[HIGH COURT OF AUSTRALIA.]

EX PARTE WILLIAMS.

H. C. OF A. 1934.

MELBOURNE, *Nov.* 2.

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

Habeas Corpus—Criminal law—Federal offence—Sentence—Adequacy—Appeal by Federal Attorney-General—Increase of sentence by State Court of Criminal Appeal—Application by prisoner for special leave to appeal to High Court—Equal division of opinion—Leave refused—Expiration of original sentence—Application to High Court for writ of habeas corpus—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 75—*Judiciary Act* 1903-1932 (*No.* 6 *of* 1903—*No.* 60 *of* 1932), *secs.* 23 (2) (*a*), (*b*), 30, 68.

A prisoner was sentenced by a New South Wales Court of Quarter Sessions to eighteen months' imprisonment for an indictable offence against a law of the Commonwealth. The Attorney-General of the Commonwealth appealed to the Court of Criminal Appeal (being the Supreme Court) of New South Wales against the sentence on the ground of its inadequacy, and that Court increased the sentence. The prisoner applied for special leave to appeal from this decision to the High Court on the ground that the Attorney-General of the Commonwealth had no right of appeal to the Court of Criminal Appeal. *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ. were of opinion that the Attorney-General did not have such a right: *Rich, Starke* and *Dixon* JJ. were of opinion that he had. The Court being equally divided, leave to appeal was refused. On the expiration of the term of imprisonment originally imposed by the Court of Quarter Sessions, the prisoner applied to the High Court for an order nisi for a writ of habeas corpus.

Held that the application should be refused.

Per Rich, Dixon and *McTiernan* JJ.: If the order nisi were granted, the applicant would not succeed on the ground taken on the application for special leave, because on an equal division of opinion in the High Court sec. 23 (2) (*a*) of the *Judiciary Act* 1903-1932 would apply, and the decision of the Court of Criminal Appeal would still stand.

Per Rich and *Dixon* JJ.: In the circumstances the Court of Criminal Appeal was authorized by law to determine its own jurisdiction conclusively and the validity of its order could not be questioned on an application for a writ of habeas corpus.

Per Starke and *Dixon* JJ.: A writ of habeas corpus did not lie, because the applicant was in execution on a criminal charge after judgment in due course of law.

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Per Starke J.: The High Court had no jurisdiction to grant the application, inasmuch as the matter was not one arising under the Constitution or involving its interpretation.

Per Evatt J.: As it was obvious that the order nisi, if granted, would ultimately be discharged, it would be futile to grant the application.

APPLICATION for order nisi for habeas corpus.

The applicant, Harold Roy Williams, was, on 23rd February 1933, charged at the Court of Quarter Sessions, Sydney, upon an indictment, with making counterfeit coins, and with having in his possession without lawful authority or excuse coining instruments, contrary to the provisions of secs. 53 and 54 of the Commonwealth *Crimes Act* 1914-1932. Williams pleaded guilty and was sentenced on each of three charges to imprisonment with hard labour for eighteen months, concurrent. The Attorney-General for the Commonwealth appealed to the Court of Criminal Appeal of New South Wales (being the Supreme Court of that State) against the sentences imposed by the Court of Quarter Sessions on the ground that they were inadequate. The Court of Criminal Appeal increased the sentences to four years' imprisonment with hard labour, the sentences to be concurrent and to date from 24th February 1933. On an application by Williams to the High Court for special leave to appeal from that decision *Gavan Duffy* C.J. and *Evatt* and *McTiernan* JJ. were of opinion that the Attorney-General had no right of appeal to the Court of Criminal Appeal: *Rich*, *Starke* and *Dixon* JJ. were of opinion that he had such a right. The High Court being equally divided in opinion, and the appeal being from the Supreme Court of a State, sec. 23 (2) (*a*) of the *Judiciary Act* 1903-1932 applied, and special leave to appeal was refused (*Williams* v. *The King* [*No.* 2] (1)).

Upon the expiration of the original sentence of eighteen months' imprisonment with hard labour imposed by the Court of Quarter Sessions, Williams applied to the High Court for an order nisi for a writ of habeas corpus. The application was referred by *Dixon* J. to the Full Court.

Gowans, for the applicant. Williams is at present being held pursuant to the order of the Court of Criminal Appeal, which had no

(1) (1934) 50 C.L.R. 551.

jurisdiction to make the order. The Court of Criminal Appeal of New South Wales had no jurisdiction to entertain the appeal by the Attorney-General of the Commonwealth to increase the sentence. The object of the present application is to raise again the same question as was considered in *Williams* v. *The King* [*No.* 2] (1), and, if the Court is again equally divided, to obtain the benefit of the opinion of the Chief Justice in favour of the applicant under sec. 23 (2) (*b*) of the *Judiciary Act*. As between the parties the question of jurisdiction has never been finally determined. The matter is not *res judicata*, and there is no binding precedent established where the Bench has been equally divided.

[DIXON J. You cannot substitute habeas corpus for a writ of error (*In re Dunn* (2); *R.* v. *Lees* (3).]

Those decisions are limited to the case where it is sought to review the decision of a superior Court in a Court of collateral jurisdiction, and where there is an absolute right of appeal. This Court can inquire into the correctness of the decision under which the applicant is now held (*In re Authers* (4); *In re Sparrow* (5)) and has jurisdiction to grant a writ of habeas corpus where the person is imprisoned for a Commonwealth offence. A Court which is clothed with Federal jurisdiction has tried the applicant, and a Court clothed with Federal jurisdiction has increased the sentence, and the High Court has jurisdiction to deal with a person who is imprisoned for a Federal offence in such circumstances (*Judiciary Act* 1903-1932, secs. 32, 33).

[DIXON J. referred to sec. 23 (2) (*a*) of the *Judiciary Act* 1903-1932.]

This application calls into question the decision of the Supreme Court of New South Wales but it does not do so "by way of appeal or otherwise." The words "or otherwise" in that section must be read as *ejusdem generis* with "appeal." Habeas corpus proceedings are not proceedings in the nature of an appeal. If the Court is again equally divided on the question of jurisdiction the opinion of the Chief Justice should prevail.

The following judgments were delivered :—

GAVAN DUFFY C.J. I think the application should be refused.

(1) (1934) 50 C.L.R. 551.
(2) (1847) 5 C.B. 215; 136 E.R. 859.
(3) (1858) E.B. & E. 828; 120 E.R. 718.
(4) (1889) 22 Q.B.D. 345.
(5) (1908) 28 N.Z.L.R. 143.

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RICH J. I agree. I think the order of the Supreme Court of New South Wales is that of a Court authorized by law to determine its own jurisdiction conclusively, and the validity of the order cannot be questioned upon an application for a writ of habeas corpus. Moreover, I am of opinion that, even if the same question as was dealt with upon the application for special leave (*Williams* v. *The King* [*No.* 2] (1)) could be raised upon the return of an order nisi, an even division of opinion upon the Bench would result in the failure of the application, because it would be one in which the order of the Supreme Court would be called in question within the meaning of sec. 23 (2) (*a*) of the *Judiciary Act*.

STARKE J. In my opinion, the application should be refused, for two reasons. The first is that the Constitution and the *Judiciary Act* confer no jurisdiction upon this Court to grant a writ of habeas corpus in this case. The grant of the writ by this Court must attach itself either to the appellate or to the original jurisdiction. There is no appeal, and the appellate jurisdiction cannot be invoked. The original jurisdiction depends upon the provisions of the Constitution, sec. 75, and of the *Judiciary Act*, sec. 30. The provisions of sec. 75 of the Constitution do not warrant the application, for there is no matter within that section. The contention then is that sec. 30 of the *Judiciary Act* warrants the application, because, it is said, it is a matter "arising under the Constitution or involving its interpretation." But the only matter involved is the interpretation of the *Criminal Appeal Act* of New South Wales. The constitutional validity of sec. 39 of the *Judiciary Act* is not involved in the application. The second reason is that a writ of habeas corpus does not lie where a person is in execution on a criminal charge after judgment in due course of law (see *Short and Mellor, Practice of the Crown Office*, 2nd ed. (1908), p. 310).

DIXON J. I agree in thinking that the rule nisi should be refused. This matter arises in a curious way. The prisoner was sentenced to eighteen months' imprisonment by a Court of Quarter Sessions in New South Wales, after conviction upon indictment for an offence against the laws of the Commonwealth. Upon an appeal by the

(1) (1934) 50 C.L.R. 551.

Federal Attorney-General to the Supreme Court, under sec. 68 of the *Judiciary Act*, and sec. 5D of the *Criminal Appeal Act* 1912-1924 of New South Wales, his sentence was increased. From that order increasing the sentence, he sought special leave to appeal to this Court, and upon that application his counsel argued matters which included the construction of sec. 5D of the State *Criminal Appeal Act* and of sec. 68 of the Commonwealth *Judiciary Act*, and the validity of the law resulting from the combination of those two enactments. This Court being equally divided in opinion, the application for special leave failed. The Chief Justice was among the Justices who took a view favourable to the prisoner. The original sentence of eighteen months has now expired, and the prisoner seeks to challenge, by a writ of habeas corpus, the legality of his continued imprisonment under the order of the Supreme Court, which, he says, is invalid as made without jurisdiction.

If I thought it possible for the prisoner to obtain by this method the benefit of the provision in the *Judiciary Act*, sec. 23 (2) (*b*), which makes the opinion of the Chief Justice prevail in an equally divided Court, when there is not called in question a decision of the Supreme Court or of a Justice of the High Court, I should not have been disposed to refuse him his order nisi, although, of course, the opinion which I expressed upon the application for special leave would lead me to think that the order nisi on its return should be discharged. But, in my opinion, it is not possible for him to obtain by that method the advantage of the effect given by sec. 23 (2) (*b*) to the Chief Justice's view. It may be that the dismissal of the application for special leave does not operate as an estoppel by judicial decision binding the parties to the habeas proceedings, which ought, therefore, to be decided by the members of the Court according to the opinions which they have already expressed if they continue to entertain them. But even so, there appear to be two barriers to success.

I am of opinion that it is not possible to challenge upon habeas corpus proceedings the validity of such an order of the Supreme Court as that which increased the prisoner's sentence. That writ cannot be granted when the prisoner is held under an actual order

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or sentence, unless the Court making the order exceeded its jurisdiction so that the order is a nullity. But the Supreme Court is a superior Court of record having general jurisdiction. It may not be true that such a Court has in all cases an authority to determine its own jurisdiction, which makes it impossible ever to treat its orders as nullities, but it is in this particular instance true that it had authority conclusively to determine the existence of its own jurisdiction, and so, whether it correctly determined it or not, to make an order which was a valid judicial order, and not a mere nullity operating to give no authority to hold the prisoner. By virtue of sec. 39 of the *Judiciary Act*, the Supreme Court is invested, not only with all the Federal jurisdiction which the Parliament has conferred on this Court, but also, subject to immaterial exceptions, with all the Federal jurisdiction which the Parliament could confer on this Court; and that jurisdiction is conferred in addition to, or, as the case may be, in substitution for, the jurisdiction which the Court possessed under State law. It was for it to decide the scope and operation of sec. 68 of the *Judiciary Act* and the other relevant enactments, and that decision, in my opinion, resulted in a binding judicial order, and not in a nullity, an order the validity of which cannot be challenged in this way. It is not to be expected that cases exactly like the present would arise under the system in England, but the conclusion I have expressed appears to me to be supported by *R.* v. *Lees* (1). There the prisoner had been convicted by the Supreme Court of St. Helena upon an indictment charging an assault with intent to murder, committed upon the high seas on a ship not alleged to be a British ship by a prisoner not alleged to be a British subject. It was sought to obtain an order nisi, upon the ground that the Supreme Court of St. Helena had no jurisdiction unless it was a British ship or the offence was committed in respect of British subjects. But the Court refused to allow a writ of habeas corpus, or any other prerogative writ, saying:—"A writ of habeas corpus, to the expediency of granting which we have also directed our attention, is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. And, even supposing

(1) (1858) E.B. & E. 828; 120 E.R. 718; 27 L.J. Q.B. 403.

it could run to St. Helena, it could only be useful as ancillary to or accompanying a writ of error, as it is only by writ of error that such judgment, according to the course of the common law, can properly be reversed: until the judgment be reversed, the prisoner ought not to be discharged" (1). *In re Dunn* (2), also supports the same position; and in the United States there is a clear statement of the position in *Terlinden* v. *Ames* (3), where *Fuller* C.J. said: "The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error."

The second reason why I think the order nisi would fail, and that in any event it would be impossible for the prisoner to obtain the benefit of par. (*b*) of sec. 23 (2) of the *Judiciary Act*, is that the proceedings would, in my opinion, "call into question" the order of the Supreme Court within the meaning of par. (*a*). I agree with the submission of Mr. *Gowans* that the words "or otherwise" in par. (*a*) of sec. 23 (2) are to be read as *ejusdem generis* with the word "appeal," but I think this application comes within the words so read. The word "appeal" covers everything in the nature of a direct review of the decision by a procedure which falls within the Court's appellate power, and the words "or otherwise" apply to any collateral examination of the correctness of a judicial decision, attacked whether by certiorari, prohibition, or habeas corpus. The word "decision" in sec. 23 (2) appears to me to refer to the judgment or order, and not the *ratio decidendi*. The result is that in the event of a further equal division of opinion in this Court, the decision of the Supreme Court would still stand.

For these reasons I think the application should be refused.

EVATT J. As a general rule it is preferable that applications such as the present, which raise important questions of law, should be granted, so that the questions may be fully debated on the return of the order nisi. But it has been made sufficiently obvious during argument that, if granted, the order would ultimately be discharged; and, on that account, I concur in the order proposed.

As at present advised, I am of opinion that this Court, in the exercise of its original jurisdiction, is not empowered to grant a writ

(1) (1858) E.B. & E. 827, at p. 836; 20 E.R. 718, at p. 721.
(2) (1847) 5 C.B. 215; 136 E.R. 859.
(3) (1901) 184 U.S. 270, at p. 278.

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of habeas corpus in this case. None of the grounds relied upon by the applicant involve any question arising under, or involving the interpretation of, the Constitution. The applicant merely raises a question as to the meaning and application of a Federal statute. The present case is quite distinct from *Ex parte Walsh and Johnson*; *In re Yates* (1), where, although the habeas was granted upon grounds not directly involving the interpretation of the Constitution, such interpretation was involved and the Court assumed seisin of the case because it was involved.

McTIERNAN J. I agree that the application should be refu sed. It is, I think, doubtful whether it comes within the Constitution or the *Judiciary Act*. But I rest my decision on considerations arising under sec. 23 (2) (*b*) of the *Judiciary Act*. This application, in my opinion, does call in question the decision of the Court of Criminal Appeal of New South Wales, which is the Supreme Court of the State. The applicant would not ultimately succeed if an order nisi were granted, as there was an equal division in this Court on the question of whether the Court of Criminal Appeal had power to make the order by which the applicant is aggrieved.

Application refused.

Solicitor for the applicant, *J. H. Yeldham*.

(1) (1925) 37 C.L.R. 36.