[HIGH COURT OF AUSTRALIA.]

GRIERSON . . . . . APPLICANT;

AGAINST

THE KING . . . . . RESPONDENT.

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

H. C OF A. 1938.

SYDNEY, *Sept.* 2.

MELBOURNE, *Sept.* 16.

Rich, Starke, Dixon and McTiernan JJ.

Criminal Law—Appeal—Dismissal on merits—Subsequent application for leave to appeal—Jurisdiction of Court of Criminal Appeal—Criminal Appeal Act of 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 26—*Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 39 *of* 1929), *sec.* 475.

The jurisdiction of the Court of Criminal Appeal of New South Wales is confined within the limits of the *Criminal Appeal Act of* 1912 (N.S.W.); therefore, that court has no jurisdiction to reopen an appeal which it has heard upon the merits and finally determined.

Decision of the Court of Criminal Appeal of New South Wales affirmed.

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

At his trial at the Quarter Sessions held in December 1932, the jury found Paul Grierson guilty on two charges, namely, (*a*) that on 29th September 1932, at Sydney, he assaulted one Frank Edgar Seckold and robbed him of one handbag and money to the amount of £530, the property of His Majesty the King; and (*b*) that on the same day he maliciously used a corrosive fluid, that is to say, ammonia, to do grievous bodily harm to one Alfred Robert Winnacot Johnston. Grierson was sentenced to imprisonment for a term of ten years with hard labour on the first charge, and a term of thirty-five years on the second charge, the sentences to be concurrent.

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In March 1933 an appeal by Grierson against his conviction and sentences on the grounds, *inter alia*, that he was wrongly convicted, that the sentences were harsh and unconscionable, and that fresh evidence was available, was dismissed by the Court of Criminal Appeal, except that the sentence of thirty-five years' imprisonment was altered to a sentence of penal servitude for life (*R.* v. *Grierson* (1)). An application by Grierson for special leave to appeal from the decision of the Court of Criminal Appeal was refused by the High Court in August 1933.

In June 1934 representations were made on behalf of Grierson to the Minister of Justice for the State of New South Wales for an inquiry under sec. 475 (1) of the *Crimes Act* 1900 (N.S.W.) on the ground that certain material facts had become known respecting the evidence of one of the material witnesses for the Crown at the trial. The Minister replied that, having considered the facts disclosed, he would not recommend an inquiry under the section. In July 1937, Grierson appeared in person before the Court of Criminal Appeal in support of a further application for leave to appeal against his conviction and sentences, but that court upheld a preliminary objection taken by the Solicitor-General that the court had no jurisdiction to entertain the application by reason of the fact that an appeal had already been maintained to the court and dismissed after the merits had been determined.

In the course of his judgment, with which *Davidson* and *Halse Rogers* JJ. concurred, *Jordan* C.J. said :—" The point which has been raised is exactly covered by the decision . . . in *R.* v. *Edwards* [*No.* 2] (2), and I am of opinion that this court should follow that decision. When an appeal has once been fully heard and disposed of, that is, in my opinion, an end of the matter so far as appeal is concerned, and the prisoner cannot continue to appeal from time to time thereafter, whenever a new point occurs to him or to his legal advisers or whenever a new fact is alleged to have come to light. This does not mean that injustice must necessarily occur when new substantial evidence pointing to a prisoner's innocence is discovered after his appeal has been finally disposed of. In such a case recourse may be had to sec. 26 of the *Criminal Appeal Act of* 1912, or to sec.

(1) (1933) 50 W.N. (N.S.W.) 71.

(2) (1931) S.A.S.R. 376.

475 of the *Crimes Act* 1900. There is no reason to suppose that the procedure provided by those sections is not adequate for the consideration of any matter which it may now be sought to raise on behalf of the prisoner. For these reasons I am of the opinion that the preliminary objection taken on behalf of the Crown must be sustained, and that we must decline to entertain the present application."

An application by Grierson for special leave to appeal against that decision was made to the High Court on 2nd September 1938.

Evatt K.C. (with him *Kirby*), for the applicant. The court has jurisdiction to reopen an appeal which has been abandoned or dismissed (*R.* v. *Pitman* (1); *R.* v. *Cox* (2); *R.* v. *Scott* (3); *Longworth* v. *Campbell* (4); *Goldsbrough & Co.* v. *MacMahon* (5)). By sec. 12 of the *Criminal Appeal Act of* 1912 (N.S.W.) the Court of Criminal Appeal is authorized to exercise in relation to the proceedings of the court "any other powers" exercisable by the Supreme Court in appeals and applications. There is nothing in that Act, nor in the *Crimes Act* 1900 (N.S.W.), which indicates that an appeal which has been dealt with by the court may not be reopened.

Crawford K.C., for the respondent. The words "to reopen an appeal which has been dismissed" in *R.* v. *Pitman* (6) refer only to dismissal by way of withdrawal of the notice of abandonment (*R.* v. *Cox* (7)). That matter is covered by rule 23 of the English rules. None of the English cases referred to on behalf of the applicant is in respect of an application similar to the one in this case. Each was in respect of an abandonment and was for the purpose of having another trial on the merits. The court has no jurisdiction to reopen an appeal that has been determined on the merits (*R.* v. *Edwards* [*No.* 2] (8)). After such a determination the matter comes within the scope of sec. 26 of the *Criminal Appeal Act of* 1912 (N.S.W.), and sec. 475 of the *Crimes Act* 1900 (N.S.W.) (*R.* v. *Fratson* (9)). The

(1) (1916) 12 Cr. App. R. 14, at pp. 14, 15.
(2) (1920) 15 Cr. App. R. 36.
(3) (1924) 18 Cr. App. R. 10.
(4) (1882) 3 L.R. (N.S.W.) 329.
(5) (1887) 8 L.R. (N.S.W.) 118; 3 W.N. (N.S.W.) 119.
(6) (1916) 12 Cr. App. R., at p. 15.
(7) (1920) 15 Cr. App. R. 36.
(8) (1931) S.A.S.R. 376.
(9) (1930) 22 Cr. App. R. 29.

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benefits of the first-mentioned section are still available to the applicant.

Evatt K.C., in reply.

Cur. adv. vult.

Sept. 16.

The following written judgments were delivered :—

RICH J. The prisoner in this case after his conviction in December 1932 appealed from his conviction to the Supreme Court of New South Wales sitting as a Court of Criminal Appeal. That appeal was dismissed in March 1933. In August 1933 he applied to this court for special leave to appeal which was refused. He now applies to us for special leave to appeal from the refusal of the New South Wales court to reopen his original appeal or to give him leave to bring a fresh appeal. His application is based upon an allegation that "certain material facts had become known respecting the evidence of one of the material witnesses for the Crown in the trial." The Court of Criminal Appeal was established by the *Criminal Appeal Act of* 1912 (N.S.W.), which took the place of provisions for appeals, writs of error, informalities and new trials contained in secs. 428, 470, 471, 472, 473 and 474 of the *Crimes Act* 1900, these sections being repealed, and was amended by the *Crimes* (*Amendment*) *Act* 1924 (No. 10), secs. 32 and 33, and Act No. 2 1929. Sec. 475 of the *Crimes Act* 1900, however, which provides for an inquiry after conviction, was not repealed. Moreover, the *Criminal Appeal Act of* 1912, sec. 26, while preserving the pardoning power of the Governor, enables the Minister of Justice to refer any petition for the exercise of the pardoning power to the Court of Criminal Appeal, and the case is then to be heard and determined as in the case of an appeal by a person convicted ; or it enables the Minister to refer any point arising in the case to the court for its opinion thereon. In making the remedies provided by sec. 475 of the *Crimes Act* 1900 and sec. 26 of the *Criminal Appeal Act* of 1912 available to a prisoner after conviction the legislature has, I think, recognized that the jurisdiction of the Court of Criminal Appeal is confined within the limits of the Act and that when the court has heard an appeal on its merits and given its decision the appeal cannot be reopened.

In my opinion the decision of the Supreme Court was right and this application should be refused.

STARKE J. The motion for special leave to appeal should be dismissed.

I agree entirely with the reasons given by *Jordan* C.J. for the decision of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal, and I can add nothing to them of any value.

DIXON J. This is an application on behalf of a prisoner for special leave to appeal from a decision of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal. The court refused an application on the part of the prisoner to reopen an appeal which he had brought unsuccessfully from his conviction or to give him leave to bring a fresh appeal. His conviction took place on 15th December 1932, and the appeal which he brought from the conviction was dismissed on 10th March 1933. The ground assigned for his application to reopen the former appeal or to permit a new one is an allegation that facts had become known concerning a material witness for the Crown which might affect the conviction.

The Supreme Court held, in accordance with a decision of the Supreme Court of South Australia (*R.* v. *Edwards* [*No.* 2] (1)), that a second appeal from a conviction could not be entertained after the dismissal, upon the merits, of an appeal or application for leave to appeal and that the first appeal could not be reopened after a final determination.

In my opinion this conclusion is correct. The jurisdiction is statutory, and the court has no further authority to set aside a conviction upon indictment than the statute confers. The *Criminal Appeal Act of* 1912 (N.S.W.) is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by a procedure discoverable from independent sources. It defines the grounds, prescribes the procedure and states the duty of the court. The statute deals with criminal appeals rather as a right or benefit conferred on prisoners convicted of

(1) (1931) S.A.S.R. 376.

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indictable offences and sets out the kind of convictions and sentences from which they may appeal and lays down the conditions on which they may appeal as of right and by leave and the procedure which they must observe. It limits the time within which appeals and applications for leave to appeal may be brought, subject, however, to a discretionary power in the court to extend the period except where the sentence is capital. The grounds or principles upon which the court is to determine appeals are stated, and the duty is imposed on the court of dismissing an appeal, unless on those principles it determines that it should be allowed. The determination of an appeal is evidently definitive, and a conviction unappealed is equally final. No considerations controlling or affecting the conclusion to be deduced from these provisions are supplied by analogous civil proceedings. Appeal is not a common-law remedy, and proceedings at law are only subject to that remedy by statute (*Attorney-General* v. *Sillem* (1)). A second writ of error could not, it would seem, be brought upon the same record after an affirmance upon the first (*Lambell* v. *Pretty John* (2) ; *Horne* (or *Herne*) v. *Bushell* (3) ; *Burleigh* v. *Harris* (4) ; *Winchurch* v. *Belwood* (5)).

In Chancery, rehearings, that is, appeals, were no longer admitted after enrolment of the decree, although an independent bill of review might be filed based upon error apparent or on facts newly discovered (*Sidney Smith's Chancery Practice*, 7th ed. (1862), vol. 1, p. 809 et seq.). Under the Judicature system an action may be brought to set aside a judgment obtained by fraud, but it is an independent proceeding equitable in its origin and nature (*Ronald* v. *Harper* (6), per *Cussen* J. ; *Halsbury's Laws of England*, 2nd ed., vol. 19, p. 266, and the cases there collected, particularly *Jonesco* v. *Beard* (7)). But under that system no court has authority to review its own decision pronounced upon a hearing *inter partes* after the decision has passed into a judgment formally drawn up (*In re St. Nazaire Co.* (8)). If the prisoner has abandoned his appeal, the Court of

(1) (1864) 2 H. & C. 581, at pp. 608, 609 ; 159 E.R. 242, at p. 253.
(2) (1725) 2 Stra. 690 ; 93 E.R. 786.
(3) (1733) 2 Stra. 949 ; 93 E.R. 961 ; 2 Barn. K.B. 253, 260, 262 ; 94 E.R. 482, 487, 489.
(4) (1734) 2 Stra. 975 ; 93 E.R. 978.
(5) (1692) 1 Salk. 337 ; 91 E.R. 296.
(6) (1913) V.L.R. 311, at p. 318.
(7) (1930) A.C. 298.
(8) (1879) 12 Ch. D. 88.

Criminal Appeal in England will exercise a discretion to allow him to withdraw his notice of abandonment, notwithstanding that it operates as a dismissal of the appeal (*Halsbury's Laws of England*, 2nd ed., vol. 9, p. 273, and the cases cited in note *o*). But in such a case there has been no determination by the court, and there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained.

Notwithstanding the dismissal of an appeal, the powers conferred by sec. 26 of the *Criminal Appeal Act of* 1912 (N.S.W.) and by sec. 475 of the *Crimes Act* 1900 (N.S.W.) remain exercisable at the instance of the executive.

In my opinion the application should be refused.

McTIERNAN J. In my opinion, the application should be refused.

I agree with the reasons contained in the judgments of my brothers *Rich* and *Dixon*.

Application refused.

Solicitor for the applicant, *P. N. Roach*.

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.