

[HIGH COURT OF AUSTRALIA.]

BURNS . . . . . APPELLANT ;  
DEFENDANT,

AND

RANSLEY . . . . . RESPONDENT.  
COMPLAINANT,

*Constitutional Law (Cth.)—Powers of Commonwealth Parliament—Legislation—Validity—Criminal law—Sedition—Public debate—Answers orally made to questions—Seditious intention—Proof—Conviction—Appeal—The Constitution (63 & 64 Vict. c. 12), ss. 51 (xxxix.), 61—Crimes Act 1914-1946 (No. 12 of 1914—No. 77 of 1946), ss. 24A (1) (b), (d), (2), 24B (2), 24D (1)\*—Judiciary Act 1903-1948 (No. 6 of 1903—No. 65 of 1948), ss. 23 (2) (b), 39 (2) (b)—The Justices Acts 1886 to 1948 (Q.) (50 Vict. No. 17—12 Geo. VI. No. 28), s. 226.*

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BRISBANE,

June 14, 15.

MELBOURNE,

October 7.

Latham C.J.,  
Rich, Dixon  
and  
McTiernan JJ.

Sections 24A (1) (b), (d), 24B (2) and 24D of the *Crimes Act* 1914-1946 are within the constitutional powers vested in the Commonwealth Parliament.

So held by the whole Court.

At a public debate at Brisbane upon the subject “that communism is not compatible with personal liberty,” B., who was a representative of the Australian Communist Party, was asked, “We all realize the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?” B. replied, “If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war.” Pressed for “a direct answer” B. said “We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer.” B. was summarily convicted under s. 24D of the *Crimes Act* 1914-1946 of uttering seditious words.

\* The relevant provisions of ss. 24A, 24B, and 24D, are set out in the judgment of Latham C.J. at p. 107 (*post*).



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*Held*, by Latham C.J. and Rich J. (*Dixon* and *McTiernan JJ. contra*), that the words uttered by B. were expressive of a seditious intention within the meaning of ss. 24A (1) and 24B (2) of the *Crimes Act* 1914-1946.

The Court being evenly divided in opinion as to whether the words uttered were expressive of a seditious intention, the opinion of the Chief Justice prevailed pursuant to the *Judiciary Act* (1903-1948), s. 23 (2) (b), and the appeal was dismissed.

#### CASE STATED.

Upon a complaint preferred by Norman William Ransley and laid under s. 24D of the *Crimes Act* 1914-1946, Gilbert Burns was charged that he "did utter seditious words in that in answer to a question, 'We all realize the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?' he did utter words expressive of a seditious intention within the meaning of the said Act, namely, 'If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. It would be a reactionary war. We would oppose that war. We would fight on the side of the Soviet Union' or words to the like effect, contrary to the Acts in such case made and provided."

Burns pleaded not guilty and the complaint was prosecuted summarily.

Evidence was given in support of the complaint, but evidence was not given by or on behalf of the accused. Upon the evidence so given the magistrate found the following facts established. On 15th September 1948, a public debate was held at the "Temperance Hall," Edward Street, Brisbane. The subject of the debate was "That communism is not compatible with personal liberty." The affirmative of that proposition was put forward by two representatives of the Queensland People's Party, and the negative contention was put forward by Burns and another person, a lady, as representatives of the Australian Communist Party. The hall was crowded, approximately two hundred persons being present. The proceedings at the debate opened with everyone in the hall rising for the singing of the National Anthem. During the course of his part in the debate, Burns said that he had been a member of the Communist Party for twenty-five years, and he gave his interpretation of his party's policy, and said that the party advocated freedom for the working man. He concluded his main address by saying that the capitalistic system had failed in the older countries in Europe. They



had tried several forms of government but they had been found wanting and these countries were now turning to communism as their salvation, because the Communist Party was the only party with a progressive policy, and all countries must eventually become communist because the future belonged to communism. During the course of her speech the other representative of the Australian Communist Party said, "I, with many other women similarly, had brought a son into the world hoping for peace in our time. It now appeared that because of the capitalistic system another war was imminent." At the conclusion of the four speeches in the debate a period of about thirty minutes was allowed by the chairman for questions to be addressed by members of the audience to the speakers. The first question put to Burns was whether a debate such as was then being held there could be held in Russia, and he replied that there was no need for a debate, there was only one party in Soviet Russia consequently there was no need for a debate. Another question put to Burns was whether when joining the Communist Party it was necessary to take any oath or whether the Communist Party required allegiance to any foreign power. Burns answered that it did not, and that all that was required of members was that they engage in party activities, accept the party programme, and be financial. After these questions a person in the body of the hall put to Burns the following question, "If the communists gained control in Australia, what would be the position of the monarchy?" Burns replied, "The monarchy is all right. We have nothing against it. But if the communists gained control in Australia, and it was found that the monarchy was in the way, the monarchy would have to go." Immediately following this question and answer another person in the body of the hall asked Burns the question, "We all know that we could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?" Burns answered "If Australia was involved in such a war, it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war." At that stage the questioner interjected "Mr. Chairman, I want a direct answer." Burns then said "We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer." At the time of the interjection Burns had his hands behind his coat on his hips and leaned forward towards the moveable rostrum which was the stand the speakers used for their notes, and he gripped both sides

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of the rostrum before he replied. This reply was in a loud tone of voice and was emphatic. After that reply there was silence for a few seconds, then there was general conversation throughout the hall and a buzz of conversation. A number of persons called to the chairman. The next question put to Burns was "If you made a seditious statement in Russia such as you have made here tonight, would you walk out of here a free man, as you most probably will do, or would you be gaoled?" Burns replied, "I think I will be a very lucky man if I do not see the inside of a capitalist gaol within the next ten years." Someone in the audience said, "You should be behind bars," and Burns said, "You might think my right place is behind bars." There were further questions and answers after which each of the four speakers again addressed the audience for five minutes each by way of reply. In the course of his reply Burns said, "If Australia was involved in war, it would be as a result of wrong policy. Being wrong policy the Communist Party could not subscribe to it."

The magistrate held that although there were some slight variations between the words complained of and the words used by Burns, he did utter the words mentioned in the complaint or words to the like effect, and that the words complained of and used by Burns were words expressive of a seditious intention, namely, an intention to excite disaffection against the Sovereign and also an intention to excite disaffection against the Government of the Commonwealth.

Burns was convicted and was sentenced to imprisonment for six months.

From that decision Burns appealed by way of case stated to the High Court.

The questions of law arising were:—

- (a) From all the facts proved in evidence before the magistrate was there evidence to warrant his conviction of Burns?;
- (b) Was the magistrate right in law in finding that Burns uttered words expressive of a seditious intention, namely, an intention to excite disaffection against the Sovereign, and also to excite disaffection against the Government of the Commonwealth?; and
- (c) Were the words found to have been used under the circumstances set out in the evidence, seditious?

The opinion of the High Court was asked upon those questions of law whether or not the magistrate gave a correct decision or, if not, what should be done or ordered by that Court or him in the premises.



The relevant statutory provisions are set out in the judgments hereunder. H. C. OF A.  
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*Paterson*, for the appellant. The words used by the appellant were not expressive of any intention to do anything which would be seditious within the meaning of ss. 24A, 24B, 24C and 24D of the *Crimes Act* 1914-1946. There must be an absolute or unconditional intention, as otherwise the case would not come within the *Crimes Act*. These sections of the *Crimes Act* are not within the legislative power of the Commonwealth. The general criminal power was not transferred to the Commonwealth (*R. v. Bernasconi* (1); *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.* (2)). This is not a valid exercise of the powers conferred by s. 51 of the Constitution (*Ex parte Walsh and Johnson*; *In re Yates* (3)). "Disaffection" as used in s. 24A of the *Crimes Act* is a vague term. To bring the matter within the Constitution it must mean disobedience to a law. It does not mean illwill (*R. v. Amba Prasad* (4); *King-Emperor v. Sadashiv Narayan Bhalerao* (5)). Section 24B of the *Crimes Act* is wholly invalid. The power to enact it does not come within s. 51 (xxxix.) of the Constitution as an incidental power (*Ex parte Walsh and Johnson*; *In re Yates* (6)). The most that can be said is that a person who incites disaffection is not likely to obey the laws and does not come within the incidental power. Assuming that the statute is constitutionally valid then the words uttered are not capable of seditious intention. The appellant was not addressing a meeting. He was taking part in a public debate, where speakers were answering questions and giving expression to certain views.

*Bennett K.C.* (with him *Lynam*), for the respondent. The evidence was sufficient to bring the appellant within s. 24B of the *Crimes Act*. That section has been validly enacted and is within the legislative power of the Commonwealth. Disaffection means illwill. It is not necessary to establish intention by intrinsic evidence. If the words are expressive of a seditious intention then the offence has been proved (*Wallace-Johnson v. The King* (7)). Under s. 14 of the *Crimes Act* it is not necessary to negative any excuse. Hypothetical cases or statements made to intelligent people or to people

(1) (1915) 19 C.L.R. 629, at pp. 634, 635.

(2) (1913) 17 C.L.R. 644; (1914) A.C. 237.

(3) (1925) 37 C.L.R. 36, at pp. 70, 71.

(4) (1897) I.L.R. 20 All. 55.

(5) (1947) L.R. 74 Ind. App. 89, at p. 96.

(6) (1925) 37 C.L.R., at pp. 118, 135.

(7) (1940) A.C. 231.



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of steadfast loyalty may be seditious (*R. v. Burns* (1); *R. v. Cohen* (2); *R. v. Fussell* (3)). Sections 24A, 24B, 24C and 24D of the *Crimes Act* are valid. They are measures for self-protection and are justified as incidental powers under s. 51 (xxxix.) of the Constitution.

[McTIERNAN J. referred to *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (4).]

It is said there that the Commonwealth can defend itself from internal attack. That applies in time of peace as well as in war (*R. v. Kidman* (5); *Ex parte Walsh and Johnson*; *In re Yates* (6)).

*Paterson*, in reply. In so far as there is evidence of the circumstances in which the alleged seditious words were uttered, they should be taken into consideration in inferring whether there was any seditious intention. The appellant was asked a question in a debate and pressed for an answer. By his reply he merely expressed an opinion. He was not inciting anyone to disaffection. The case of *Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth* (7) does not decide the question. The evidence was such that the matter did not come within s. 24B of the *Crimes Act* (*R. v. Hush*; *Ex parte Devanny* (8)).

*Cur. adv. vult.*

Oct. 7.

The following written judgments were delivered:—

LATHAM C.J. This matter comes before the Court upon a case stated by Mr. Stanley Wilson, Chief Stipendiary Magistrate, Brisbane, under *The Justices Acts 1886 to 1948* (Q.), s. 226. It is an appeal under the *Judiciary Act 1903-1948*, s. 39 (2) (b) brought in the manner prescribed by the law of the State of Queensland—High Court Rules Part II., s. IX., Rule 1. The appellant Gilbert Burns was prosecuted upon the following charge:—That he was guilty of uttering seditious words in that “in answer to a question ‘We all realize the world could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?’ he did utter words expressive of a seditious intention within the meaning of the said Act, namely, ‘If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism.

(1) (1886) 2 T.L.R. 510; 16 Cox C.C. 355.

(2) (1916) 10 W.W.R. 333.

(3) (1848) 3 Cox C.C. 291.

(4) (1943) 67 C.L.R. 116, at p. 132.

(5) (1915) 20 C.L.R. 425.

(6) (1925) 37 C.L.R. 36.

(7) (1943) 67 C.L.R. 116.

(8) (1932) 48 C.L.R. 487, at pp. 505, 506, 510, 517, 518.



It would be a counter-revolutionary war. It would be a reactionary war. We would oppose that war, we would fight on the side of the Soviet Union ' or words to the like effect, contrary to the Acts in such case made and provided."

It was proved that the appellant uttered the words alleged, except that he used the words "Soviet Russia " instead of the words "Soviet Union." The statement was made at a public debate in Brisbane between representatives of the Queensland People's Party and the Australian Communist Party upon the subject " That Communism is not compatible with personal liberty." After a question had been asked about the monarchy a person in the body of the hall asked the appellant the question set forth in the complaint. The appellant replied in the words stated down to " It would be a reactionary war." The questioner said that he wanted a direct answer. The appellant then said : " We would oppose that war. We would fight on the side of Soviet Russia. That is a direct answer."

The appellant called no evidence. He was convicted, and has appealed to this Court.

It is plain that the statement made by the appellant was made deliberately and upon consideration and that war between Australia and Russia was treated by him not as a fantastic suggestion, but as a not improbable event.

The *Crimes Act* 1914-1946 provides in s. 24D as follows :—" Any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence."

Section 24B (2) provides " Seditious words are words expressive of a seditious intention." Section 24A (1) contains the following provisions :—" Subject to sub-section (2) of this section an intention to effect any of the following purposes, that is to say—(a) . . . (b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom ; (c) . . . (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth ; . . . is a seditious intention."

Section 24A (2) provides that—" It shall be lawful for any person— (a) to endeavour in good faith to show that the Sovereign has been mistaken in any of his counsels ; (b) to point out in good faith errors or defects in the Government or Constitution of the United Kingdom or of any of the King's Dominions or of the Commonwealth . . . ; (c) to excite in good faith His Majesty's subjects to attempt to procure by lawful means the alteration of any matter

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in the Commonwealth as by law established; or (d) to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of illwill and hostility between different classes of His Majesty's subjects."

The stipendiary magistrate held that the words used by the appellant were words expressive of a seditious intention, namely, an intention to excite disaffection against the Sovereign, and also to excite disaffection against the Government of the Commonwealth—pars. (b) and (d) of s. 24A (1).

It is not necessary in the present case to consider the common law as to sedition. The appellant was charged with an offence against the statute—uttering seditious words—s. 24D. Section 24B provides that seditious words are words expressive of a seditious intention, and the case for the prosecution depends upon whether or not the words proved to have been uttered expressed the intention described in pars. (b) or (d) of s. 24A (1) (see *Wallace Johnson v. The King* (1)).

Two arguments were presented on behalf of the appellant. The first was that the words used by the appellant were not expressive of a seditious intention because they did not show any intention to excite disaffection against the Sovereign or the Government or Constitution of the Commonwealth for the reason that they referred only to a hypothetical contingency, and not to an actuality, namely, to the contingency of a war in which the King and the Commonwealth might be engaged against Soviet Russia. It was conceded that if words expressing an intention to fight and to urge others to fight against Australia were uttered while Australia was actually engaged in war they would be words expressive of a seditious intention. It was argued, however, that, because the words referred only to a possible future war, they were not seditious. In my opinion the hypothetical element involved in the statement does not in itself exclude the words used from the category of seditious words. Almost any statement referring to the future and applying to human action can be shown to involve a hypothetical element. The future is unknown, and any statement as to action in any future circumstances must necessarily depend upon the happening of particular circumstances. A statement that the view of the Communist Party is that Russia should be supported as against Australia and the British Sovereign in any war in which Australia, the Sovereign, and Russia may be involved is a statement which is presented as a policy to be approved and to be put into effect. Such a statement shows a present intention to excite



disaffection against the Sovereign and the Government. "Disaffection" when used in relation to a Sovereign or a Government means not merely the absence of affection and regard, but disloyalty, enmity and hostility. In other contexts the word might have a different significance, but in the context of the Act there can be in my opinion no real question but that "exciting disaffection" refers to the implanting or arousing or stimulating in the minds of people a feeling or view or opinion that the Sovereign and the Government should not be supported as Sovereign and as Government, but that they should be opposed, and when the statement in question is made in relation to a war it means that they should, if possible, be destroyed. Such advocacy is encouragement of and incitement to active disloyalty. In my opinion the statements made by the appellant were expressive of a seditious intention.

It was further argued for the appellant that the Act, in the provisions quoted which refer to the excitement of disaffection, made it an offence to excite illwill against or opposition to the Government, and that, so construed, these provisions were beyond the legislative power of the Commonwealth Parliament because that Parliament had no general power to make laws with respect to crime (*Attorney-General for the Commonwealth v. Colonial Sugar Refining Co. Ltd.* (1)) and, in particular, could not make political criticism a criminal offence.

The provisions of s. 24A (2) provide an answer to the argument that s. 24A (1) prevents political criticism and political opposition to a Government. But, apart from the provisions of sub-s. (2) of s. 24A, sub-s. (1) does not in my opinion apply to mere political criticism. "Disaffection" in the context in which it is used means more, as I have said, than political opposition.

Section 61 of the Constitution provides that the executive power of the Commonwealth is vested in the King and is exercisable by the Governor-General as the King's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Under s. 51 (xxxix.) of the Constitution the Commonwealth Parliament has power "to make laws with respect to matters incidental to the execution of any power vested by the Constitution . . . in the Government of the Commonwealth . . . or in any department or officer of the Commonwealth." Under this provision the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the

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(1) (1914) A.C. 237; 17 C.L.R. 644.



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execution of their powers (see *R. v. Kidman* (1)). No question arises in this case such as was discussed in *Ex parte Walsh and Johnson*; *In re Yates* (2) as to the validity of legislation purporting to deal with the future possible exercise of Commonwealth legislative powers. The Commonwealth Government and its agencies are actually in being. The Commonwealth Parliament, which is the legislative organ of the Commonwealth, has power to make laws to protect them and itself, not only against physical attack and interference, but also against utterance of words intended to excite disaffection against the Government (in the sense stated) and to prevent or impede the operation of governmental agencies which prepare for defence and conduct warlike operations during war in accordance with the policy of the Government, which is responsible to the Parliament of the Commonwealth. The encouragement of internal disloyalty is a grave obstacle to effective defence against an external enemy. Such encouragement is an incitement to the promotion of civil war at a time when the country is defending itself against hostile attack.

In the provisions which have been attacked relating to disaffection Parliament has provided protection for the Government and governmental activities. Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies. I agree that the Commonwealth Parliament has no power to pass a law to suppress or punish political criticism, but excitement to disaffection against a Government goes beyond political criticism.

Advice to citizens to fight against their own country in time of war is, for the reasons which I have stated, within the provisions of the statute and in my opinion these provisions are valid.

The appeal should be dismissed.

Four justices concur in the decision as to the constitutional power of the Commonwealth Parliament to enact the particular provisions of the *Crimes Act* the validity of which has been questioned in this case. Therefore the *Judiciary Act*, s. 23 (2), does not present any obstacle to giving a decision in the case. On the question whether there was evidence upon which the magistrate could

(1) (1915) 20 C.L.R. 425, at p. 440.

(2) (1925) 37 C.L.R. 36.



properly convict the defendant the Court is equally divided in opinion and under the *Judiciary Act*, s. 23 (2) (b), the opinion of the Chief Justice prevails. The appeal is therefore dismissed.

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RICH J. Appeal from a conviction of a charge under s. 24D of the Commonwealth *Crimes Act* 1914-1946.

Counsel for the appellant submitted two arguments against the conviction—(1) that the relevant sections of the Act were invalid and (2) the utterances of the appellant were not expressive of a seditious intention within the meaning of s. 24A (1) and s. 24B (2). Logically the constitutional question should be dealt with first because if the sections mentioned are beyond the power of the Commonwealth Parliament the question of interpretation need not be considered. In my opinion these sections do not purport to prevent or punish mere criticism of a political nature but are intended to defend the existing regime against its overthrow or suppression. As I consider the sections are valid I pass to consider the crucial question of interpretation. The chief stipendiary magistrate by whom the complaint was heard convicted the appellant, finding that the words uttered were expressive of a seditious intention viz. an intention to incite disaffection against the Sovereign and an intention to incite disaffection against the Government of the Commonwealth—words contained in s. 24A (1) (b) and (d). In his argument counsel for the appellant quoted what he considered the relevant sections of the Act—s. 24B (2) and s. 24D (1) and by combining the two sections suggested that the charge amounted to “Any person who utters words which are expressive of seditious intention shall be guilty of an indictable offence.” The section upon which the magistrate founded his decision is ss. 24A (1) (b) and (d). The circumstances in which the utterances were made were at question time after the conclusion of a public debate before a large audience in the Temperance Hall, Brisbane.

The subject of the debate was “That Communism is not compatible with personal liberty.” The appellant was one of two persons who represented the Communist Party and spoke on its behalf. The questions put to the appellant and his answers are already in statement and need not be repeated. I do not think that the fact that the words complained of were uttered in answer to questions or were based on contingencies or were hypothetical statements alters or affects the intention expressed by them. They were part of the debate and were made on the platform before the audience. The appellant was explaining the policy of the Communist Party and its attitude to the Sovereign and the Commonwealth Government



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if either stood in its way. In debating the subject his object was to make a favourable impression on the audience and convert them to the acceptance of the policy of which he was the exponent. Moreover in his reply during the debate he said : " If Australia was involved in war it would be as a result of wrong policy. Being wrong policy the Communist Party could not subscribe to it." The appellant appears to have considered that his utterances were seditious because in answer to a question " If you made a seditious statement in Russia such as you have made here tonight, would you walk out of here a free man as you most probably will do or would you be gaoled ? ", the appellant replied : " I think I will be a very lucky man if I do not see the inside of a capitalist gaol within the next ten years." This remark has some bearing on his intention. The substantial question then is the meaning of the relevant words in the light of the sections of the Act. Disaffection connotes enmity and hostility, estranged allegiance, disloyalty, hostility to constituted authority or to a particular form of political government. " Excite " means to inspire, infect or inflame disaffection. And " intention " signifies design, purpose or object. In short the utterances in question were designed to inspire or kindle hostility against the Sovereign and the Government of the Commonwealth. I would dismiss the appeal.

DIXON J. This is an appeal by a defendant from a summary conviction by a Court of Petty Sessions exercising Federal jurisdiction. The appellant was convicted upon a charge under the *Crimes Act* 1914-1946 of the Commonwealth for uttering seditious words.

The offence is created by s. 24D (1), which provides that any person who writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence. Although it is described as an indictable offence, s. 24E provides that, with the consent of the Attorney-General it may be prosecuted summarily subject to certain conditions not presently material.

The offences created by s. 24D (1) are dependent for their definition upon s. 24B (2) and s. 24A. Section 24B (2) provides that seditious words are words expressive of a seditious intention. Sub-section (1) of s. 24A enumerates a number of states of mind that amount to a seditious intention. The enumeration should, I think, be understood as exhaustive. Sub-section (2) enumerates certain things that may be lawfully done. Its purpose is to qualify sub-s. (1) or at all events to make certain that sub-s. (1) is not construed so widely as to cover what sub-s. (2) declares to be lawful.



Of the states of mind enumerated by sub-s. (1) only two are material to the present case. That is shown both by the facts and by the findings of the Court of Petty Sessions. They are mentioned in pars. (b) and (d) of the sub-section. One such state of mind is an intention to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom. The other is an intention to excite disaffection against the Government or Constitution of the Commonwealth. The existence in the appellant of any of these intentions would be enough.

The facts upon which the conviction is founded can be briefly stated. On 15th September 1948 in the Temperance Hall in Edward Street, Brisbane, before an audience of 200 people, a debate was held between two representatives of the Queensland People's Party and two representatives of the Australian Communist Party. The question chosen for debate was whether Communism is compatible with personal freedom. The appellant was one of the two representatives of the Australian Communist Party. Each debater spoke for fifteen minutes. At the conclusion of the debate the chairman invited or permitted questions from members of the audience. This was part of the evening's programme. A number of questions was asked. Among them was a question to the appellant—"If the Communists gained control in Australia what would be the position of the monarchy?" The appellant answered—"The monarchy is all right. We have nothing against it. But if the Communists gained control in Australia and it was found that the monarchy was in the way, the monarchy would have to go." This answer is not the subject of the charge. It was given in evidence as part of the context of the answer given by the appellant to the question he was next asked and that answer is the subject of the charge. The question was asked—"We all know that we could become embroiled in a third world war in the immediate future between the Western Powers and Soviet Russia. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?" The first answer given to this question by the appellant was—"If Australia was involved in such a war, it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war. It would be a reactionary war." The questioner then demanded what he called a direct answer to the question. At this the appellant grasped the rostrum, leaned forward and said loudly and emphatically—"We would oppose that war: we would fight on the side of Soviet Russia. That is a direct answer."

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The question and a combination of the two answers form substantially the seditious words the utterance of which is charged as an offence. The conviction does not appear to have been drawn up. But on the findings it would be expressed as a conviction for uttering seditious words in that in answer to a question—"We all realize we could become embroiled in a third world war in the immediate future between Soviet Russia and the Western Powers. In the event of such a war what would be the attitude of the Communist Party in Australia?"—he did utter words expressive of a seditious intention, namely—"If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. It would be a reactionary war. We would oppose that war, we would fight on the side of Soviet Russia." A sentence of six months' imprisonment was imposed upon the appellant.

There are two questions for our consideration. One is whether the material provisions of ss. 24A (1), 24B (2) and 24D of the *Crimes Act* are valid. The other question is whether words so uttered are expressive of a seditious intention within the meaning of sub-s. (1) of s. 24A and sub-s. (2) of s. 24B. That means in effect whether they are expressive of an intention to excite disaffection against the Sovereign or the Government of the United Kingdom or against the Government of the Commonwealth. For if the words are not expressive of any such intention, they would hardly be capable of expressing any other of the specific intentions defined in s. 24A (1).

The factors upon which reliance was or may be placed in support of the appellant's denial that the requisite intention existed or was expressed may, I think, be stated under three heads. In the first place the statement was not volunteered but was elicited from him by a question and by a persistent demand for a definite answer. What he said therefore should not be considered as intended to excite any feelings in others but only to state as requested his own opinion. In the second place the opinion so stated was not directed so much to the relations of British subjects to the Sovereign or Government of the United Kingdom or of Australia as to a possible war supposedly resulting from a policy to which the appellant was opposed. In the third place the opinion related only to a contingency and did not express an actual intention with reference to an existing state of war. Although I have set out these matters separately they ought, of course, to be considered in combination. For the appellant's case is that, if the episode is examined in its entirety, no sufficient ground will appear for finding that he conveyed to the audience the specific intention of exciting disaffection



against the Sovereign or the Government of the United Kingdom or against the Government or the Constitution of the Commonwealth.

In s. 24A (1) (b), (c) and (d) I take the word "Government" to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organized entity and independently of the persons of whom it consists from time to time. Any interpretation which would make the word cover the persons who happen to fill political or public offices for the time being, whether considered collectively or individually, would give the provision an application inconsistent with parliamentary and democratic institutions and with the principles of the common law, as understood in modern times, governing the freedom of criticism and of expression.

The word "Constitution" in these three paragraphs probably has the same meaning, and, if so, it does not refer to a document or instrument of government but to the polity or organized form of government which the fundamental rules of law have established whether they are expressed in a written constitution or not. Sections 24A, 24B and 24D are based upon the *Draft Criminal Code of 1879* (s. 102) drawn by Sir *Fitzjames Stephen* and revised by the Commissioners; and his *Digest of the Criminal Law* contains paragraphs in much the same form. It would therefore be a mistake to give the words of the provisions a meaning going beyond the sense in which by that date they would be understood when used with reference to the common law misdemeanour of seditious words or libel. Disaffection is a traditional expression but it is not very precise. It means an estrangement upon the part of the subject in his allegiance which has not necessarily gone as far as an overt act of a treasonable nature or an overt breach of duty. It supposes that the loyalty and attachment to Authority, upon which obedience may be considered to depend, is replaced by an antagonism, enmity and disloyalty tending to make government insecure.

To be seditious the words uttered must, under so much of pars. (b) and (d) of s. 24A (1) as is relevant, be expressive of an intention to effect the purpose of exciting this state of feeling against the Sovereign or the Government or Constitution of the United Kingdom or the Government or Constitution of the Commonwealth.

I take the words "expressive of an intention," in the case of an utterance, to mean that what is said conveys in fact an intention on the part of the speaker to excite or produce such an actual state of feeling. What constitutes the offence is the expression of a real

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intention to effect the seditious purpose and that purpose itself must be a reality. It is not sufficient that words have been used upon which a seditious construction can be placed, unless on the occasion when they were used they really conveyed an intention on the part of the speaker to effect an actual seditious purpose.

If s. 24D (1) and s. 24B (2) in their application to the material part of pars. (b) and (d) of s. 24A (1) are understood in the manner I have stated I see no reason to doubt that, to that extent at all events, the provisions are constitutionally capable of a valid operation. It is always difficult to define the extent of incidental powers. But I do not suppose that it would be denied that the legislative power of the Commonwealth extends to measures for the suppression of incitements to the actual use of violence for the purpose of resisting the authority of the Commonwealth or effecting a revolutionary change in the form of government. In the same way I think that the legislative power authorizes measures against incitements to the use of violence for the purpose of effecting a change in our constitutional position under the Crown or in relation to the United Kingdom or in the Constitution or form of government in the United Kingdom. Our institutions may be changed by laws adopted peaceably by the appropriate legislative authority. It follows almost necessarily from their existence that to preserve them from violent subversion is a matter within the legislative power. But the power must extend much beyond inchoate or preparatory acts directed to the resistance of the authority of government or forcible political change. I am unable to see why it should not include the suppression of actual incitements to an antagonism to constitutional government, although the antagonism is not, and may never be, manifested by any overt acts of resistance or by any resort to violence.

The substantial question upon which the appeal depends is whether the appellant did, by the words made the subject of the charge, convey an intention to effect the purpose of exciting disaffection against the Sovereign or the Government or Constitution, whether of the Commonwealth or of the United Kingdom. This is, in my opinion, a question of fact. It is a question of fact upon which we are bound to form our own judgment. For this is an appeal by way of rehearing and, like other appeals, it is an appeal upon law and fact (see *Wishart v. Fraser* (1) and the authorities there cited). But although it is a question of fact it is important to see exactly what the question is. It is even more important to see what it is not. It is not a question whether, if the appellant were,

(1) (1941) 64 C.L.R. 470, at pp. 480, 481.



in the event of war, to pursue his threatened course of action, it would amount to a treasonable adherence to the King's enemies. It is not a question whether he expressed an intention, although an intention depending on a contingency, to act in a manner exhibiting disaffection on his own part against the Crown and the Government of the Commonwealth and of the United Kingdom. It is not a question whether his words showed himself, as he stood before the audience, to be a disaffected person. The question relates to a purpose of exciting disaffection in others. It must be a purpose of exciting in others disaffection against the Crown, the Government of either country, or the Constitution. His present intention of effecting that purpose must be conveyed by his words. It must be conveyed by the words made the subject of the charge, namely, those relating to the contingency of war with Russia, not by his reference to the monarchy. That reference, however, would not support the charge. Further, his words must be understood in the light of the circumstances in which they were uttered. For "the character of every act depends upon the circumstances in which it is done," per *Holmes J. : Schenck & Baer v. United States of America* (1).

Now it is clear enough that the question put to the appellant was concerned, not with the sovereignty of the Crown, not with the authority of the Government or of the Constitution, but with the attitude of the appellant, as a communist, or of his party in case of war with Russia. He confined his first answer itself to condemning such a war and expressing his party's opposition to it. It is difficult to believe that by this he conveyed any intention on his part of endeavouring to influence the attitude of his audience towards the Crown or the Government. He had not volunteered the statement. The attitude of his audience to the Crown or the Government was, I should think, not within his contemplation. When the question was repeated and a more categorical reply was insisted upon, his answer and the manner in which it was delivered seem to have exhibited a resolve to state his own sentiments without reserve. But there is no indication of any desire to persuade his audience of anything but his own conviction about the course his party would take if a war with Russia occurred. His answer is a disclosure of his own views actuated by the persistence of his questioner; not an active attempt to effect a purpose of causing his listeners to adopt an attitude of mind. But supposing that by his answer he did wish to influence opinion as to the side that should be taken in the contingency of a war with Russia. The attitude towards the Crown or the Government of persons whose opinion

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(1) (1919) 249 U.S. 47, at p. 52 [63 Law. Ed. 470, at p. 473].



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might be so influenced would be only indirectly and consequentially involved and would not be within the immediate and substantial purpose which the supposition would ascribe to the appellant. His mind and his words were devoted to a contingency. It was spoken of as an hypothesis, an hypothesis involving a dilemma. He was not addressing himself to the subject of attachment to or estrangement from constituted authority. Enmity, antagonism, disaffection against government or the Constitution was not the purpose of the question or the reply.

An intention to effect the purpose of exciting disaffection is expressed by words and observations calculated to arouse such feelings. To say that his purpose was to arouse antagonism to the British Crown or to the Government or Constitution of the Commonwealth or of the United Kingdom would, to my mind, be a strained and unreal inference. The sentiments the appellant avowed were hypothetically treasonable. The party he represented is commonly believed to be disaffected against British institutions and the appellant may well have harboured feelings of disaffection. But under the law he is entitled to be acquitted of any crime that he has not actually committed. In my opinion he did not in fact commit the crime with which he was charged for the simple reason that he did not answer the question for the purpose of exciting disaffection and his words, as they would be understood in the circumstances in which he uttered them, were not expressive of an intention to effect that purpose.

I think that the appeal should be allowed and the conviction quashed.

MCTIERNAN J. The complaint upon which the appellant was prosecuted fairly represents the words spoken by the appellant on the occasion to which the complaint relates. There is no doubt that the appellant intentionally uttered those words or words to a like effect on that occasion. The debatable question of fact is whether he uttered the words with the necessary criminal intention. Such an intention is an essential element in the offence of which the appellant was convicted.

The offence is created by s. 24D of the Commonwealth *Crimes Act* 1914-1946. It is an offence under that section to write, print, utter or publish seditious words. The appellant was prosecuted for uttering seditious words. Section 24B (2) defines "seditious words" as words expressive of a seditious intention; and s. 24A (1) specifies the intentions which are seditious and criminal under the Act. In order to describe the offence created by s. 24D fully, it



would be necessary to say that it consists of writing, printing, uttering or publishing any words expressive of an intention to effect any of the purposes enumerated or contained in s. 24A (1).

The offence is indictable but the magistrate had authority under s. 24E to proceed summarily and to acquit or convict the appellant.

The magistrate found that the words were expressive of an intention to excite disaffection against the Sovereign and the Government of the Commonwealth. These purposes are contained in s. 24A (1). The conviction is based on the finding that the appellant uttered the words charged or words with a like meaning with the intention to effect one or both of these purposes.

This appeal against the conviction is upon questions of law and fact. If there could be a reasonable doubt that the words uttered by the appellant are expressive of the intention found by the magistrate, the conviction cannot stand. In a case of this kind I think that the Court ought to consider whether, if the trial had been upon indictment, the jury might have entertained a reasonable doubt that the words were uttered with the criminal intention found by the magistrate. The general nature of the directions which the jury might have received can be gathered from the summing up in each of the following cases: *R. v. Aldred* (1) and *R. v. Burns* (2). But in applying those directions it is necessary to bear in mind that the appellant was charged with this statutory offence and the statute makes a specific criminal intention an essential ingredient of the offence: the intention must be to effect any of the purposes contained in s. 24A (1).

The words charged do not literally refer to the Sovereign or the Government of the Commonwealth. However, they import that the persons whose feelings they represent, and they include the appellant, are grossly disloyal and violently hostile to the Sovereign and the Government of the Commonwealth. The words are capable of stirring up enmity or disaffection against the Sovereign and the Government of the Commonwealth. The words in themselves are evidence that the appellant spoke with the criminal intention found by the magistrate. But it is obvious that all the circumstances in which the words were uttered must be taken into consideration in order to arrive at a correct conclusion on the question whether the appellant uttered the words with the necessary criminal intention. It is not a question of what is the tendency of the words or the result which they are calculated to produce but of the purpose which the appellant meant to effect by speaking the words. Was it the purpose to excite disaffection against the Sovereign and the

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(1) (1909) 22 Cox C.C. 1.

(2) (1886) 16 Cox C.C. 353.



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1949. proof must be applied. I think that there is room for a reasonable  
BURNS doubt that the appellant uttered the words with the intention of  
v. effecting any criminal purpose which would render them seditious.  
RANSLEY. It is entirely consistent with the evidence to find that the appellant  
McTiernan J. spoke the words charged in order to give an answer to the question  
put to him and that he had no intention other than to give the  
information sought by the person who asked the question. That is  
not a seditious intention. Upon all the facts established at the  
trial, I think that it was not proved beyond reasonable doubt that  
the appellant uttered the words charged with a seditious intention.

In my opinion the provisions of the *Crimes Act* upon which the  
complaint is founded are valid. My reasons for this opinion are  
stated in *R. v. Sharkey* (1).

I should allow the appeal, discharge the conviction and dismiss  
the complaint.

*Appeal dismissed.*

Solicitors for the appellant, *Delaney, Delaney & Simmonds*.

Solicitor for the respondent, *G. A. Watson*, Crown Solicitor for  
the Commonwealth.

J. B.

(1) (1949) 79 C.L.R. 121.