[HIGH COURT OF AUSTRALIA.]

HORWITZ . . . . . APPELLANT;

AND

CONNOR, INSPECTOR GENERAL OF PENAL ESTABLISHMENTS OF VICTORIA . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1908.

MELBOURNE, *June* 10.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Special leave to appeal—Habeas Corpus—Mandamus—Discretion of Governor in Council of State—Prisoner under sentence of State Court—Remission of sentence—Crimes Act 1890 (*Vict.*) (*No.* 1079), *sec.* 540.*

Where a person is detained in a State gaol under a sentence of a State Court, the High Court has no jurisdiction to order him to be allowed to come before the High Court in order that he may personally apply for leave to appeal from a judgment of a Court of that State.

Mandamus will not lie to the Governor in Council of a State, and no Court has jurisdiction to review his discretion in the exercise of the prerogative of mercy.

Where a writ of *habeas corpus*, which had been obtained by a prisoner alleging that he was entitled to his liberty under regulations made pursuant to sec. 540 of the *Crimes Act* 1890 (Vict.), had been discharged by the Supreme Court,

Special leave to appeal was refused.

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

* Sec. 540 of the *Crimes Act* 1890, so far as is material, is as follows:—

". . . It shall be lawful for the Governor in Council to make such rules and regulations as he shall think fit for the mitigation or remission conditional or otherwise of any sentence of imprisonment or of imprisonment or detention with hard labour as an incentive to or reward for good conduct whilst the offender shall be imprisoned or detained under such sentence, and to mitigate or remit the term of punishment accordingly."

On 8th September 1904 Louis Horwitz was at the Supreme Court criminal sittings at Melbourne convicted and sentenced to imprisonment for five years with hard labour, and on 4th October 1905 he was again convicted and sentenced to twelve months imprisonment, cumulative upon the term of the first sentence, and thereafter he was serving those sentences in the Geelong gaol.

A writ of *habeas corpus* was on 18th March 1908 obtained on behalf of Horwitz and directed to Edward Charles Connor, Inspector-General of Penal Establishments of Victoria, by which it was alleged that Horwitz was entitled to his release from gaol by virtue of sec. 540 of the *Crimes Act* 1890. Pursuant to that section certain regulations had been made by the Governor in Council for the remission of sentences, under which a prisoner, on earning a certain number of marks proportionate to the length of his sentence, might have a portion of his sentence remitted. On the return of the writ on 3rd April 1908 the Full Court held that, upon a proper interpretation of the regulations, Horwitz was not entitled to be released and discharged the writ.

Bryant, now applied that Horwitz should be allowed to personally make an application for special leave to appeal from the judgment discharging the writ of *habeas corpus*.

[GRIFFITH C.J.—What jurisdiction is there under the Constitution for this Court to order a prisoner under sentence of a State Court to be brought before this Court in order that he may make an application ?]

There is no other provision than that in sec. 46 of the *Crimes Act* 1891.

Per curiam.—This application must be refused.

Bryant, then applied for special leave to appeal. Regulations once having been made under sec. 540 of the *Crimes Act* 1890, a prisoner becomes entitled as of right to his discharge on complying with the regulations: *Julius* v. *Lord Bishop of Oxford* (1).

[GRIFFITH C.J.—The remedy of the prisoner, if he has any, is a

(1) 5 App. Cas., 214.

H. C. OF A. 1908.

HORWITZ v. O'CONNOR.

mandamus to the Governor or to the Governor in Council to exercise his discretion.]

There is a duty imposed on the Governor in Council.

[O'CONNOR J.—If you are right there is a cause of action for false imprisonment against the Governor in Council.]

Yes.

[GRIFFITH C.J.—It is not for this Court to instruct the Governor in Council as to what he is to do.

HIGGINS J.—The words "it shall be lawful" are used twice in sec. 540. Must they not have the same meaning in each case?]

Yes. In each case they are mandatory.

[GRIFFITH C.J.—Your construction of the section would have the effect of transferring the administration of gaols from the gaol officials to a jury.]

The regulations go a very long way.

The judgment of the Court was delivered by

GRIFFITH C.J. The power given to the Governor in Council by sec. 540 of the *Crimes Act* 1890 is a discretionary power to make regulations, and further, "to mitigate or remit the term of punishment accordingly," that is, in accordance with the regulations. The Governor in Council has power to remit the term of imprisonment of the applicant. He has not done so. The most that might be asked for here would be a mandamus to the Governor in Council to consider the matter. But a mandamus to the Governor in Council will not lie, and no Court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy. The application will be refused.

Applications refused.

Solicitor for the applicant, *W. Bruce* for *Wighton*, Geelong.

B. L.