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SUPREME COURT OF VICTORIA

SULLIVAN v HAMEL-GREEN & ORS

Starke J

16, 23 October 1969 — [1970] VicRp 21; [1970] VR 156; (1969) 16 FLR 1

CRIMINAL LAW – PUBLISHING A PAMPHLET – DEFENDANT FOUND DISTRIBUTING A PAMPHLET TITLED *WHY REGISTER FOR NATIONAL SERVICE?* – CHARGED WITH INCITING THE COMMISSION OF OFFENCES – MEANING OF THE WORD "PUBLISH" – WHETHER ANY AMBIGUITY IN THE MEANING AND CONTEXT IN THE ACT – WHEHER REGARD MAY BE HAD TO THE DICTIONARY MEANING OF "PUBLISH" – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *CRIMES ACT* 1914-1966, S7A(b); *NATIONAL SERVICE ACT* 1951-1966 (CTH), S48(1)(a), (b).

HELD: Order nisi absolute. Dismissal set aside. Remitted for hearing and determination in accordance with the law.

1. To ascertain what was the popular use of the word "publish" it was permissible to have regard to the definitions of the word in the *Shorter Oxford Dictionary*. It seemed that all the definitions envisaged the making public or known of information to a person or persons.

2. If the central concept in the word "publish" was to make public, the use of the word necessarily contemplated the distribution in one way or another of the writing or material.

3. The word "publishes" in s7A(b) was unambiguous and should be construed in its natural and popular sense as defined in the *Shorter Oxford English Dictionary*. In these circumstances, the word included the act of distribution, and, accordingly, the magistrate was in error in dismissing the information.

STARKE J: On 25 March 1969 the defendant was charged at a Court of Petty Sessions at Melbourne that contrary to s7A(b) of the Commonwealth *Crimes Act* 1914-1966 on 1 February 1969 in Melbourne he did publish a certain writing, to wit a pamphlet, entitled "Why Register for National Service?" which incites to the commission of offences against the *National Service Act* 1951-1968 (Com.), that is offences against s48(1)(a) and s48(1)(b) of the said Act, the said offences being offences against the law of the Commonwealth. He pleaded not guilty.

Section 7A(b) in so far as it is relevant provides:

> "If any person...(b) prints or publishes any writing which incites to, urges, aids or encourages, the commission of offences against the law of the Commonwealth or of a territory or the carrying on of any operations for or by the commission of such offences he shall be guilty of an offence. Penalty: Two hundred dollars or imprisonment for twelve months, or both."

The law of the Commonwealth which it was alleged was the subject of the incitement is contained in s10(1) and s11(1) of the *National Service Act* 1951-1966, and s48(1) of that Act as amended by s21 of Act No. 51 of 1968. In so far as they are relevant, the above-named sections are in the following terms. Section 10(1) provides:—

> "The Minister may, from time to time, by notice published in the *Gazette*, require all male persons not being persons registered under this Act who
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> (a) upon the date specified in the notice—
>
> (i) are British subjects or are ordinarily resident in Australia; or
>
> (ii) not being British subjects but being persons ordinarily resident in Australia, are included in a prescribed class of persons; and
>
> (b) have attained the age of nineteen years and have attained, or will attain, the age of twenty years during such period as is specified in the notice, to register under this Act."

Section 11(1) provides:

"Subject to this Act, a person to whom a notice under the last preceding section applies shall, within fourteen days after a date specified in the notice as the date for the registration, register under this Act."

Section 48(1) as amended, provides:

"A person who, being required to register under this Act—
(a) fails to register; or
(b) while the liability continues, remains unregistered under this Act,
is guilty of an offence punishable upon conviction by a fine of not less than forty dollars or more than two hundred dollars."

By notice in *Gazette* No. 2 of 1969 and dated 17 December 1968 the Minister required all male persons to whom the sections applied who had attained or would attain the age of 20 years during the period which commenced on 1 January 1969 and ended on 30 June 1969 to register under the *National Service Act* 1951-1968. The Minister further specified 20 January 1969 as the date for registration of persons to whom the notice applied. It was admitted upon behalf of the defendant that the defendant had handed a copy of the pamphlet "Why register for National Service?" to a person in the street outside the post office Melbourne on 1 February 1969. Accordingly, no evidence was led by either side, but a submission was made by the solicitor for the defendant that he had no case to answer. His argument broadly was on two grounds:

(1) that the pamphlet did not incite persons to commit an offence, and

(2) that the defendant did not publish the pamphlet within the meaning of the Act.

The magistrate found that the pamphlet did incite persons to commit an offence, but upheld the second submission and dismissed the information.

On 23 April 1969 Master Brett granted the informant an order nisi to review this decision on the following grounds:

(1) that the Stipendiary Magistrate was in error in holding that the defendant did not publish the pamphlet within the meaning of s7A(b) of the Commonwealth *Crimes Act* 1914-1966 when he handed the said pamphlet to another person outside the Post Office, Melbourne;

(2) that the magistrate was in error in dismissing the information on the ground that the pamphlet had not been published.

The short point, therefore, in this case turns on the proper construction to be placed on the word "publish" on s7A(b) of the Commonwealth *Crimes Act*. As far as I have been able to ascertain there is no decided case bearing upon the meaning of the word "publish" in this section, nor have counsel been able to refer me to any such authority. There are various cases dealing with the meaning of the word "publish" in other statutes, but these authorities deal with the meaning of the word in the context of those enactments and I have not found them helpful: see *Stroud's Judicial Dictionary*, 3rd ed., vol. 3 at p2398.

The definitions of the word "publish" in the relevant senses in the *Shorter Oxford English Dictionary*, 3rd ed., vol. 2, p1614 are:

1. to make publicly or generally known, to declare openly or publicly, to tell or noise abroad, also to propagate;

2. to announce in a formal or official manner and to pronounce (a judicial sentence), to promulgate a law or edict, to proclaim;

3. to proclaim a person publicly as something or in some capacity or connexion;

4. to issue or cause to be issued for sale to the public (copies of a book, engraving etc.), said of an author, editor or specifically or a professional publisher; to make generally accessible or available.

If the word is given its ordinary and natural English meaning as defined above, it seems

to me that the conduct of the defendant in handing the pamphlet to a member of the public is clearly a publication within the meaning of the section. The question, however, is whether the word "publish" is to be given some special or limited meaning. Mr Marks, for the defendant, submitted that the word should not be construed to embrace the word "distribute" and relied on *Leveridge v McCann* [1951] NZLR 855. In that case the respondent had been charged with publishing on 17 April 1951 a pamphlet likely to encourage the continuance of a declared strike, contrary to the provisions of reg4(d) of the *Waterfront Strike Emergency Regulations* 1951 the material parts of which were as follows:

> "Every person commits an offence against these regulations who...(d) prints or publishes any statement...or other matter...likely to encourage...the continuance of a declared strike."

The respondent admitted distributing a number of pamphlets. The learned magistrate who heard the information held that on the material date a declared strike was in progress and that the pamphlet was one likely to encourage the continuance of that declared strike. He held the act of the respondent in distributing the pamphlet did not amount to publishing them within the meaning of the word "publishes" as used in reg4(d) and he dismissed the information. On 1 May 1951 after the dismissal of the information reg4(d) was amended by inserting after the word "publishes" the words "or distributes or delivers to the public or to any person or persons or causes to be printed or published or distributed or delivered as aforesaid".

On appeal by the informant from the dismissal of the information it was held:

> (1) that the amendment could be looked at in order to clear up any ambiguity in the use of the word "publishes" so as to determine the proper construction of reg4(d) as originally made;
>
> (2) that in the light of the amendment which was an extension of the scope of reg4(d) the original reg4(d) was limited to publication in the popular sense which did not cover distribution;
>
> (3) even without the aid of the amendment in interpreting reg4(d) the word "publish" did not embrace the act of distribution.

The words in reg 4(d) before it was amended are for all practical purposes identical with the words of s7A(b). There has, of course, been no amendment of s7A(b). The first question that arises is whether Fell J in *Leveridge v McCann*, *supra*, was right in construing the word "publishes" in the light of the subsequent amendment. I take it to be settled law that in construing a provision in any statute, recourse can only be had to subsequent amendment or to any other legislation if the clause under consideration or any word in such clause is ambiguous.

In *Attorney-General v Clarkson* [1900] 1 QB 156, at p165, Sir Francis Jeune P said:

> "But having regard to that Act, it seems to me that it is impossible for us to take any other view of the construction of s5 than that which, in my opinion, the legislature have imposed upon us. Our duty is to interpret the meaning of the legislature, and if the legislature in one Act has used language which is admittedly ambiguous, and in a subsequent Act have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the legislature have acted as their own interpreters of the earlier Act."

In *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 2 KB 403, at p414; 125 LT 108; 90 LJKB 461, Lord Sterndale MR said:

> "I think it is clearly established in *Attorney-General v Clarkson* [1900] 1 QB 156, that subsequent legislation on the same subject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed on an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be an ambiguity in the earlier legislation, then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

Fell J in *Leveridge v McCann*, *supra*, held that there was an ambiguity in the use of the word "publishes" and, therefore, felt himself free to interpret the word in the light of the subsequent amendment. He gives five examples of what he suggests are differing meanings of

the word "publishes" but if one takes the natural, ordinary, popular and grammatical use of the word I think that such instances given by Fell J are covered. To ascertain what is the popular use of the word "publish" it is permissible, in my opinion, to have regard to the definitions of the word in the *Shorter Oxford Dictionary*. It seems to me that all the definitions envisage the making public or known of information to a person or persons. I am, therefore, of opinion that there is no ambiguity in the use of the word "publish" in s7A(b). For this reason I respectfully disagree with the conclusion of Fell J that he was at liberty to construe reg 4(d) in the light of subsequent amendment. But Fell J went on to say that apart from the amendment altogether he would not construe the word "publish" to include distribute. At p859 he said:

> "If I am wrong in interpreting the original Regulation with the aid of the amendment, and look at it alone, must I hold that the intention was to give to the word 'publish' as used in the Regulation the meaning of 'distribute or deliver'?
>
> "Even though the Regulation is penal, it is to be given such fair, large, and liberal construction as will best ensure the attainment of its objects; but objects must be gathered from reading the words used, and, so reading them, I am not satisfied that the respondent, who only distributed the pamphlets, can be convicted of the offence charged. The Regulation refers to printing or publishing; if distributing also was to be an offence, in my opinion the Regulation should have expressly said so."

But if the central concept in the word "publish" is to make public, it seems to me that the use of the word necessarily contemplates the distribution in one way or another of the writing or material. In my opinion, *Leveridge v McCann* was wrongly decided and I should not follow it.

Mr Marks further relied on the provisions of s30F of the *Crimes Act* 1914-1966. This section provides that

> "any person who knowingly prints, publishes, sells or exposes for sale or circulates or distributes any book, periodicals, pamphlet, handbill, poster or newspaper for or in the interests of or issued by any unlawful association shall be guilty of an offence".

All I need say of this argument is that unless I found the word "publishes" in s7A(b) ambiguous, for the reasons given above I have no right to resort to other provisions of the same Act as an aid to construction. Finally, Mr Marks contended that the word "publishes" should be construed as first publishes. I do not see any reason for reading into what is to my mind a clear provision a word that is not there.

In my opinion the word "publishes" in s7A(b) is unambiguous and should be construed in its natural and popular sense as defined above. In these circumstances, in my judgment the word includes the act of distribution, and, accordingly, the magistrate was in error in dismissing the information.

In the result the order nisi will be made absolute, the order below is set aside. I remit the matter to the magistrate of the Court of Petty Sessions at Melbourne to be further dealt with in accordance with this judgment, and I order that the applicant's cost be taxed, and when taxed paid by the respondent, not exceeding $120. The same order will be made in each of the other orders to review.

Solicitor for the informant: HE Renfree, Commonwealth Crown Solicitor.
Solicitors for the defendants: Holding, Ryan and Redlich.
