in His Majesty's military forces because none of the confinees were members of the defence force. Section 158 (2) does not provide that a confinee, notwithstanding his discharge, is to be deemed to be for any purpose a member of the defence force. All that it does is to provide that the *Army Act* is to apply to him during the term of his sentence notwithstanding his discharge, and that he can be punished in accordance with the Act as if he continued to be subject to military law. Neither the prosecutor nor the other confinees were, therefore, at the material date, members of His Majesty's forces, actually or notionally. Civilians subject to military law can be punished in accordance with the *Army Act* for offences, of which there are many, which can be committed by any person subject to military law, but collective insubordination by a number of civilians could not be joining in a mutiny in His Majesty's forces. At the adjournment of the general court-martial, therefore, the trial of the prosecutor had reached the stage at which it was clear on my view of the law that he was being tried for an offence to which he was not made subject by s. 158 (2). The court-martial intends to accept as correct and binding upon it under reg. 575 (10) a ruling of the Judge Advocate-General that the prosecutor and the other confinees are in His Majesty's forces because they are in an establishment which is part of the Australian Military Forces. But I cannot agree with this ruling. If it were correct, civilians who had never been in the Army but who were sentenced to detention in a military camp would become members of His Majesty's forces. A writ of prohibition may be applied for as soon as the absolute absence of jurisdiction is apparent on the record of the proceedings of the inferior tribunal: *Halsbury's Laws of England* 2nd ed., vol. 9, p. 825. An inferior tribunal cannot, by placing a

wrong construction upon the meaning of the words of a statute, give itself jurisdiction which it would not have had upon the true construction of the expression (*Elston* v. *Rose* (1); *Estate and Trust Agencies* (1927) *Ltd.* v. *Singapore Improvement Trust* (2); *R.* v. *Foster*; *Ex parte Crown Crystal Glass Co. Pty. Ltd.* (3); *R.* v. *Connell*; *Ex parte Hetton Bellbird Collieries Ltd.* (4)). This applies to the *Army Act* in the same way as any other Act (*Smith* v. *Whitney* (5); *Fitzgerald* v. *Macdonald* (6)).

For these reasons, whilst it follows from my answers to contentions (1) and (2) that the prosecutor can be tried under the *Army Act* by a court-martial for other offences created by that Act, the present general court-martial, in proceeding to try him on a charge of mutiny, is acting in excess of its jurisdiction.

(4) That the provisions in s. 158 (2) of the *Army Act* for the trial by court-martial of members of the defence force who have been discharged for offences committed whilst serving their sentence is an infringement of s. 71 of the Constitution. In *R.* v. *Bevan* (7) it was held that legislation providing for the trial by court-martial of members of the defence force is a valid exercise of the defence power. I adhere to the view there expressed that the Commonwealth Parliament, in the absence of some express provision or necessary implication to that effect in an Imperial Act, can only legislate to make an Act of the Imperial Parliament applicable in Australia where the Imperial legislation, if enacted as a law of the Commonwealth, would be a valid exercise of the legislative powers of the Commonwealth Parliament under the Constitution. If, therefore, the provisions of s. 158 (2), if enacted as a law of the Commonwealth, would infringe s. 71 of the Constitution, the adoption of the sub-section by a Commonwealth Act making it applicable to Australia would also be invalid. But the decision in *R.* v. *Bevan* (7) was not intended to limit the power of the Commonwealth Parliament to legislate under the defence power for the trial of persons by court-martial to persons who are members of the defence force. There are many occasions in which civilians are placed in such a position that it is necessary in the interests of defence, including the maintenance of discipline, to subject them to military law and to trial by court-martial for offences under that law. One instance would be where, as here, men who had been punished by being sentenced and discharged at the same time were serving their sentence in a military detention camp. But it was submitted that

(1) (1868) L.R. 4 Q.B. 4, at p. 8.
(2) (1937) A.C. 898, at pp. 913, 917.
(3) (1944) 69 C.L.R. 299, at p. 310.
(4) (1944) 69 C.L.R. 407, at pp. 455, 456.
(5) (1886) 116 U.S. 167, at pp. 176-182 [29 Law. Ed. 601, at pp. 603-606].
(6) (1918) N.Z.L.R. 769, at p. 786.
(7) (1942) 66 C.L.R. 452.

H. C. OF A. 1945. THE KING v. COX; EX PARTE SMITH. Williams J.

s. 158 (2) applies not only to discharged men serving a sentence in a military prison or detention camp but also to such men serving their sentence in civil gaols. But, as my brother *Dixon* has pointed out, the assumption upon which that submission rests appears to be mistaken, and, in view of my answer to the third contention, it is, in any event, unnecessary to pursue it.

For these reasons, I am of opinion that the order nisi should be made absolute to prohibit the general court-martial from proceeding with the trial of the prosecutor for mutiny under s. 7 (3) of the *Army Act*.

Order absolute for writ of prohibition directed to the respondents prohibiting them from further proceeding with the trial of the prosecutor Smith upon the charge of joining in a mutiny in His Majesty's Military Forces preferred against him and set out in the charge sheet dated 16*th June* 1945.

Solicitor for the prosecutor, *G. H. S. Corbett.*

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

J. B.