[HIGH COURT OF AUSTRALIA.]

BAILEY . . . . . APPELLANT;
APPLICANT,

AND

KELSEY . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

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MELBOURNE, *Mar.* 10, 11.

SYDNEY, *Mar.* 25.

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

Criminal Law—Fugitive offenders—Provision for return of offender to part of dominions where alleged offence committed—Where punishable in that part with imprisonment with hard labour for a term of twelve months or more—Confinement in a prison combined with labour by whatever name called deemed to be imprisonment with hard labour—Whether applicable to charge of false pretences—False pretences punishable with imprisonment for a term not exceeding five years—Provision by Prison Rules that every prisoner engage in useful work etc.—Fugitive Offenders Act 1881 (*Imp.*) (44 & 45 *Vict. c.* 69), *ss.* 5, 9—*Larceny Act* 1916 (*Imp.*) (6 & 7 *Geo. V., c.* 50), *s.* 32 (1)—*Criminal Justice Act* 1948 (*Imp.*) (11 & 12 *Geo. VI., c.* 58), *ss.* 1, 52 (1)—*Prison Rules* 1949 (*U.K.*) (*No.* 1073 *of* 1949), *rr.* 56, 57, 58.

Section 9 of the *Fugitive Offenders Act* 1881 (Imp.) provides that Pt. I shall apply to certain named offences and to every offence which is for the time being punishable in the part of Her Majesty's dominions in which it was committed by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment. The section then proceeds " and for the purposes of this section rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour ". By s. 32 (1) of the *Larceny Act* 1916 (Imp.) persons convicted of the offence of false pretences are liable to penal servitude for any term not exceeding five years. Section 1 (1) of the *Criminal Justice Act* 1948 (Imp.) provides that no person shall be sentenced by a court to penal servitude; and every enactment conferring power on a court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of the Act. Section 52 (1) provides that the Secretary of State may make rules for the regulation and management of prisons etc. and for the classification, treatment, employment, discipline and control of persons required to be detained therein. By the

Prison Rules 1949 (U.K.) rr. 56 et seq. made under s. 52 (1), subject to certain exceptions relating to the health of the prisoner, every prisoner shall be required to engage in useful work for not more than ten hours a day.

Held, that false pretences is an offence punishable by imprisonment with hard labour for a term of twelve months or more within the meaning of s. 9 of the *Fugitive Offenders Act* 1881.

Decision of the Supreme Court of the Northern Territory (*Kriewaldt* J.) affirmed.

APPEAL from the Supreme Court of the Northern Territory.

Jack Bailey appealed, by leave, to the High Court from a decision of the Supreme Court of the Northern Territory (*Kriewaldt* J.) given on 31st October 1958 refusing an application by him that a writ of *habeas corpus ad subjiciendum* should issue directed to John Leslie Kelsey or other The Comptroller of Prisons and Keeper of Her Majesty's Gaol at Fannie Bay, Darwin.

The facts appear in the judgment hereunder.

M. R. Hardwick, for the appellant. Under s. 5 of the *Fugitive Offenders Act* 1881 the legislature has prescribed *habeas corpus* as a method of testing the validity of the committal. [He referred to *Collis* v. *Smith* (1); *Reg.* v. *Ganz* (2), and *R.* v. *Brixton Prison (Governor)*; *Ex parte Servini* (3).] Under s. 10 it is not possible to examine the validity of the committal. The learned judge below was in error in holding that false pretences under s. 32 (1) of the *Larceny Act* 1916 was within the provisions of the *Fugitive Offenders Act* 1881, s. 9. Since the enactment of the *Criminal Justice Act* 1948 the kind of punishment prescribed for the offence is imprisonment *simpliciter*: see s. 1 (1). The words "or by any greater punishment" in s. 9 of the *Fugitive Offenders Act* 1881 refer to penal servitude or death. Although the statute is ambulatory in its operation regard should be had in its construction to the kinds of punishment in existence in 1881. Part I of the *Fugitive Offenders Act* 1881 does not specify imprisonment as being a kind of punishment to which the Part applies. In 1881 the word imprisonment was used as descriptive of imprisonment with hard labour or penal servitude: see e.g. the *Criminal Procedure Act* 1881 (Imp.), s. 29. The problem here has arisen before. [He referred to *R.* v. *Morton Stewart* (decision of stipendiary magistrate in Western Australia) (4) and *Stafford* v. *St. Lewis* (Supreme Court of Trinidad and Tobago) (5).] The former decision was in favour of the appellant, the latter of the

(1) (1909) 9 C.L.R. 490.
(2) (1882) 9 Q.B.D. 93.
(3) (1914) 1 K.B. 77.
(4) Unreported but see *London Times* 27th March 1953.
(5) (1957) 107 L. Jo. 507.

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respondent. The words in s. 9 " which is for the time being punishable by " mean " punishable by the Court ". The courts are not concerned with the method of disposing of prisoners, once the sentence has been imposed. " Imprisonment " as now used is not the same thing as " imprisonment without hard labour ". There is a difference between the kind of punishment which a court may impose and the subsequent administrative way in which the sentence is carried out. Consequently the existence of the *Prison Rules* 1949 is not relevant to the problem. The words " or greater punishment " in s. 9 refer to kinds of punishment, not to the duration of punishment. [He referred to *McArthur* v. *Williams* (1) and *R.* v. *Governor of Brixton Prison*; *Ex parte Percival* (2).]

Sir Garfield Barwick Q.C., Attorney-General for the Commonwealth of Australia (with him *S. Hulme*) for the respondent. The procedure by way of *habeas corpus* is available in the first place to determine the validity of the warrant only. The question of the authority of the magistrate to issue the warrant may be examined, but the authority is established if there is evidence before the magistrate such as Pt. I of the *Fugitive Offenders Act* required. Here there is no challenge to the authentication of the warrant nor to the fact that there was evidence which raised the necessary presumption of the commission of the offence. The challenge should be limited to the question: whether the material before the magistrate raised a presumption that the offence is one to which Pt. I of the Act applied. The magistrate had before him evidence of an expert, that there could be imposed on the applicant a punishment of confinement with labour for more than twelve months, and that confinement with labour for more than twelve months is within the prescription of s. 9. There the matter should end. [He referred to *R.* v. *Secretary of State for India*: *Ex parte Ezekiel* (3).] Section 10 of the *Fugitive Offenders Act* 1881 pre-supposes the existence of a valid warrant but the discretion given by it can be exercised on an application for *habeas corpus*. Observations in *McArthur* v. *Williams* (1) to the effect that the discretion under s. 10 is wide enough to permit reviewing the validity of the warrant should not be followed. It is not possible to confine the language of the *Fugitive Offenders Act* 1881 by reference to prison practice in England at the date of its enactment. The statute was intended to operate indefinitely in the future. It looks at the detriment that a prisoner may suffer. The words " to punish " are not equivalent to " to

(1) (1936) 55 C.L.R. 324.
(2) (1907) 1 K.B. 696, at pp. 706 et seq.
(3) (1941) 2 All E.R. 546, at p. 553.

sentence ". The *Prison Rules* 1949 are made within the authority to make rules conferred by the *Criminal Justice Act* 1948. Imprisonment was always a common law form of punishment. Where there was authority to impose imprisonment with or without hard labour it was not necessary for the judge who intended to impose a sentence of imprisonment *simpliciter* to say " without hard labour ". [He referred to *R.* v. *Morris* (1).] Any offence which may result in confinement with labour for twelve months or more falls within Pt. I of the *Fugitive Offenders Act*. A person sentenced to imprisonment for thirteen months without hard labour from 1881 to 1948 would be within the provisions of the Part because imprisonment *simpliciter* has always been combined with some degree of labour by virtue of, first, *The Prison Act* 1865 and then *The Prison Act* 1898.

M. R. Hardwick, in reply.

Cur. adv. vult.

Mar. 25.

THE COURT delivered the following written judgment :—

This is an appeal from an order of the Supreme Court of the Northern Territory. The order dismissed an application for a writ of *habeas corpus ad subjiciendum* directed to the Comptroller of Prisons and Keeper of the Gaol at Darwin. The application for the writ was made by the appellant who was a prisoner in the gaol. He was held under a committal by a magistrate made in purported pursuance of s. 5 of the *Fugitive Offenders Act* 1881 (44 & 45 Vict. c. 69). Part I of that Act relates to the return of a fugitive accused of an offence to which the Part applies committed in one part of the Queen's dominions when he is found in another part of Her Majesty's dominions. Section 5 forms a provision of Pt. I.

Sir Laurence Dunne, a metropolitan magistrate in London, had issued a warrant for the apprehension of the plaintiff on four charges of offences against s. 32 (1) of the *Larceny Act* 1916 (6 & 7 Geo. V. c. 50). Section 32 (1) of the *Larceny Act* deals with false pretences and amongst other things provides that a person who by any false pretence with intent to defraud obtains from any other person any money or valuable security shall be guilty of a misdemeanour and on conviction thereof liable to penal servitude for any term not exceeding five years. Section 9 of the *Fugitive Offenders Act* 1881 provides that Pt. I shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanour, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was

(1) (1951) 1 K.B. 394.

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committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment. Then the section proceeds "and for the purposes of this section rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour". If s. 32 (1) of the *Larceny Act* 1916 were unaffected by any later legislation, it would be clear enough that Pt. I of the *Fugitive Offenders Act* 1881 applied to the offences with which the appellant is charged under the warrant of Sir Laurence Dunne. For under the very terms of s. 32 they are punishable with penal servitude for a term not exceeding five years. But it is not unaffected by later legislation. On the contrary by s. 1 of the *Criminal Justice Act* 1948 (11 & 12 Geo. VI., c. 58) penal servitude was abolished as also were sentences by a court to imprisonment with hard labour. The appellant maintains that since that Act it is no longer true that any ordinary crime in England is punishable by imprisonment with hard labour for a term of twelve months or more or by any greater punishment. Accordingly he contends that Pt. I of the *Fugitive Offenders Act* 1881 is no longer applicable to the offences of false pretences with which he is charged under s. 32 of the *Larceny Act* 1916. This contention forms the foundation of his present appeal.

Section 1 (1) of the *Criminal Justice Act* 1948 provides that no person shall be sentenced by a court to penal servitude; and every enactment conferring power on a court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of the Act. Sub-section (2) of s. 1 deals in a similar manner with hard labour. The sub-section provides that no person shall be sentenced by a court to imprisonment with hard labour; and that every enactment conferring power on a court to pass a sentence of imprisonment with hard labour in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the term for which a sentence of imprisonment with hard labour could have been passed in that case immediately before the commencement of the Act; and so far as any enactment requires or permits prisoners to be kept to hard labour it shall cease to have effect. Sub-section (3) deals with enactments providing for sentences of imprisonment or committals directing that the offender shall be treated as an offender of a particular division or be placed in a particular division and provides that such enactments shall cease to have effect. The

policy of these provisions is made more apparent by s. 52 dealing with the rules for the management of prisons and the like and by certain of the rules made thereunder. Section 52 (1) provides that the Secretary of State may make rules for the regulation and management of prisons, remand centres, detention centres, attendance centres and Borstal institutions respectively, and for the classification, treatment, employment, discipline and control of persons required to be detained therein. Pursuant to this provision the *Prison Rules* 1949 (No. 1073 of 1949) were adopted. They are to be found in *Statutory Instruments* 1949, vol. 1, p. 3470. Under the heading " Work " rr. 56, 57 and 58 (p. 3483) make the following provisions :—Every prisoner shall be required to engage in useful work for not more than ten hours a day, of which so far as practicable at least eight hours shall be spent in associated or other work outside the cells : Provided that the medical officer may excuse a prisoner from work on medical grounds, and no prisoner shall be set to any work unless he has been certified as fit for that type of work by the medical officer. Prisoners may receive payment for work in accordance with rates approved by the commissioners. No prisoner shall be set to any type of work not authorised by the commissioners. Except with the authority of the commissioners, no prisoner shall work in the service of another prisoner or of an officer, or for the private benefit of any person.

It is apparent that the effect of a sentence imposed under s. 32 of the *Larceny Act* 1916 as modified by s. 1 of the *Criminal Justice Act* 1948 is to render the prisoner liable to imprisonment for the term specified together with work in pursuance of the provisions of rr. 56-58 of the *Prison Rules* 1949. In this state of affairs the appellant maintains that it can no longer be true that false pretences is an offence punishable in England with hard labour for a term of twelve months or more within the meaning of s. 9 of the *Fugitive Offenders Act* 1881, notwithstanding the expansiveness of the definition of hard labour included in that provision. If this be so Pt. I of the *Fugitive Offenders Act* 1881 does not apply to the offences with which the appellant is charged and moreover it has no application to any but a very few offences against English law. The question of the correctness of the appellant's contention appears to depend on the expanded definition or description of hard labour given by s. 9 and the possibility of the present form of punishment falling within it. We can put aside the natural or undefined meaning of imprisonment with hard labour. That was a known sentence under English law which now has gone. For an analogous reason we can put aside the term " rigorous imprisonment ". For that

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seems to refer to a form of punishment established under the Indian *Penal Code* by that name and under like codes. The material part of the description of hard labour contained in s. 9 is "any confinement in a prison combined with labour by whatever name it is called". Confinement of that kind is to be deemed to be imprisonment with hard labour. Is it correct to say that under the present system established by the *Criminal Justice Act* 1948 and the rules made under s. 52 the sentence to which a person convicted under s. 32 of the *Larceny Act* is liable, is confinement in a prison combined with labour by whatever name it is called? The words "any confinement in a prison combined with labour by whatever name it is called" are clearly meant to form a general description and not to identify a particular punishment existing in any particular part of Her Majesty's dominions. Part I of the *Fugitive Offenders Act* 1881 was intended to apply generally in all parts of the British dominions. It would have been unwise if not impossible to make the application of the Act depend on the terminology of punishment that had been or might be adopted in the many parts of the dominions in order to refer to punishment of the kind contemplated; and for that reason general descriptive words were relied upon. It is true that it was assumed in framing s. 9 that it was from the sentence to which the law exposed the offender that the application of the Act would be ascertained. But that does not mean that all that is involved must be expressed in the sentence of the court in words. It means no more than that the sentence provided by law must import or connote the liability to that form of punishment which is enough to bring the offences within s. 9. The history of the term imprisonment with hard labour is a long one. It perhaps begins with 16 Geo. III c. 83. But there is no purpose in tracing it now unless it be to show that in England there was progressively a great mitigation in the rigidity and severity of the kind of labour involved in point of fact under such a sentence. At the time of the passing of the *Fugitive Offenders Act* 1881 the provisions governing that form of punishment seem to have been *The Prison Act* 1865 (28 & 29 Vict. c. 126), s. 19, and 1st Sched. 34 and 35 as affected by s. 37 of *The Prison Act* 1877 (40 & 41 Vict. c. 21). It must be confessed that the form of labour possible under those provisions was according to present day views extremely severe and arduous and at the same time productive of no result in a material form. But the connotation of the description in s. 9 was not fixed by reference to these characteristics of the then existing English permissible forms of labour to which prisoners under sentence to imprisonment with hard labour might be put. Sections 2 and 4 of *The Prison Act* 1898

(61 & 62 Vict. c. 41) placed the whole question of carrying out a sentence to hard labour under the authority of the Secretary of State who made *Prison Rules* for the purpose. The mitigation had gone so far by 1948 that the provisions of s. 52 (1) of the *Criminal Justice Act* 1948 and the rules thereunder really made little or no substantial difference in the treatment of a prisoner sentenced to hard labour. See *Halsbury's, Laws of England*, 2nd ed. vol. 26, pars. 387, 407 and supplement. The *Fugitive Offenders Act* 1881 was conceived as a measure operating between many parts of the Queen's dominions and it would be a mistake to treat the very general words of the definition in s. 9 of imprisonment with hard labour as restricted by contemporary practice in English prisons. When in the light of these considerations the material part of that definition is examined it will be seen that the real basis of the objection to the application of the *Fugitive Offenders Act* 1881 lies in the distinction between the term "work" and the term "labour". There is no doubt that the word "work", particularly if used in a contrast with the word "labour", may have a much wider meaning than the latter word and embrace mental and physical employments in which manual or muscular effort apparently plays little part. It is said therefore that rr. 56, 57 and 58 of the *Prison Rules* 1949 because of their use of the word "work" cannot operate so that the test offered by s. 9 is satisfied: they cannot operate so that a term of imprisonment imposed now in England involves a "confinement in a prison combined with labour by whatever name it is called". This argument, while it may depend on a nice distinction between English words which is by no means universally observed, cannot be put aside lightly. In truth the use in the *Prison Regulations* of the expression "required to engage in useful work" instead of the words "put to hard labour" reflects the change in outlook and practice that has taken place. But when the draftsman of s. 9 employed the word "labour" in the material phrase, it was not for the purpose of marking a contrast between "work" and "labour". The rigor, burden or physical effort involved was not the point. The point was the character of the punishment as reflecting the view taken in the claiming country of the quality of the offence. The mere fact that prior to 1948 *Prison Regulations* had so mitigated the rigor of hard labour that it amounted to little or no more than useful work could not at that time have affected the application of the *Fugitive Offenders Act* 1881 to offences punishable in England with hard labour. What has happened really is a change of terminology (and, in relation to the "divisions", of organisation). It is a change which reflects no great change of substance, if the substance is considered as in

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1949. On the whole the more reasonable conclusion appears to be that the present English system sufficiently satisfies the expression " any confinement in a prison combined with labour by whatever name it is called ". It is as well to say " present English system ", because a change may be made by *Prison Rules* and the conclusion depends upon the rules now existing. That they may be changed is no objection to treating them as at present governing the quality and effect of the sentence of imprisonment. For s. 9 speaks of " every offence which is *for the time being* punishable " etc. The conclusion means that the appeal must fail. It is desirable, however, to add that, for the respondent, the Attorney-General relied on certain arguments which were, so to speak, preliminary to the question with which this judgment deals. They depended upon the form in which s. 5 of the *Fugitive Offenders Act* 1881 is expressed in conferring authority upon the magistrate, the limits of the remedy of *habeas corpus* and probably in some measure a view that in administering the law of the Northern Territory the Court could not take judicial notice of the statutes of the United Kingdom : see per *Hood* J. *re Marshall* (1), compare s. 69 of the *Evidence Act* 1928 (Vict.) and s. 19 of the *Evidence Act* 1898-1954 (N.S.W.). The Attorney-General accepted the view that the powers conferred by s. 10 of the *Fugitive Offenders Act* 1881 might be used on the hearing of an application for a writ of *habeas corpus*, but he denied the applicability of that provision to a case where the ground is that the warrant is invalid. In the view we take no such question arises but in making that observation we do not intend to cast doubt on the soundness of the position the Attorney-General took as to s. 10.

The conclusion which has been expressed that the ground upon which the appellant rests his appeal fails makes it unnecessary to consider these arguments.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Newell & Ward*, Darwin, by *F. S. Newell & Marsh.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.

(1) (1901) 26 V.L.R. 816, at p. 821.