IN THE HIGH COURT OF AUSTRALIA.

HODGE

v.

NEEDIE

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on 4th March, 1947.

H. J. Green, Govt. Print., Melb.

C.2774

HODGE v. NEEDLE.

REASONS FOR JUDGMENT. LATHAM C.J.

Various questions have been argued upon this application. In the forefront of those questions stands the matter of the interpretation of sec. 39 of the Native Administration Act 1905-36. The section is in the following terms:-

> "It shall not be lawful for any person, other than a superintendent or protector, or a person acting under the direction of a superintendent, or under a written permit of a protector, without lawful excuse, to enter or remain or be within or upon any place where natives are camped or where any natives may be congregated or in the course of travelling in pursuance of any native custom."

The latter words, relating to congregation and travelling, were added by an amendment made in the year 1936. The rest of the section is in the following terms:-

> "Any person, save as aforesaid, who, without lawful excuse, the proof whereof shall lie upon him, is found in or within five chains of any such camp shall be guilty of an offence against this Act; but no person shall be prosecuted for an offence under this section except by the direction of a protector."

The applicant, Hugh Peter Vere Hodge, is not a superintendent or protector under the Act, nor was he a person acting under the direction of a superintendent or under a written permit of a protector. It was charged that, not being such a person, he did, without lawful excuse, enter upon a place where natives were congregated contrary to sec. 39 of the Act. It was proved that Hodge went to a place in the bush where natives were not congregated. That place was near a native camp but not in or within five chains of the camp. Accordingly, he was not guilty of any offence under the latter part of the section, which provides that it shall be an offence without lawful excuse for any person without a permit or proper authority to be found in or within 5 chains of a camp. The prosecution, therefore, was based entirely upon the earlier words of the section, which prohibit unauthorised persons from entering within or upon certain places. Various questions have been raised, with some of which it is unnecessary to deal in the view which we take of the meaning of the section.

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There was no evidence that the natives were congregated at the place where they were in pursuance of any native custom. Accordingly, if the words "in pursuance of any native custom" are attached to and modify the word "congregated" as well as the word "travelling", there was no evidence of the offence charged. That is the question which stands in the forefront of the case.

The Supreme Court has held that the words "in pursuance of any native custom" modify only the word "travelling" and that therefore the word "congregated" is to be read apart from these final words of the first paragraph of the section. In my opinion the words are capable of either construction, but the more reasonable construction, having regard not only to the precise words of the section, but to the provisions of the Act as a whole, is to attach the words both to "congregated" and to "travelling". I call attention to the circumstances that the word "where" is used twice and not three times, and that the words "may be" are used once and not twice. These are considerations which aid the view that "in pursuance of any native custom" belong to both "congregated" and "travelling". There are obvious reasons for preserving the natives from intrusion by Europeans upon their ceremonial observances, whether those ceremonial observances are conducted when congregated, that is, in a native assembly, or in the course of travelling. If the other construction were adopted the result would be that whenever natives came in numbers to any place, the question would arise as to whether Europeans could be present at all. The answer to the question would depend upon the interpretation of the words "without lawful excuse".

In my opinion the section should be construed by holding that the words "in pursuance of any native custom" should be attached to "congregated" as well as to "travelling" and upon this ground in my opinion special leave to appeal from the order of the Full Court should be granted and, the application being by consent treated as the hearing of the appeal, the appeal should be allowed. The order of the Supreme Court should be discharged, the decision of the Magistrates and the conviction thereon should be set aside and

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in lieu of that order the complaint should be dismissed. The Supreme Court in Western Australia had power upon the proceedings by way of order to review the decision of the Magistrates, to set aside the decision appealed from, and to quash the conviction. In my opinion that is the order which should now be made by this Court.

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JUDGMENT DIXON J.

The question whether the provision standing as sec. 39 of the Native Administration Act 1905-1936 makes it an offence to enter or remain or be without lawful excuse within or upon any place where natives may be congregated independently of the purpose of their congregating depends entirely on the meaning of the provision. The meaning is primarily to be ascertained from the form in which it is expressed. It is expressed in a form the prima facie meaning of which, as I understand English usage, is that, to constitute the offence, the natives must be congregated in pursuance of a native custom. The material phrase is " place " where natives are camped or where any natives may be " congregated or in the course of travelling in pursuance of any " native custom. "

Prima facie the effect of this order of words is to state two complete conditions ; one by the words " where natives are camped " and the other by the words beginning " or where ". The latter is an alternative condition also complete in itself but containing subordinate alternatives.

Prima facie the subordinate alternatives " congregated or in the course of travelling " are both governed or modified by the words " in pursuance of any native custom."

To attach these words to the second limb only of these alternatives, though not impossible, is both awkward and artificial. How awkward will be found if an attempt is made to read the words aloud so as to convey that meaning. To do so involves a pause after the word " congregated " followed by an unnaturally sustained if not hurried endeavour to read the remaining words without any hint of a pause or division between the words " travelling " and " in pursuance ". If the words " in pursuance of any native custom " were not meant to modify " congregated " the phrase should have been written " where any natives may be " in the course of travelling in pursuance of any native custom " or may be congregated. " But, as they are in fact written, the

reader,unless his mind be controlled by some considerations external to the precise text or unless his sensibilities to English forms of speech have been dulled,will more naturally understand the second limb of the provision as dealing only with the case of aborigines,in pursuance of native custom, travelling or congregating.

I cannot find either in the context or subject matter any indication whatever of a wider intention. Indeed the balance of probabilities derived from such considerations as appear from the context and subject matter,appear to me to preponderate in favour of the view that it was not intended to make it an offence to be or remain without lawful excuse in any place where natives might congregate independently of the purpose for which they came together.

It is a gratuitous assumption that the Legislature, in adding the words in question to the original provision,as it did in 1936,had any policy in view beyond the exclusion of strangers when natives are ### carrying out any tribal or native custom.

To enlarge a penal provision upon the supposition that the objects of the Act require the widest interpretation is not in accordance with the common law rules of construction. So far from its being permissible to adopt such a course,the rule is that,if the words of a penal provision are susceptible of two interpretations,the narrower should be adopted unless satisfactory reasons appear persuading the mind that the wider meaning in truth was intended.

In the present instance the prima facie meaning is the narrower and there is nothing to warrant the judicial adoption of a secondary and wider meaning.

In my opinion special leave to appeal should be granted. Treating the matter as an appeal duly instituted,the appeal should be allowed and the conviction quashed.

JUDGMENT. STARKE J.

I have more doubt about this matter than the other members of the Court, because I think that they depart from the prima facie rule of construction, and also because that construction withdraws some protection from the aboriginals which it is possible the Legislature intended. But the matter is not of any great importance, for the Parliament of Western Australia can, if it thinks the view of the Supreme Court is right, easily alter the section by a slight re-arrangement of the words - putting the words "may be congregated" after the sentence ending with "native custom". And it might also consider whether the intention is that the offence should be punished summarily and, if so, clearly so to provide. On the whole I do not dissent from the decision which has been given.

RICH J. I agree.

WILLIAMS J. I agree substantially with the reasons of the Chief Justice and have nothing to add.

ORDER.

Special leave to appeal from order of Full Court of 21st October 1946 granted. By consent application treated as appeal pursuant to such special leave duly instituted. Appeal allowed: order of Supreme Court discharged. Decision of Magistrates and conviction thereon set aside. In lieu thereof complaint dismissed. Respondent to pay appellant's costs of order to review in Supreme Court before Wolff J. and Full Court, of the application for special leave and of the appeal.