[HIGH COURT OF AUSTRALIA.]

DOURAN . . . . . APPELLANT;
DEFENDANT,

AND

WHISKER . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE COURT OF NORFOLK ISLAND.

H. C. OF A. 1946.

MELBOURNE, *March* 4;

SYDNEY, *April* 13.

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

High Court—Appeal—Competency—Court of Norfolk Island—"Full jurisdiction"—Information for an offence—Larceny triable summarily—Norfolk Island Act 1913-1935 (*No.* 15 *of* 1913—*No.* 14 *of* 1935), *ss.* 8, 11—*Crimes Act* 1900-1935 (*No.* 40 *of* 1900—*No.* 13 *of* 1935) (*N.S.W.*), *ss.* 117, 139, 501*—*Appeal Ordinance* 1919-1936 (*No.* 1 *of* 1919—*No.* 14 *of* 1936) (*Norfolk Island*), *s.* 6—*Judiciary Ordinance* 1936 (*No.* 15 *of* 1936) (*Norfolk Island*).

The *Norfolk Island Act* 1913-1935 provides, by s. 8 (1), that "the Governor-General may make ordinances for the peace, order, and good government of Norfolk Island," and, by s. 11 (1), that "the High Court shall have jurisdiction, with such exceptions, and subject to such conditions as are prescribed by Ordinance . . . to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of the Chief Magistrate acting judicially in Norfolk Island." The *Judiciary Ordinance* 1936 (Norfolk Island) constitutes the Court of Norfolk Island with two jurisdictions, "full" and "limited." The court in full jurisdiction is constituted by a judge, the

* The *Crimes Act* 1900-1935 (N.S.W.) provided:—By s. 117: "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." By s. 139: "Whosoever steals . . . any . . . woodwork, belonging to any building . . . shall be liable to be punished as for simple larceny." By s. 501 (1): "Whosoever commits . . . (*a*) simple larceny; or . . . (*c*) any offence mentioned in the following sections of this Act, namely . . . One hundred and thirty-nine . . . and . . . the value of the property in respect of which the offence is charged . . . does not exceed ten pounds, shall on conviction in a summary manner . . . be liable to imprisonment for twelve months or to pay a fine of fifty pounds."

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chief magistrate or a special magistrate, and has jurisdiction to punish all crimes and offences; the court in limited jurisdiction is constituted by a judge, the chief magistrate, a special magistrate or two or more justices of the peace, and has jurisdiction to punish all crimes and offences in respect of which a pecuniary penalty or a sentence of imprisonment not exceeding six months may be imposed. The Ordinance provides that the provisions of the *Crimes Act* 1900 and the *Justices Act* 1902 (N.S.W.), as amended to the date of the commencement of the Ordinance, shall, *mutatis mutandis* and so far as applicable, be in force in Norfolk Island and the jurisdiction and powers conferred by those Acts on judges and justices of the peace shall be exercised by the Court of Norfolk Island, that all crimes and offences (other than offences punishable summarily) shall be prosecuted by information in the name of a member of the police force appointed under the *Police Ordinance* 1931, and that all issues of fact joined on an information for an indictable offence (other than an offence punishable by death, for which a grand jury is provided) shall be tried by the court in its full jurisdiction and a jury of seven elders. The Ordinance also provides for an appeal from a judgment, decree, order or conviction of the court in its limited jurisdiction to the same court in its full jurisdiction, and for an appeal to the High Court from any judgment, order, decree, or sentence of the court in full jurisdiction "not being an appeal to which the *Appeal Ordinance* 1919-1936 applies." The *Appeal Ordinance* 1919-1936 provides for the reservation by the Court of Norfolk Island, in trials for indictable offences, of questions of law for the High Court, and proceeds, in s. 6: "Except as aforesaid, and except in cases of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence."

In the Court of Norfolk Island constituted by the chief magistrate, D. was charged, on the information of a police officer appointed under the *Police Ordinance* 1931, with stealing woodwork belonging to a building contrary to the provisions of s. 139 of the *Crimes Act*. It appeared that the value of the woodwork did not exceed £10. D. pleaded guilty and agreed that the charge be dealt with summarily. He was fined £50 "with the option of twelve months' imprisonment."

Held that D. was entitled to appeal as of right to the High Court against the sentence because (1) it was imposed by the Court of Norfolk Island in its full jurisdiction in exercise of the power derived from s. 501 of the *Crimes Act* to deal summarily with the indictable offence charged; (2), by *Latham* C.J., *Dixon*, *McTiernan* and *Williams* JJ., s. 6 of the *Appeal Ordinance* did not preclude an appeal as of right in the case of an indictable offence dealt with summarily, and, by *Starke* J., the *Crimes Act* did not authorize the imposition of a sentence in the alternative form adopted in this case and there was, therefor, an error on the face of the proceedings within the exception provided by s. 6 of the *Appeal Ordinance*.

Decision of the Court of Norfolk Island varied.

APPEAL from the Court of Norfolk Island.

On the information of Constable Whisker, a police officer appointed under the *Police Ordinance* 1931 (Norfolk Island), Richard Douran was charged, in the Court of Norfolk Island constituted by the chief magistrate, with stealing woodwork from a building, contrary to s. 139 of the *Crimes Act* 1900-1935 (N.S.W.). He pleaded guilty and agreed to the charge being dealt with summarily. He was fined £50 "with the option of twelve months' imprisonment."

From the sentence so imposed Douran purported to appeal as of right to the High Court. The relevant statutory provisions and ordinances are sufficiently set forth in the judgments hereunder.

The appellant did not appear, but submitted his case in writing.

Adam, for the respondent.

Cur. adv. vult.

April 13.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a sentence of the Court of Norfolk Island in its full jurisdiction. The appellant, Richard Douran, was charged with stealing twenty-three battens belonging to a building. He pleaded guilty and was fined £50 "with the option of twelve months' imprisonment. One month allowed to pay the fine." The appellant contends that the sentence is excessive.

The *Crimes Act* 1900-1935 of New South Wales is made applicable to Norfolk Island, *mutatis mutandis*, by the *Judiciary Ordinance* 1936 (Norfolk Island), s. 22. The *Crimes Act*, s. 139, provides that whoever steals any woodwork belonging to any building shall be liable to be punished as for simple larceny. By s. 117 it is provided that whoever commits simple larceny, or any felony by the Act made punishable like simple larceny, shall, with certain exceptions, be liable to penal servitude for five years. But s. 501 provides, *inter alia*, that whosoever commits simple larceny where the 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. The appellant was dealt with under s. 501, the value of the battens being only a few shillings.

Upon the argument of the appeal—the appellant having submitted his contentions in writing and the Crown being represented by counsel—a question arose as to whether the appellant had a right of appeal or whether he could appeal to this Court only by special leave.

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The *Norfolk Island Act* 1913-1935, s. 11, provides that the High Court shall have jurisdiction, with such exceptions and subject to such conditions as are prescribed by ordinance made by the Governor-General, to hear and determine appeals from all sentences of any judge or of the chief magistrate acting judicially in Norfolk Island, and the judgment of the High Court shall be final and conclusive. In the present case the chief magistrate acted judicially in Norfolk Island in hearing the case and imposing the sentence against which this appeal is brought. Under the *Judiciary Ordinance*, s. 10, the Court of Norfolk Island sitting in its full jurisdiction may be constituted by the chief magistrate.

By the *Appeal Ordinance* 1919-1936 the Governor-General has exercised the power conferred by s. 11 of making exceptions and prescribing conditions with respect to certain appeals to the High Court. Section 6 of this Ordinance is as follows :—

" Except as aforesaid, and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against any law in force in the Territory."

The offence with which the appellant was charged is an indictable offence under the *Crimes Act*, though it may be dealt with summarily under s. 501 : See *R.* v. *Johnstone* (1). The question is whether s. 6 prevents any appeal to this Court except by special leave. The effect of s. 6 is to limit appeals in the cases to which the Ordinance applies to three categories : (1) appeals referred to in the phrase " Except as aforesaid " ; (2) error apparent on the face of the proceedings ; (3) appeals by special leave of the High Court. The initial words " Except as aforesaid " show that the object is to limit appeals in cases to which the other provisions of the Ordinance are applicable.

The other provisions of the Ordinance relate to the reservation of questions of law after a trial before a magistrate and a jury. Section 2 provides that when any person is indicted for an indictable offence, the magistrate's court shall, on application by or on his behalf " made before verdict," and may in its discretion, reserve a question of law for the High Court. Section 3 defines the powers of the High Court where a question is reserved, and they include a power of setting aside a verdict and judgment and ordering a verdict of not guilty or other appropriate verdict to be entered. These provisions are applicable only where there is a trial before a jury, and not where an offence is dealt with summarily.

(1) (1945) 70 C.L.R. 561.

The *Judiciary Ordinance*, s. 23 (1), provides that all crimes and offences (other than offences punishable summarily) shall be prosecuted by information in the name of a member of the police force. Section 23 (2) of the Ordinance provides as follows :—

" All issues of fact joined on any such information shall, except in the case of an offence punishable by death and offences punishable summarily, be tried by the Court in its Full Jurisdiction and a jury of seven elders."

" Indictment " includes " information " (*Acts Interpretation Act* 1901-1937 (Cth.), s. 27 (*a*)—made applicable by the *Interpretation Ordinance* 1915-1940, s. 3).

Thus in Norfolk Island there is no procedure by preliminary inquiry before magistrates and committal to a higher court, but offences are dealt with either summarily—as to certain of them in the court sitting in its limited jurisdiction (*Judiciary Ordinance*, s. 11) ; and as to any of them by the court sitting in its full jurisdiction (*Judiciary Ordinance*, s. 12)—or under the *Judiciary Ordinance*, s. 23, by the court in its full jurisdiction and a jury of seven elders. There are other provisions relating to offences punishable by death.

The *Appeal Ordinance* applies in its positive provisions only to cases where a person is prosecuted by information before a jury. The provision in s. 6 excluding appeals except as provided in the section should, in my opinion, be regarded as similarly limited in application and therefore as not applying to cases, such as this, of indictable offences which have been dealt with summarily.

The contrary view to that which I have expressed would mean that when the court of full jurisdiction convicted a person of an offence which is punishable only summarily—as it may do (*Judiciary Ordinance*, s. 12 (*b*))—there would be an appeal as of right to the High Court under the *Norfolk Island Act*, s. 11 (and see also *Judiciary Ordinance*, s. 21), but that when a person was summarily convicted of an indictable offence (that is, an offence which could be tried before a jury and was presumably more serious in character than an offence which was punishable only summarily) there would be no appeal except by special leave. This consideration supports the view that the provisions of the *Appeal Ordinance* should be construed as being intended to apply only to cases where there has been a trial by jury, and that s. 6 does not make it necessary for the appellant in this case to obtain special leave to appeal.

The appellant appeals only on the ground that the sentence is excessive, and not on the ground that the court in its full jurisdiction had no jurisdiction to punish him summarily upon a plea of guilty. In the course of argument a question was raised as to whether

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s. 501 of the *Crimes Act* could be applicable in Norfolk Island, where, as already stated, there is no procedure by way of committal for trial. The *Judiciary Ordinance*, s. 22, provides that, subject to the Ordinance, the provisions of the *Crimes Act* and the *Justices Act* shall, *mutatis mutandis*, and so far as applicable, be in force in Norfolk Island and the jurisdiction and powers conferred by those Acts on judges and justices of the peace shall be exercised by the court. Many of the provisions of the *Crimes Act* and the *Justices Act* relate to committal for trial by justices, and many of the provisions of the *Crimes Act* require a trial by jury of twelve persons. The words "*mutatis mutandis*" make it easy to apply the provisions with respect to a jury of twelve to the jury of seven elders established under the law of Norfolk Island, and, in my opinion, there is no greater difficulty in regarding s. 501 as giving power to the chief magistrate sitting in the court of full jurisdiction to deal summarily with the cases mentioned in s. 501 instead of sending them on to be tried by a jury. In exercising such a power the chief magistrate would exercise substantially the same functions as those intended to be exercised by justices in New South Wales under s. 501. I am therefore of opinion that, upon the defendant's plea of guilty, it being conceded that the value of the articles stolen was less than £10, the court had power to convict the appellant.

In one respect however, the sentence of the court is, in my opinion, wrong. The court acted under s. 501 of the *Crimes Act*. That section provides that a person convicted thereunder shall be liable to imprisonment for twelve months or to pay a fine of £50. These are alternative penalties—only one of them can be inflicted. The chief magistrate imposed a fine of £50 with what is described as the option of imprisonment for twelve months. He had no power to do this under s. 501. The *Justices Act*, s. 82, provides for a method of enforcing payment of a fine by excluding distress and providing that the justices may make an order for imprisonment in default of payment—where the amount of the fine exceeds 10s., imprisonment of one day for each 10s. The *Justices Act* is expressly made applicable to Norfolk Island by the *Judiciary Ordinance*, s. 22, which has already been quoted. But the application of s. 82 is excluded by the express provisions of the *Judiciary Ordinance*, s. 25. This section provides that the court may, in the order imposing any fine or penalty, direct that in default of payment or satisfaction at the time and in the manner ordered, it may be recovered by distress, and that in default of sufficient distress the defendant may be imprisoned for any term not exceeding three months. This provision makes it impossible to apply s. 82 of the *Justices Act*, and also prevents the

imposition of imprisonment for twelve months in default of payment of the fine.

The appellant contends that the fine is excessive. The value of the battens was very small and he argues that the sentence, which is the maximum sentence under s. 501, is out of proportion to the offence.

This Court obtained a report from the chief magistrate, which has been provided in the form of a copy of a report made to the Governor-General upon an application by the appellant for remission of penalty. In that report the chief magistrate refers to the difficulty of administering the law in Norfolk Island in the face of a general refusal of the people to assist by giving evidence of offences, and he states that there is a wave of crime sweeping over the island. It is not suggested that the appellant was in necessitous circumstances or that he had any real excuse for his act. The penalty is severe, but severe penalties are sometimes necessary in order to prevent persistent breaches of the law, which are profitable so long as they can be concealed. The breaches may be small in themselves, but unless severe penalties are sometimes imposed the law may become almost inoperative, especially within a small community such as Norfolk Island. I can see no adequate reason for interfering with the exercise of discretion by the chief magistrate, who was acquainted with local conditions. But the sentence should be varied to a fine of £50, in default of payment within one month of this date to be recovered by distress, levy, and sale of the chattels of the defendant, and in default of sufficient distress the defendant should be imprisoned for three months.

STARKE J. Appeal from the Court of Norfolk Island established pursuant to the *Norfolk Island Act* 1913-1935 and the *Judiciary Ordinance* 1936 made by the Governor-General in Council pursuant to that Act.

The appellant was charged with stealing certain woodwork or battens belonging to a dwelling house in Norfolk Island contrary to the provisions of s. 139 of the *Crimes Act* 1900-1935 (N.S.W.). The *Judiciary Ordinance* provides that the provisions of the *Crimes Act* and the *Justices Act* 1902-1931 (N.S.W.) shall, *mutatis mutandis*, and so far as applicable, be in force in Norfolk Island and that the jurisdiction and powers conferred by those Acts on judges and justices of the peace shall be exercised by the Court of Norfolk Island. The offence with which the appellant was charged is a felony in New South Wales and indictable (see *Crimes Act*, s. 4, "Indictment," and ss. 9, 116 and 117; *Interpretation Act* 1897 (N.S.W.),

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s. 29). It was punishable as simple larceny and an offender guilty of simple larceny is liable to penal servitude for five years (*Crimes Act*, ss. 117 and 139). And so far as I can discover a felony is not a fineable offence (cf. *Archbold's Criminal Pleadings, Evidence and Practice*, 28th ed., p. 258). The appellant pleaded guilty and was fined £50 or twelve months' imprisonment and he appeals to this Court against the sentence on the ground that it is excessive.

The *Norfolk Island Act*, s. 11, gives an appeal to this Court with such exceptions and subject to such conditions as are prescribed by ordinance made by the Governor-General from all judgments, orders and sentences of any judge or chief magistrate acting judicially in Norfolk Island.

The *Judiciary Ordinance* establishes a Court for Norfolk Island which is called the Court of Norfolk Island. It is divided into two parts, namely, full jurisdiction and limited jurisdiction. The court in full jurisdiction has jurisdiction to punish all crimes and offences and in limited jurisdiction to punish summarily all crimes and offences in respect of which a pecuniary penalty or sentence of imprisonment not exceeding six months may be imposed. In full jurisdiction the court is constituted by a judge, the chief magistrate or a special magistrate and when sitting in limited jurisdiction by a judge, the chief magistrate, a special magistrate, or by two or more justices of the peace.

All crimes and offences (other than offences punishable summarily) are prosecuted by information in the name of a police officer appointed under the *Police Ordinance* 1931. All issues of fact joined on such information are, except in case of an offence punishable by death and offences punishable summarily, to be tried by the court in its full jurisdiction with a jury of seven elders, but, in the case of an offence punishable by death, by a grand jury.

An appeal to this Court from any judgment, order, decree or sentence of the court in full jurisdiction (not being an appeal to which the *Appeal Ordinance* 1919-1936 applies) may be by case stated. The *Appeal Ordinance*, s. 6, provides, so far as material, that, except by case stated and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to it from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against any law in force in the Island.

There is no appeal to this Court from any judgment, decree, order or conviction of the court sitting in its limited jurisdiction. But the limited jurisdiction was not applicable to the case and further, the accused was, in fact, before the court in full jurisdiction. The

punishment inflicted on him is not in accordance with the provisions of ss. 117 and 139 of the *Crimes Act*.

No jurisdiction appears authorizing the court to inflict an alternative punishment : fine or imprisonment. There is, prima facie, an error on the face of the proceedings.

But it is said that the accused was dealt with under s. 501 of the *Crimes Act*. That section provides in substance that whosoever commits simple larceny or any offence mentioned in s. 139 of the *Crimes Act* and the 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. According to the latest decision of this Court in *R.* v. *Johnstone* (1), this section does not alter the quality of the offence—the felony created by s. 139 is not reduced to a minor or another offence, but it authorizes justices to deal summarily with the indictable offence created by s. 139. This section does not justify the actual sentence that was passed, £50 or twelve months' imprisonment. It provides an alternative sanction : one or the other is permissible but the conviction must specify which punishment is inflicted. Even if this section applies an error is therefore apparent on the face of the proceedings.

But can the section be applied to the present case ? The *Judiciary Ordinance* provides that the jurisdiction and powers conferred by the *Crimes Act* and the *Justices Act* on judges and justices of the peace shall be exercised by the Court of Norfolk Island and that the Acts of New South Wales just mentioned are, *mutatis mutandis*, and so far as applicable, in force in Norfolk Island. By these words a double jurisdiction appears to be conferred upon the Court of Norfolk Island in Full Jurisdiction : a jurisdiction to try all crimes and offences with a jury and also a jurisdiction to try summarily all crimes and offences that might be heard and determined by justices of the peace in New South Wales including, of course, stipendiary and police magistrates. The court in its limited jurisdiction has jurisdiction to punish summarily all crimes and offences in respect of which a pecuniary penalty or a sentence of imprisonment not exceeding six months may be imposed. But this does not limit the jurisdiction and authority of the court in full jurisdiction.

Under s. 501 the appellant might, in New South Wales, have been convicted in a summary manner of the offence charged against him, for the value of the property in respect of which the offence is charged does not, on the facts appearing in the documents placed before this Court, exceed £10.

(1) (1945) 70 C.L.R. 561.

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Consequently, on the appellant's plea of guilty, the Court of Norfolk Island might and may be taken to have dealt with and sentenced him in a summary manner, in the same manner as a person charged might have been dealt with and sentenced by justices in New South Wales.

But the alternative sentence inflicted by the Court of Norfolk Island cannot be sustained. One or the other must be quashed and it seems proper to quash that relating to imprisonment rather than that relating to the fine. The fine inflicted on the appellant should be sustained and in default of payment the provisions of the *Judiciary Ordinance* should be applied.

A notification for general information issued by the Norfolk Island Administration will explain the reasons for sustaining the fine: "Complaints have lately been made that from no less than six unoccupied dwellings, tanks, water pipes, taps, doors, windows and timber have been stolen, while complaints are also frequently received of thefts from orchards. These thefts have assumed such proportions that an appeal is now made to all law-abiding citizens to assist in bringing the thieves to justice." And according to a report of the chief magistrate of the Island there is only one policeman there, a totally inadequate force and the inhabitants do not come forward to assist the Administration.

DIXON J. By s. 22 of the *Judiciary Ordinance* 1936 of the Territory of Norfolk Island, the *Crimes Act* 1900-1935 (N.S.W.) and *Justices Act* 1902-1931 (N.S.W.) are to be in force in Norfolk Island, *mutatis mutandis*, and so far as applicable. A charge was laid against the appellant for an offence against s. 139 of the *Crimes Act*, that is to say for stealing certain woodwork, to wit twenty-three battens, belonging to a building, a dwelling house. Under s. 139 a person guilty of such an offence is liable to be punished as for simple larceny. It is therefore an indictable offence. Section 23 (1) of the *Judiciary Ordinance* 1936 of Norfolk Island provides that all crimes and offences (other than offences punishable summarily) shall be prosecuted by information in the name of a member of the police force appointed under the *Police Ordinance*. The appellant was prosecuted in this manner. In Norfolk Island there are no proceedings by way of committal for trial.

The *Judiciary Ordinance* establishes the Court of Norfolk Island (s. 5). Its jurisdiction is divided into two, full jurisdiction and limited jurisdiction (s. 9). Sitting in its limited jurisdiction it may punish all crimes and offences in respect of which a pecuniary penalty or a sentence of imprisonment not exceeding six months

may be imposed (s. 11 (*b*)). In its full jurisdiction it has jurisdiction to punish all crimes and offences (s. 12 (*b*)). From a judgment, decree, order or conviction of the Court of Norfolk Island sitting in its limited jurisdiction an appeal lies to the same court in its full jurisdiction, but not directly to this Court (ss. 20 and 21 (2)).

The information against the appellant was, apparently, brought before the Court of Norfolk Island in its full jurisdiction. But upon its coming on to be heard, the chief magistrate constituting the court agreed in an arrangement made between the informant and the defendant (the appellant) that the charge should be dealt with summarily, the appellant pleading guilty.

This course was taken in purported pursuance of s. 501 of the *Crimes Act*, which provides that whoever commits simple larceny or any of a series of offences, enumerated by reference to the sections creating them, including s. 139, and the amount of money or the value of the property in respect of which the offence is charged does not exceed £10, shall on conviction in a summary manner be liable to imprisonment for twelve months or to pay a fine of £50. The chief magistrate took the accused's plea of guilty and imposed a fine of £50, in default twelve months' imprisonment, allowing one month to pay the fine. Doubt has been thrown upon his power to act under s. 501, which confers upon magistrates, when the amount or value of the property involved is less than £10, authority to deal summarily with the indictable offences enumerated in the section. In Norfolk Island, notwithstanding the fact that there are no preliminary proceedings before justices in a prosecution for an indictable offence, the distinction between summary offences and indictable offences is maintained. Issues of fact joined upon an information for an indictable offence, unless capital, are tried by the court in its full jurisdiction with a jury of seven elders (s. 23 (2) of the *Judiciary Ordinance*).

In my opinion s. 501 is applicable to Norfolk Island. Clearly there is no reason why summary proceedings should not be instituted under its provisions. Where the one court deals with summary proceedings and prosecutions on indictment I see no reason why that court should not take the course, which in New South Wales is open to justices, of applying s. 501. The substance of the matter is that instead of the accused going before a jury he is dealt with summarily. The difference between the procedures established in New South Wales and in Norfolk Island is, I think, just the kind of thing upon which the words "*mutatis mutandis*" in s. 22 of the *Judiciary Ordinance* were meant to operate. I therefore am of opinion that the appellant was convicted summarily before the Court of Norfolk Island in its Full Jurisdiction.

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His appeal to this Court is from the sentence, of the severity of which the appellant complains. Section 11 (1) of the *Norfolk Island Act* 1913-1935 provides that the High Court shall have jurisdiction with such exceptions and subject to such conditions as are prescribed by ordinance made by the Governor-General to hear and determine appeals from all judgments, decrees, orders and sentences of any judge or of the chief magistrate acting judicially in Norfolk Island. Unless there is some legislative exception denying an appeal, it may be assumed that from the sentence imposed upon the appellant an appeal lies to this Court, either under the foregoing provision or under s. 73 (ii.) of the Constitution: Cf. *Federal Capital Commission* v. *Laristan Building and Investment Co. Pty. Ltd.* (1), and the opinion of *Higgins* J. there cited. The only ground for suggesting that the present case falls within some such exception lies in the bracketed words in s. 21 (1) of the *Judiciary Ordinance*, viz., "(not being an appeal to which the *Appeal Ordinance* 1919-1936 applies)" and in a provision of the latter Ordinance.

The *Appeal Ordinance* lays down a procedure by which the Court of Norfolk Island may, in trials for indictable offences, reserve questions of law for the High Court, and prescribes the conditions under which an accused person, if convicted, may require the Court of Norfolk Island to do so. It provides how such reservations are to be dealt with and how the decision of the High Court is to be given effect. The Ordinance then concludes: "Except as aforesaid and except in the case of error apparent on the face of the proceedings, an appeal shall not without the special leave of the High Court be brought to the High Court from a judgment or sentence pronounced on the trial of a person charged with an indictable offence against any law in force in the Territory."

Does this mean that the appellant must obtain special leave before he can appeal? No doubt the offence of which he was convicted summarily under s. 501 of the *Crimes Act* would be properly described as an indictable offence: See *R.* v. *Johnstone* (2) and *Commissioner for Railways (N.S.W.)* v. *Pitman* (3). Further "information" is included in the word "indictment": See s. 27 (*a*), *Acts Interpretation Act* 1901-1937 and s. 3 of the *Interpretation Ordinance* 1915-1940.

But is the prohibition of an appeal except by special leave applicable? Is not the true interpretation of s. 6 that it is confined to convictions upon indictment and does not apply to summary convictions whether for indictable or for summary offences? In my opinion that is its meaning. The context in which it stands shows

(1) (1929) 42 C.L.R. 582, at pp. 583-585.
(2) (1945) 70 C.L.R. 561.
(3) (1936) 56 C.L.R. 144.

it is confined to that subject and, moreover, the words " pronounced on the trial " do not cover summary proceedings. Were it otherwise there would in Norfolk Island be an appeal as of right from a summary conviction for a summary offence, an appeal as of right on questions of law from a conviction after a trial on indictment, but an appeal only by special leave from a summary conviction for an offence which is indictable. Section 6 should be read *secundum subiectam materiem.*

I therefore think that the appellant is entitled to appeal without special leave.

On the merits of his appeal I have had some doubt. The fine imposed seemed to me to be severe punishment for such an offence. At first I thought it was so out of proportion to the apparently trivial nature of the theft that we should intervene. But the chief magistrate meant it as a deterrent against thefts of that very kind, which it seems were frequent in Norfolk Island and were causing the dilapidation of unoccupied dwellings. In a matter so much depending upon local conditions and upon an appreciation of the difficulties of protecting unoccupied habitations in the Island, and of the need of doing so, I think that we ought not to interfere with the discretion of the court exercising jurisdiction in the Territory.

But it appears that the provision contained in s. 25 of the *Judiciary Ordinance* limits the period of imprisonment which may be imposed in default of a fine to three months, and then only in default of distress. That is an overriding provision. The conviction should therefore be amended by substituting an order for the recovery of the fine in accordance with s. 25. Otherwise the appeal should be dismissed.

McTIERNAN J. In this case I agree with the judgment of my brother *Dixon* and with his reasons for judgment.

WILLIAMS J. I have read and substantially agree with the judgments of the Chief Justice and my brother *Dixon* and have nothing to add. I also agree with the order which they propose.

Sentence varied to a fine of £50, *in default of payment within one month to be recovered by distress and, in default of sufficient distress, defendant to be imprisoned for three months. Appeal otherwise dismissed.*

Solicitor for the respondent, *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

E. F. H.