[HIGH COURT OF AUSTRALIA.]

SKINNER . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1913.

MELBOURNE, *June* 16, 17.

Barton A.C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Criminal law — Criminal appeal—Shorthand note — Sentence — Misdirection — "Common prostitute," meaning of—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 6, 21—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 71—*Crimes* (*Girls' Protection*) *Act* 1910 (*N.S.W.*) (*No.* 2 *of* 1910), *sec.* 2—*Crimes* (*Girls' Protection*) *Amendment Act* 1911 (*N.S.W.*) (*No.* 21 *of* 1911), *sec.* 2 (*b*).

The absence of a shorthand note of the proceedings at the trial of any person on indictment, as provided for by sec. 21 of the *Criminal Appeal Act* 1912, does not of itself amount to a ground entitling an accused person to have his conviction set aside.

A Court of Criminal Appeal should not interfere with a sentence merely because members of the Court might have inflicted a different sentence more or less severe, nor unless the Court sees that the sentence is manifestly excessive or manifestly inadequate.

Sec. 71 of the *Crimes Act* 1900 provides that "whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of fourteen years, shall be liable to penal servitude for ten years." Sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910 substitutes sixteen years for fourteen years in that section and adds the following proviso :—"Provided that it is a sufficient defence to any charge which renders a person liable to be found guilty of an offence described in" sec. 71 "of the Principal Act, as amended by this Act, in respect of offences under" that section "where the girl in question was over the age of fourteen years, if it shall be made to appear to the Court or jury before whom the charge is brought that the girl was at the time of the alleged offence a common prostitute, or an associate of common

prostitutes, or that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years."

Held, that the words "common prostitute" there mean a woman who carries on the trade or business of prostitution and submits herself to men for the purpose of gain. Direction of Judge to jury in that sense approved.

Special leave to appeal from the decision of the Supreme Court of New Wales: *R.* v. *Skinner*, 13 S.R. (N.S.W.), 280, refused.

APPLICATION for special leave to appeal.

Herbert James Edward Skinner was tried before *Pring* J. at the sittings of the Supreme Court at Armidale, New South Wales, upon an indictment under the *Crimes Act* 1900, as amended by the *Crimes* (*Girls' Protection*) *Act* 1910 and the *Crimes* (*Girls' Protection*) *Amendment Act* 1911, for carnally knowing a certain girl over the age of ten years and under the age of sixteen years. He was convicted and sentenced to seven years' imprisonment. No shorthand note was taken of the proceedings under sec. 21 of the *Criminal Appeal Act* 1912. The defences were that the girl was a "common prostitute" within the meaning of sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910, and also that, at the time of the alleged offence, the accused had reasonable cause to believe that the girl, who was over fourteen years of age, was of or above the age of sixteen years. Two witnesses were called for the defence, who stated that they had had intercourse with the girl; and the jury, after delivering their verdict, in answer to *Pring* J., said that they found that those statements were true. Thereupon the learned Judge said to the police officers in attendance that they should prosecute those witnesses for the same offence of carnally knowing the girl. The prisoner appealed to the Supreme Court in accordance with the provisions of the *Criminal Appeal Act* 1912, having obtained the leave of such Court to appeal on grounds other than those involving a question of law: *R.* v. *Skinner* (1). *Pring* J. made a report in which he said (*inter alia*):—"I told the jury that the words 'common prostitute' in" sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910 "meant the class of woman ordinarily known as a common prostitute—that is to say, one who, whether in a street or in a

(1) 13 S.R. (N.S.W.), 280.

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house, carries on the trade or business of prostitution, and submits herself to men for the purpose of gain. I further said that, if a girl of light or immoral character had intercourse with one man, or even with several men, she was not necessarily a common prostitute, and I left it to the jury to say whether the girl in this case had been proved, under the circumstances in evidence, to be a common prostitute. I also pointed out that sec. 71 of the *Crimes Act* 1900 was intended to protect girls of vicious sexual tendencies against themselves. With regard to the sentence, I took into consideration the fact sworn to by the prisoner himself—that he had committed the offence on several occasions." The grounds of the appeal to the Supreme Court were:—(1) That the Judge wrongly directed the jury as to the meaning of the words "common prostitute" in sec. 2 of the *Crimes (Girls' Protection) Act* 1910. (2) That the Judge having advised the prosecution for the offence of carnally knowing a girl under sixteen of the two witnesses for the defence, the accused was practically debarred from obtaining further evidence to show other acts of prostitution by the girl with others than those mentioned at the trial. (3) That the verdict was against the evidence. (4) That the sentence was excessive.

The appeal having been dismissed (1), the accused now applied for special leave to appeal to the High Court.

Jacobs, for the appellant. The direction as to the meaning of the words "common prostitute" in sec. 2 of the *Crimes (Girls' Protection) Act* 1910 was wrong. The words mean a girl who is given to indiscriminate intercourse with men, not necessarily as a business or for gain. The verdict was against evidence, for there was clear evidence that the accused had reasonable ground for believing that the girl was over sixteen years of age. The recommendation of the Judge at the close of the trial that the two witnesses should be prosecuted would naturally prejudice the accused on an appeal, if he sought to give further evidence as to the character of the girl. The sentence should have been reduced. It is not necessary to show that the Judge, in awarding sentence, acted on a wrong principle of law. If the Court thinks that the

(1) 13 S.R. (N.S.W.), 280.

sentence is excessive, that is sufficient: *R.* v. *Shershewsky* (1). [He referred to the *Criminal Appeal Act* 1912, secs. 5, 6, 7 (3), 8, 11, 24 (2).] The provision in sec. 21 of the *Criminal Appeal Act* 1912 for shorthand notes of proceedings on trials on indictment is mandatory.

Cur. adv. vult.

June 17.

BARTON A.C.J. In this case there is a motion for special leave to appeal against the dismissal, by the Court of Criminal Appeal in New South Wales, of an appeal against a conviction and sentence. There are several grounds, namely, misdirection by the Judge at the trial; that the verdict is against the evidence; that the appeal was likely to be prejudiced by the action of the learned Judge at the end of the trial in recommending the police to prosecute two of the witnesses for a similar offence; that the Court of Criminal Appeal should have reduced the sentence; and, lastly, that there was no shorthand note taken at the trial.

The ground that the verdict was against the evidence is not pressed. The objection as to the Judge's remark to the police at the close of the trial is quite unworthy of attention. That no shorthand note was taken at the trial is a ground to which we do not give any weight, because the section in reference to the taking of a shorthand note is merely directory, and the prisoner was evidently not prejudiced by the absence of a shorthand writer's report. The learned Judge who tried the case appears to have taken a full note.

There remain the two points upon which the appellant declares that he relies, the one being misdirection at the trial, and the other that the sentence is excessive and should have been reduced.

As to the second of those two points, of course the sentence is arrived at by the Judge at the trial under circumstances, many of which cannot be reproduced before the tribunal of appeal. He hears the witnesses giving their evidence, and also observes them while it is being given, and tested by cross-examination. He sees every change in their demeanour and conduct, and there are often circumstances of that kind that cannot very

(1) 28 T.L.R., 364.

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well appear in any mere report of the evidence. It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.

Now, as to the question of misdirection. The appellant was charged with having had carnal knowledge of a girl under the age of sixteen years, that being the limit to which the age of consent was raised by the Act of 1910. He set up, *inter alia*, a defence applicable where a girl is over fourteen years of age, that she was a common prostitute. That defence applies, as a later amending Act prescribes, only where the female of whom carnal knowledge is alleged has consented. On the question of what is a common prostitute the learned Judge said in his report:—"I told the jury that the words 'common prostitute' in that section meant the class of woman ordinarily known as a common prostitute—that is to say, one who, whether in a street or in a house, carries on the trade or business of prostitution, and submits herself to men for the purpose of gain. I further said that, if a girl of light or immoral character had intercourse with one man, or even with several men, she was not necessarily a common prostitute, and I left it to the jury to say whether the girl in this case has been proved, under the circumstances in evidence, to be a common prostitute." One of the affidavits endeavours to place a complexion less favourable to the appellant upon the direction of his Honor, but in such a matter the Court will take the report of the Judge as correct.

Whether the words "common prostitute" are used in the Statute in their every-day meaning or in a special sense is a question of construction, and was for the learned Judge to decide. The question for us, therefore, is whether *Pring* J. stated the law correctly in what he said as to the meaning of the words

"common prostitute." The words occur in other Statutes, but, so far as we know or can ascertain, there is no statutory definition of them. I think that, when the learned Judge said that a "common prostitute" is a woman who "carries on the trade or business of prostitution, and submits herself to men for the purpose of gain," he stated the meaning of those words in their ordinary acceptation. It may operate in some instances as a hardship that the law does not provide for cases in which the character of the girl who consents is dissolute or abandoned. But the law is that she must be a common prostitute, or an associate of common prostitutes; and we have not to find reasons why the legislature drew the line where it did. We find in a Statute words in ordinary use. The learned Judge has attributed their ordinary sense to them. There is nothing to show that they are used in any other sense. That being so, it is impossible for us to say that his direction was erroneous.

For these reasons I think that there is no ground for holding that the Supreme Court was wrong in dismissing the appeal. If I thought otherwise, it would not follow that the case is a proper one for the grant of special leave. In *Bataillard* v. *The King* (1), and in other cases, it has been clearly laid down that the considerations upon which special leave to appeal in criminal matters will be granted differ to a material extent from those upon which it will be granted in civil cases. Where there has been an apparent miscarriage of justice, or a departure from the principles of natural justice, or where the case is one of extraordinary importance in respect of the future administration of the law—where there are considerations of that or the like nature, the Court will, but only after full consideration of all the circumstances, grant special leave to appeal.

I do not say, then, that in this case special leave would have been granted if a *primâ facie* case of error on the part of the Court of Criminal Appeal had been established. But I have thought it right to recall the principles which guide us in the grant or refusal of special leave to appeal in criminal cases. In support of the views I have stated there are several authorities

(1) 4 C.L.R., 1282.

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which my learned brother *Isaacs*, with his usual research, has collected, and I shall ask him to refer to them.

Special leave will be refused.

ISAACS J. I agree with what my brother *Barton* has said, and I shall refer to two or three of the points taken by learned counsel, and also to some of the authorities.

I mention first the point as to the absence of a shorthand note. I am quite of the opinion expressed by my brother *Barton*, that the section itself makes it clear that the absence of a shorthand note does not of itself amount to a ground entitling an accused person to have his conviction set aside. But there is distinct authority for it, too. In *R.* v. *Elliott* (1), *Channell* J., who presided, said that "the provisions of the Statute as to taking a shorthand note were directory only and not a condition precedent to the hearing of the appeal or to the conviction standing; that was to say, the absence of a shorthand note did not in itself entitle an appellant to have his conviction set aside."

With regard to the sentence it was complained that the language of *Sly* J. and *Gordon* J. was not justified. The considerations stated by my brother *Barton* would appeal to one apart from any precedent. But the same view was taken in England before the New South Wales Parliament adopted the English Act, and was expressed almost in the words of those learned Judges. There are more than one such case, but I will only refer to *R.* v. *Sidlow* (2). The Court consisted of Lord *Alverstone* C.J., *Darling* and *Channell* JJ., and the Lord Chief Justice said that "the question of sentences under the *Criminal Appeal Act* had given them some difficulty. Of course if there was evidence that the Judge in passing sentence had proceeded on a wrong principle or given undue weight to some of the facts proved in evidence the Court would interfere; but it was not possible to allow appeals because members of this Court might have inflicted a different sentence more or less severe." That entirely bears out the language which is now pressed upon us as a misdirection. The case cited by learned counsel of *R.* v. *Shershewsky* (3) is consistent with that decision. There *Coleridge* J.

(1) 25 T.L.R., 572. (2) 24 T.L.R., 754, at p. 755. (3) 28 T.L.R., 364.

said that the sentence would be altered "if the sentence was manifestly excessive." But whether the sentence is manifestly excessive depends upon the test to be applied, and the test was stated in *R.* v. *Sidlow* (1), and it was not intended to be over-ruled. An instance of a manifest mistake is found in *R.* v. *Simpson* (2), heard before Lord *Alverstone* C.J. and *Pickford* J. and Lord *Coleridge* J. There a man who appealed against his sentence had been told that if he persisted in his appeal his sentence might be increased. He accepted that position. He had been convicted of an attempt to murder, and his sentence was increased from twelve years' to fifteen years' penal servitude because the Court apparently thought the attempt to murder was of such a nature that it was manifestly inadequately met by a sentence of twelve years. Then with regard to misdirection, it would, I agree, be a ground upon which this Court might well grant special leave to appeal if substantial and gross injustice were shown to have occurred, and it would be hard, in most cases, at all events, to contend that such injustice had not occurred if a man were deprived of a statutory defence to a statutory crime by the misdirection of the Judge, which prevented him obtaining the benefit of facts brought forward in his defence. The latest case in support of that view is *R.* v. *Crane* (3), where the Court held that some remarks of the Judge, which were inaccurate, and which the Court found to be not qualified by any subsequent words, might have caused misapprehension in the minds of the jury, and they therefore ordered the conviction to be set aside. But here the main question is whether the direction is right, and the direction complained of in the short words originally put would be hard to consider wrong. However that might be, subsequent words were used which made the matter perfectly clear. Those words are in the affidavit in support of the application, and in the report of the Judge who tried the case. I find in *Wharton's Law Lexicon*, 10th ed., p. 618, this definition of "Prostitute"—"a woman who indiscriminately consorts with men for hire." That appears to me to be the common meaning of the word when used in a definite sense and not in a metaphorical sense, and when

(1) 24 T.L.R., 754.
(2) 75 J.P., 56.
(3) 75 J.P., 415.

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the word "common" is used with it by way of emphasis and to prevent any possible mistake, it entirely negatives any metaphorical notion, and it seems to me to be beyond question that it indicates just such a woman as is described in the quotation I have read. That is substantially what the learned Judge told the jury, and I therefore think that he was quite right, and that leave to appeal should be refused.

GAVAN DUFFY J. I concur.

POWERS J. I concur.

RICH J. I also concur.

Special leave to appeal refused.

Solicitors, *Gavan Duffy & King* for *D. P. Claverie*, Armidale.

B. L.

[HIGH COURT OF AUSTRALIA.]

COLLITT AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

BORSALINO GUISEPPE E FRATELLO SOCIETA ANONIMA . . . } RESPONDENTS.
PLAINTIFFS,

H. C. OF A. 1913.

MELBOURNE, *May* 13; *June* 20, 23, 24, 27.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Trade Mark—Passing off—Name of person applied to goods—Secondary meaning.

Barton A.C.J., Isaacs, Powers and Rich JJ.

The name of a person may acquire a secondary meaning as denoting goods made by a certain manufacturer, so as to prevent another person applying