Foll
R v Owens;
Farrington; Ex
parte Seaton
(1933) 49
CLR 20

[HIGH COURT OF AUSTRALIA.]

SYMONS . . . . . APPELLANT;
COMPLAINANT,

AND

THE CITY OF PERTH . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1922.

SYDNEY, *April* 27.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Practice—High Court—Appeal from inferior Court of State exercising Federal jurisdiction—Order to review—Order nisi returnable before High Court granted by Judge of Supreme Court of State—Jurisdiction—Rules of the High Court 1911, *Part II., Sec. IV., r.* 1—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 39 (2) (*b*).

The *Rules of the High Court* 1911, by Part II., Sec. IV., r. 1, provide that "Appeals to the High Court from decisions of inferior Courts of a State in the exercise of Federal jurisdiction shall be brought in the same manner" &c. "as are respectively prescribed by the law of the State for bringing appeals from the same Courts to the Supreme Court of the State in like matters."

Held, that where by the law of a State the procedure for appealing from an inferior Court to the Supreme Court is by an order *nisi* to review granted by a Judge of the Supreme Court, the procedure for appealing to the High Court from that inferior Court when exercising Federal jurisdiction is by an order *nisi* to review granted by a Justice of the High Court, and a Judge of the Supreme Court of that State has in such a case no jurisdiction to grant an order *nisi* to review returnable before the High Court.

APPEAL from the Supreme Court of Western Australia to the High Court.

Before a Police Magistrate at Perth in Western Australia, a complaint was heard whereby Hedley Vicars Symons charged that the City of Perth, being a party bound by an award of the Commonwealth Court of Conciliation and Arbitration, committed a specified breach of the award. The complaint having been dismissed, the complainant applied to *Burnside* J. (a Judge of the Supreme Court

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of Western Australia) in Chambers for, and was granted, an order *nisi* calling upon the defendant to show cause before a Justice of the High Court at Sydney why the order of the Police Magistrate dismissing the complaint should not be reviewed on certain grounds.

The matter coming before *Starke* J. in Chambers was referred by him to the Full Court.

Flannery K.C. (with him *Collins*), for the appellant.

Leverrier K.C. (with him *J. A. Ferguson*), for the respondent, took preliminary objections:—Under the *Judiciary Act* an appeal from an inferior Court of a State exercising Federal jurisdiction cannot be brought to a Justice of the High Court, but it must be brought to the Full Court (sec. 20 (*c*)). The matter was not properly before *Starke* J., and he could not refer it to the Full Court; for under the *Rules of the High Court*, Part II., Sec. IV., r. 1, a Judge of the Supreme Court of a State has no power to grant an order *nisi* to review returnable before the High Court. The proper procedure is to obtain an order *nisi* from a Justice of the High Court. Even if a Judge of the Supreme Court had power to grant an order *nisi* to review returnable before the High Court, the appeal so instituted must be heard in that State unless a Justice of the High Court otherwise directs (r. 4).

Flannery K.C. The appeal is properly before this Court. The order *nisi* to review was properly granted by *Burnside* J. conformably to the *Judiciary Act* and the *Rules of the High Court*, Part II., Sec. IV., r. 1. Under sec. 17 of the *Judiciary Act* he was invested with Federal jurisdiction in the matter, and might exercise the jurisdiction of a Justice of the High Court by directing the appeal to be heard in Sydney. The making the order *nisi* returnable in Sydney and before a single Justice are at most irregularities which can be cured under the *Rules of the High Court*, Order LVII., r. 6, and Part II., Sec. V., r. 1. As to the power of *Burnside* J. to grant an order *nisi* to review returnable before the High Court, he, having Federal jurisdiction, had power under r. 1 of Sec. IV. of Part II. of the *Rules of the High Court* to grant it.

[KNOX C.J. referred to *Bell* v. *Stewart* (1).]

(1) (1920) 28 C.L.R., 419, at p. 424.

KNOX C.J. In my opinion this application cannot be entertained. It comes before us on a reference, by my brother *Starke*, of an application to make absolute an order *nisi* to review granted by *Burnside* J., a Judge of the Supreme Court of Western Australia. The order *nisi* when granted was made returnable before a Justice of this Court. As to its having been made returnable before a Justice I say nothing. The question is whether a Judge of the Supreme Court of Western Australia had any jurisdiction to grant an order *nisi* returnable before this Court to review a decision of a Police Magistrate sitting in Federal jurisdiction. The procedure in Western Australia for reviewing an order of a magistrate is by order *nisi* to review, which is to be obtained from a Judge of the Supreme Court, and is made returnable before a Judge of the Supreme Court or the Supreme Court. It is suggested that r. 1 of Sec. IV. of the Appeal Rules of this Court authorizes a Judge of the Supreme Court of a State to grant an order *nisi* such as that which is the basis of an appeal to the Supreme Court of the State, but returnable before this Court. I cannot read Sec. IV., r. 1, in that way. By sec. 39 (2) of the *Judiciary Act* an appeal to the High Court is given from a decision of any inferior Court of a State exercising Federal jurisdiction whenever an appeal lies from decisions of that Court to the Supreme Court of the State. Sec. IV., r. 1, of the Appeal Rules provides that "Appeals to the High Court from decisions of inferior Courts of a State in the exercise of Federal jurisdiction" (this is one of that class of appeals) "shall be brought in the same manner" &c. "as are respectively prescribed by the law of the State for bringing appeals from the same Courts to the Supreme Court of the State in like matters." In my opinion, that does no more than provide that the method of procedure to be adopted in conveying an appeal from an inferior Court exercising Federal jurisdiction is to be as nearly as possible similar to the method adopted in conveying an appeal from that inferior Court to the Supreme Court of that State. There is no foundation for the argument that that rule goes further and confers on a Judge of the Supreme Court of a State power to grant an order *nisi* to review returnable before this Court.

I think that this Court has no jurisdiction to entertain this application.

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Isaacs J.

ISAACS J. I agree that this appeal is incompetent. The *Rules of the High Court*, which relate both to original and to appellate jurisdiction, are rules which by the *High Court Procedure Act* are to regulate the proceedings of the High Court. The suggestion that r. 1 of Sec. IV. of Part II. of those Rules confers a power on the Supreme Court of a State to allow an appeal to this Court is unfounded. Whatever power is possessed by the Supreme Court, and whether that power is exercised by one Judge or by more than one, must be contained in the grant of power by sec. 39 of the *Judiciary Act* or some other specific Federal legislation, so far as Federal jurisdiction is concerned. Nothing I say is to be taken as casting any doubt upon the power of the Supreme Court in such a case as this to entertain an appeal from a Court of inferior jurisdiction. But what I am clear about is that there is no power in the Supreme Court to launch an appeal in this Court.

HIGGINS J. I agree.

GAVAN DUFFY J. I agree that the appeal is incompetent.

STARKE J. I agree that the appeal is improperly before this Court, although by an order *nisi* granted by a Justice of this Court it might properly have been brought before us.

KNOX C.J. The appeal is struck out and (by a majority) with costs.

Appeal struck out with costs.

Solicitors for the appellant, *Dwyer, Durack & Dunphy*, Perth, by *Sullivan Bros.*

Solicitors for the respondent, *Parker & Parker*, Perth, by *Dawson, Waldron, Edwards & Nicholls.*

B. L.