[HIGH COURT OF AUSTRALIA.]

PARSONS . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

H. C. OF A. 1957.

SYDNEY, *Sept.* 5; *Nov.* 18.

Dixon C.J., McTiernan, Webb, Kitto and Taylor JJ.

Criminal Law—Murder—Penalty—Penal servitude for life—Former penalty of death—Trial—Jury—Peremptory challenges by prisoner—Number to which entitled—Capital offence—Whether murder "capital"—Crimes (Amendment) Act 1955 (*N.S.W.*), *s.* 5 (*b*)—*Jury Act* 1912-1951 (*N.S.W.*), *s.* 55 (2).

Section 55 of the *Jury Act* 1912-1951 (N.S.W.) provides:—"(1) The same right of challenge to jurors shall exist in cases of misdemeanour as in cases of felony. (2) No persons shall, except for cause shown, be allowed in either case more than eight, or if the offence charged be capital, twenty challenges. . . ."

Held, that the words "if the offence charged be capital" refer not to charges which by the law as it stood at the date of the enactment in 1912 of the sub-section were capital but to offences in respect of which a prisoner upon his trial stands in jeopardy of a capital sentence.

Accordingly where subsequent to the passing of the *Crimes (Amendment) Act* 1955 (N.S.W.), which altered the penalty for murder from death to penal servitude for life, and prior to the passing of the *Supreme Court Procedure Act* 1957 a prisoner upon his trial for murder claimed to be entitled to twenty peremptory challenges under s. 55 (2) above-mentioned.

Held, that he was not so entitled.

Decision of the Court of Criminal Appeal of New South Wales: *Reg.* v. *Parsons* (1957) 74 W.N. (N.S.W.) 401, affirmed.

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

William John Parsons was arraigned on 26th September 1956 in the Central Criminal Court of New South Wales before *Walsh* J. on an indictment charging that he on 4th July 1956 at Long Jetty in the State of New South Wales did feloniously and maliciously murder Pearl Lyons. Upon his arraignment it was claimed on his behalf that he was entitled, when the jury was being empanelled,

H. C. OF A. 1957.

PARSONS v. THE QUEEN.

to twenty peremptory challenges under s. 55 (2) of the *Jury Act* 1912-1951 (N.S.W.). This claim was denied by the trial judge who declined to allow the prisoner more than eight peremptory challenges.

At his trial the prisoner sought to make a case of provocation but was convicted of murder and was sentenced to penal servitude for life.

The prisoner appealed from his conviction and sentence to the Court of Criminal Appeal of New South Wales (*Owen* J., *Roper* C.J. in Eq. and *Clancy* J.) upon three grounds:—(1) that on the empanelling of the jury after his arraignment the trial judge erred in denying to the prisoner twenty peremptory challenges; (2) that the trial judge wrongly directed the jury on the issue of provocation; and (3) that there was fresh evidence available touching the issue of provocation. His appeal was dismissed: *Reg.* v. *Parsons* (1).

From this decision the prisoner by notice of motion dated 3rd May 1957 applied to the High Court for special leave to appeal upon the same three grounds as had been relied upon in the Court of Criminal Appeal.

The first ground was that principally relied upon on the application for special leave and it is in respect of that ground only that the application calls for report. In relation to this ground the relevant statutory provisions and the arguments of counsel appear sufficiently in the judgments of the Court hereunder.

J. J. Davoren and *D. E. Horton*, for the applicant.

H. A. Snelling Q.C., Solicitor-General for New South Wales, and *D. F. Kelly*, for the Crown.

Cur. adv. vult.

Nov. 18.

The following written judgments were delivered:—

DIXON C.J., KITTO AND TAYLOR JJ. This is an application for special leave to appeal from an order of the Supreme Court sitting as a Court of Criminal Appeal (1). The order dismissed an appeal from a conviction of murder. It is not necessary to say much concerning the facts of the case. The murder was committed on 4th July 1956. The applicant, a married man of about fifty-nine years of age, had been living for two or three years apart from his wife with a woman named Pearl Lyons. On the morning of that day he fired three shots with a loaded rifle in a room of the flat where they lived. One of these shots killed the woman Lyons,

(1) (1957) 74 W.N. (N.S.W.) 401.

another grazed his own head. At his trial he made a case of provocation but he was convicted of murder. His appeal to the Court of Criminal Appeal was based on three grounds. The first ground was that on the empanelling of the jury after his arraignment he had been allowed only eight peremptory challenges and that he ought to have been allowed up to twenty. The second ground concerned the direction given by the learned judge to the jury concerning provocation. The third ground related to the production of fresh evidence bearing upon the ground of provocation. The Supreme Court decided all three matters against the appellant. In support of the application to this Court for special leave on his behalf all three grounds are relied upon. Little need be said concerning the second and third grounds. They could not form an adequate foundation for the application. The criticisms made of the summing-up to the jury are not of such character that they would warrant this Court in giving special leave to appeal for the purpose of considering the direction. As to the fresh evidence, the reasons given by the Supreme Court for declining to order a new trial on the ground of its having been brought forward by the appellant since the trial are ample and open to no objection that really affects their validity. It would be contrary to the principles guiding this Court in such matters for the Court to intervene and give special leave to appeal for the purpose of reconsidering the propriety of the refusal of a new trial on that ground.

The substantial purpose however of the application for special leave was to obtain a reconsideration by this Court of the interpretation placed by the Supreme Court upon the provisions of the law of New South Wales relating to peremptory challenges by a prisoner on a criminal inquest since the virtual abolition of capital punishment by s. 5 of the *Crimes (Amendment) Act* 1955 (No. 16 of 1955).

By s. 55 of the *Jury Act* 1912 it was provided as follows :— (1) The same right of challenge to jurors shall exist in cases of misdemeanour as in cases of felony. (2) No persons shall, except for cause shown, be allowed in either case more than eight, or if the offence charged be capital, twenty challenges. (3) The Crown shall in every case have the same, but no greater, right. (4) Every peremptory challenge beyond the number so allowed shall be void, and the trial shall proceed as if no such challenge had been made. At the time of this enactment (a consolidating measure) there were under the *Crimes Act* 1900 (N.S.W.) nine capital crimes. They were :—murder (s. 19), poisoning or wounding with intent to murder (s. 27), rape (s. 63), similar offences against young girls (s. 67), breaking and entering a dwelling-house and while therein

H. C. OF A. 1957.

PARSONS v. THE QUEEN

Dixon C.J. Kitto J. Taylor J.

assaulting with intent to murder or inflicting grievous bodily harm (s. 110), setting fire to a dwelling-house knowing a person to be therein (s. 196), casting away a ship and the like acts, a person being then in such vessel (s. 235), and exhibiting false signals with intent to bring a ship into danger (s. 240). By Act No. 16 of 1955 in all these cases penal servitude for life was substituted for sentence of death. There are two other offences under the law of New South Wales for which the sentence is death and they have not been affected. One is treason, in respect of which offence the statute of 25 Edw. III c. 2 applies (see s. 16 of *Crimes Act* 1900 (N.S.W.)). The other is piracy accompanied by assaults with intent to murder. By s. 4 of the *Piracy Punishment Act* 1902 (N.S.W.) (No. 69 of 1902) that is a crime punishable by death.

After the appellant had been arraigned on the indictment for murder it was claimed on his behalf that he was entitled to twenty peremptory challenges under s. 55 (2) of the *Jury Act* 1912. The Crown contended that as the offence of murder was no longer capital he was not entitled to more than eight peremptory challenges. Accordingly, after he had exercised his eight challenges he was denied further challenges except for cause. The Supreme Court as a Court of Criminal Appeal decided that this course was correct. Their Honours said :—" Section 55 of the *Jury Act* is, in our opinion, a provision having an ambulatory operation and designed to apply to all future jury trials for misdemeanour or felony whether at the date of the enactment of the section the offence charged was then a misdemeanour or felony, or whether it was declared by some later statute to be a misdemeanour or a felony. In our opinion it has a similar operation, where as here, a later statute provides that an offence for which the penalty heretofore has been death shall no longer be a capital offence " (1).

In support of the application for special leave to appeal from this decision it was urged that when s. 55 (2) of the *Jury Act* said " if the offences charged be capital, twenty challenges " it was adopting a compendious reference to existing offences which by the law as it stood at the passing of the Act were punishable by death. If this was so, it was argued, the change in punishment affixed to the offence would not result in a reduction of the number of challenges. The offence would still be one to which s. 55 (2) had referred when it allowed twenty challenges. In support of this view it was further contended that such an incident of trial by jury as the right to challenge was one falling within the principle requiring the clearest

(1) (1957) 74 W.N. (N.S.W.), at p. 402.

language before a construction is adopted prejudicial to any provision protecting the liberty of the subject. It will be noticed that this last argument rather treats the question as one depending upon the intention with which s. 5 of the *Crimes (Amendment) Act* 1955 (No. 16 of 1955) changed the punishment of the crimes with which it deals from death to penal servitude for life.

Although perhaps it is not a very material matter, it is to be noted that s. 55 (2) is expressed to limit the number of challenges allowed, not to grant challenges. Sub-sections (2) and (4) of s. 55 in fact have their foundation in the final words of s. 29 of 6 Geo. IV c. 50, called the *Counties Juries Act* 1825 (Imp.), together with 7 & 8 Geo. IV c. 28, s. 3, the *Criminal Law Act* 1827. By the former provision it was enacted that no person arraigned for murder or felony should be admitted to any peremptory challenge above the number of twenty. By the latter provision it was enacted that if any person indicted for any treason felony or piracy should challenge peremptorily a greater number of men returned to be of the jury than such person was entitled by law so to challenge in any of the said cases, every peremptory challenge beyond the number should be entirely void and the trial of such person should proceed as if no such challenge had been made. It was upon similar provisions in force in Ireland that *Gray* v. *The Queen* (1) was decided. The question there was whether a prisoner was entitled to peremptory challenges up to the number of twenty if he were arraigned for a felony for which the punishment was then no longer death but transportation. But that question depended upon the true character of the common law right to challenge. Was it given in case of felonies or was it given simply *in favorem vitae* for capital offences ? If the latter, when the felony ceased to be capital and became punishable only with transportation the right of challenge would be lost. That was the view which had been taken in Ireland. On the other hand, the view in England had been that although the reason why peremptory challenges were allowed in the case of felony was that felonies were at common law capital offences, subject perhaps to one or two exceptions, yet it was as felonies that the right of peremptory challenge was made incident to them. The judges, with the exception of *Parke* B., advised the House of Lords that the former was the true principle. *Parke* B., however, after an examination of the history of the law, concluded that at common law the right of peremptory challenge belonged only to that class of charges in which life is in jeopardy. The House of Lords adopted the view

(1) (1844) 11 Cl. & F. 427 [8 E.R. 1164].

H. C. OF A. 1957.

PARSONS v. THE QUEEN.

Dixon C.J. Kitto J. Taylor J.

which the other judges supported. The decision is relied upon not because it controls the interpretation of s. 55 of the *Jury Act*. It certainly does not. But because it contains statements by the judges of the strict rule of interpretation requiring plain language to deprive a prisoner of such a right. For example, *Tindal* L.C.J. said : " And if the question, whether his right to the peremptory challenge has or has not been taken away, remains open to any doubt, it appears to me, that in accordance with the general principle of decision applied to criminal cases, *tutius erratur in mitiori sensu*, the decision of such question is to be given in favour of the prisoner, who is not to be deprived, by implication of a right of so much importance to him, given by the common law, and enjoyed for many centuries, unless such implication is absolutely necessary for the interpretation of the statute " (1). The history of the right to trial by jury and its incidence in Australia is of course affected by the character of the early settlement of this country. In fact it was not for a little time after 9 Geo. IV c. 83, that trial by jury in criminal cases was established : see *Reg.* v. *Valentine* (2). But by s. 24 of Act of Council 11 Vict. No. 20, a consolidation of the jury laws of 1847, it was provided that the challenge to the polls of jurors may be made and should be allowed in other courts in like form and manner and in other respects as are established used and practised in like cases in the Courts at Westminster. To this section there was a proviso that no person arraigned for murder or other felony should be admitted to any peremptory challenge above the number of twenty. In effect this provision was reproduced in s. 336 of the *Criminal Law Amendment Act* 1883 (N.S.W.) (Act 46 Vict. No. 17). Through the *Jury Act* 1901 it formed the basis of s. 55 of the *Jury Act* 1912. It is as well to record these matters but they do little more than afford the context in which s. 55 (2) must be construed. Whether in *Gray* v. *The Queen* (3) *Parke* B. or the other judges were right as to the true principle of common law, it would seem to be reasonably clear that the legislature of New South Wales preferred to put the right to twenty peremptory challenges upon the capital nature of the charge for which the prisoner might be indicted. The natural meaning of s. 55 (2) is to provide a principle, namely, that if the prisoner is to be put in jeopardy of a capital sentence he shall have twenty peremptory challenges and that otherwise the limit of peremptory challenges shall be eight. It is a clear and intelligible principle and accords with the general

(1) (1844) 11 Cl. & F., at pp. 480, 481 [8 E.R., at p. 1183].
(2) (1871) 10 S.C.R. (N.S.W.) 113.
(3) (1844) 11 Cl. & F. 427 [8 E.R. 1164].

ground upon which the common law proceeded, namely, that peremptory challenges should be given *in favorem vitae*. It is not a natural interpretation of the words " if the offence charged be capital " to treat them as merely being a compendious reference to the charges which by the law as it then stood were capital. The use of the conditional " if " would be inept if that were the meaning. The question is not really what was meant by s. 5 of the *Crimes* (*Amendment*) *Act* 1955 in altering the capital nature of the crimes. The plain meaning of that was to affix a lesser punishment than death to those crimes. The intention of that alteration did not go beyond the change in the nature of the sentence. What consequences flowed from that is a matter of general law. Section 55 (2) provides one matter of law which necessarily is affected. This effect is produced because it distinguishes between capital and other offences and the differing restrictions on the number of challenges depended on the distinction.

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

McTIERNAN J. I agree that this application should be refused. The substantial question concerns the right of peremptory challenge of jurors. The applicant was indicted for murder and arraigned on that charge. He claimed twenty peremptory challenges. The Court allowed him eight. The indictment and arraignment were under the *Crimes Act* 1900 as amended by subsequent Acts, including the *Crimes* (*Amendment*) *Act* 1955. S. 19 of the *Crimes Act* 1900 had, until the latter Act was passed, provided that death should be the penalty for murder. S. 5 (b) of the *Crimes* (*Amendment*) *Act* 1955 amended s. 19 by altering the punishment for the crime to penal servitude for life. Other sections abolished the death penalty for most of the other offences for which the *Crimes Act* 1900 had provided that punishment.

The present question has to be decided upon s. 55 of the *Jury Act* 1912 before it was amended by s. 10 of the *Supreme Court Procedure Act* 1957. Until then, s. 55 gave the right to twenty peremptory challenges, " if " as sub-s. (2) said " the offence charged is capital ". S. 10 of the *Supreme Court Procedure Act* 1957 added to this condition the words " or murder ". The applicant was convicted upon the indictment for murder on which he was arraigned, and sentenced to penal servitude for life. That was the only sentence which the court could impose upon him.

Twenty peremptory challenges were claimed by the applicant upon the ground that murder, the offence charged, was capital

H. C. OF A. 1957.

PARSONS v. THE QUEEN

McTiernan J.

within the meaning of s. 55 of the *Jury Act* 1912. According to the terms of the section before amended by s. 10 of the *Supreme Court Procedure Act* 1957, if the offence charged was not capital, only eight peremptory challenges were given, whether the offence was felony or misdemeanour. The court allowed eight peremptory challenges on the basis that since the commencement of the *Crimes (Amendment) Act* 1955, murder is one of the offences that is not punishable by death. Neither by the *Crimes (Amendment) Act* 1955 nor by any other Act was the right of twenty peremptory challenges for murder or any other offence, which was capital, before the passing of that Act, expressly reduced to eight.

The statement in *Gray* v. *The Queen* (1), which was read in argument, shows that there is a strong presumption that the legislature would not interfere with the right of peremptory challenge without words clearly expressing its intention to do so. It is the statement by *Tindal* C.J. which begins with the words, "And the reason of such conclusion", and ends with the words, " the interpretation of the statute ".

When the present case was tried the right to twenty peremptory challenges in murder or any other case depended upon the condition " if the offence charged is capital ". It has been stated that murder was expressly included in the condition by the *Supreme Court Procedure Act* 1957 ; an Act passed too late to apply to the trial of the applicant. Before that Act was passed the right of twenty peremptory challenges was not attached specifically to murder or any crime as such. Nor did the *Jury Act* purport to say that any offence in the case of which s. 55 gave the right of twenty peremptory challenges would still be deemed to be capital even if it should cease to be punishable by death. In applying s. 55 of the *Jury Act* 1912 for the purpose of determining whether the applicant was entitled to twenty or eight peremptory challenges, it was necessary to ascertain whether under the *Crimes Act* 1900, as amended by subsequent Acts, the offence charged in the indictment on which he was arraigned was capital. As stated above, the subsequent Acts included the *Crimes (Amendment) Act* 1955, s. 5 (b) of which altered the punishment for murder from death to penal servitude for life. It follows that the applicant was entitled under s. 55 of the *Jury Act* 1912 only to eight peremptory challenges because the offence charged in the indictment was not capital. Since the commencement of the *Crimes (Amendment) Act* 1955, it is necessary to interpret the words of s. 55 of the *Jury Act* 1912, " if the offence charged is capital " as not being applicable to murder or any offence which

(1) (1844) 11 Cl. & F., at pp. 480, 481 [8 E.R., at p. 1183].

the former Act removed from the category of capital offences. Otherwise there would be contrariety or repugnancy between that Act and s. 55 of the *Jury Act* 1912. There is nothing in the *Jury Act* to warrant the view that the legislature intended such a result. I am of opinion that the implication that the right of twenty peremptory challenges was by s. 5 (b) of the *Crimes* (*Amendment*) *Act* 1955 reduced to eight such challenges is " absolutely necessary for the interpretation " of s. 55 of the *Jury Act* 1912, *Gray* v. *The Queen* (1). That is a necessary consequence of the operation of s. 5 (b) of the *Crimes* (*Amendment*) *Act* 1955.

WEBB J. I would refuse special leave to appeal.

We have had the advantage of a careful argument by Mr. *Davoren* for the applicant, including a review of English and Australian authorities dealing with the extent to which peremptory challenges have been allowable on charges of felony and on charges of offences for which the penalty was death. However, I see no reason for differing from the view taken by the Court of Criminal Appeal.

It was only on the question of the extent of the peremptory challenges allowable that the Solicitor-General was called upon to reply. It is noted that, as Mr. *Davoren* observed, the Court of Criminal Appeal did not refer to any authorities in dealing with the point. As to this, I think that s. 55 of the *Jury Act* 1912-1951 unequivocally restricts the right to twenty such challenges to charges of offences for which, at the time of the trial, the punishment is death. After considering the opinions of the judges in *Gray* v. *The Queen* (2) I see no reason for thinking that if their Lordships who constituted the majority had not to investigate the position at common law and the effect of statutes in different terms, but had merely to construe s. 55 they would have reached the same conclusion. It seems to me that in confining the right to twenty peremptory challenges to the case of charges of capital offences s. 55 makes the nature of the punishment the test of the right, and not the quality of the offence independently of the punishment.

I cannot regard the word " capital " in s. 55 as merely descriptive of a class of offences as at the time s. 55 was enacted, and not as referring to offences from time to time thereafter punishable by death. The *Jury Act* is " constantly speaking in the present "—see *Le Mesurier* v. *Connor* (3) per *Isaacs* J.

(1) (1844) 11 Cl. & F., at p. 481 [8 E.R., at p. 1183].

(2) (1844) 11 Cl. & F. 427 [8 E.R. 1164].

(3) (1929) 42 C.L.R. 481, at p. 503.

H. C. OF A. 1957. PARSONS v. THE QUEEN. Webb J.

I am unable to see how the action of the legislature in 1957 in inserting the words "and murder" in s. 55, following the substitution in 1955 of life imprisonment for death as the penalty for murder, in any way helps the case for the applicant. If s. 55 were ambiguous such action might be relied upon to remove the ambiguity. But it cannot be relied upon to create one.

Application for special leave to appeal refused.

Solicitors for the applicant, *Frederick & M. L. McGuren.*

Solicitor for the Crown, *F. P. McRae,* Crown Solicitor for New South Wales.

R. A. H.