[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPLICANT;
RESPONDENT,

AND

SCOTT . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1950.

PERTH, *Sept.* 5, 19.

Latham C.J., Fullagar and Kitto JJ.

Infants—Child welfare—Neglected child—Contributing to child becoming a neglected child—Child not shown to have been guilty of an offence—Child Welfare Act 1947 (*W.A.*), *s.* 137 (*No.* 66 *of* 1947).*

The applicant was charged under s. 137 (1) of the *Child Welfare Act* 1947 (W.A.) that she " did by wilful misconduct and habitual neglect contribute to " (a named child) " aged twelve months becoming a neglected child."

Held, that it must be established as an element of the offence that the child in question has itself been guilty of an offence.

Order of Supreme Court of Western Australia (Full Court) reversed.

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

The applicant, Freda Maud King, was charged, under s. 137 of the *Child Welfare Act*, 1947 (W.A.), in the Children's Court at Perth that " on the 28th day of December 1949 and on divers other dates

* The *Child Welfare Act* 1947 (W.A.), by s. 137, provides :—" (1) Any person who has, either by wilful misconduct or habitual neglect, or by any wrongful or immoral act or omission encouraged or contributed to the commission of any offence by any child, or caused or suffered the child to become a neglected child, or contributed to such child becoming a neglected child, shall be guilty of an offence. Minimum penalty irreducible in mitigation : Five pounds. Maximum penalty : Fifty pounds or imprisonment with hard labour for six months. . . . (3) The court before whom any person is convicted of an offence under this section may (if such person is a parent or guardian of the child), in lieu of or in addition to any other punishment, order the person convicted—(a) To pay any fine which may have been imposed on the child for the offence committed by such child ; (b) To find good and sufficient security to the satisfaction of the court that the child will be of good behaviour for a period not exceeding twelve months."

at Perth, she did by wilful misconduct and habitual neglect contribute to Carol Ann King, aged twelve months becoming a neglected child."

The evidence led by the prosecution, and which was uncontradicted, established that the child in question, a female aged twelve months, was in the custody of the applicant, that the applicant was a woman of dissolute habits and that the child when found was in a dirty and starved condition. Before the charge against the applicant was heard a declaration had been made by the Special Magistrate declaring the child to be a " neglected child " in that she was under the guardianship or in the custody of a person whom the court considered unfit to have such guardianship or custody. The declaration was made under s. 30 of the *Child Welfare Act* 1947 (W.A.) read in conjunction with the definition of " neglected child " contained in s. 4 (par. 5) of that Act. The Special Magistrate dismissed the charge on the ground that the only child referred to in s. 137 is a child who has committed an offence and that a child declared neglected under category 5 of the definition of " neglected child " cannot be considered to have committed an offence.

From this decision the respondent appealed by way of order to review to the Full Court of the Supreme Court of Western Australia. The Supreme Court (*Wolff* and *Walker* JJ., *Dwyer* C.J. dissenting) allowed the appeal and remitted the case to the Special Magistrate for a rehearing. The view adopted by the majority of the court was that although the first of the three offences created by s. 137 (1) was not committed until the child concerned committed some offence, the other two offences created by that sub-section were independent of the commission of any offence by the child.

From this decision the present applicant sought special leave to appeal to the High Court.

C. B. Gibson (with him *A. C. Gibson*), for the applicant. The section is not ambiguous and the words used must be interpreted in their ordinary grammatical sense. The expressions " the child " and " such child " appearing in the section can refer only to a child already mentioned and that child is one with special characteristics, viz. a child who has committed an offence. The majority of the Supreme Court proceeded on the basis that the construction now contended for would make tautologous all words appearing in the sub-section after the words " of any offence by any child ". The sub-section envisages two possibilities :— (1) where a person has contributed to the commission of an offence by a child ; and (2) where a child has committed an offence and a

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person has caused it to become or has contributed to its becoming a neglected child, and whether or not the person concerned has contributed to the commission by the child of the particular offence. The words appearing after the words " of any offence by any child " may, therefore, have application to circumstances not covered by the preceding words of the sub-section. The Court should not add words to a statute unless a literal reading reduces it to a nullity (*Salmon* v. *Duncombe* (1)). The marginal notes are not part of the statute: *Interpretation Act* 1918–1948 (W.A.), s. 21 (3). This case involves a question of public importance in the administration of the *Child Welfare Act* 1947 (W.A.) and this is a special circumstance justifying the granting of special leave to appeal (*Ex parte Bucknell* (2)).

R. V. Nevile, for the respondent. Special circumstances must be shown before special leave to appeal will be granted (*Ex parte Bucknell* (2); *In re Eather* v. *The King* (3)). That the Supreme Court was not unanimous is not a special circumstance. This is a case concerning the interpretation of a statute and no principle of construction is involved. The construction contended for by the applicant envizages reading the words " who has committed an offence " after the words " the child " and thus giving the word " the " a restrictive meaning. The word " the " does not always have a restrictive meaning (*Southcombe* v. *Guardians of Yeovil Union* (4); *R.* v. *The Mayor, Aldermen, and Burgesses of the Borough of Liverpool* (5): *Shawe Storey* v. *I.R.C.* (6)). The intention of the legislature should be ascertained by reading the Act as a whole. The section should not be read *in vacuo* (*Re Bidie*; *Bidie* v. *General Accident, Fire and Life Assurance Corporation, Ltd.* (7)). If the latter half of the sub-section refers only to a child who has committed an offence then that portion of the sub-section is surplusage. There is now little force in the submission that a penal statute should receive a restrictive interpretation (*Scott* v. *Cawsey* (8); *McQuade* v. *Barnes* (9)). The section should be interpreted with regard to the mischief sought to be remedied (*Seaford Court Estates Ltd.* v. *Asher* (10); *British Movietonews Ltd.* v. *London and District Cinemas, Ltd.* (11)).

Cur. adv. vult.

(1) (1886) 11 App. Cas. 627.
(2) (1936) 56 C.L.R. 221.
(3) (1915) 20 C.L.R. 147.
(4) (1897) 1 Q.B. 343.
(5) (1838) 8 Ad. & E. 176 [121 E.R. 804].
(6) (1914) 1 K.B. 87.
(7) (1948) 2 All E.R. 995, per Lord *Greene* at p. 998.
(8) (1907) 5 C.L.R. 132, per *Isaacs* J. at pp. 154-156.
(9) (1949) 1 K.B. 154.
(10) (1949) 2 K.B. 481, per *Denning* L.J. at p. 499.
(11) (1951) 1 K.B. 190.

The following written judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from an order of the Full Court of the Supreme Court of Western Australia allowing an appeal from a dismissal by a Special Magistrate in the Children's Court of a charge against Freda Maud King for an offence against the *Child Welfare Act* 1947, s. 137. The charge was that the appellant, who was the mother of a female child aged twelve months, " did by wilful misconduct and habitual neglect contribute to Carol Ann King, aged 12 months, becoming a neglected child." It was proved that the mother was a woman of dissolute habits, that she had not looked after her child properly, and that the child was in a dirty and starved condition. Section 4 of the *Child Welfare Act* 1947 includes within the definition of " neglected child " " any child who . . . (5) is under the guardianship or in the custody of any person whom the court considers is unfit to have such guardianship or custody." Section 30 provides that a child may be declared to be a neglected child. Such a declaration is not (as was the case under the former Act of 1927, s. 30) based upon a complaint or charge against the child. A child who is only twelve months old is incapable of committing an offence against the law. The question which arises upon this application is whether the magistrate was right in holding that a person cannot be convicted of an offence under s. 137 where it is not shown that the child in question has been guilty of an offence.

Section 137 is in the following terms :—" (1) Any person who has, either by wilful misconduct or habitual neglect, or by any wrongful or immoral act or omission encouraged or contributed to the commission of any offence by any child, or caused or suffered the child to become a neglected child, or contributed to such child becoming a neglected child, shall be guilty of an offence. Minimum penalty irreducible in mitigation : Five pounds. Maximum penalty : Fifty pounds or imprisonment with hard labour for six months. . . . (3) The court before whom any person is convicted of an offence under this section may (if such person is a parent or guardian of the child), in lieu of or in addition to any other punishment, order the person convicted—(a) to pay any fine which may have been imposed on the child for the offence committed by such child ; (*b*) to find good and sufficient security to the satisfaction of the court that the child will be of good behaviour for a period not exceeding twelve months."

The Special Magistrate was of opinion that s. 137 created an offence only in cases where the neglected child in question was a

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child who had committed an offence. In the Supreme Court the majority of the court (*Walker* and *Wolff* JJ., *Dwyer* C.J. dissenting) took the contrary view, allowed an appeal, and remitted the case to the magistrate to be reheard.

Section 137 creates three offences. In all cases there must be wilful misconduct or habitual neglect or wrongful or immoral act or omission. The offences consist in, by any of these means,— (1) encouraging or contributing to the commission of any offence by any child; (2) causing or suffering "the child" to become a neglected child; (3) contributing to "such child" becoming a neglected child. I agree with *Dwyer* C.J. that in offence No. (2) the words "the child" must be read as referring to the child previously mentioned, namely a child who has committed an offence. Similarly the words "such child" in the description of offence No. (3) must also be taken to refer to a child who has committed an offence. This is the natural interpretation of the words of the section. In order to produce the result which was reached by the Full Court it is necessary to read the words "the child" as if they were "a child" and the words "such child" as if they also were "a child." In my opinion there is no justification for making what is really a substitution of words for those which actually appear in the section.

The contrary view was supported in the first place by reference to the long title—"An Act to consolidate and amend the law relating to the making of better provision for the protection, control, maintenance and reformation of neglected and destitute children, and for other purposes connected therewith." It is argued that the penalizing of persons who by misconduct &c. contribute to a child becoming a neglected child (whether or not that child has committed an offence) is a means of protecting &c. neglected children and that s. 137 should therefore, if possible, be given a construction which will bring about that result. But where words are clear in themselves there is no occasion to resort to the long title of a statute for purposes of interpretation and, where there is no ambiguity in the operative words of a section, the section must be interpreted according to its terms and should not be altered in order to make it more effective so as to carry out what appears to be the purpose of an enactment.

In the second place it was argued that unless the construction approved by the majority of the Full Court were adopted the final words of sub-s. (1) would be ineffective. It was urged that if any person by misconduct &c. contributed to a child becoming a neglected child, then such a person would necessarily be a person

who had thereby encouraged or contributed to the commission of an offence by the child and would therefore be guilty of what I have called offence No. (1). Thus the provision creating offence No. (3) would be useless and nugatory. This argument, however, overlooks the fact that wilful misconduct &c. may contribute to a child being a neglected child in a case where a child has committed an offence even though that misconduct &c. did not encourage or contribute to the commission of the particular offence of which the child has been guilty. Thus a person can be guilty of offence No. (3) without being guilty of offence No. (1).

Reference was made in argument to the marginal note to s. 137—"Punishment for misconduct or neglect leading to delinquency of child." But s. 21 (3) of the *Interpretation Act* 1918-1948 expressly provides that marginal notes are not part of a statute. Therefore the marginal note cannot be relied upon for the purpose of interpreting any provision of an Act.

The conclusion which I have reached obtains some support from the words of s. 137 (3) (a), which provides that a person convicted under the section may be ordered to pay any fine which may have been imposed on the child for the offence committed by such child. This provision assumes that when a person is convicted under the section the child in question has committed an offence in respect of which a fine may have been imposed.

For the reasons which I have stated I am of opinion that the dissenting judgment of *Dwyer* C.J. was right and, as the matter is of importance in the administration of the *Child Welfare Act*, that special leave to appeal should be granted, the appeal allowed, the order of the Full Court set aside and the order of the magistrate dismissing the complaint restored.

FULLAGAR J. Motion on notice for special leave to appeal from a judgment of the Full Court of Western Australia. The applicant was charged on complaint before the Children's Court at Perth for that on 28th December 1949 and on divers other dates at Perth she did by wilful misconduct and habitual neglect contribute to Carol Ann King, aged twelve months, becoming a neglected child. The Special Magistrate dismissed the charge. The complainant appealed by way of order to review to the Supreme Court, which, by a majority, *Dwyer* C.J. dissenting, allowed the appeal and referred the matter to the magistrate for re-hearing.

The complaint was made under s. 137 (1) of the *Child Welfare Act* 1947, which is in the following terms:—"Any person who has, either by wilful misconduct or habitual neglect, or by any

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wrongful or immoral act or omission encouraged or contributed to the commission of any offence by any child, or caused or suffered the child to become a neglected child, or contributed to such child becoming a neglected child, shall be guilty of an offence."

The term "neglected child" is defined in s. 4 of the Act, and it was proved before the magistrate that the child, Carol Ann King, fell within par. 5 of the definition as being a child who was "under the guardianship or in the custody of a person whom the court considers to be unfit to have such guardianship or custody." The child was under the guardianship or custody of the applicant, who is her mother, and it may be taken to have been proved also that the applicant had by wilful misconduct or habitual neglect contributed to the child becoming a neglected child. It was not, however, either alleged or proved that the child had committed any offence, and she was, of course, by reason of her tender years, incapable of committing an offence. Under earlier legislation there may have been some justification for saying that "being a neglected child" was itself technically an "offence," but this is clearly not so under the Act of 1947, which is a consolidating and amending Act.

The view taken by the magistrate was, in effect, that the complaint disclosed no offence committed by the applicant because it did not allege that the child had committed any offence. He considered that s. 137 (1), on its true construction, dealt only with cases where an offence had been committed by a child. In such cases it enacted that an offence was also committed by any person who, to put it shortly, had, (1) whether the child was a neglected child or not, encouraged or contributed to the commission of the offence, or (2) if the child was a neglected child, (a) caused or suffered the child to become a neglected child, or (b) contributed to the child becoming a neglected child. On this view of the sub-section it is clear, of course, that the complaint does not disclose an offence. *Dwyer* C.J. agreed with this view. The other members of the Full Court, however, were of opinion that the latter part of the sub-section made it an offence, apart altogether from the commission of any offence by a child, for a person to cause or suffer *any* child to become a neglected child or to contribute to *any* child becoming a neglected child.

I am of opinion that the matter is of sufficient importance to warrant the granting of special leave, and I am of opinion that the view taken by the magistrate and by *Dwyer* C.J. is correct and that the appeal should be allowed.

I think, in the first place, that that view represents the more natural construction of the language actually used. The first limb of s. 137 (1) deals with encouraging or contributing to the commission of an offence by "*any* child." The second limb, however, does not refer to "*any* child": it refers to "*the* child" and to "*such* child." Each of these expressions prima facie denotes some definite child who has already been referred to. A definite child has already been referred to, viz. a child who has committed an offence, and the most natural way of reading the expressions "the child" and "such child" is to take them as referring to the child who has committed the offence.

I think, in the second place, that this construction is the more reasonable and probable having regard to the subject matter of the enactment. It reveals the sub-section as dealing with a series of cognate offences, offences whose basic element is the commission of an offence by a child. On the other construction the sub-section deals with two classes of offence which are unrelated, or at most only distantly related, and which one would not expect to find created together by a single paragraph of an enactment.

Finally, I would regard the provisions of sub-s. (3) of s. 137 as decisive of the question. Sub-section (3) provides that:— "The court before whom any person is convicted of an offence under this section may (if such person is a parent or guardian of the child), in lieu of or in addition to any other punishment, order the person convicted—(a) to pay any fine which may have been imposed on the child for the offence committed by such child; (b) to find good and sufficient security to the satisfaction of the court that the child will be of good behaviour for a period not exceeding twelve months." The references to "*the* child" and "*the* offence" seem clearly to be founded on the assumption that in every case to which s. 137 applies there will be a child who has committed an offence.

Every relevant consideration thus seems to me to support the view adopted by the magistrate and by *Dwyer* C.J. The other view seems to rest fundamentally on the preconception that Parliament must have intended to make it an offence for any person to cause or suffer a child to become a neglected child. It is unsafe, I think, to make any such assumption as to what Parliament is likely to have intended, and I would myself agree with *Dwyer* C.J. that there may well have been considerations of policy which would lead Parliament (especially having regard to the great breadth of the definition of "neglected child" in s. 4) to refrain from enacting a provision so wide and far-reaching.

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In my opinion, special leave to appeal should be given, the appeal should be allowed, the order of the Full Court (except as to costs) set aside and the order of the Children's Court restored. The costs of this appeal should be paid by the respondent.

KITTO J. The applicant was charged with having, by wilful misconduct and habitual neglect, contributed to a certain child becoming a neglected child. The complaint was laid under s. 137 of the *Child Welfare Act* 1947 (W.A.), which provides by sub-s. (1) that—"Any person who has, either by wilful misconduct or habitual neglect, or by any wrongful or immoral act or omission encouraged or contributed to the commission of any offence by any child, or caused or suffered the child to become a neglected child, or contributed to such child becoming a neglected child, shall be guilty of an offence."

On the hearing of the complaint it was proved that the child had been declared a neglected child within the meaning of the Act, as being in the custody of a person, namely the present applicant, whom the court considered to be unfit to have such custody: see s. 4 definition of "neglected child," par. (5). The magistrate was apparently satisfied that the applicant had, by wilful misconduct or habitual neglect, contributed to the child becoming a neglected child, but he dismissed the complaint upon the ground that the child had not committed any offence and that in s. 137 (1) the only child referred to is one who has committed an offence.

The magistrate's decision was reversed by the Supreme Court (*Wolff* and *Walker* JJ., *Dwyer* C.J. dissenting). The view adopted by the majority of the court was that, although the first of the three offences created by s. 137 (1) is not committed until the child concerned commits some offence, the other two offences created by that sub-section are independent of the commission of any offence by the child. This result can be arrived at only in one of two ways, namely (1) by reading the words which create the second and third offences as if they were entirely divorced from the words creating the first offence, and therefore treating the words "the child" and "such child" as not referring to the child mentioned earlier in the sub-section, or (2) by treating "the child" and "such child" as referring back to the words "any child" and therefore as meaning simply the particular child in question.

The first of the offences created by the sub-section consists of conduct which is converted into an offence *ex post facto* by the subsequent commission of an offence by the child in relation to

whom the conduct has taken place. Conduct of the kinds described, however clear may be its tendency to encourage or contribute to a future breach of the law by the child, is not made an offence until the child actually commits the breach. Consequently it is only conduct in relation to a child who thereafter commits an offence which is the subject of the first portion of the sub-section.

That being so, to read the remainder of the sub-section as relating to any child, whether he commits an offence or not, would be to attribute to the legislature an intention to deal in the one provision with conduct which has occurred in relation to a child regarded as becoming a law-breaker, and with conduct which has occurred in relation to a child regarded as neglected but not as becoming a law-breaker. If that had been the intention, the last thing one would have expected to find would be words used which imply identity between the child referred to as a law-breaker and the child referred to as neglected but not as a law-breaker. Yet there is no denying that "the child" and "such child" do imply that the identical child is envisaged throughout the sub-section. Each of the methods above-mentioned by which the referential effect of those words may be got rid of is open to serious objection. The first converts "the" and "such" into "any," without assistance from the context, and for reasons based upon *à priori* conceptions of the policy likely to have prompted the enactment of the sub-section; and the second denies the conclusion already stated, namely that the first portion of the sub-section applies only to conduct in relation to a child who thereafter commits an offence.

These objections are, in my opinion, fatal to the view which was accepted by the majority of the Supreme Court; but any doubt there may be as to their decisiveness appears to me to be removed by the terms of sub-s. (3), which enacts that—"The court before whom any person is convicted of an offence under this section may (if such person is a parent or guardian of the child), in lieu of or in addition to any other punishment, order the person convicted—(a) to pay any fine which may have been imposed on the child for the offence committed by such child . . ."

In this provision the legislature has again used the expressions "the child" and "such child," and has used them in a context which affirms that the child referred to has, before the conviction of the person charged, committed, not only an offence, but "the offence." Sub-section (3) is expressed as applicable to every case in which a parent or guardian is convicted of any of the three

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offences created by sub-s. (1); and the use of the words "the offence committed by such child" makes it plain that there cannot be any offence under any part of sub-s. (1) unless the child, in relation to whom the conduct charged takes place, thereafter commits an offence.

The result is, in my opinion, that, just as it is the commission of an offence by the child in question which makes a person punishable who, by conduct of the kinds mentioned in the section, has encouraged or contributed to the commission of the child's offence, so it is the commission of an offence by the child which makes a person punishable who, by such conduct, has caused or suffered the child to become, or has contributed to his becoming, a neglected child.

In my opinion special leave to appeal should be granted, the appeal should be allowed, the order of the Supreme Court should be set aside and the order dismissing the complaint should be restored.

Special leave to appeal granted. Appeal allowed with costs. Order of Supreme Court, except in relation to costs, discharged. Order of special magistrate restored.

Solicitors for the applicant: *Hardwick, Slattery & Gibson.*
Solicitors for the respondent: *R. V. Nevile,* Crown Solicitor.

F. T. P. B.