[HIGH COURT OF AUSTRALIA.

COLLIS . . . . . APPELLANT

AND

SMITH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *Aug.* 24, 25.

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

Practice—Appeals from Supreme Courts in criminal cases—Special leave—Question of fact—Opposed application—Fugitive Offenders Act 1881, 44 & 45 *Vict. c.* 69, *sec.* 5—*Committal to await return—"Strong or probable presumption" of commission of offence.*

A fugitive from South Africa, who had been apprehended in New South Wales under the *Fugitive Offenders Act* 1881, secs. 2 and 3, on charges of fraud, attempt to commit fraud, and forgery, was committed by a magistrate to prison to await his return, under sec. 5, and on an application for a *habeas corpus* the Supreme Court ordered the discharge of the fugitive on the ground that the evidence adduced before the magistrate did not raise a "strong or probable presumption" that the fugitive had committed any of the offences mentioned in the warrant.

Held, on the facts, that the question whether the necessary presumption was raised depended on a particular inference of fact which a jury might draw from the evidence, and therefore that the case was not one in which special leave to appeal should be granted.

Bataillard v. *The King*, 4 C.L.R. 1282, and *McGee* v. *The King*, 4 C.L.R. 1453 followed.

The fact that if the fugitive were returned to South Africa an important question of law might arise on the trial is not sufficient reason for granting special leave to appeal in such a case.

In applications for special leave to appeal counsel for the respondent may be allowed to appear and oppose.

Special leave to appeal from the decision of the Supreme Court: *Ex parte Smith*, 9 S.R. (N.S.W.), 570, refused.

MOTION for special leave to appeal from a decision of the Supreme Court of New South Wales on an application for a writ of *habeas corpus*.

The appellant was the Governor of the Gaol at Sydney. The respondent, Septimus W. Smith, had been arrested there under the *Fugitive Offenders Act* 1881, on a warrant from South Africa, on charges of fraud, attempt to commit the crime of fraud, and forgery. He had previously been arrested under similar authority on a charge of fraud, and had been committed by a magistrate to await his return, but the Supreme Court on an application for a *habeas corpus* had ordered his discharge: *Ex parte Smith* (1). After his arrest on the second warrant he was again brought before a magistrate and again committed. He then moved the Supreme Court for a *habeas corpus*. It is not necessary to set out in detail the evidence upon which the order for the committal of the respondent had been made; but the effect of it may be stated shortly. The respondent, using the assumed name of Walter Steyn, entered into negotiations with a certain municipality for the purchase by the latter of certain land for the purpose of a scheme of water supply. The respondent had obtained an option over the land for £5,000 and ultimately sold it to the municipality for £25,000. The clerk of the municipality, who carried on the negotiations on its behalf, was the brother of the respondent; he knew the identity of the person with whom the municipality was dealing, but kept it secret from his employers. There was evidence that the municipality would not have assented to the purchase if they had known that Walter Steyn was identical with Septimus W. Smith. Evidence was given before the magistrate as to the ingredients of the offences under the law of Cape Colony. The Supreme Court was of opinion that although the evidence established a case of some suspicion, yet it did not raise such a strong or probable presumption within the meaning of sec. 5 of the Act that the respondent had committed an offence as would justify an order for his return to South Africa, and accordingly they made absolute the rule for his discharge: *Ex parte Smith* (2). Motion was now made for special leave to appeal from that decision.

(1) 8 S.R. (N.S.W.), 593. (2) 9 S.R. (N.S.W.), 570.

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On the motion coming on for hearing the High Court granted leave to counsel for the respondent to appear and oppose.

Brissenden, for the appellant: The case involves an important question as to the construction of sec. 5 of the *Fugitive Offenders Act* 1881, *i.e.*, what is the meaning of a "strong or probable presumption." The Supreme Court thought themselves bound by their former decision on the question of fraud: *Ex parte Smith* (1). But in this case there was important additional evidence on that point. As to the forgery, they were of opinion that there was a *primâ facie* case, but that that was not sufficient under sec. 5; that a "strong or probable presumption" meant something more than a *primâ facie* case. The forgery consisted in writing a fictitious name as signature, with intent to defraud. The fraud consisted in concealing the real name of the purchaser—the name being material. It was more than a mere non-disclosure of the truth. There was a deliberate misleading of the purchaser. Both fraud and forgery are common law offences under the law of Cape Colony. There was evidence that the Council would not have acted on the representations of their agent if they had known that the vendor was the agent's brother. There was also an offence against a Statute in making a false statement in a declaration made for revenue purposes in connection with the sale. There was evidence that the price was grossly excessive. Collusion between an agent and a vendor in order to obtain an excessive price is fraud. *Lysaght Bros. & Co. Ltd.* v. *Falk* (2). In *Gordon* v. *Street* (3) the false representation as to the name was held to be material, although the price was not affected by it. The Supreme Court construed sec. 5 in a manner for which there is no foundation or authority.

Wise K.C. (*Perry* with him), for the respondent. There is no appeal from an order of the Court discharging a prisoner on a *habeas corpus* application. *Cox* v. *Hakes* (4).

[GRIFFITH C.J.—An appeal lies under the Constitution from every judgment of a Supreme Court. There may, however, be

(1) 8 S.R. (N.S.W.), 593.
(2) 2 C.L.R., 421.
(3) (1899) 2 Q.B., 641.
(4) 15 App. Cas., 506.

a reason why special leave to appeal should not be granted in such a case as this.

Brissenden referred to *United States of America* v. *Gaynor* (1); *Attorney-General of New South Wales* v. *Jackson* (2).

GRIFFITH C.J.—There is clearly power to entertain the appeal.]

The words of the *Judicature Act*, secs. 18, 19, are as strong as those of the Constitution. *Habeas corpus* cannot be destroyed. By the fundamental principles of English law the respondent has a right to be discharged. No appeal should be allowed once an order for discharge has been made.

[ISAACS J., referred to *Reg.* v. *Mount & Morris* (3).]

At any rate the power to entertain an appeal should not be exercised except in very exceptional circumstances. This is not a case within the class in which the Privy Council grants special leave to appeal: *Kops* v. *The Queen* (4). The Supreme Court has decided twice on practically the same evidence that there is no strong or probable presumption of guilt. There is no question of law of general importance under the law of the State. The only question is what was the proper inference to be drawn from the facts in this particular case. The same combination of circumstances is not likely to arise again. The Supreme Court was entitled to consider the evidence before it, and to say whether in their opinion the necessary presumption was raised. [He referred to *Ex parte Lillywhite* (5); *In re Castioni* (6).]

[ISAACS J. referred to 44 and 45 Vict. c. 69, sec. 7.

O'CONNOR J. referred to *McGee* v. *The King* (7).]

The Supreme Court drew the proper inference from the facts There was no evidence of a criminal fraud. No person was defrauded. There was no evidence of intent except the act itself, and if the act was not a fraud there could be no intent or attempt to defraud. He referred to *Stephens* v. *Abrahams* (8); *Nash* v. *Calthorpe* (9). There was no evidence that the price was

(1) (1905) A.C., 128.
(2) 3 C.L.R., 730, at p. 736.
(3) L.R. 6, P.C., 283.
(4) (1894) A.C., 650.
(5) 19 N.Z.L.R., 502.
(6) (1891) 1 Q.B., 149, at p. 157.
(7) 4 C.L.R., 1453.
(8) 27 V.L.R., 753; 23 A.L.T., 233.
(9) (1905) 2 Ch., 237.

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excessive, or that it was in any way affected by the misrepresentation. According to the law of Cape Colony, there must be an injury to some person in order to constitute fraud. There was no forgery because there was no counterfeit in a material part of the document.

Brissenden, in reply. In order to satisfy sec. 5, there is no necessity to go further than is required under the *Extradition Act*, that is to raise a *primâ facie* case, to shift the burden of proof. A "strong" presumption is one which would justify a jury in convicting if no more appeared. It cannot mean more than probable. [He referred to *Reg.* v. *Spilsbury* (1); *Best on Evidence*, 10th ed., p. 278.] It was only intended to exclude a "slight" presumption.

[GRIFFITH C.J. Do you contend that no more than a *primâ facie* case is necessary to justify sending a man to the other side of the earth?]

The same hardship exists under the *Extradition Act*, sec. 9. [He referred to *Reg.* v. *Maurer* (2).] The Supreme Court had no jurisdiction to consider the weight of evidence, but only whether there was evidence on which the magistrate could reasonably find as he did. That raises an important question of law.

[GRIFFITH C.J.—It is the duty of the Supreme Court to inquire whether there was such a case as the Statute required. That was a question of fact. They were of opinion that a jury would not convict the respondent.]

There is another question of law, whether on the evidence the respondent could be guilty of forgery. The law in Cape Colony is the same as that of New South Wales in that respect.

Wise K.C., referred to *In re Arton* (No. 2) (3).

Aug. 25th.

GRIFFITH C.J. The jurisdiction of the magistrate in this case to commit the fugitive to prison depends, under sec. 5 of the *Fugitive Offenders Act* 1881, upon whether the evidence adduced to him

(1) (1898) 2 Q.B., 615.
(2) 10 Q.B.D., 513.
(3) (1896) 1 Q.B., 509.

raises, according to the law ordinarily administered by him, a strong or probable presumption that the fugitive has committed the offence mentioned in the warrant. If the evidence did not disclose such a case, then he had no jurisdiction to make the order of committal.

The Supreme Court, on an application for a writ of *habeas corpus*, is bound to examine the evidence in order to see whether it discloses such a case or not.

In the present case the Supreme Court, having the evidence before it, examined it. There is no conflict of fact. The facts are admitted. But whether the fugitive had committed any offence or not depends upon an inference of fact which must be drawn by a jury. One jury might find that that additional fact does not exist, another perhaps might think that it does. Now supposing a case of this sort, arising in New South Wales, had been left to a jury and the jury had convicted, and on appeal the Supreme Court had held that there was no evidence to go to the jury, and quashed the conviction, it is quite clear that in such a case this Court would refuse special leave to appeal, on the principle laid down by the Privy Council in many cases, and followed by this Court, particularly in *Bataillard* v. *The King* (1) and *McGee* v. *The King* (2), where reference was made to *In re Dillet* (3) and other English cases; and the principle was again affirmed quite recently by the Privy Council in *Tshingumuzi* v. *The Attorney-General of Natal* (4). This Court never grants special leave to appeal in criminal cases upon questions of fact. There is also an abstract question of law, which, it is suggested, might arise if the fugitive were sent back to Cape Colony and convicted. What would be the decision of that abstract question of law by the Supreme Court of Cape Colony I do not know. It would be much more satisfactory that the Court of Cape Colony should determine it than that we should do so.

In my opinion the case falls within the rule that this Court will not grant special leave to appeal in criminal cases upon a mere question of fact, and the motion for special leave should, therefore, be dismissed.

(1) 4 C.L.R.. 1282.
(2) 4 C.L.R., 1453.
(3) 12 App. Cas., 459.
(4) (1908) A.C., 248.

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BARTON J., O'CONNOR J., and ISAACS J. concurred.

Special leave refused.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondent, *E. R. Abigail.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

SOBYE . . . . . APPELLANT; INFORMANT,

AND

LEVY . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, *Nov.* 19th.

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

Special leave to appeal—Question of fact or law—Gaming and wagering—Gaming and Betting Act 1906 (*N.S.W.*) (*No.* 13 *of* 1906), *secs.* 3, 4—*Police Offences (Amendment) Act* 1908 (*N.S.W.*) (*No.* 12 *of* 1908), *sec.* 21—*Limerick competition—Lottery—Literary skill—Selection according to merit—Arbitrary conditions.*

The respondent was convicted under sec. 4 of the *Gaming and Betting Act* 1906, and the *Police Offences (Amendment) Act* 1908, sec. 21, of selling a ticket in a lottery, the alleged lottery being a Limerick competition. The respondent kept a tobacconist's shop, at which the appellant, upon payment of 1/-, obtained two cigars and a ticket entitling him to compete in the Limerick competition, by supplying the last line of the Limerick. The ticket stated that the competition was entered into by the holder thereof upon the distinct understanding and agreement that the decision of the committee appointed by the respondent should be final and conclusive, and that £500