[HIGH COURT OF AUSTRALIA.]

WHITTAKER . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

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SYDNEY, *July* 30; *Aug.* 6, 24.

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

Criminal Law—Criminal appeal—Recommendation to mercy—Sentence—Appeal by Attorney-General—Increase of sentence—Judicial discretion—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 5D—*Crimes* (*Amendment*) *Act* 1924 (*N.S.W.*) (*No.* 10 *of* 1924), *sec.* 33.

Sec. 5D of the *Criminal Appeal Act* 1912 (N.S.W.) (inserted by sec. 33 of the *Crimes* (*Amendment*) *Act* 1924 (N.S.W.)) provides that "the Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any Court of Quarter Sessions and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper."

Held, by *Knox* C.J., *Gavan Duffy*, *Powers* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that sec. 5D of the *Criminal Appeal Act* 1912 confers an unfettered discretion upon the Court of Criminal Appeal to alter the sentence imposed by a trial Judge.

On an appeal by the Attorney-General under that section the Court of Criminal Appeal held that in reviewing the exercise of the discretion of the trial Judge the Court ought not to interfere with a sentence unless "it is not merely inadequate, but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles or undervalued or overestimated some of the material features of the evidence." And being of opinion that the trial Judge, when imposing sentence, had been influenced by the presumption that the recommendation to mercy made by the jury in the case implied that it in substance accepted the prisoner's version of certain material facts and, therefore, that his Honor had erred in that respect, the

Court of Criminal Appeal considered the matter for itself and decided that, in the circumstances, the sentence of imprisonment for twelve months should be set aside and a sentence of penal servitude for five years substituted therefor.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Powers* and *Starke* JJ. (*Higgins* J. dissenting), that an application for special leave to appeal from the decision of the Court of Criminal Appeal should not be granted.

R. v. *King*, (1925) 25 S.R. (N.S.W.) 218; *R.* v. *Withers*, (1925) 25 S.R. (N.S.W.) 382, and *Skinner* v. *The King*, (1913) 16 C.L.R. 336, referred to.

Special leave to appeal from the decision of the Court of Criminal Appeal of New South Wales: *R.* v. *Whittaker*, (1928) 28 S.R. (N.S.W.) 411, refused.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of New South Wales.

Alexander Lindsay Whittaker was tried before *Ferguson* J. and a jury, at the Central Criminal Court at Sydney, for the murder of his wife. The evidence disclosed that she died as a result of receiving severe injuries in practically every part of her body, the injuries being in the nature of severe bruises and cuts. Following upon an illness the deceased had taken wine as a tonic and her increasing fondness for it had led to frequent over-indulgence, of which fact Whittaker had endeavoured to prevent his neighbours from becoming aware. It was shown that Whittaker had been drinking on the day of the tragedy, and that when he returned home with another man he took several bottles of beer with him. As the result of drinking the liquor Whittaker, his wife and the other man became intoxicated, the condition of the wife being considerably worse than that of the two men. The other man left and Whittaker went to a shop in the vicinity to purchase some cigarettes. He stated that on his return his wife appeared to fall from the bed on which she was lying to the floor, that she with difficulty got on to her feet and, as he thought, endeavoured to make her way to the front verandah. Being undesirous that her condition should be noticed by neighbours and passers-by, he pushed her back with his arm and, without waiting to see what happened to her, went and slept in another room. At about 4 o'clock the following morning he awoke, and, noticing a light in his wife's bedroom, he went in and found her lying face downwards on the floor. Several conflicting statements were made by Whittaker to the police as to his movements

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after he found his wife lying on the floor. For the defence it was submitted that the deceased had received the injuries from which she died as a result of her having fallen and struck her head on the edge of a drawer of the wardrobe when Whittaker pushed her back into the room; and that he had no intention of doing his wife any harm nor had he any knowledge that he had done so. In his summing up to the jury *Ferguson* J. told them that if they believed the defence raised by Whittaker they should acquit him; if, however, they did not believe him, but were of opinion that he was guilty of some criminal act that caused her death, but which fell short of murder, they should find him guilty of manslaughter. The jury found Whittaker guilty of manslaughter, with a strong recommendation to mercy; and he was sentenced to a term of imprisonment with hard labour for twelve months.

The Attorney-General appealed against this sentence under sec. 5D of the *Criminal Appeal Act* 1912 (inserted by sec. 33 of the *Crimes* (*Amendment*) *Act* 1924) as being insufficient. A report was made by *Ferguson* J. in which he stated the grounds on which he based his discretion as to the sentence. His Honor said (*inter alia*) "that while the conviction for manslaughter established conclusively the fact that the death was caused by Whittaker's unlawful act, his acquittal for murder established with equal conclusiveness the fact that the act was not committed with intent to kill or inflict grievous bodily harm, or with reckless indifference to human life." Those findings, said his Honor, were binding on him irrespective of any view he himself might have formed on the evidence. His Honor continued:—"Reading them in the light of conflicting contentions on the part of the prosecution and the defence, I interpreted them as meaning that, while the jury were satisfied that the prisoner used more violence than he admitted, still they accepted in substance his version of the occurrence or, what in legal effect would be the same thing, considered that there was reasonable doubt whether that was not the true version. This view was confirmed by their strong recommendation to mercy. . . . In passing sentence I accepted as an established fact everything which on my interpretation of the jury's verdict they

had found as a fact, and dismissed from consideration everything which, in my opinion, they had negatived."

The Court of Criminal Appeal held that in reviewing the exercise of the discretion of the trial Judge the Court must follow the principles laid down in *R.* v. *King* (1), and as enunciated in *R.* v. *Sidlow* (2) and *Skinner* v. *The King* (3), and the question for the consideration of the Court was, did the trial Judge proceed upon any wrong principle ? The learned Judge was, in the opinion of the appellate Court, wrong in putting his own interpretation upon what he conceived to be the jury's view of the facts upon which they based their verdict and their recommendation, and dismissing from his consideration everything but that version of the facts. In other words, he assumed as an established fact that, though the prisoner had used more violence than he admitted, the story told by him was substantially true, or that there was reasonable doubt whether it was true or not. In proceeding upon this assumption his Honor had proceeded upon a wrong principle, and precluded himself from exercising his discretion upon a judicial review of the whole of the facts. The recommendation of the jury was not binding on him, as such recommendations are not always based upon reason or upon logic. The Court of Criminal Appeal set aside the sentence imposed by the trial Judge and substituted for it a sentence to a term of penal servitude for five years: *R.* v. *Whittaker* (4).

From this decision Whittaker now applied for special leave to appeal to the High Court.

H. E. Manning K.C. (with him *Ralston*), for the applicant. A sentence should not be interfered with unless it appears that the trial Judge has proceeded on wrong principles or has given undue weight to any fact found in evidence (*Sidlow's Case* (2)). Here the trial Judge in imposing sentence exercised his judicial discretion properly by taking into consideration the facts as found by the jury and also the evidence generally (*R.* v. *Marshall* (5)). The Court of Criminal Appeal misinterpreted what was said by the trial

(1) (1925) 25 S.R. (N.S.W.) 218.
(2) (1908) 1 Cr. App. R. 28.
(3) (1913) 16 C.L.R. 336.
(4) (1928) 28 S.R. (N.S.W.) 411.
(5) (1917) 12 Cr. App. R. 208.

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Judge in his report. A correct interpretation would show that his Honor had not erred in principle, and therefore the appellate Court was not justified in interfering with the sentence. If sec. 5D of the *Criminal Appeal Act* 1912 confers a discretion upon the Court of Criminal Appeal it is not an unfettered one, and must be exercised in accordance with the rules laid down for the exercise of judicial discretion. In any case a final Court of appeal, as the High Court is under the Constitution, can correct an erroneous exercise of discretion, and, therefore, special leave to appeal should be granted. [Counsel referred to *In re Eather* v. *The King* (1); *Peacock* v. *The King* (2); *Skinner* v. *The King* (3).]

Weigall K.C., S.-G. for N.S.W., for the respondent. The object of sec. 5D of the *Criminal Appeal Act* 1912 is to ensure uniformity in sentences for similar offences. The trial Judge made a mistake by overlooking the distinction between a special and a general verdict. The verdict of the jury was one of manslaughter and the duty of his Honor was to award a sentence adequate for that offence. As he had not done so, the Court of Criminal Appeal was justified in increasing the sentence. [Counsel referred to *R.* v. *Gumbs* (4); *R.* v. *Dean* (5); *R.* v. *Withers* (6).]

Cur. adv. vult.

Aug. 24. The following written judgments were delivered :—

KNOX C.J. AND POWERS J. The applicant was charged with murder. The jury found him guilty of manslaughter and recommended him to mercy. *Ferguson* J. sentenced him to imprisonment for twelve months and the Attorney-General appealed to the Court of Criminal Appeal under sec. 5D of the *Criminal Appeal Act* 1912, as amended by the Act of 1924. The Court of Criminal Appeal imposed a sentence of penal servitude for five years in substitution for the sentence of imprisonment for twelve months, and the applicant now seeks special leave to appeal from this order.

(1) (1915) 20 C.L.R. 147.
(2) (1911) 13 C.L.R. 619.
(3) (1913) 16 C.L.R. 336.
(4) (1926) 19 Cr. App. R. 74.
(5) (1924) 18 Cr. App. R. 133.
(6) (1925) 25 S.R. (N.S.W.) 382.

The learned Chief Justice of New South Wales, who delivered the judgment of the Court, thought that in reviewing the exercise of the discretion of the trial Judge the Court must be guided by the principles laid down in *R.* v. *King* (1) and *Skinner's Case* (2), and ought not to interfere unless satisfied that the trial Judge had proceeded upon some wrong principle. If this be the rule upon which the Court of Criminal Appeal ought to act in exercising the power conferred on it by sec. 5D, we agree with the learned Chief Justice in thinking that, for the reasons given by him, the Court was justified in the circumstances of the present case in exercising its discretion. If, on the other hand, the true view of sec. 5D be, as we think it is, that unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal, that Court has exercised its discretion. In either event there is, in our opinion, nothing in this case to justify this Court in granting special leave to appeal, and the application should be refused.

ISAACS J. This application for special leave to appeal has raised several questions of importance. The most serious of these, from the standpoint of public justice and of the constitutional duty of this Court, is whether in Australia we are in future to adhere to, or depart from, the settled law of appellate discretionary jurisdiction as administered for centuries in the English Courts and sanctioned finally by the House of Lords and the Privy Council. With this question, as it is of permanent import, I shall deal separately after considering the special issues and merits of the present case.

1. *The Issues.*—Alexander Lindsay Whittaker was charged before *Ferguson* J. with the murder of his wife ; the jury acquitted him of murder, found him guilty of manslaughter, and added a strong recommendation to mercy. The statutory punishment for manslaughter is penal servitude for life or for any term not less than three years, or imprisonment for any term not exceeding three years. The law thus vests in the trial Judge the discretion of imposing within those limits such sentence as to the Court may seem proper. The learned trial Judge, in the exercise of his discretion, imposed a sentence of twelve months' imprisonment with hard labour. The

(1) (1925) 25 S.R. (N.S.W.) 218. (2) (1913) 16 C.L.R. 336.

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Attorney-General appealed to the Court of Criminal Appeal against this sentence as inadequate. The appeal was made under sec. 5D of the *Criminal Appeal Act of* 1912, as amended by the *Crimes (Amendment) Act* 1924 (No. 10 of 1924), sec. 33. The section enacts that the Court of Criminal Appeal, on an appeal by the Attorney-General, " may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper." The only difference between this provision and one simply conferring a general right of appeal is that the Court of Criminal Appeal, if it displaces the sentence appealed from, must itself proceed to award the punishment: it cannot remit the matter to the primary tribunal to reconsider it after correction of any mistake. It is, of course, trite law that every Court of general appellate jurisdiction has the function of itself exercising in a proper case the discretion of the tribunal appealed from. It is, as will appear later, essential to remember throughout that the jurisdiction of the Court of Criminal Appeal under sec. 5D, though *discretionary*, is an appellate power to control an order that is itself *discretionary*. That is the pivot on which one great question in this case turns, and as to the true nature of appellate discretionary power and its distinction from original discretionary power a superficial consideration is apt to mislead.

The appeal was heard by *Street* C.J., *James* and *Campbell* JJ. A report was made by the learned primary Judge in which he stated the grounds on which he based his discretion as to the sentence. His Honor said that while the conviction for manslaughter established conclusively the fact that the death was caused by the prisoner's unlawful act, his acquittal for murder established with equal conclusiveness the fact that the act was not committed with intent to kill or inflict grievous bodily harm or with reckless indifference to human life (*Crimes Act* 1900, sec. 18). Those findings, said the learned Judge, were binding on him, irrespective of any view he himself might have formed on the evidence. So far, the accuracy of the views expressed is incontestable. But then follows this further passage: " Reading them in the light of the conflicting contentions on the part of the prosecution and the defence, I interpreted them as meaning that while the jury were satisfied that the prisoner used more violence than he admitted, still they accepted in substance

his version of the occurrence, or—what in legal effect would be the same thing—*considered that there was reasonable doubt whether that was not the true version.*" Further on: "In passing sentence I accepted as an established fact everything which *on my interpretation* of the jury's verdict they had found as a fact, and dismissed from consideration everything which *in my opinion* they had negatived." (Italics are mine.) Now, it is this further passage that has present importance. The Court of Criminal Appeal found no justification for what they termed the "assumption" that there was no reasonable doubt that the prisoner's story was substantially true. They considered that if the jury had thought the prisoner's story, which was one of misadventure, was substantially true, the probability was the verdict would have been an acquittal. In short, the Court of Criminal Appeal held that there was no material before the learned trial Judge upon which he could reasonably draw the inference or arrive at the interpretation upon which he based his judgment. Therefore, held the Court of Criminal Appeal, he had proceeded upon "a wrong principle," and thereby laid the sentence open to review. Their Honors held in accordance with the law as laid down by four Justices of the Supreme Court in *R.* v. *King* (1) and *R.* v. *Withers* (2) (and in the latter case the Court said they still adhered to the former case), that, under the appeal section referred to, the Court was not justified in interfering with a sentence unless it is "not merely inadequate but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles or undervalued or overestimated some of the material features of the evidence" (3). Finding this condition satisfied, the Court of Criminal Appeal considered the matter for itself and thought that in the circumstances the sentence must be set aside and there must be substituted the graver sentence of penal servitude for five years.

Now, against this the prisoner seeks to appeal on the ground that the Court of Criminal Appeal had placed a wrong interpretation on the report of *Ferguson* J., and that upon a correct interpretation of that report that learned Judge had not erred in principle; and, consequently, on the authority of the cases mentioned the Court's

(1) (1925) 25 S.R. (N.S.W.) 218. (2) (1925) 25 S.R. (N.S.W.) 382
(3) (1925) 25 S.R. (N.S.W.), at p. 394.

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judgment was wrong in law. After considerable argument on that basis, accepted by the learned Solicitor-General, there was, on a suggestion from the Bench, a further discussion as to whether those decisions were wrong, and whether the " discretion " in sec. 5D was not unappealable. This was, of course, strenuously opposed by Mr. *Manning*; and the Solicitor-General on his part, while to some extent placing some specific reliance on the word " discretion " as distinguishing this case from *Skinner's Case* (1) did really not go further than saying that the discretion was such as was indicated in certain English cases cited by him, and which included *R.* v. *Gumbs* (2) and *R.* v. *Dean* (3). Indeed, he observed that *Withers' Case* (4) was correct.

The suggestion as to the immunity of a Supreme Court judgment, under sec. 5D, from appeal, is, needless to say, of the greatest importance, not only to this class of cases, but in a vast variety of instances in different classes of legislation where " discretion " is conferred. For there can be no distinction in law between an express and an implied grant of discretion to a Court, nor between a grant of discretion only and a grant of discretion in a general jurisdiction of appeal. I understand the suggestion to be in effect that the discretion given by sec. 5D is " absolute " in the fullest sense, and therefore free from any limitation whatever—free, that is, from the limitations which a long and consistent line of authority has, in the absence of express legislative declaration of absoluteness, always attached to any grant of " discretion " to a Court—limitations which therefore the Legislature must, in my opinion, be taken to have had in mind when framing the section. The suggestion further tacitly assumes that the Legislature of New South Wales can control the appellate functions of this Court. The question of immunity, no doubt, logically comes first, but since I reject the suggestion it will be more convenient before stating the reasons for my opinion to complete the consideration of the merits. I take that course because it seems to me transparently self-evident that, in this case, however broad an interpretation is given to sec. 5D—short of conferring arbitrary and despotic authority on the Court of Criminal

(1) (1913) 16 C.L.R. 336.
(2) (1926) 19 Cr. App. R. 74.
(3) (1924) 18 Cr. App. R. 133.
(4) (1925) 25 S.R. (N.S.W.) 382

Appeal irrespective of circumstances—the events of this particular case inevitably present an appealable question in the fullest sense.

It is true that the Court of Criminal Appeal imposed its sentence of penal servitude for five years on its own consideration of the circumstances. But it is decisive that the Court introduced as one of those circumstances, and as a basic factor in awarding punishment, the impossibility of inferring any opinion of the jury that the prisoner's story was substantially true. If the unwarranted assumption of such an opinion is a matter of principle, its improper exclusion is also a matter of principle. If an unwarrantable assumption of the prisoner's comparative innocence is a mistake of principle—as no doubt it is—leading to improper leniency, it follows necessarily that the rejection of that assumption as being on the materials in the case impossible in law, is, if the assumption proves to be legally possible and in truth sustainable, equally a mistake of principle leading to undue severity. It is in that case a mistake of law, and the prisoner is thereby deprived of the benefit of the Court taking into consideration a most extenuating circumstance. One or other of the two tribunals, it is plain, must have erred on a matter of principle vitally affecting the punishment. Either the learned primary Judge wandered from the legal road too far north or the Court of Criminal Appeal wandered from its permitted path too far south; and so the one or the other has exceeded the limits which the law has allotted for the legitimate exercise of discretion, and the decision of the Court of Criminal Appeal is amenable to a Court of general appellate jurisdiction, applying ordinary practice in such cases for the determination of the question which assumption is correct. And, in my opinion, in a matter involving personal liberty, and particularly where a sentence of considerable severity has been imposed, it is the inescapable duty of this Court, in the due fulfilment of the constitutional purpose for which it was created and exists, that the objection taken to the legality and propriety of the sentence should receive consideration on its merits.

2. *The Merits.*—On the merits, having to consider the divergent views so clearly and forcefully expressed by the learned trial Judge

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and the learned Judges of the Full Court respectively, I have formed the opinion that the Full Court decision was right and should be upheld.

The verdict of the jury establishing the crime of manslaughter cannot be reduced to comparative innocence by a mere recommendation to mercy. The jury did not state their reasons. *Ferguson* J. interpreted it by the light of the rival contentions. I agree that that is not a sufficient or a reliable test, and it leaves the mind of the jury on that subject still a mere matter of conjecture. What I think is a safer test, if there be any, is the Judge's charge to the jury. On his directions to them the law presumes they acted, and with reference to the accused's explanation the jury were directed, and properly directed, in these words: "Although you do not give it full credence, if you still think it may reasonably be true, you are not entitled to take some other version which should make him guilty." I am forced to the view of *Street* C.J. that if the assumption made upon the basis of which the original sentence was passed were correct, the jury would probably have acquitted. Whatever weight might have been given to the recommendation otherwise, it was in this instance pressed beyond the limits of its proper function. The recommendation of a jury for leniency should always be treated with respect and careful attention. It is a recognized feature of our legal system. But a recommendation *simpliciter* is, after all, a recommendation only, and the Judge, on whom falls the sole responsibility of measuring the punishment within the limits assigned, must consider for himself how far it is consistent with the demands of justice that he should accede to the recommendation. But that is all. The Full Court was right, therefore, in regarding the original sentence as founded upon a mistake of principle, and the way was then clear to displace the sentence by its own. This it did, and since what the Full Court did was itself free from any mistake of principle or other vitiating element, its decision is unimpeachable. It cannot, consistently with what is termed by the Privy Council "sound practice," be revised by this Court, even though this Court has a general appellate jurisdiction; but it is essential to note that our inability to revise does not arise from want of jurisdiction, but from the consideration that, upon accepted

principles applicable to such a case, revision of discretion, in the absence of some vitiating cause, would for reasons presently appearing be a departure from the true course of justice.

3. *Appellate Discretionary Jurisdiction.*—As to the suggestion of immunity, the problem is this : Is a decision of the Court of Criminal Appeal under sec. 5D always immune from review on appeal to this Court, assuming, of course, that the decision is within the jurisdiction of the Court of Criminal Appeal ? In other words, is it immune from the fundamental considerations by which in all other cases the law surrounds a grant of discretion ? Even under a War statute expressly conferring on a Court " absolute discretion," Lord *Cozens-Hardy* M.R. declined to say that there was no appeal, and *Kennedy* L.J. contented himself with holding that in the circumstances he had no discretion to exercise on appeal (*Lyric Theatre London Ltd.* v. *L.T. Ltd.* (1)). In *Morgan* v. *Morgan* (2) Lord *Penzance* said : " A loose and unfettered discretion . . . is a dangerous weapon to entrust to any Court." If given at all, it must, in my opinion, be given in express terms. Here the Legislature has not used the phrase " absolute discretion," but simply the word " discretion " to vary the sentence (which necessarily means appellate jurisdiction), followed by the power to declare such sentence as to the Court " may seem proper." Reference to decided cases, as, for instance, those cited by Lord *Halsbury* in *Sharp* v. *Wakefield* (3) will show that this section is practically in common form. It needs scarcely to be observed that so far as the jurisdiction of this Court is concerned, sec. 73 of the Constitution is sufficient warrant, provided only in compliance with legislative requirement by sec. 35 of the *Judiciary Act*, the special leave of this Court is obtained. The jurisdiction of this Court under sec. 73 is " to hear and determine appeals from *all* judgments, decrees, orders, and sentences . . . of the Supreme Court of any State." It includes, therefore, all judgments, &c., whether based on law or facts or discretion, except so far as limited by Act of Parliament. There has been no exception as to " discretion." And further, Parliament has expressly said (*Judiciary Act*, sec. 39 (2) (*c*)) that special leave to appeal may be granted,

(1) (1914) 84 L.J. K.B. 712.
(2) (1869) L.R. 1 P. & D. 644, at p. 647.
(3) (1891) A.C. 173.

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even though the law of the State may prohibit any appeal from a State Court or Judge. So that the hands of this Court are free to exercise in this case its constitutional jurisdiction in the fullest degree as justice may require.

The suggestion raises, as I have said, a mere abstract question of whether entertaining an appeal from an order under sec. 5D, made under any circumstances short of usurping jurisdiction, is contrary to established British precedent. An affirmative answer encounters a dilemma. As it is undeniable there is constitutional and statutory jurisdiction to entertain such an appeal, this Court would on such appeal have the same legal power as the Court appealed from (see, for instance, per Viscount *Haldane* in *Gray* v. *Ashburton* (1), *Thesiger* L.J. in *Davy* v. *Garrett* (2), and sec. 37 of the *Judiciary Act*). And, having the same power, it is bound to exercise it in a proper case (*ibid.*). Now, either the discretion conferred by sec. 5D is intended to be exercised independently of the prior opinion of any other Court, or it is not. If it is, then it is the duty of this Court in a proper case to form its own opinion independently of that of the Supreme Court—otherwise it refuses to perform its constitutional and statutory duty. If it is not, then that must be because the exercise of the discretion of the Supreme Court, which the Constitution on appeal transfers to this Court, as the Australian apex of the State system of law, would not on general principles be properly so exercised, and, if that be true of this Court, it must be true of the Supreme Court. *Quacunque via* the suggestion is unsustainable. It becomes only a question, which horn of the dilemma represents the legal truth. All precedent, and the precedent is founded on solid reasons, shows that the latter view is correct.

It is obvious that unless the Legislature wished to confine the appeal to correcting mere errors of law, no other language could have been used. It is also obvious that to adhere to rigid literalness in interpreting sec. 5D would lead to absurdity. Without some tacit limitation it would empower the Court to inflict a life sentence for stealing a loaf of bread, or to impose whipping for embezzlement. But the law is not so absurd. It reads grants of discretion with well-known limitations, unless there be express provision to the

(1) (1917) A.C. 26, at p. 32. (2) (1878) 7 Ch. D. 473, at p. 490.

contrary. Sentences awarded under sec. 5D cannot exceed those provided by law. But, once that tacit limitation is admitted, literalness cannot be insisted on as a rigid principle. The door is opened to inquiry whether there is not also the implication that what is called by the Privy Council " sound practice " in relation to appeals from discretionary orders, is not also proper to observe. Being discretion all through, both primary and appellate, it follows that, granted jurisdiction, it must be " practice," rather than rigid principle, that is to be looked to for proper guidance. If there is a principle, it is that the practice should be observed. An instance is found in *Brown* v. *Dean* (1), where the House of Lords had to construe the words in a County Court Act, empowering a Judge to order a new trial " if he shall think just." In the Court of Appeal *Fletcher Moulton* L.J. (see *Dean* v. *Brown* (2)) sought to read these words in their naked literalness, as the suggested reading would do here. But the House of Lords said that the words " if he shall think just " meant if he shall think just according to law, and that the rules ordinarily observed as to new trials he was bound to obey. So here, *mutatis mutandis,* and allowing for the case being referable to discretion, the same principle applies. In *Crowther* v. *Elgood* (3) *Lopes* L.J. said : " It is *settled law* that where a Judge has a discretion the Court of Appeal will not interfere with his decision unless the Judge has not exercised his discretion, or unless he has done so under a clear mistake." (Similarly by *Cotton* L.J. (4).) But the expressions actually employed in sec. 5D are not at all infrequent; on the contrary, they are, as already stated, in common form, and they have been judicially interpreted. In *Sharp* v. *Wakefield* (5) the House of Lords had to consider the nature of the discretion vested in justices by an Act which empowered them to grant licences to such persons as they should, in the exercise of their " discretion," " deem fit and proper." It would be hard to get a more apposite instance. Lord *Halsbury* L.C. said (6) :—" An extensive power is confided to the justices in their capacity to be exercised judicially ; and ' discretion ' means when it is said that something is to be done within the discretion of the authorities that that something is to

(1) (1910) A.C. 373.
(2) (1909) 2 K.B. 573, at pp. 581-582.
(3) (1887) 34 Ch. D. 691, at p. 698.
(4) (1887) 34 Ch. D., at p. 697.
(5) (1891) A.C. 173.
(6) (1891) A.C., at p. 179.

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be done according to the rules of *reason and justice*, not according to private opinion: *Rooke's Case* (1); *according to law*, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised *within the limit*, to which an honest man competent to the discharge of his office *ought to confine himself*: *Wilson* v. *Rastall* (2)." And then instances are given, which show (*inter alia*) that in exercise of the discretion each case must be considered on its individual merits, and that any pre-arranged rule for refusing relief would not be a valid exercise of discretion. For instance, it would be a failure to perform its judicial duty if this Court were to refuse leave to appeal on the ground that it is a bad policy to review decisions of any Court as to which the Constitution and the Federal Legislature have given to Australians the opportunity of appeal to this Court. Now, the case of *Wilson* v. *Rastall* was one in which Lord *Kenyon* used the expression " within the limits " to include the grant of a new trial because of a mistake made by a Judge at the trial on which the verdict proceeded, and the refusal where no error existed in the trial or other reason recognized by the practice of his predecessors. But it is not within the limits—in other words, it is not a judicial exercise of discretion—to do plain injustice. That is shown in a very recent case by the judgment in *Kierson* v. *Joseph L. Thompson & Sons Ltd.* (3); by the judgment of *Atkin* L.J. in *Ritter* v. *Godfrey* (4); by *Bevington* v. *Perks and the Bell Assurance Society* (5). Then, says Lord *Halsbury* in the passage quoted, discretion must be " according to law." Now, it has been laid down in various cases that discretion is not exercised according to law, if on a mere difference of opinion it is used by an appellate Court to reverse the judgment of a primary Court *itself exercising discretion*. That is to say, when so exercised it is not exercised in such a way as to preclude revision on appeal in accordance with established practice. For at this point we are concerned with whether this Court will as a rule of practice refrain from interfering with a discretionary order of the Supreme Court.

(1) (1598) 5 Rep. 100a.
(2) (1792) 4 T.R. 753, at p. 757.
(3) (1913) 1 K.B. 587, at p. 589, *Cozens-Hardy* M.R. *Buckley* and *Hamilton* L.JJ.
(4) (1920) 2 K.B. 47, at p. 60.
(5) (1925) 2 K.B. 229.

The question being one of *discretion throughout*, and the appellate Court being called upon by a competent litigant to exercise its discretion, that Court applies its discretion in this way. If the "sound practice" resulting from centuries of legal procedure is observed, the appellate Court does not interfere—as a rule. But if that "sound practice" is not observed, it then proceeds to exercise the discretion it possesses. And it is beyond question a departure from sound practice for an appellate Court to proceed to apply its own discretion to the case, unless it examines the grounds on which the Court appealed from has made its discretionary order. If that order has been made in the proper exercise of judicial discretion, the Court of Appeal, for patent reasons, abstains from altering it —that is, as a rule. If, on the contrary, some defect, variously described in different judgments, but amounting to a vitiating circumstance, the Court of appeal does not hesitate to do justice in the matter according to its own opinion as far as it can weigh the circumstances. Two cases, both in 1917 and both decided by the highest authority, are excellent and converse illustrations. One is *The Stanton* (1). The President of the Admiralty Division had made a discretionary order in Prize. The Judicial Committee gave special leave to appeal. On the appeal the Privy Council, speaking by Lord *Parker of Waddington*, dismissed the appeal because their Lordships were not satisfied (2) "that in making the order appealed from the President either ignored any matter which he ought to have considered, or took into account any matter which he ought to have ignored. In other words, they are not satisfied that he did not exercise the discretion conferred upon him by the rules in a judicial manner and on proper grounds." Therefore, said Lord *Parker*, "it follows that this appeal must be dismissed with costs." It is necessary to remember that as a matter of jurisdiction their Lordships might have revised the decision, but the appeal "must" be dismissed only because the well-established rule I have referred to would otherwise have been infringed by the appellate Court. In the same year the Privy Council heard an appeal from the High Court of Bombay (*Rehmat-un-Nissa Begam* v. *Price* (3)). The case

(1) (1917) A.C. 380.
(2) (1917) A.C., at p. 385.
(3) (1917) L.R. 45 Ind. App. 61.

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gives, as it seems to me, a perfect answer to the question presented by the suggestion. As in the present case, the primary Judge in his discretion made an order—in that case for dissolution of partnership. As here, the appellate Court in its discretion discharged the order and substituted a different order—one reversing the decision appealed from. Again, as in this case, a further appeal was made to a superior appellate tribunal, in that case the Privy Council. It was objected—really pressing the very suggestion I am dealing with—that as the High Court of Bombay had exercised its discretion the Privy Council should not disturb its decision. But that was answered by Sir *Lawrence Jenkins*, speaking for a Board which included also Lord *Buckmaster* and Lord (then Sir *Walter*) *Phillimore*, in these words (1) :—" The appellate Bench decided adversely to it (the appellant's claim), and it was urged in argument against interference with this decision, that it is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the appellate Bench as it is before this Board, and yet the appellate Bench did not hesitate to substitute its discretion for that of the original Court. . . . In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree. . . . It cannot be said that the Court acted capriciously or in disregard of any legal principle in the exercise of its discretion." The Board went on to say for themselves that there were elements in the case warranting the first Court's decision, and pointed out sufficient of them. In the result the appeal was allowed and the original decree restored, with some variations directed by the Board itself. It clearly appears, therefore, that merely to " substitute discretion " is simply to disregard the discretionary order of the primary Court, as if it had never been made, except, of course, as attracting the appeal. That is not " sound practice," in other words, not conducive to justice, and lays the appellate order, though in a sense made with jurisdiction, open to correction by a superior tribunal in the exercise of its own

(1) (1917) L.R. 45 Ind. App., at p. 66

discretion, as in the case referred to. To substitute an order made in the proper exercise of appellate discretion is totally different, and in accordance with the settled law of discretion. The Privy Council cases bring the two things into contrast. The situation is to a great extent summarized by Viscount *Haldane* in *Gray* v. *Ashburton* (1). Referring to the discretion of a Judge with respect to costs under the *Judicature Act*, Lord *Haldane* says :—" The very scheme of the *Judicature Acts* is that there should be an appeal from the Judge who awards the costs to the Court of Appeal. *That Court of Appeal also may therefore have to exercise the discretion which the rule confers.* The Court of Appeal has laid down the practice, which is a rule of practice and not of principle restricting legal power, that it will not interfere with a discretion exercised by a Judge of first instance in a matter in which discretion is entrusted to him, such as costs. But the Court of Appeal only applies *that limitation of its powers* in cases where the Judge has acted, in exercising his discretion, on judicial principle, and on the proper principle. There are many cases in which the Court of Appeal interferes with costs, and it is always *free to interfere* as regards costs if it thinks that the Judge has exercised his judicial discretion in a fashion that is not in accordance with *settled principle.*"

The authorities to which I have referred support the position I have formulated earlier, representing the general law as it has consistently been applied to the question of discretion. This is the " settled law " which the English Courts proceeded to apply when the Criminal Appeal law came to be administered by them. In *Skinner's Case* (2) this Court unanimously followed the same course and for the same reasons. I can see no ground for doubting either the accuracy of that decision or the analogy of the present case.

It was and is with a full appreciation of the " settled law " of curial discretion that a long line of eminent English Judges have administered the *Criminal Appeal Act*. Some of the decisions, very important and typical, have been cited by *Street* C.J. in *R.* v. *King* (3) and *R.* v. *Withers* (4) ; and others equally cogent were brought to the notice of the Court by the Solicitor-General during

(1) (1917) A.C., at p. 32.
(2) (1913) 16 C.L.R. 336
(3) (1925) 25 S.R. (N.S.W.) 218.
(4) (1925) 25 S.R. (N.S.W.) 382.

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his very fair and helpful argument, and two of these I have already cited. I add another, namely, *R.* v. *O'Connell*, best reported in the *Justice of the Peace Reports* (1). The Court consisted of Lord *Alverstone* C.J. and *Bingham* and *Walton* JJ. The Lord Chief Justice said (2):—" I have already said in this Court that we are not here to criticize or correct sentences on what I may call minor differences of opinion in the standard of punishment. *We have to consider before we interfere with a sentence that has been imposed whether a wrong standard or principle has been applied in the particular case under consideration.*" That is a very explicit statement, not of a mere procedural rule, nor of an arbitrary practice rule, founded either on the convenience of the Court or its disinclination to interfere with the business of the primary Court: it is the recognition of the time-honoured " sound practice " introduced and followed as a safeguard against injustice in the particular instance. If, as Lord *Loreburn* L.C. said in *Brown* v. *Dean* (3), a successful litigant in any civil Court has a vested interest in the judgment he has obtained, which ought not to be taken from him without proper recognized cause, even on grounds of discretion; still more should we respect the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal. When the Judges of England adopted the attitude stated in *O'Connell's Case*, they neither misunderstood nor shirked their duty. But if the Act empowered them, consistently with established rules of law and settled practice, to reduce a sentence in the absence of the circumstances mentioned, and on their own view of its impropriety, simply on the matter as it appeared to them, then they must have known it was their duty to exercise that power; declining it would have been a conscious failure to administer justice.

But it must be patent to all, as soon as one passes from a superficial notion of discretion as applied to sec. 5D to a careful examination of the subject, that the practice is based on essential requirements of public justice. The just sentence to be passed on an offender after an open trial depends, or may depend, on many considerations not apparent or available to the Court of appeal. The condition and

(1) (1909) 73 J.P. 118.
(2) (1909) 73 J.P., at p. 119.
(3) (1910) A.C 373.

appearance of a prosecutor who has been assaulted or robbed, his manner of giving evidence, the demeanour of witnesses, the prisoner's conduct in Court, the impression produced by the words, the behaviour or the personal appearance of the accused, the "atmosphere," as it may shortly be called, of the trial, are or may be of very great worth in estimating the appropriate penalty for the crime. The printed reproduction of the formal documents and other evidence, charge, verdict, and possible further statement of the convicted person, may most inadequately convey the real or full import of the proceedings. The trial as a living and moving act is within the sole knowledge of the trial Judge, and even he in his report can but partially invest the appellate tribunal with the accurate knowledge and significance of what has transpired. It follows, as is constantly recognized in civil proceedings, and should, in my opinion, be no less observed when personal liberty and public justice are the subjects of consideration, that no appeal Court can for such a purpose properly disregard the fact of the superior advantage of the primary tribunal. The unrecorded and, to a very great extent, the unrecordable material upon which the law requires the primary Judge to act is entirely or largely absent from the record as it is in the hands of the Court of appeal.

It would be quite wrong, therefore, to treat the question of sentence, though in the discretion of the appeal Court, as a matter left to that body apart from the opinion of the trial Judge. But if it once be conceded that his opinion is to be taken into account, is it not a necessary corollary that if justice is to be maintained, that opinion must, not as a matter of law but as an element of fair play, be regarded as prima facie correct, and, in order that it should be displaced, it must be shown, as the Court of Criminal Appeal has said, that it is "not merely inadequate, but manifestly so, because the learned Judge in imposing it either proceeded upon wrong principles, or undervalued or overestimated some of the material features of the evidence." By "inadequate" I understand the learned Chief Justice of New South Wales to have meant inadequate as the matter would appear to the members of the appellate Court on the materials apparent to them, there being

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always the grave possibility of other relevant circumstances known only to the primary Judge.

It is on these principles that the decisions in England and in this country have so far proceeded. No distinction can, in my opinion, be made in this respect between sec. 6 (3) and sec. 5D. I adopt entirely the able and, to me, convincing reasoning of the Full Court of New South Wales in the two cases mentioned. To that I would add that I cannot think the New South Wales Parliament as a British legislature can, in the absence of distinctly coercive words, be taken to have intended to give the Court at the request of the Crown a greater opportunity of increasing the sentence of a convicted person than of reducing it on his own application. The mere use of the words " discretion " and " seem proper " is, as shown, not apt to effect that object. If, however, that view be wrong, it must be because the section divests the inquiry of any requirement beyond the mere opinion of the Court investigating the matter on the materials it can obtain, and that on an appeal to this Court, would place unfettered responsibility on this Court in like manner to form its own independent opinion in every case as to the adequacy of the sentence, apart altogether from the opinion of either of the State Courts.

For the reasons stated, and for them alone, the leave should, in my opinion, be refused.

HIGGINS J. The actual question before us is not whether the Court of Criminal Appeal was right or was wrong in increasing the punishment of the prisoner from one year to five, but whether special leave to appeal should be granted in order that the matter should be fully discussed. That Court takes the view that it has no right to alter the sentence unless the trial Judge has made some mistake as to the principles on which he should exercise his difficult function. Accepting the principles for sentencing as stated by that Court, it is my opinion that the trial Judge has not in any way violated those principles. As so often happens when we differ on the Bench, the difference is not as to the major premise—the principles to be applied—but as to the minor premise—have those principles been followed ? To my mind, there has been a misapprehension of what

the trial Judge said in his report and in his reasons for sentence. He did not say that he dismissed everything else from consideration but what he inferred to be the (unexpressed) view of the jury, but that he "dismissed from consideration everything which," in his opinion, "they had negatived." The distinction is vital. Nor did the Judge say that he felt bound to act on the jury's recommendation to mercy.

The charge was murder. The jury found the prisoner "guilty of manslaughter with a strong recommendation to mercy." This finding negatived murder; but it also negatived mere accident as the cause of the death. The learned Judge accepted this finding, which left him face to face with the only other alternative, that the prisoner had used violence—though not such violence as would justify a finding of murder. Both murder and accident have been negatived by the jury; and, as *Ferguson* J. said: "In passing sentence I accepted as an established fact everything which *upon my interpretation of the jury's verdict they had found as a fact*, and dismissed from consideration everything which in my opinion they had negatived." No one contends that murder and accident were not both negatived; and no one contends that the trial Judge was not right in accepting loyally the finding of the jury whatever may have been his own opinion. But naturally it gave him some satisfaction to discover that the jury had not by their finding negatived in any degree the statement of the accused that he did not mean to do his wife any serious hurt.

When once it is established that the trial Judge made no mistake in principle, then, according to the Chief Justice, the Court of Criminal Appeal should not interfere with the sentence. Different minds may naturally take different views of the circumstances; but the trial Judge is more likely to form a just estimate of the actors in the drama than any appeal Court. It is evident that in coming to his conclusion in this case the Chief Justice started, as most people would start, with the impression that "that sentence" (imprisonment with hard labour for twelve months) "was inadequate." Such an impression was very natural at first sight when the prisoner had been found guilty of killing his wife by violence. But, as the Chief Justice admits, his own impression that

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the sentence was inadequate is "neither here nor there"—is not to be treated as a ground for interfering with the sentence; and the trial Judge may well have taken the view that although the husband used more violence than he had admitted, he had used it in a drinking bout when he had no intention of inflicting any grievous bodily harm—that in his shame and disgust at seeing his wife go on to the verandah in her drunken state in the public view he had pushed her into the house roughly, and that this push, or blow, had brought her head into contact with the wardrobe and caused her death. If he came to such a conclusion, he would not in any way be contradicting or negativing anything in the jury's verdict; and the sentence might well be adequate. The man bore the highest reputation among those who knew him as to his previous relations with his wife and family; the Judge may well have believed the accused (who gave evidence on his own behalf) when he said:—"I did not mean to kill her. I did not mean to hurt her."

I have said enough to show why it seems to me that the Court of Criminal Appeal, on its own view of its duty, ought not to have interfered with the sentence. But is it true that the Court of Criminal Appeal has no right to interfere unless the trial Judge has made no mistake of principle? A doubt has been raised from the Bench as to the effect of the *Criminal Appeal Act* 1912 as amended by the *Crimes (Amendment) Act* 1924. Sec. 5D provides: "The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any Court of Quarter Sessions and the Court of Criminal Appeal may *in its discretion* vary the sentence and *impose such sentence as* to the said Court *may seem proper*."

The words "in its discretion" do not appear in the analogous section relating to an appeal by the prisoner from the sentence (sec. 6 (3)); and it has been suggested that the Legislature has conferred upon the Court of Criminal Appeal the right to interfere whether there has been a mistake of principle or not on the part of the trial Judge—that that Court has an absolute discretionary right to impose such a sentence as seems fit to the Court. But the Solicitor-General, following certain New South Wales cases, has disclaimed such a view. Under the circumstances, I cannot think

it to be our duty to decide this question, which has not been argued or suggested from the Bar, but to act on the provisional assumption that the practice of the New South Wales Court, under sec. 5D, is right—the practice not to interfere with the sentence unless there has been a mistake of principle on the part of the trial Judge. As no such mistake has been established, I think it would be wiser, as well as more seemly to grant the special leave to appeal in order that the whole position may be fully and carefully examined. It is no light matter to decide that because the Legislature has, in sec. 5D, used such common words as "in its discretion," it meant to substitute the discretion of Judges who have not seen or heard the accused and the witnesses for the discretion of a Judge who has—and who has made no mistake of principle. On this point the authorities cited by my brother *Isaacs* are distinctly relevant (*Sharp* v. *Wakefield* (1); *Rehmat-un-Nissa Begam* v. *Price* (2)). The absurdity of deciding a point involving such far-reaching consequences on a mere motion for special leave to appeal—without argument, without the matter being considered by the New South Wales Bench, without that Bench having even purported to exercise that absolute discretion which it is said they have under the section—seems, to my mind, to be manifest.

GAVAN DUFFY AND STARKE JJ. On an appeal by the Attorney-General of New South Wales against any sentence pronounced by the Supreme Court of that State the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the Court may seem proper (*Criminal Appeal Act* 1912-1924, sec. 5D). There is nothing in the words of the section to limit the exercise of discretion, and the Court of Criminal Appeal exercised its discretion in this case by setting aside a sentence of twelve months' imprisonment with hard labour imposed by the Supreme Court of New South Wales upon the prisoner for the manslaughter of his wife and imposing a sentence of five years' penal servitude in place thereof. The Court of Criminal Appeal, in imposing the sentence complained of, did not proceed in opposition to any principle of law but in accordance with its own considered view of the facts.

(1) (1891) A.C., at pp. 179-180. (2) (1917) L.R. 45 Ind. App., at p. 66.

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Special leave to appeal from such a decision ought not to be granted by this Court.

Special leave to appeal refused.

Solicitors for the applicant, *W. A. Windeyer, Fawl & Osborne.*

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

J. B.

Cons *David Syme & Co Ltd v Grey* (1992) 38 FCR 303

Foll *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118

Appl *Rowan v Cornwall (No5)* (2002) 82 SASR 152

[HIGH COURT OF AUSTRALIA.]

THE HERALD AND WEEKLY TIMES LIMITED Appellant; Defendant,

AND

McGREGOR . . . . . Respondent. Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 5, 8; *Nov.* 8.

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

Defamation—Libel—Innuendo—Whether words capable of innuendo alleged—Plea of justification—Persistence in at trial—Damages—Assessment—Direction to jury—Whether plea of justification can be considered in assessing exemplary or compensatory damages—False plea—Penal damages—New trial—Substantial wrong or miscarriage—Rules of the Supreme Court 1916 (*Vict.*), *O. XXXIX., r.* 6.

In an article published in its newspaper in 1927 purporting to narrate events relating to a horse-race run in 1912 the defendant said concerning the plaintiff:—"A bookmaker from New Zealand was credited with accumulating a small fortune over Wingarara at that period. He had been taken into the confidence of McGregor. Both the jockey" (the plaintiff) "and his punter have passed away. Neither was of frugal habits. Despite the disclosure of stable information, Robertson" (the owner) "profited handsomely." The plaintiff, who at the time he brought the action was a retired jockey and was employed in the training of race-horses, alleged that the words meant that he