[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPLICANT-APPELLANT;

AND

JOHNSTONE . . . . . RESPONDENT.

H. C. OF A. 1945.

SYDNEY, *Aug.* 20.

MELBOURNE, *Oct.* 15.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Criminal Law—Habitual criminal—Declaration—Offences within schedule—Simple larceny—Stealing from the person—Summary conviction—Habitual Criminals Act 1905 (*N.S.W.*) (*No.* 15 *of* 1905), *s.* 3 (2), (3), *Schedule—Crimes Act* 1900-1929 (*N.S.W.*) (*No.* 40 *of* 1900—*No.* 2 *of* 1929), *ss.* 476, 477, 501.

Convictions in respect of simple larceny or stealing from the person, where the offender has been proceeded against summarily under s. 501 of the *Crimes Act* 1900-1929 (N.S.W.), are convictions of offences comprised in class (V) of the schedule to the *Habitual Criminals Act* 1905 (N.S.W.) for the purposes of a declaration made under the latter Act.

So *held* by *Latham* C.J., *Rich*, *Dixon* and *Williams* JJ. (*Starke* J. dissenting).

Opinion of *Dixon* and *McTiernan* JJ. in *Commissioner for Railways* (*N.S.W.*) v. *Pitman*, (1936) 56 C.L.R. 144, that s. 501 of the *Crimes Act* refers to existing offences and does not define new ones, approved and applied.

Decision of the Court of Criminal Appeal of New South Wales: *R.* v. *Johnstone*, (1945) 45 S.R. (N.S.W.) 367; 62 W.N. 207, reversed.

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

Hilton Lawrence Johnstone was convicted before a stipendiary magistrate of the offence of stealing from the person, an offence punishable summarily without his consent under s. 501 of the *Crimes Act* 1900-1929 (N.S.W.). During the preceding nine years, Johnstone had been convicted under s. 501 twice of stealing from the person and five times of larceny and he had many other convictions. Stealing from the person and larceny are indictable offences under ss. 94 and 117 of the *Crimes Act* 1900-1929.

In addition to imposing a sentence of twelve months' imprisonment with hard labour upon Johnstone, the magistrate directed that an

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application be made by the clerk of the peace to a court of quarter sessions to have Johnstone declared an habitual criminal.

The declaration was made under sub-ss. 2 and 3 of s. 3 of the *Habitual Criminals Act* 1905 (N.S.W.) by *Holt*, Chairman of Quarter Sessions, and Johnstone appealed to the Court of Criminal Appeal of New South Wales.

The Chairman of Quarter Sessions reported that, apart from the question as to whether Johnstone's convictions warranted the declaring of Johnstone an habitual criminal, the important question arose as to whether convictions in respect of offences for simple larceny or stealing from the person, where the offender had been proceeded against under s. 501 of the *Crimes Act* 1900-1929, were summary convictions of offences comprised in class (V) of the schedule to the *Habitual Criminals Act* 1905.

The Court of Criminal Appeal held that s. 501 of the *Crimes Act* created new offences, and that therefore a conviction for stealing from the person or for larceny under that section was not a conviction of an offence comprised in any of the classes in the schedule to the *Habitual Criminals Act*, s. 501 not being one of the sections specified in that schedule : *R.* v. *Johnstone* (1).

The Crown applied to the High Court for special leave to appeal against that decision and it was agreed by the parties that in the event of special leave being granted the hearing of the application should be regarded as the hearing of the appeal.

The relevant statutory provisions are set forth in the judgments hereunder.

Barwick K.C. (with him *Downing*), for the applicant. It is immaterial whether s. 501 of the *Crimes Act* creates a new offence, because on the proper reading of s. 3 of the *Habitual Criminals Act* and the schedule the classification of the offences is not by reference to the sections of the *Crimes Act* but to their nature. If it were otherwise, regard could not be had, as provided in s. 3 (4) of the *Habitual Criminals Act*, to offences committed outside New South Wales. It follows that particular methods of procedure to obtain conviction should be disregarded. A conviction for simple larceny under s. 501 of the *Crimes Act* is of the same nature as the larceny mentioned in class (V) in the schedule to the *Habitual Criminals Act*. It is the precise offence except as to subject matter. The schedule to the *Habitual Criminals Act* is not limited strictly to the offences prescribed under the sections referred to therein. Section 501 of the *Crimes Act* does not create new offences (*Commissioner for Railways*

(1) (1945) 45 S.R. (N.S.W.) 367 ; 62 W.N. 207.

(*N.S.W.*) v. *Pitman* (1)). In the view the Court took, an expression of opinion on this point was unnecessary in *Commissioner for Railways* (*N.S.W.*) v. *Cavanough* (2). All that happens under s. 501 is that jurisdiction is given to magistrates, although the way in which jurisdiction is given is by the formula provided therein. As in *Cavanough's Case* (2), the problem in *Pitman's Case* (3) was whether the subject conviction was a conviction for a felony or a misdemeanour for the purposes of s. 80 of the *Government Railways Act* 1912-1930 (N.S.W.). The *discrimen* is the liability to punishment at the time the offence is committed and not the actual punishment. Procedure and actual punishment are immaterial (*In re Burley* (4)). The whole point and policy of the *Habitual Criminals Act* is not so much directed to the procedure by which the result is arrived at, as to the nature of the crimes. The point actually decided in *Commissioner for Railways* (*N.S.W.*) v. *Hailey* (5) does not arise in this case.

Sugerman K.C. (with him *Sheahan*), for the respondent. The scheme shown in the statutes under consideration is not a scheme of a logical nature; inferences cannot be drawn from any results which may follow. The curious position arises in a number of cases that a particular offence may be an offence on conviction for which a declaration under the *Habitual Criminals Act* may be made but previous convictions for the like offence are not qualifications for a declaration. In ss. 476 and 477 of the *Crimes Act* is a considerable list of offences punishable under those sections which do not come within any of the classes in the schedule to the *Habitual Criminals Act*. Sections 140 to 147 inclusive of the *Crimes Act* dealing with various forms of larceny are not brought into the schedule. Again, on conviction under s. 526A of the *Crimes Act*, the summary offences, the prisoner may be convicted of being an habitual criminal; on the indictable offences he may not. The legislation does not provide any orderly scheme. The sections which are referred to in the schedule to the *Habitual Criminals Act* have a real governing effect upon the scope of the general words which appear in the classes in the schedule. The legislature was concerned with the way in which the offence was prosecuted and not with the punishment attaching to it. The matter is quite unconnected with the question whether the particular offence is a felony or not.

[DIXON J. In *Ex parte Cusack*: *Re Searson* (6) s. 501 of the *Crimes Act* was treated entirely as a jurisdictional section and it was

(1) (1936) 56 C.L.R. 144, at pp. 150, 151.
(2) (1935) 53 C.L.R. 220.
(3) (1936) 56 C.L.R. 144.
(4) (1932) 47 C.L.R. 53.
(5) (1938) 60 C.L.R. 83.
(6) (1935) 52 W.N. (N.S.W.) 214.

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held that the time limitations did not apply to prosecutions under that section.]

The scheme of the *Crimes Act* is adverted to in *Pitman's Case* (1). The only offences which may be taken into account upon an application to declare a person an habitual criminal are the precise offences set forth in the schedule to the *Habitual Criminals Act*. Section 501 of the *Crimes Act* creates a new and qualified offence of larceny. To apply under s. 3 (4) the provisions of the *Habitual Criminals Act* to convictions outside New South Wales it is necessary to find different convictions for offences the ingredients whereof are the same as the ingredients of the offences set forth in the schedule. The operation of sub-s. 2 of s. 3 is confined to identical offences; s. 501 of the *Crimes Act* creates other offences which are not identical offences (*Pitman's Case* (2)). Under s. 501 the prosecutor elects the manner in which he proposes to prosecute while under s. 477 it rests upon the action of the magistrate if the accused consents.

Barwick K.C., in reply, referred to *Ex parte Nomarhas*; *Re Comans* (3).

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered:—

LATHAM C.J. The *Habitual Criminals Act* 1905 (N.S.W.) s. 3 (2) and (3) are in the following terms:—"(2) Where a person is convicted before a stipendiary or police magistrate of an offence punishable summarily with or without the consent of the accused under any of the following sections of the Crimes Act, 1900, as amended by the Crimes (Amendment) Act, 1924, namely, sections four hundred and seventy-seven, five hundred and one, or 526A, and such person has been previously convicted either on indictment or summarily on more than three occasions of an offence comprised in any of the classes in the Schedule, the stipendiary or police magistrate may, in his discretion, in addition to the sentence, direct that an application be made by the clerk of the peace to a judge of the Supreme Court or to a court of quarter sessions to have the person so convicted declared an habitual criminal. (3) A judge of the Supreme Court or a court of quarter sessions may, upon the application of the clerk of the peace, by warrant declare the person so convicted to be an habitual criminal."

The respondent to this application for special leave to appeal was convicted before a stipendiary magistrate of an offence punish-

(1) (1936) 56 C.L.R., at pp. 152, 153.
(2) (1936) 56 C.L.R., at pp. 148, 152-155.
(3) (1944) 44 S.R. (N.S.W.) 187; 61 W.N. 97.

able summarily without his consent under s. 501 of the *Crimes Act*, namely, stealing from the person. He had previously been convicted under s. 501 twice of stealing from the person and five times of larceny, and had many other convictions. Stealing from the person and larceny are indictable offences under ss. 94 and 117 of the *Crimes Act* respectively. They are offences comprised in class (V) of the schedule to the *Habitual Criminals Act* by the following words: "*Crimes Act*, 1900—Sections 94 to 98 inclusive—Robbery. . . . Sections 117 to 131 inclusive, 134 to 139 inclusive, 148 to 153 inclusive—Larceny."

The stipendiary magistrate directed that an application should be made by the clerk of the peace to a court of quarter sessions to have the respondent declared an habitual criminal. A court of quarter sessions made such a declaration. The respondent appealed to the Court of Criminal Appeal. The learned Chairman of Quarter Sessions reported that the question which arose was whether convictions in respect of offences for simple larceny or stealing from the person, where the offender has been proceeded against under s. 501 of the *Crimes Act*, 1900, are summary convictions of offences comprised in class (V) of the schedule to the *Habitual Criminals Act* 1905. The Court of Criminal Appeal, following the decision of the Supreme Court in *Cavanough* v. *Commissioner for Railways* (1) and the decision, upon an equal division of opinion in this Court, in *Commissioner for Railways* (*N.S.W.*) v. *Pitman* (2), held that s. 501 of the *Crimes Act* created new offences, and that therefore a conviction for stealing from the person or for larceny under s. 501 was not a conviction of an offence comprised in any of the classes in the schedule, s. 501 not being one of the sections specified in the schedule.

Before referring to s. 501 of the *Crimes Act*, it may be pointed out that s. 3 (2) of the *Habitual Criminals Act* refers to offences punishable summarily with or without the consent of the accused under ss. 477 and 501 of the *Crimes Act*. Section 477 provides for the punishment summarily of certain indictable offences with the consent of the accused. Section 501 provides for the punishment summarily of certain indictable offences without the consent of the accused. A summary conviction under either of those sections provides a starting point for the application of s. 3 (2) of the *Habitual Criminals Act*. But a declaration that a person is an habitual criminal can be made only if, there having been such a summary conviction, he has been convicted "either on indictment or summarily on more than three occasions of an offence comprised in any of the classes in the Schedule." Those offences are, as already stated in the case of stealing

(1) (1935) 35 S.R. (N.S.W.) 162; 52 W.N. 31. (2) (1936) 56 C.L.R. 144.

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from the person and larceny, all specified by reference to groups of sections and by a general description, e.g., to take another example, "Sections 33 to 37 inclusive—Wounding." Those offences are all indictable offences. The words "convicted either on indictment or summarily . . . of an offence comprised in the Schedule" in themselves are sufficient, in my opinion, to show that an offence comprised in the schedule is regarded as being the same offence whether the conviction for it is on indictment, or summary under ss. 477 and 501.

This conclusion is reinforced by a consideration of s. 501 of the *Crimes Act*. That section provides that "whosoever commits or attempts to commit—(a) simple larceny; or (b) the offence of stealing any chattel, money, or valuable security from the person of another; or (c) any offence mentioned in" specified sections and the amount of the money or the value of the property in respect of which the offence is charged, or of the reward, does not exceed £10 shall on conviction in a summary manner before two justices be liable to imprisonment for twelve months or to pay a fine of fifty pounds. It is further provided that the jurisdiction conferred on two justices by the sections shall be exercisable only by a stipendiary or police magistrate.

It is argued for the respondent that this section creates new offences. Simple larceny is made an offence by s. 117 and stealing from the person is made an offence by s. 94. The offences mentioned in par. c are created by the sections specified in the paragraph. It is contended that if the amount of money, &c., concerned does not exceed £10 and the accused is convicted by a magistrate, the offence is different from the offences mentioned in the other sections referred to in s. 501.

I find great difficulty in acceding to this view of the effect of s. 501. The offence for which a person is prosecuted is, e.g., simple larceny. That is an offence under s. 117. Section 501 provides that if he is convicted of that offence by a magistrate summarily the limit of punishment for the offence shall be as stated in s. 501 and not penal servitude as stated in s. 117. But the offence is the same, viz., simple larceny—whether prosecuted on indictment under s. 117 or summarily under s. 501. The latter section provides only for a particular summary procedure with a less severe maximum penalty than if the prosecution for that same offence is by way of indictment.

This conclusion is, I think, strongly supported by s. 548A, which is as follows: "On the hearing of a charge for any offence referred to in sections five hundred and one or 526A of this Act, if the justices are of opinion that the charge should not be disposed of summarily they

shall abstain from any adjudication thereupon, and shall deal with the case by committal or holding to bail as in an ordinary case of an indictable offence."

If upon a prosecution for an offence " referred to in s. 501 " the magistrate commits for trial in pursuance of s. 548A, the accused goes before a jury for trial, necessarily upon the offence charged, and equally necessarily upon an indictable offence, i.e., the offence " referred to in " (but not created by) s. 501. The offence is the same offence whether it is prosecuted upon indictment or summarily.

I agree with, and need not repeat, the reasoning set forth in the judgments of *Dixon* and *McTiernan* JJ. in *Commissioner for Railways (N.S.W.)* v. *Pitman* (1).

In my opinion, special leave to appeal should be given, the appeal allowed, the order of the Court of Criminal Appeal set aside, and the order of the Court of Quarter Sessions restored.

RICH J. The question submitted to the Supreme Court by the Chairman of the Quarter Sessions was whether convictions in respect of simple larceny or stealing from the person, where the offender has been proceeded against under s. 501 of the *Crimes Act* 1900, are summary convictions of offences comprised in class (V) of the schedule to the *Habitual Criminals Act* 1905 (N.S.W.).

The question originated when the respondent was declared to be an habitual criminal under s. 3, sub-clauses 2 and 3.

On appeal to the Supreme Court, the declaration was set aside and the appeal allowed.

The cases referred to by Judge *Holt*, the Chairman of Quarter Sessions, and considered by the Supreme Court, justified the Chief Justice of that Court and *Halse Rogers* J. in characterizing the position with respect to ss. 477 and 501 of the *Crimes Act* as " somewhat remarkable " or " the result as unfortunate."

An application for special leave to this Court was directed to be argued as on an appeal so that the decisions in question might be reviewed.

The matter turns on the meaning and application with reference to the schedule of the words in s. 3 (2) " such person has been previously convicted either on indictment or summarily on more than three occasions of an offence comprised in any of the classes in the Schedule." The relevant class in the schedule is expressed as follows :—" Class (V) *Crimes Act*—1900 Sections 94 to 98 inclusive—Robbery. . . . Sections 117 to 131 inclusive—Larceny."

(1) (1936) 56 C.L.R., at pp. 148-151, 155-158.

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The prisoner had been convicted summarily on a sufficient number of occasions of stealing from the person and larceny, offences dealt with by ss. 94 and 117. Prima facie, therefore, the words of the provision made by s. 3 (2), which I have quoted, were satisfied. But the summary convictions were made under s. 501 of the *Crimes Act* and it is said that the operation of that section is not simply to give summary jurisdiction over offences already existing, such as those I have mentioned, but to create new and distinct offences, though based on the old offences. I shall not again set out the section ; it is sufficiently stated in the judgment of the Chief Justice and it will also be found in the reports of the decisions of this Court in *Commissioner for Railways (N.S.W.)* v. *Cavanough* (1) and *Commissioner for Railways (N.S.W.)* v. *Pitman* (2). The suggestion is that s. 501 of the *Crimes Act* creates new offences, one ingredient of which is that the property in respect of which the offence is charged does not exceed £10, and the other ingredients of which are defined by the common law, in the case of simple larceny and the offence of stealing from the person, and, in the case of the other offences, by the sections enumerated in s. 501 (1) (c) with or without the aid of the common law. I am unable to adopt this view. In my opinion, s. 501 is a jurisdictional section. The limitation of £10 goes to the jurisdiction of the magistrate and not to the classification of the crime. In the same way the limitation of the punishment to imprisonment for twelve months and the payment of a fine of £50 concerns the power of the magistrate and not the definition of the crime or its legal description. I take in this case the same view of the relevant provisions as was expressed in relation to a kindred problem in *In re Burley* (3). In my opinion, the prisoner was liable to be dealt with under s. 3 (2) of the *Habitual Criminals Act* 1905. I am, therefore, of opinion that we should grant special leave to appeal and, treating the application as the hearing of the appeal, allow the appeal, set aside the order of the Court of Criminal Appeal and restore that made at Quarter Sessions.

STARKE J. Motion on the part of the Solicitor-General for New South Wales for special leave to appeal from a judgment of the Supreme Court of New South Wales sitting as a Court of Criminal Appeal setting aside a declaration that the prisoner was an habitual criminal purporting to have been made under the *Habitual Criminals Act* 1905-1924. By that Act " where a person is convicted before a stipendiary or police magistrate of an offence punishable summarily

(1) (1935) 53 C.L.R. 220.
(2) (1936) 56 C.L.R. 144.
(3) (1932) 47 C.L.R., at p. 58.

with or without the consent of the accused under any of the following sections of the Crimes Act,1900, as amended by the Crimes (Amendment) Act, 1924, namely, sections . . . five hundred and one . . . and such person has been previously convicted either on indictment or summarily on more than three occasions of an offence comprised in any of the classes in the Schedule, the . . . magistrate may, in his discretion, in addition to the sentence, direct that an application be made by the clerk of the peace to a judge of the Supreme Court or to a court of quarter sessions to have the person so convicted declared an habitual criminal " and a declaration may be made accordingly.

The " classification of offences for the purposes of the Act " set forth in the schedule is so far as material : " Class (V), Crimes Act, 1900 . . . Sections 117 to 131 inclusive, 134 to 139 inclusive, 148 to 153 inclusive—Larceny."

The question is whether convictions under s. 501 of the *Crimes Act* 1900 for simple larceny or stealing from the person are summary convictions of offences comprised in Class (V) of the schedule to the *Habitual Criminals Act* 1905-1924.

The offences in the schedule are arranged in five classes according to the nature of the offence, as wounding, poisoning, larceny &c., but the particular offences within each class are identified by the sections and s. 501 is not one of the sections mentioned in Class (V) relating to larceny. This is clearer in the *Habitual Criminals Act*, enacted in 1905 (No. 15 of 1905). The schedule in that Act is " Classification for the purposes of this Act " of sections of the *Crimes Act* 1900. There are eight classes mentioning the particular sections and classifying them according to the nature of the offence as wounding, poisoning, robbery, larceny and so forth. But though the present schedule of the *Habitual Criminals Act* 1905-1924 is not identical with the Act of 1905, No. 15, the meaning of the schedule is unaltered.

Now s. 501 (1) provides that " whosoever commits or attempts to commit—(a) simple larceny ; or (b) the offence of stealing any chattel . . . or valuable thing ; (c) any offence mentioned in the following sections of this Act " (which are set forth) " and the amount of money or the value of the property in respect of which the offence is charged, or of the reward, does not exceed ten pounds, shall on conviction in a summary manner " (a stipendiary or police magistrate, sub-s. 2) " be liable to imprisonment for twelve months or to pay a fine of fifty pounds."

And it is said that s. 501, upon its proper construction, merely provides for the summary hearing of the offences created by other

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sections of the Act, namely, s. 117 (simple larceny), and the offences mentioned in sub-s. c.

The decision of the Supreme Court in *Cavanough* v. *Commissioner for Railways* (1), and see in this Court (2), and of this Court in *Commissioner for Railways (N.S.W.)* v. *Pitman* (3), are opposed to this view, and so is sub-s. b of s. 501, for it is restricted to stealing from the person which is not the offence described in s. 134 nor the whole content of the common law offence, larceny. Upon reconsideration, these cases appear to me to have been rightly decided.

The history of s. 501, the arrangement of the *Crimes Act*, and the form of the section all, I think, support the view that s. 501 does a good deal more than provide for the summary hearing of offences created by other sections. In the *Crimes Act* 1900, s. 501 related to the unlawful use of another person's cattle and was arranged under the sub-heading "Larceny and unlawful taking &c. of animals." But the amending Act No. 10, 1924, s. 24, omitted s. 501 and the heading "Larceny and unlawful taking &c. of animals" and inserted the present s. 501. And at this point the provisions of s. 154A and s. 526A, which relate to the using of vehicles or boats, inserted in the *Crimes Act* by the Act No. 10, 1924, ss. 9, 25, might be noticed. Both sections state the offence in identical words, but in one case the offender is liable to imprisonment for three years whilst in the other the offender shall on conviction before two justices be liable for imprisonment for twelve months or to pay a fine of one hundred pounds. It would be somewhat difficult, I should think, to maintain that these two sections in identical words constitute but one offence and provide merely different methods of trial. Again, s. 548A should be noticed, which speaks of "a charge for any offence referred to in s. 501 or s. 526A of this Act" and gives power to deal with the case by committal.

But it is for the offence described in s. 501 or s. 526A that the committal is made "as in an ordinary case of an indictable offence." The arrangement of the Act as it stands at present was enacted by the amending Act No. 2, 1929, s. 21.

Part IV. covers "Offences relating to property" and chapter I., "Stealing and like offences", with sub-headings such as "Robbery," "Larceny" and so forth. Part XIV. covers "Offences punishable by Justices and procedure before Justices generally." And there are several chapters. Chapter I. covers "Indictable offences punishable summarily only by consent of the accused." Chapter II. covers "Offences punishable summarily in certain cases by whipping."

(1) (1935) 35 S.R. (N.S.W.) 340; 52 W.N. 123.

(2) (1935) 53 C.L.R., at pp. 226, 227.

(3) (1936) 56 C.L.R. 144.

Chapter III. covers "Other offences punishable summarily" with various sub-headings such as "Assaults," "Larceny and similar offences."

The distinction between an indictable offence punishable summarily and offences punishable summarily is thus clearly recognized. And many of the offences contained in Part XIV. are not indictable offences at all. By way of illustration, I refer to the *Crimes Act* 1900-1929, ss. 482-492, relating to offences punishable summarily, in certain cases by whipping, and also to the provisions in ss. 505, 511, 525, 526B, which relate to "Person drunk while driving vehicle," and is arranged under the heading "Larceny and similar offences." But the form of all these sections is the same as s. 501, "Whosoever" or "any person" who does certain acts "shall on conviction before . . . Justices be liable" to imprisonment or fine as the case may be. Thus the words in s. 501, "Whosoever commits or attempts to commit" certain acts shall on conviction in a summary manner before a magistrate be liable to imprisonment for twelve months or to pay a fine, are the words and the appropriate words commonly adopted by the legislature to create and describe offences. And prescribing in s. 501 that the amount of money or the value of property in respect of which the offence is charged shall not exceed ten pounds is more than a limitation of jurisdiction; it is an essential ingredient of the offence created by the section.

For these reasons, special leave to appeal should be refused in this case and also, I think, because the Crown might well have made the matter clear by legislation instead of appealing to this Court, in a matter which has only local importance, some eight years after the decision of *Pitman's Case* (1).

DIXON J. The question in this application by the Crown for special leave to appeal is whether, for the purposes of sub-s. 2 of s. 3 of the *Habitual Criminals Act* 1905 (N.S.W.), prior summary convictions obtained under s. 501 of the *Crimes Act* 1900 (N.S.W.) may be taken into account in ascertaining whether the prisoner has been previously convicted a sufficient number of times.

Under s. 3 of the *Habitual Criminals Act*, it is necessary that the prisoner shall have been convicted of offences included or comprised in certain classes mentioned in the schedule. If s. 501 creates new offences, it is clear that the new offences so created are not specified in the schedule. There are, it is true, some grounds for a contention that it is not absolutely necessary that prior convictions shall relate to offences distinctly specified if the offences are substantially the

(1) (1936) 56 C.L.R. 144.

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same as those specified, but I pass that contention by. For if s. 501 does not create new offences, but gives summary jurisdiction over offences, elsewhere or otherwise created, subject to a qualification or condition as to the amount involved in the offence, then it is immaterial that s. 501 is not among the sections mentioned in the schedule, provided, of course, that the convictions are for offences so mentioned, as in fact they are in the present case.

In *Commissioner for Railways (N.S.W.)* v. *Pitman* (1), I expressed the opinion that s. 501 refers to existing offences and does not define new ones, and that the fact that the section adds a limitation in reference to the amount or value of the subject matter of the crime does not affect the definition of the crime, because the limitation goes only to the jurisdiction conferred on the magistrate. I have seen no reason to depart from that conclusion or from the reasons which in *Pitman's Case* (2) I gave in support of it. I do not propose to repeat them.

I am therefore of opinion that the prisoner in this case was liable under the *Habitual Criminals Act* to a declaration that he is an habitual criminal. I think special leave to appeal should be granted to the Crown, and that the proceedings before us should be treated as an appeal which should be allowed. The order of the Supreme Court sitting as a Court of Criminal Appeal should be set aside and the order or declaration of the Court of Quarter Sessions at Sydney restored.

WILLIAMS J. This is a motion on notice by the Crown for special leave to appeal against a judgment of the Supreme Court of New South Wales sitting as the Court of Criminal Appeal which set aside a declaration by a Chairman of Quarter Sessions declaring the respondent an habitual criminal within the meaning of the *Habitual Criminals Act* 1905 (N.S.W.) as amended.

The respondent was convicted summarily before a stipendiary magistrate of stealing from the person and sentenced to twelve months imprisonment with hard labour. The magistrate, in the exercise of the powers conferred upon him by s. 3 (2) of the *Habitual Criminals Act*, directed that an application should be made by the clerk of the peace to a court of quarter sessions to have the respondent declared an habitual criminal. The previous convictions relied on in support of the application were convictions under s. 501 (1) (a) of the *Crimes Act* 1900, as amended—simple larceny : and s. 501 (1) (b) —the offence of stealing any chattel, money or valuable security from the person of another.

(1) (1936) 56 C.L.R. 144. (2) (1936) 56 C.L.R., at pp. 150, 151.

The *Habitual Criminals Act*, s. 3 (2), authorizes the application to be made where a person is convicted of an offence punishable summarily with or without the consent of the accused under ss. 477, 501 or 526A of the *Crimes Act*, as amended, and such person has been convicted either on indictment or summarily on more than three occasions of an offence comprised in any of the classes in the schedule. The schedule, which is intituled "classification of offences for the purpose of this Act," contains five classes, class (V) being sub-divided into several sub-classes. These include "Sections 94 to 98 inclusive,—Robbery" and "Sections 117 to 131 inclusive, 134 to 139 inclusive, 148 to 153 inclusive,—Larceny."

Section 94 of the *Crimes Act* provides that whosoever steals any chattel, money or valuable security from the person of another shall, except where a greater punishment is provided by this Act, be liable to penal servitude for ten years. Section 117 provides that whosoever commits simple larceny, or any felony by this Act made punishable like simple larceny, shall, except in the cases hereinafter otherwise provided for, be liable to penal servitude for five years. Sections 476 and 477 provide that where a person is charged before one or more justices with certain offences (which include, *inter alia*, s. 477 (c), committing simple larceny and, s. 477 (e), stealing any chattel, money or valuable security from the person of another), if the accused consents to the charge being disposed of summarily, and if the subject matter of the charge or the value of the property involved does not amount to £100, the justice or justices shall have jurisdiction to hear and determine the charge and pass sentence of imprisonment for twelve months or inflict a fine of £50 upon the person charged. Section 501 (1) provides that whosoever commits or attempts to commit (a) simple larceny or (b) the offence of stealing any chattel, money or valuable security from the person of another and the amount of money or value of the property in respect of which the offence is charged does not exceed £10 shall on conviction in a summary manner before two justices be liable to imprisonment for twelve months or to pay a fine of £50. Section 501 (2) provides that the jurisdiction conferred on two justices by this section and by s. 526A of this Act shall be exercised only by a stipendiary or police magistrate. Sections 477 (b) and 501 (1) (c) include a large number of offences by reference to the previous sections in which these offences are mentioned. Many of these sections are enumerated in the schedule to the *Habitual Criminals Act*. Section 548A provides that on the hearing of a charge for any offence referred to in s. 501 or s. 526A, the justices, if of opinion that the charge should not be disposed of summarily, shall abstain from any adjudication thereon and shall

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deal with the case by committal or holding to bail as in the ordinary case of an indictable offence.

Section 9 of the *Crimes Act* declares that whenever a person is made liable to the punishment of death, or of penal servitude, the offence for which such punishment may be awarded shall be dealt with as a felony, and whenever the term " felony " is used the same shall be taken to mean an offence punishable as aforesaid. This section corresponds with the definition of " felony " in s. 29 of the *Interpretation Act* 1897 (N.S.W.). A person who commits the offences of stealing from the person or of simple larceny commits offences within the meaning of ss. 94 and 117 for which the punishment of penal servitude may be awarded. The offence is committed at the time the person does the acts which constitute the offence. It is the same offence whether he escapes and is never brought to justice, or, being brought to justice, he is tried and convicted on indictment, or, there being jurisdiction to try the offence summarily, with or without his consent, he is tried and convicted summarily. Sections 477 and 501, instead of referring to the relevant portions of ss. 94 and 117, repeat these portions *verbatim*. It would seem that this was done in order to ensure that only the intended portions were so included. The purpose of ss. 477 and 501 is not to create new offences but to confer jurisdiction upon justices to try summarily offences defined by other sections. Otherwise it would be impossible for justices in accordance with s. 548A to abstain from adjudicating upon a charge for an offence referred to in s. 501 and commit the offender for trial as in the ordinary case of an indictable offence. The conferment by ss. 477 (f) and 501 (1) (c) of summary jurisdiction over offences mentioned in other sections of the Act is inconsistent with any other construction.

It is clear that the Court of Criminal Appeal, if the matter had been *res integra*, would have held that the convictions of the respondent under s. 501 of stealing from the person and simple larceny were convictions for offences comprised in the schedule and so could be taken into account under the *Habitual Criminals Act*. But the matter was not *res integra*, because the Supreme Court had already held in *Pitman* v. *Commissioner for Railways* (*N.S.W.*) (1) that it was bound by its own decision in *Cavanough* v. *Commissioner for Railways* (2) to hold that the offence of simple larceny described in s. 501 was a new offence and not the same offence as that described in s. 117, so that a person convicted of the former offence was not convicted of a felony. When *Pitman's Case* (3) came before this Court on appeal,

(1) (Unreported).

(2) (1935) 35 S.R. (N.S.W.) 162; 52 W.N. 31

(3) (1936) 56 C.L.R. 144.

there was an equal division, so that the decision of the Supreme Court stood. *Starke* and *Evatt* JJ. agreed with the Supreme Court that a person summarily convicted of stealing the sum of £7 under s. 501 and ordered to pay a fine and costs was not convicted of a felony within the meaning of s. 80 of the *Government Railways Act* 1912-1930. *Dixon* and *McTiernan* JJ. were of opinion that he had been convicted of a felony. *Dixon* J. said: "It appears to me that when s. 501 speaks, as it does, of simple larceny, or of the offences mentioned in specified and enumerated sections, it is referring to existing offences and not defining new ones. The fact that it adds a limitation in reference to the amount or value of the subject matter of the crime does not, I think, affect its definition. The limitation goes only to the jurisdiction conferred on the magistrate" (1). *McTiernan* J. said: "The statutory criterion for determining what is a felony is not based on the powers of the adjudicating tribunal, nor indeed, on the punishment in fact awarded (compare s. 422), but on the nature of the punishment to which the person charged exposed himself by committing the offence" (2). I agree with these citations and so prefer the opinion of *Dixon* and *McTiernan* JJ. to that of *Starke* and *Evatt* JJ.

The respondent was, therefore, in my opinion, previously convicted on more than three occasions of offences comprised in the schedule, namely those defined in ss. 94 and 117 of the *Crimes Act*, so that I would give special leave to appeal; and, as the matter has been fully argued, allow the appeal.

Special leave to appeal granted. Appeal allowed.
Order of Court of Criminal Appeal set aside.
Order of Court of Quarter Sessions restored.

Solicitor for the applicant, *A. H. O'Connor*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Pike & Pike*.

J. B.

(1) (1936) 56 C.L.R., at pp. 150, 151. (2) (1936) 56 C.L.R., at p. 158.