[HIGH COURT OF AUSTRALIA.]

NAMATJIRA . . . . . APPLICANT;
DEFENDANT,

AND

RAABE . . . . . RESPONDENT.
COMPLAINANT,

ON APPLICATION FOR LEAVE TO APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1959.

MELBOURNE, *Mar.* 12, 13.

Dixon C.J., McTiernan, Fullagar, Kitto and Windeyer JJ.

Aboriginals—Ordinance—Construction—Provision that Administrator of Territory may declare a person to be a ward if certain conditions present—Declaration as ward—Person declared ward given no opportunity to be heard prior to declaration—Right of appeal against declaration to judicial tribunal—Whether necessary for each case to be dealt with individually—Whether necessary for notice to be given to proposed ward prior to declaration—Licensing Ordinance 1939-1957 (*N.T.*), *s.* 141—*Welfare Ordinance* 1953-1957 (*N.T.*), *s.* 14.

Section 14 of the *Welfare Ordinance* 1953-1957 (N.T.) provides that subject to the provisions of the section the Administrator may, by notice in the *Gazette*, declare a person to be a ward if that person by reason of (*a*) his manner of living; (*b*) his inability, without assistance, adequately to manage his own affairs; (*c*) his standard of social habit and behaviour; and (*d*) his personal associations, stands in need of such special care or assistance as is provided by the ordinance. Sub-section (2) goes on to exclude almost everyone but aboriginals from the operation of the ordinance. By s. 30 an appeal is given to a judicial tribunal from a declaration.

Held, that on its proper construction s. 14 does not require that each case of a proposed declaration should be dealt with individually or after notice to the proposed ward.

Application for leave to appeal from the Supreme Court of the Northern Territory (*Kriewaldt* J.), refused.

APPLICATION for leave to appeal from the Supreme Court of the Northern Territory.

Albert Namatjira was tried before the court of summary jurisdiction at Alice Springs in the Northern Territory on a complaint laid by Gordon Edgar Raabe charging the defendant for that on 26th August 1958 near Hermansberg he did supply liquor to Henoch

Raberaba, a ward within the meaning of the *Welfare Ordinance* 1953-1957, contrary to s. 141 of the *Licensing Ordinance* 1939-1957. On 7th October 1958 the defendant was found guilty and sentenced to imprisonment with hard labour for six months.

The defendant appealed from his conviction and sentence to the Supreme Court of the Northern Territory. On 23rd December 1958 *Kriewaldt* J. in a written judgment ordered that the appeal against conviction be dismissed but that the appeal against sentence be allowed to the extent that the period be reduced from six months to three months. The defendant now applied to the High Court for leave to appeal against this decision.

M. J. Ashkanasy Q.C. and *N. M. Stephen*, for the applicant.

Dr. *E. G. Coppel* Q.C. and *R. L. Gilbert*, for the respondent.

The following oral judgment of the Court was delivered by DIXON C.J. :—

This is an application for leave to appeal from an order of the Supreme Court of the Northern Territory. The order was made on an appeal from conviction and sentence by a magistrate. The order of the Supreme Court dismissed the appeal subject to a reduction in the sentence which the magistrate had imposed.

The defendant who is the applicant was charged with having committed an offence on 26th August 1958 near Hermansberg in the Northern Territory of Australia. The offence charged was that he did supply liquor to one Henoch Raberaba, a person who is a ward within the meaning of the *Welfare Ordinance* 1953-1957, contrary to s. 141 of the *Licensing Ordinance* 1939-1957. Sub-section (1) of s. 141 of the *Licensing Ordinance* which creates the offence says that a person shall not sell, give or supply or permit to be sold given or supplied, liquor to a person who is a ward within the meaning of the *Welfare Ordinance* 1953-1955. Sub-section (1) prescribes the penalty. In terms it prescribes a minimum and a maximum and does so for a first and again for any subsequent offence. It provides that where the offence is a first offence imprisonment for not less than six months and not more than one year shall be imposed. In the case of a subsequent offence, imprisonment for not less than one year and not more than two years must be imposed. The magistrate was governed by that provision and, having convicted the defendant of the offence, he was bound to sentence him to a term of not less than six months imprisonment, it being a first offence.

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Somewhat unusually the section goes on to provide that on an appeal from a conviction the Supreme Court of the Northern Territory shall have a wider discretion. Sub-section (5) confers this discretion where a person is convicted of a first offence ; it says nothing about a second. The sub-section says that where a person convicted of a first offence against the section appeals to the Supreme Court of the Northern Territory against the conviction or against the sentence passed on the person for the offence, and the Supreme Court is satisfied that, by reason of the youth of the person, or other extenuating circumstances, the sentence passed on the person should be mitigated, the Supreme Court may, in substitution for that sentence, pass on the person a sentence of imprisonment for a lesser term or impose on the person a fine of not less than £30. The defendant having appealed from his conviction under sub-s. (1) of s. 141, *Kriewaldt* J. in the Supreme Court was of the opinion that his appeal against the conviction should be dismissed but he considered that he was in a position under sub-s. (5) to exercise his special discretion and he reduced the sentence which the magistrate was obliged to pass to three months, imprisonment.

From the order dismissing his appeal and reducing the sentence in the manner I have described the defendant now seeks to appeal to this Court. No appeal lies from the Supreme Court of the Northern Territory to this Court as of right. The appeal must be by the leave of this Court and the present application is for that leave.

It is based on three grounds. The first in substance is that on the evidence the defendant ought not to have been convicted of having supplied liquor to Henoch Raberaba. The second is that the declaration of Henoch Raberaba as a ward under the *Welfare Ordinance* was void. That he was declared a ward is an essential part of the facts necessary for the conviction. It is said that the declaration was void because it was not made in a manner which, according to the argument, is required by the *Welfare Ordinance* under which it was made. The third ground is that the sentence ought again to be reviewed by this Court and still further reduced.

It is convenient to deal with the first and third grounds before going to the question of compliance with the requirements of the *Welfare Ordinance*. We have read the evidence as it is set out in the record before us and we are quite satisfied that the defendant did on the occasion charged supply liquor to Henoch Raberaba and therefore did commit the offence charged ; that is to say, unless the contention that Raberaba was not validly declared a ward be well-founded. We think that the magistrate and the learned judge of the Supreme Court were perfectly right in so holding. Indeed, on the

whole of the evidence as we read it, we think that it would be impossible to escape from the conclusion that the defendant did actually supply liquor to Raberaba as alleged in the charge.

There is next the ground that the sentence should be reviewed. The learned judge of the Supreme Court had the advantage of understanding the environment in which the offence was committed and the advantage also of an experience of the administration of the law expressed in s. 141 of the *Licensing Ordinance*. We would be very loath to interfere with the discretion which he exercised in the Northern Territory in estimating what is a proper punishment, but in any case we see no ground disclosed by the facts or the circumstances surrounding the offence for doubting that his Honour exercised a proper discretion.

For those reasons the two grounds we have mentioned fail.

It will be noticed that an essential ingredient in the offence is that the liquor was supplied to a ward within the meaning of the *Welfare Ordinance*. It was therefore necessary that the prosecution should establish that Henoch Raberaba to whom the liquor was supplied was a ward within the meaning of that ordinance. The ordinance itself contains a provision enabling the giving of a certificate that a man is a ward to be itself prima facie evidence of that fact: s. 16 (3) and (4). The prosecutor relied on the production of such a certificate to found his case. But further facts appeared. It appeared that a very large number of persons, over 15,000, had been declared wards at the same time. The declaration contained a list of aboriginals including Raberaba exceeding that number. Raberaba was not called upon in advance to show cause why he should not be declared a ward. These facts have been made the foundation of a contention that the requirements of s. 14 of the *Welfare Ordinance* 1953 were not fulfilled. The requirements which are alleged to exist depend upon the true interpretation of that ordinance. Section 14 provides that subject to the provisions of the section, the Administrator may, by notice in the *Gazette*, declare a person to be a ward if that person, by reason of (*a*) his manner of living; (*b*) his inability, without assistance, adequately to manage his own affairs; (*c*) his standard of social habit and behaviour; and (*d*) his personal associations, stands in need of such special care or assistance as is provided by the ordinance. Sub-section (2) of s. 14 then excludes a very large category of persons from the operation of the ordinance. When the category is examined it is seen that with the exception of what may be called transient aliens and a few others the exclusion must cover everybody but aboriginals.

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What was said in support of the objection to the validity of the declaration that Raberaba was a ward is that impliedly sub-s. (1) of s. 14 requires that before any man is declared to be a ward, notice shall be given to him, an opportunity shall be given to him of showing cause against the proposal that he shall be declared a ward, and that in any case some examination or investigation of his individual case should be made. If one were to encounter such legislation as is embodied in sub-s. (1) of s. 14 without having any knowledge of its background or of the conditions prevailing or of its general intended operation, one might readily yield to the view that some such implication was proper, provided that there was no context to control or rebut the implication. We have given anxious consideration to the proper interpretation of s. 14 because of the prima facie view I have stated, the view that you might take if you looked at s. 14 isolated from all other considerations whether contained in the ordinance or existing prior to the ordinance or to be found in the general circumstances where it applies.

The definition of " ward " is provided by s. 6 of the *Welfare Ordinance* and it is that, of course, which operates on s. 141 of the *Licensing Ordinance.* The definition says that " ward " means a person in respect of whom a declaration made under s. 14 of the *Welfare Ordinance* is in operation. It may be a mere chance that the words employed are " is in operation ", but mere chance or not, those words open the way to the contention that it is not enough that there should be a declaration in fact that the person supplied is a ward and that the declaration must be efficacious in law and operative. When you turn however to s. 14 (1) and consider its context, the first thing in that context by which you are struck is that there is immediately given an appeal to what is a judicial tribunal.

I need not elaborate the nature and ambit of the appeal. It is a remedy which is open from the making of the declaration and so long as it lasts. It enables any person against whom a declaration is made to contest its propriety, the existence of the conditions necessary to its validity and the present need for the declaration. The fact that this remedy is provided obviously deprives the argument that an opportunity to be heard must be given before a declaration is made of one of the most important considerations by which it might otherwise be supported. For if it is sought to make an implication in a legislative provision that a hearing must be given before an adverse conclusion is reached, the ground for the implication is usually that otherwise the person affected is left without a means of presenting his case in opposition to the conclusion. We have used the words " adverse conclusion " but perhaps that is not a

very appropriate term, because it is the claim of the Crown that the real purpose of s. 14 and the provisions that follow it is beneficial and not adverse. It is easy however to understand that a person who is regarded as a ward might not so view the matter. When he becomes a ward he occupies a particular status. It is a status which is so guarded that it is difficult to suppose that, if he really be a person who stands in need of special care and assistance, it would not operate to give him that care and assistance. But it is a special status of pupilage, and that is enough to make it right to approach the construction of the ordinance with the view that it might prove necessary to imply a condition that an opportunity shall be given to the proposed ward to show cause against the making of a declaration. When, however, you see that the ordinance itself means to give an immediate remedy to a person declared a ward if he objects to his status, not a little of the ground for such an implication is displaced. Next it is proper to look at the background of the legislation. It is quite apparent that it took the place of legislation which dealt in terms with the protection of aborigines. The ordinances by which that was provided for are repealed by s. 4.

If you then turn to the actual operation of s. 14, it is at once apparent that it is directed to the large body of persons existing in the Northern Territory of whom it might well be thought that it was necessary to give them the particular status of wards as described in the ordinance. It is a status substantially the same as that which they occupied under the *Aboriginals Ordinance*. Next you find that the power to declare them wards is given to the Administrator. The Administrator is, in the Northern Territory, the head of the government in that Territory, that is to say, the local government of that Territory. One would not expect to find, if it was intended that each individual case were to be inquired into and the particular circumstances of the case ascertained, that such a duty or function would be committed to the head of a government, even if it be the head of a government of a federal territory. The head of a government acts usually on the advice of officers and upon departmental reports.

To sum the matter up, the legislation takes the place of prior legislation under which a large body of aboriginals had a particular status analagous to that which is given here ; it confers a power to give a similar status to persons who stand in need of special care and assistance ; the power is almost confined in its application to aboriginals, having regard to the ambit of the exclusions ; they are persons who might be regarded as being as a class in such need and

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on the grounds enumerated; the power is reposed in the Administrator of the Territory; a person declared a ward has a right of appeal should he choose to exercise it and be in a position to exercise it; and the status given is protective in its nature.

In those circumstances we have reached the conclusion that it is not proper to make the implication which is claimed for s. 14 (1) and to require that each particular case should be dealt with individually after notice to the person concerned. We think that the power does authorize the "block" declaration that persons are wards within the *Welfare Ordinance* which was in fact made.

For these reasons we think that the second point, as described in the enumeration with which I began, also fails and that this application should be refused.

The application is refused.

Solicitors for the applicant, *Elijah Carter*, Alice Springs by *Weigall & Crowther*.

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. D. B.