[HIGH COURT OF AUSTRALIA.]

WILLIAMS . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

[No. 2.]

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

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MELBOURNE, *May* 8, 9; *June* 11.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—Appeal—Indictable offence against law of Commonwealth—Appeal against sentence by Commonwealth Attorney-General—Appeal to State Court of Criminal Appeal—Jurisdiction—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 77 (III.)—*Judiciary Act* 1903-1932 (*No.* 6 *of* 1903—*No.* 60 *of* 1932), *secs.* 68,* 77—*Criminal Appeal Act* 1912-1924 (*N.S.W.*) (*No.* 16 *of* 1912—*No.* 16 *of* 1924), *sec.* 5D.*.

A prisoner having been sentenced by a New South Wales Court to imprisonment for an indictable offence against a law of the Commonwealth, the Attorney-General of the Commonwealth appealed to the Court of Criminal Appeal of New South Wales against the sentence on the ground of its inadequacy. That Court increased the sentence. On an application by the prisoner for special leave to appeal from this decision to the High Court, *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ. were of opinion that sec. 68 of the *Judiciary Act* 1903-1932 did not operate upon sec. 5D of the *Criminal Appeal Act* 1912-1924 (N.S.W.) so as to enable the Attorney-General of the Commonwealth to appeal to the Court of Criminal Appeal; *Rich*, *Starke* and *Dixon* JJ. were of opinion that it did so operate. The Court being equally divided, leave to appeal was refused.

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

* The provisions of these sections are set out at p. 536, *ante*.

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Subsequently to the decision of the High Court in *Williams* v. *The King* [*No.* 1] (1), in the report of which the prior facts sufficiently appear, the Attorney-General for the Commonwealth appealed to the Court of Criminal Appeal of New South Wales against the sentence imposed on the prisoner upon the ground that it was inadequate. That Court increased the sentence to four years with hard labour to date from 24th February 1933.

The applicant now applied for special leave to appeal from this decision to the High Court on the grounds, substantially, that (*a*) the Commonwealth Attorney-General had no right of appeal, (*b*) the Court of Criminal Appeal had no jurisdiction to deal with a sentence originally imposed by a trial Judge in respect to a Commonwealth offence, (*c*) the conferring of a right to appeal by sec. 5D of the *Criminal Appeal Act* 1912-1924 (N.S.W.) on a named officer, the State Attorney-General, could not, by analogy, be held to confer a right of appeal on some Commonwealth officer, (*d*) the right to appeal was conferred only upon persons convicted of offences and not on the Crown, (*e*) an appeal as to the sentence was not an appeal from a trial and conviction, (*f*) the State Parliament could not be given authority by the Commonwealth Parliament to erect a tribunal or remove a tribunal or substitute a new tribunal to deal with a sentence imposed on a person convicted of an offence against the Commonwealth, and (*g*) the *Judiciary Act* 1903-1932 did not confer jurisdiction but merely dealt with procedure.

Windeyer K.C. and *Gowans*, for the applicant. The *Judiciary Act*, sec. 68, as amended by the *Judiciary Act* 1932 in consequence of the decision in *Seaegg* v. *The King* (2), does nothing more than say that the various State Courts have jurisdiction. In giving a right of appeal to the prisoner it has not given a similar right to the Crown. The right of the Crown to apply to another tribunal to increase the sentence is something unknown to British law apart from the New South Wales *Criminal Appeal Act* 1912-1924, sec. 5D. But the *Judiciary Act*, even as amended, still has no reference to sentences. The term "proceeding" does not include "sentence." "Trial and conviction" does not include "sentence." An application

(1) *Ante*, p. 536. (2) (1932) 48 C.L.R. 251.

for review of a sentence is not an "appeal" (see *Judiciary Act*, sec. 72, and heading thereto, and definition in sec. 2). Sec. 68 (2) of the *Judiciary Act* deals only with procedure and does not confer a right of appeal. The Commonwealth has no power to invest State Courts with jurisdiction by reference to State law. Such an investing would be against the spirit of the Constitution (The Constitution, sec. 77). The Commonwealth Attorney-General is not the officer to prosecute the appeal. He has no *locus standi*. "Proceedings" means a course of legal conduct, not any one step. It is a collective word.

Sir *T. Bavin* K.C. (with him *Crawford*), for the Crown. Sec. 68 of the *Judiciary Act*, as amended to overcome *Seaegg* v. *The King* (1), gives a right of appeal to the Crown as well as to the convicted person. If it had been intended to limit the right of appeal to an accused person, it would have been very simple to have used appropriate words to do so, but the Act is not so limited, and the State Act confers a right of appeal not only on the convicted person but on the Crown. Sec. 68 (2) of the *Judiciary Act* exercises the power conferred by sec. 77 of the Constitution and confers the "like jurisdiction" on State Courts which they had in relation to State offences. "The like jurisdiction" does not mean part of the jurisdiction. Had it been intended to limit the jurisdiction, the words "by a convicted person" would have achieved the result which is contended for by the applicant. It is a jurisdiction "with respect to persons who are charged," that is, over the person of the offender. The Attorney-General for the Commonwealth was the proper person to bring the appeal. The appeal under the *Criminal Appeal Act* is not given to the Attorney-General for New South Wales, but to the parties to the litigation. The real party in all criminal cases is the Crown and not the Attorney-General. This proceeding was an "appeal." Any application to review by any party interested is an appeal. The right of appeal is given to the Federal Attorney-General by sec. 68 of the *Judiciary Act*, as amended, by reason of the words "the like jurisdiction." Sec. 68 enables the State Court to exercise jurisdiction

(1) (1932) 48 C.L.R. 251.

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to administer the Federal *Crimes Act*, including trial, conviction and sentence. Jurisdiction " with respect to the hearing and determination of appeals " is a jurisdiction to " hear appeals." The expression " conviction or . . . any proceedings connected therewith " in sec. 68 of the *Judiciary Act* includes " sentence." The applicant's contention that the amendment of sec. 68, assuming that it does give a right of appeal, only gives a right of appeal in respect of something arising out of trial and conviction and does not extend to the question of sentence is not correct. If that contention were good then the words " trial and conviction " in sec. 68 (2) (*c*) must bear the same meaning and every person in gaol for an offence against the laws of the Commonwealth is wrongly in gaol, because there is no jurisdiction in any State Court to sentence the person convicted unless it is to be found in sec. 68. Sec. 68 must, therefore, give jurisdiction to impose a sentence. The imposition of the sentence is an exercise of Federal jurisdiction. " Conviction " includes " sentence " (*Archbold's Criminal Pleading*, 28th ed. (1931), pp. 241, 339; *Burgess* v. *Boetefeur* (1)). An appeal against sentence is an appeal arising out of conviction. Sec. 68 in its original form dealt with sentences and gave State Courts of first instance jurisdiction to impose sentences: the amendment of that section covered the same field and invested the State Courts with appellate power to deal with sentences. The jurisdiction given to the State Court was to hear appeals by the two parties concerned: " the like jurisdiction " is a jurisdiction to hear appeals by either party, and the Crown properly appears by the Attorney-General. The State Courts have power when derived from Commonwealth authority, and the mere fact that there are differences in the law of the different States does not render the Federal Act invalid. The words of sec. 68 are intended to confer the same jurisdiction as is administered by the State law.

Gowans, in reply. The problem being primarily one of construction of the amended section, the Court should have regard to (1) the state of the law prior to the amendment, (2) the state of the law if the section were construed in the way contended for by the respective parties, and (3) the principles of construction

(1) (1844) 7 M. & G. 481; 135 E.R. 193.

applicable to this class of statute. The precise defect disclosed by *Seaegg's Case* (1) was that the prisoner had no right of appeal against conviction except by way of a case stated on request made prior to conviction. The *Judiciary Act*, sec. 72, gave no right of appeal to the Crown. The Crown's contention involves (*a*) the creation of a new form of appeal, (*b*) the investment of a new Court with Federal jurisdiction, (*c*) the granting of a right of appeal to the Crown, and (*d*) the extension of that appeal to sentences. "Jurisdiction" means "the capacity to entertain proceedings," not "powers." Sec. 68 (2) merely indicates the Courts to go to for the respective proceedings described therein. The earlier part of the sub-section is descriptive of the various classes of State Courts. As to the contention that it is a jurisdiction "over the person" of the offender, the delimitation of the objects of the jurisdiction says nothing as to the extent of the subject matter. The "like jurisdiction" does not bring in *in globo* the provisions of the New South Wales *Criminal Appeal Act*. (Compare sec. 9, restitution of property; and sec. 7 (4), confinement to a lunatic asylum.) Sec. 68 (1) provides a new mode of procedure for appeals. Sec. 68 (2) indicates the Courts to approach. The section should be construed as meaning that the State Courts there described shall have the capacity to entertain in their respective spheres the same kind of proceedings in respect of Federal offences as they entertained in respect of State offences, and with the same procedure. The party who can appeal is still the prisoner, and his appeal is against conviction only (*Judiciary Act*, sec. 72). The term "appeals" should be confined to the type mentioned in the Commonwealth Act, not the New South Wales Act. "Conviction" does not include "sentence" (*Archbold's Criminal Pleading*, 28th ed. (1931), p. 241; *R.* v. *Johnson* (2); *R.* v. *Blaby* (3); *R.* v. *Verney* (4); *Criminal Appeal Act* 1912 (N.S.W.), secs. 2, 5 (*b*) and (*c*)). Sentence may be by a different Court or at a different time from conviction. The jurisdiction of the trial Judge to impose sentence is not to be found in sec. 68 but is contained in sec. 39 (2) of the *Judiciary Act*. "Proceedings connected therewith" implies collateral proceedings,

(1) (1932) 48 C.L.R. 251.
(2) (1909) 1 K.B. 439.
(3) (1894) 2 Q.B. 170.
(4) (1909) 2 Cr. App. R. 107.

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e.g., applications for separate trials, for change of venue, &c., and not sentence. The section should be construed strictly and so as to bring about uniformity of application in the various States. The Commonwealth Attorney-General is not given power to prosecute appeals under sec. 69 of the *Judiciary Act* or otherwise.

Cur. adv. vult.

June 11.

The following written judgments were delivered :—

GAVAN DUFFY C.J. Part III. of the Act of the New South Wales Legislature entitled the *Criminal Appeal Act* of 1912, under the heading of " Right of Appeal and Determination of Appeals," deals with two distinct subjects, (1) the grant of a right of appeal in various cases, and (2) determination of appeals by the Court. Sec. 5D deals with both of these subjects and is as follows : " The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any Court of Quarter Sessions and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper." Sec. 68 (2) of the *Judiciary Act* 1903-1932 of the Commonwealth Parliament runs as follows : " The several Courts of a State exercising jurisdiction with respect to . . . (*c*) the trial and conviction on indictment ; of offenders or persons charged with offences against the laws of the State, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth committed within the State, or who may lawfully be tried within the State for offences committed elsewhere." It is claimed by the Crown that this sub-section entitles the Attorney-General for the Commonwealth, in the case of persons tried in a State Court for offences against the laws of the Commonwealth committed within that State, to use the power of appeal conferred on the State Attorney-General by sec. 5D of the *Criminal Appeal Act* of 1912, because that appeal is an appeal arising out of a conviction. In my opinion this contention cannot be sustained. The words in sub-sec. 2, " shall

have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth," deal with the power and jurisdiction of the Court to hear and determine an appeal when an appeal has been instituted, not with the right of the Crown or the accused person to institute an appeal. The Commonwealth Parliament in enacting sec. 68 was exercising the power of investing State Courts with Federal jurisdiction conferred by sec. 77 of the Constitution and not, as is suggested for the Crown, exercising that power and in the same section exercising a distinct power to confer a right of appeal upon an individual. No doubt Parliament might have done this had it chosen to do so, but the words used are not appropriate for that purpose. However, it is not necessary to enlarge on this subject, because the appeal granted by sec. 5D is not an appeal arising out of a conviction but an appeal arising out of a sentence, and the two are carefully distinguished by the *Criminal Appeal Act*, as will be seen by reference to Part III. of the Act and more particularly to secs. 5, 5D, 5E, and 6. If that be so, the Court of Criminal Appeal in this case was endeavouring to exercise a power which it possessed as a State Court, but a power with which it was not invested by sec. 68 of the *Judiciary Act*.

The appeal should be allowed.

RICH J. The question in this application is that which the Court did not think arose directly on the previous appeal of this prisoner in which for other reasons he succeeded (*Williams* v. *The King* [*No.* 1] (1)). After that decision the Federal Attorney-General appealed against the sentence imposed at Quarter Sessions, upon the ground of its inadequacy. The Court of Criminal Appeal increased the sentence and the prisoner now applies for special leave to appeal against the order so increasing it.

The question turns upon the interpretation of sec. 68 of the *Judiciary Act* 1903-1927, as amended by Act No. 60 of 1932 which was passed in consequence of *Seaegg* v. *The King* (2). We ought not to ignore the occasion of the amendment, which, in my opinion, gives a colour to its language. I find it is impossible, if the history

(1) *Ante*, p. 536. (2) (1932) 48 C.L.R. 251.

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of the amendment is taken into account, to give effect to the contention of the applicant that the words of the section give the Supreme Court power only to entertain appeals which other legislation gives to the parties. It seems to me that a construction can be reasonably given and ought to be given to the section by which the express grant of jurisdiction includes the grant of rights of appeal coextensive with those existing under the State law. I take the object of the provision to be to assimilate criminal procedure, including remedies by way of appeal, in State and Federal offences. The policy upon which the provision is based is that the administration of the criminal law should be uniform in any given State although some of the offences are created by Federal legislation and the others exist under State law. The matter has been exhaustively dealt with in the judgment of *Jordan* C.J. with which I agree.

I think that the application for special leave should be refused.

STARKE J. Special leave to appeal should be refused, but if granted the appeal should be dismissed.

In my opinion, the Court of Criminal Appeal in New South Wales had jurisdiction to hear an appeal on the part of the Attorney-General of the Commonwealth against the sentence imposed on the prisoner, on the ground of its inadequacy. My reasons for this conclusion are, I think, sufficiently expressed in *Williams* v. *The King* [*No.* 1] (1), but I would also add, if I may, my concurrence in the reasoning of my brother *Dixon* in the matter now before us.

DIXON J. In my opinion, sec. 68 (2) of the *Judiciary Act* 1903-1932 operates upon sec. 5D of the New South Wales *Criminal Appeal Act* in such a way as to enable the Attorney-General of the Commonwealth to appeal to the Court of Criminal Appeal against a sentence imposed upon a prisoner convicted in New South Wales on indictment of an offence against the laws of the Commonwealth. The reasoning by which I have reached this conclusion consists of steps which I shall set out.

(1) Sec. 51 (XXXIX.) of the Constitution and sec. 77 (III.) as construed in *Ah Yick* v. *Lehmert* (2) confer ample power upon the

(1) *Ante*, p. 536. (2) (1905) 2 C.L.R. 593.

Parliament to invest the Courts of a State with power to entertain, and to authorize the prisoner or the Crown to take, any proceedings by way of appeal or review in the case of offences against Federal law which the State law allows in cases of offences against State law.

(2) The power or powers derived from sec. 51 (XXXIX.) and sec. 77 (III.) in combination may be exercised by the Parliament without discriminating in its enactment between these sources of authority. The provision should not be referred to sec. 77 (III.) alone and construed as doing no more than that power may be considered to authorize. Thus, even if it were correct that sec. 77 (III.) is not a source of power to enact new remedies, but only of power to give State Courts a Federal authority to administer existing remedies, it would not follow that sec. 68 (2) of the *Judiciary Act* 1903-1932 should receive an interpretation which, with respect to appeals after trial upon indictment, restricted its operation to conferring upon the State Courts capacity to entertain appeals elsewhere given by Federal law to the prisoner or the prosecution.

(3) The provision in sec. 68 upon which the question turns was inserted by Act No. 60 of 1932 in consequence of the decision of this Court in *Seaegg's Case* (1). It is, therefore, certain that the amendment was intended to confer upon the Courts of Criminal Appeal of the States a jurisdiction to hear and determine appeals in the case of Federal offences such as existed in the case of State offences and to confer upon prisoners, at any rate, a right to invoke that jurisdiction and to obtain analogous remedies. No construction of the provision should be adopted which defeats that object, unless the language in which it is expressed is found incapable of any construction that would accomplish it.

(4) To effect the object, the enactment provides that the several Courts of a State exercising jurisdiction with respect to the hearing and determination of appeals arising out of the trial or conviction on indictment, or out of any proceedings connected therewith, of offenders or persons charged with offences against the laws of the State shall have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth. Thus, the method pursued is, so to speak, to take up and adopt

(1) (1932) 48 C.L.R. 251.

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" with respect to persons who are charged with offences against the laws of the Commonwealth " all the jurisdiction of the State Court to hear and determine appeals which answer the description " appeals arising out of the trial or conviction on indictment, or out of any proceedings connected therewith, of offenders or persons charged with offences against the laws of the State." A provision conferring jurisdiction to hear and determine appeals of a specified kind may, perhaps, be taken to mean to do no more than to say which shall be the Court to entertain appeals and administer the remedies that other provisions of the law give to the party. But it is also open to an interpretation by which it gives a jurisdiction to review proceedings not hitherto subject to appeal and so creates new remedies by conferring power to administer them. The first construction would defeat the clear object of the Legislature. The second would achieve it, and ought, therefore, to be adopted.

(5) But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description " appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith." This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice. It is, in my opinion, no objection to the validity of such a provision that the State law adopted varies in the different States.

(6) Sec. 5D of the New South Wales *Criminal Appeal Act*, which authorizes the Attorney-General of the State to appeal against any sentence to the Court of Criminal Appeal and empowers that Court to impose such sentence as it thinks fit, does give an appeal which falls within the description " appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith." The word " conviction " is capable of including sentence, and a construction which confines the description to appeals from verdict and incidental proceedings, and excludes appeals from sentence, appears to me inconsistent with the evident purpose of the Legislature of giving to prisoners, at any rate, the

same remedies by way of appeal in the case of Federal offences as exist in the case of State offences.

(7) I do not think that the contention is well founded that, in spite of the prima facie meaning of the general description, it should be interpreted as relating to appeals by the prisoners only, or as insufficient to include such an innovation as an appeal from sentence by the prosecution. Conceding that such a proceeding is a marked departure from the principles theretofore governing the exercise of penal jurisdiction, it is a departure sanctioned by State law, and it had already been made when the amendment in the provisions of sec. 68 (2) was introduced. General words adopting an existing set of provisions of State law appear to me to be of a different order from general words which are not referential, but deal independently with the subject matter. The general language of sec. 3 of the *Appellate Jurisdiction Act* 1876, which enacted that, subject to certain exceptions, an appeal lies to the House of Lords from any order of the Court of Appeal in England, has been held to give no right of appeal from an order for discharge from custody made upon the return of a writ of habeas, although expressed in terms sufficient to do so, because it could not be supposed " that a section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right " (per Lord *Birkenhead*, *Secretary of State for Home Affairs* v. *O'Brien* (1)). But such a process of interpretation does not appear to me to be applicable to an enactment dealing with the existing and known provisions of a particular department of the statutory law of the States and by a general description adopting it for Federal purposes. Whatever, upon the natural meaning of the language, falls within the description should, I think, be understood as within the legislative intention.

(8) The New South Wales section gives the right of appeal against sentence to the Attorney-General of the State. It gives it to him in virtue of his office. He is the proper officer of the Crown in right of the State for representing it in the courts of justice. When sec. 68 (2) speaks of the " like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth," it recognizes that the adoption of State law must proceed by analogy.

(1) (1923) A.C. 603, at p. 610.

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The proper officer of the Crown in right of the Commonwealth for representing it in the Courts is the Federal Attorney-General. I do not feel any difficulty in deciding that, under the word "like" in the expression "like jurisdiction," the functions under sec. 5D of the State Attorney-General in the case of State offenders fall to the Federal Attorney-General in the case of offenders against the laws of the Commonwealth.

In my opinion the application for special leave should be refused.

EVATT AND MCTIERNAN JJ. Following upon the decision of this Court in *Williams* v. *The King* [*No.* 1] (1), the Attorney-General of the Commonwealth lodged in the Court of Criminal Appeal of New South Wales a notice stating: "I desire to appeal to the Court of Criminal Appeal against certain sentences pronounced by the Court of Quarter Sessions at Sydney in the State of New South Wales on the twenty-fourth day of February in the year 1933."

It will be observed that the notice indicates that the appeal is brought by His Majesty's Attorney-General for the Commonwealth and is not expressed to be given on behalf of the Crown. The Attorney-General of the Commonwealth thereby assumes to exercise the right of "appeal" which is conferred by sec. 5D of the New South Wales *Criminal Appeal Act* upon the Attorney-General of New South Wales.

The Chairman of Quarter Sessions, his Honor Judge *White*, had sentenced the present applicant to eighteen months imprisonment in respect of each of three offences against the law of the Commonwealth, to which the applicant pleaded guilty, and the sentences were made concurrent. This sentence was increased to five years by the Court of Criminal Appeal upon an appeal instituted by the Attorney-General of New South Wales. But, on appeal to this Court by the prisoner, it was decided that the Attorney-General of New South Wales had no authority to institute the appeal and the sentence imposed by Judge *White* was restored.

The Attorney-General of the Commonwealth then made his application to the Court of Criminal Appeal (i.e., the Supreme Court of New South Wales; see *Stewart* v. *The King* (2)) to increase the

(1) *Ante*, p. 536. (2) (1921) 29 C.L.R. 234.

sentence. The Court entertained the application and ordered that the applicant be imprisoned for four years with hard labour. It has been assumed that the sentence for each offence was increased to four years' imprisonment with hard labour, the sentences to be concurrent, although this is not expressly stated in the order of the Court of Criminal Appeal. But it has to be taken that the Court of Criminal Appeal desired to fix at four years the aggregate sentence to be served by the applicant instead of the period of eighteen months fixed by the trial Judge, and that of five years fixed by the Court of Criminal Appeal when first it assumed jurisdiction over the matter.

The question whether the Supreme Court was right in entertaining the application of the Attorney-General of the Commonwealth and making the order complained of depends upon the meaning to be ascribed to sec. 68 of the *Judiciary Act* as it was amended on December 5th, 1932, shortly after the decision of this Court in *Seaegg* v. *The King* (1). The amendment was obviously intended to remove the obstacles which, as *Seaegg's Case* revealed, lay in the way of an appeal to the Court of Criminal Appeal of a State by a person convicted within that State of an offence created by Commonwealth law. But, as we pointed out in *Williams* v. *The King* [*No.* 1] (2),

> "it does not follow that it was intended by Parliament to give the Crown a right of appeal against the sentence imposed. Such an intention would usually be expressed very clearly and an appeal against a sentence is, we understand, not accorded to the Crown by any State law excepting that of the State of New South Wales, although in every State of the Commonwealth a person convicted on indictment is given a right of appeal to the local Court of Criminal Appeal."

It is now contended that the amendment has this wider operation. The question has been fully argued, and we think that, in amending sec. 68, the Commonwealth Parliament intended to do no more than to remedy the defect which was exposed by *Seaegg's Case* (1). In our opinion, Parliament did not intend to give the Crown a right to approach a Court of Criminal Appeal to question the adequacy of a sentence, merely because a State statute chose to include an analogous provision in the local *Criminal Appeal Act*.

In the case of *Willingale* v. *Norris* (3), *Walton* J. said: "This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes."

(1) (1932) 48 C.L.R. 251. (2) *Ante*, p. 536.
(3) (1909) 1 K.B. 57, at p. 66.

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Evatt J. McTiernan J.

We think that this observation has a special application in the case before us. Under the circumstances, general words must be looked at with considerable care, it being always remembered that the relevant problem is to ascertain the intention of Parliament. The judgments of the House of Lords in *Secretary of State for Home Affairs* v. *O'Brien* (1) apply an analogous principle, in interpreting very general words creating an appellate jurisdiction, by excluding from their scope judgments ordering the release of a person applying for the writ of habeas corpus.

For instance, the Earl of *Birkenhead* said :—

> " The argument is, of course, founded upon the very wide language of sec. 3 of the *Appellate Jurisdiction Act*, 1876, which is undoubtedly general enough to cover this or almost any other case. It is certainly true that in terms the words are wide enough to give an appeal in such a matter as the present. But I should myself, if I approached the matter without the assistance of the authority at all, decline utterly to believe that a section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right. But happily we are in a position to approach the matter with even greater confidence, for in *Cox* v. *Hakes* (2) a very similar matter was debated and decided by this House " (3).

His Lordship then referred to *Cox* v. *Hakes* (2), and said :—

> " Lord *Halsbury* L.C. summarized the matter in the following sentence (4) : ' It is the right of personal freedom in this country which is in debate ; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal ' " (5).

The question at issue here is to what extent sec. 68 has carried the criminal law of the State into the law of the Commonwealth with respect to the trial and punishment of indictable offences. In our opinion, Parliament only intended to open the Court of Criminal Appeal to the persons against whom *Seaegg's Case* (6) specially said it was closed unless they went in the manner prescribed by secs. 72-76 of the *Judiciary Act*. The mischief sought to be remedied was that a person convicted on indictment under Commonwealth law had no appeal to the local Court of Criminal Appeal (*i.e.*, the

(1) (1923) A.C. 603.
(2) (1890) 15 App. Cas. 506.
(3) (1923) A.C., at p. 610.
(4) (1890) 15 App. Cas. 522.
(5) (1923) A.C., at pp. 610, 611.
(6) (1932) 48 C.L.R. 251.

Supreme Court) except in pursuance of secs. 72 and 76 of the *Judiciary Act*. If Parliament intended to empower the Crown in right of the Commonwealth or the Attorney-General of the Commonwealth to appeal against a sentence, it has adopted a most cryptic method of expression. When it desired to legislate as to the manner of prosecuting indictable offences against Commonwealth law the *Judiciary Act*, (sec. 69) expressly authorize the Attorney-General of the Commonwealth to prosecute them. Yet it made no special provision for dealing with " appeals " by the Crown against sentences by empowering the Attorney-General or some other person to set the appeal in motion. Why ? Because, as we think, it was never contemplated by Parliament, either before or after the decision in *Seaegg's Case* (1), that the Commonwealth Crown or any of its officers should exercise or possess such an extraordinary right.

The conclusion to which we have come is supported by the wording of the amendment to sec. 68 (1) and sec. 68 (2) of the *Judiciary Act*. It would be very surprising if Parliament intended to include a " sentence " in the denotation of the word " conviction " or of " proceedings connected with " a trial or conviction. Indeed, an " acquittal " is, in one sense, a " proceeding connected with " a trial. Moreover, the position in favour of the appellant is strengthened when it is remembered that we have to determine whether the general phrase " appeals arising out of any such trial or conviction or out of any proceedings connected therewith " exhibits a clear intention to embrace appeals in which the Crown itself is appellant. This language leaves us with the gravest doubt as to whether, for the first time in the history of the Commonwealth, Parliament did grant such a right. We do not think that the Commonwealth Parliament has manifested any intention of effecting such a drastic change in the established criminal law and practice of the Commonwealth. Lord *Loreburn* L.C. said in *Nairn* v. *University of St. Andrews* (2) :—

> " It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the Legislature forsees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate

(1) (1932) 48 C.L.R. 251.

(2) (1909) A.C. 147, at p. 161.

H. C. OF A. 1934. WILLIAMS v. THE KING [No. 2]. Evatt J. McTiernan J.

that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continually obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are."

This principle of construction is applicable here. We think its application should result in a decision adverse to the submissions of learned counsel for the Commonwealth.

Assuming that the words used in the amendment to sec. 68 are sufficient to authorize an appeal by the Crown wherever a State Act authorizes an appeal by the Crown in analogous cases under State law, we are also of opinion that the " appeal " mentioned in sec. 5D of the New South Wales *Criminal Appeal Act* is not an appeal by the Crown within the amendment. Sec. 5D confers the right to approach the Court upon the " Attorney-General," that is the Attorney-General in and for New South Wales (*Interpretation Act* 1897, sec. 17). The person holding that office has a dual capacity. He is a political officer as well as the legal representative of the Crown in the Courts.

In our opinion, the nomination of the Attorney-General of New South Wales as the person authorized to apply to the Court under sec. 5D of the New South Wales *Criminal Appeal Act,* is an essential ingredient of the jurisdiction thereby created. Sec. 5D does not empower the Crown to approach the Court of Criminal Appeal to obtain an alteration of sentences imposed in its own Courts. The prerogative of mercy which is exercisable on the advice of Ministers is not affected by the Act, but sec. 5D authorizes the Court to act as a sentence-reviewing tribunal whenever its aid is invoked by the Minister of the Crown who is expressly nominated. It is conceded that, under sec. 5D, the New South Wales Court of Criminal Appeal may be asked by the Attorney-General to *reduce* a sentence as well as to *increase* it, and that the Court of Criminal Appeal, which " may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper," is thereby enabled to *reduce* as well as to *increase* a sentence. In our view it is impossible to describe such a proceeding as a true " appeal." If the Crown applies to reduce a sentence there would, we imagine be no respondent

to the "appeal." No doubt it is called an "appeal" in sec. 5D, but it is certainly not an appeal *stricto sensu*, and the word "appeals" in sec. 68 of the *Judiciary Act* should be construed only as applying to appeals *stricto sensu*. In the case of *Whittaker* v. *The King* (1), *Knox* C.J. and *Powers* J. expressed the opinion that the true view of sec. 5D was "that unlimited judicial discretion is thereby conferred on the Court of Criminal Appeal." *Gavan Duffy* and *Starke* JJ. adopted much the same interpretation, namely, that the section confers an unfettered discretion upon the Court of Criminal Appeal to alter the sentence imposed by a trial Judge. These considerations show clearly that, although the services of the Court of Criminal Appeal may be invoked by the Attorney-General under sec. 5D of the *Criminal Appeal Act*, just as they may be by the Minister of Justice to whom a petition has been addressed for the exercise of the pardoning power under sec. 26 of the same Act, neither method of proceeding is really an appeal by the Crown.

We therefore conclude that the Supreme Court had no jurisdiction to increase the appellant's sentence. We only concur in the order that special leave to appeal should be refused because, owing to the equal division of opinion in this Court, the granting of special leave would be immediately followed by the dismissal of the appeal. As to whether proceedings other than an appeal can be successfully prosecuted by the applicant, we express no opinion. This application was originally framed as for a writ of habeas corpus, but, upon the hearing, it was treated as an application for special leave.

Application for special leave to appeal refused.

Solicitor for the applicant, *J. Yeldham.*

Solicitor for the Crown, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1928) 41 C.L.R. 230, at p. 235.