[HIGH COURT OF AUSTRALIA.]

O'MEALLY . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

TAYLOR . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

H. C. OF A. 1958.

MELBOURNE, *Mar.* 3, 14.

Dixon C.J., Williams, Webb, Fullagar and Taylor JJ.

Criminal Law—Punishment—Court authorised by statute to order whipping where "the commission of the offence was attended with or accompanied by cruelty or great personal violence"—Whether fulfilled if cruelty etc. consisted of facts which constituted essential elements of crime charged—Considerations admissible in determining whether crime should be punished by whipping—Crimes Act 1928 (*Vict.*) (*No.* 3664), *s.* 510 (2).

Section 510 (2) of the *Crimes Act* 1928 (Vict.) provides that "Where any male person . . . is convicted of an indictable offence against the person of another, and in the opinion of the court the commission of the offence was attended with or accompanied by cruelty or great personal violence the court may in addition to the punishment awarded direct that he be once twice or thrice privately whipped."

Held, that the cruelty or great personal violence could consist in the facts which constituted the essential elements of the crime charged.

Two prisoners were convicted of unlawfully and maliciously wounding a prison official with intent to do grievous bodily harm. The trial judge sentenced each man to six years' imprisonment and to be privately whipped with twelve strokes of the cat-o'-nine-tails. While the trial judge based the sentences on the violence involved in the crime he said in effect that he would not have ordered the whipping had it not been for all the surrounding circumstances including the fact that the men were prisoners one of whom was serving

H. C. OF A. 1958. O'MEALLY v. THE QUEEN.

a life sentence without benefit of remissions and the other of whom was serving a sentence of which about ten years remained unexpired, that they had already broken gaol and that the grievous bodily harm had been inflicted on a prison official in order to effect an escape.

Held, that the considerations were not inadmissible in determining whether the crime should be punished under s. 510 (2).

Special leave to appeal from decision of Court of Criminal Appeal of Victoria, refused.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of Victoria.

On 7th August 1957 William John O'Meally and John Henry Taylor pleaded guilty before *Hudson* J. in the Supreme Court of Victoria to a charge of having on 29th March 1957 escaped from Pentridge Gaol. By the presentment by which they were so charged they were further charged with wounding Robert Henry Davis, one of the warders at the gaol, with intent to do him grievous bodily harm. To this further charge which related to an act done on the day of the said escape in order to enable the escape to be made, they pleaded not guilty, but upon their trial on 27th August 1957 they were both found guilty. Taylor, who was aged twenty-seven years, admitted ten prior convictions, the earliest of which was in 1950. Four were for using a motor car without the consent of the owner. Then followed two for shop-breaking and stealing. Then in 1954 he was convicted of robbery under arms, and in 1955 of escape, of larceny, and of assault with intent to rob whilst armed. At the time of the escape in March 1957, he was serving, as a result of the convictions of 1954 and 1955, sentences aggregating about thirteen and a half years, of which leaving out of account remissions, about ten and a half years then remained to be served. O'Meally, who was aged thirty-seven years, admitted nine prior convictions, the earliest being in 1938. These included one for receiving, four involving breaking and entering and two for assault, the assault in one case being by kicking. Then in May 1952, he was convicted of murder and sentenced to death. This sentence was commuted to " imprisonment for the full term of his life without any remissions whatsoever and without the benefit of the regulations relating to the remission of sentences." In 1955, he was convicted of escape and sentenced to four years' imprisonment, to be served concurrently with his life sentence. On 31st October 1957, O'Meally and Taylor were both sentenced by *Hudson* J. in respect of the escape and the wounding of 29th March 1957. Taylor was sentenced to four years' imprisonment for the escape, and six years for the wounding and it

was directed that one year of the four and two years of the six should be served concurrently with the sentence he was already serving. In addition, on the charge of wounding he was sentenced to be once privately whipped with the cat-o'-nine-tails and the number of strokes was fixed at twelve. Upon O'Meally the trial judge imposed a like sentence in respect of each of the two offences except that in O'Meally's case his Honour directed that the whole of the two terms of four years and six years be served concurrently with the existing life sentence. His Honour declined to fix any minimum term in the case of either of the applicants.

From the sentences so imposed each of the prisoners sought leave to appeal to the Court of Criminal Appeal of Victoria. On 19th December 1957 that Court, constituted by *Lowe*, *Gavan Duffy* and *Smith* JJ. ordered, *Smith* J. dissenting, that the applications be dismissed.

From this decision O'Meally and Taylor sought special leave to appeal to the High Court.

N. Morris. for the applicant in each application.

Sir *Harry Winneke* Q.C., Solicitor-General for the State of Victoria, and *W. M. Irvine*, for the Crown in each application.

Cur. adv. vult.

Mar. 14.

THE COURT delivered the following written judgment:—

This is an application for special leave to appeal against an order of the Supreme Court of Victoria sitting as a Court of Criminal Appeal. The order refused applications for leave to appeal against sentences imposed upon two prisoners, O'Meally and Taylor, who had been convicted of unlawfully and maliciously wounding with intent to do grievous bodily harm. The prisoners had been jointly charged with this offence, which depends upon s. 14 of the *Crimes Act* 1928 (Vict.), in an indictment which contained a separate count against each of them under s. 38 of the *Gaols Act* 1928 (Vict.) for escaping from gaol. To these separate counts they respectively pleaded guilty. To the joint count for maliciously wounding with intent to do grievous bodily harm they pleaded not guilty. They were both found guilty by the verdict of the jury. Upon his conviction for escaping from gaol each prisoner was sentenced to four years' imprisonment. Upon the conviction for maliciously wounding with intent to do grievous bodily harm each was sentenced to six years imprisonment and to be privately whipped with twelve strokes

H. C. OF A. 1958.

O'MEALLY v. THE QUEEN.

Dixon C.J. Williams J. Webb J. Fullagar J. Taylor J.

of the cat-o'-nine-tails. As to the extent to which the sentences of imprisonment should be served with existing terms of imprisonment that the prisoners were undergoing at the time of their escape, there was necessarily a difference made between them ; for O'Meally was serving a life sentence without remission commuted from a capital sentence for murder. But nothing in this application turns on the difference.

Special leave to appeal is now sought from the order of the Supreme Court in so far as it affirms the order in each case for a whipping. These orders were made under sub-ss. (2) and (3) of s. 510 of the *Crimes Act* 1928 as amended by s. 11 of Act No. 5379. The provisions now stand as s. 477 of the *Crimes Act* 1957 (No. 6103). The application for special leave is based upon two alternative grounds. The first is that upon the true construction of sub-s. (2) of s. 510 the sub-section did not cover the offence committed by the prisoners. The second ground is that the considerations which led to the infliction of the sentences for whipping went outside those governing the discretion conferred upon the court by the provision. It was recognised that the question whether an unnecessarily severe punishment had been imposed was not one which, according to its practice, this Court would entertain upon an application for special leave to appeal from a State Court of Criminal Appeal and no attempt was made to support the present application on that ground.

Before considering the effect of s. 510 (2) and (3) it is desirable to state briefly the circumstances of the case. Both men had escaped before from gaol. Taylor, who in spite of being only twenty-seven years of age, had previously been convicted of several serious crimes, was undergoing sentences of which about ten years and six months remained unexpired. O'Meally, who is ten years older than Taylor, had been convicted of murder in 1952 and sentenced to death. That sentence was commuted, but to imprisonment for the full period of O'Meally's natural life. On 29th March 1957, fifteen prisoners, including Taylor and O'Meally, were assembled outside the Governor's office in Pentridge Gaol. They were waiting to go in to see the visiting justice. This office was not far from the main gate of the gaol and a way to the outer world lay through a small grille gate. A chief penal officer who was on duty at the gate opened the grille to let out an overseer. Taylor, followed by O'Meally, made a rush to get through the grille after the overseer. The chief penal officer shut the grille to and refused to stand aside, though Taylor had a pistol in his hand. Taylor shot him in the leg some inches above the knee. The bullet broke the femur and inflicted other

injuries. Both prisoners then effected their escape ; but they were subsequently recaptured. They were confederates in the escape and, as the jury found on evidence, O'Meally was an accomplice in the shooting. Accordingly both were convicted of unlawfully and maliciously wounding the chief penal officer with intent to do grievous bodily harm.

Section 510 originally comprised three sub-sections. Sub-section (1) provided that where any male person apparently of the age of sixteen years or upwards is convicted under any of certain enumerated sections of the *Crimes Act* the court before which he was convicted might in addition to the punishment awarded direct that the offender be once twice or thrice privately whipped. This provision or rather its substance is a very old one : see s. 296 of the *Criminal Law and Practice Act* 1864 (Vict.) based on s. 1 of the *Security from Violence Act* 1863 (26 & 27 Vict. c. 44) of the United Kingdom ; s. 28 of the *Criminal Law and Practice Amendment Statute* 1871 (Vict.) ; s. 519 (1) of the *Crimes Act* 1890 (Vict.) ; cf. *Halsbury, Laws of England*, 2nd ed., vol. 9, p. 251, par. 357 and notes and contrast ; 3rd ed., vol. 10, p. 491, par. 895 and notes. The specific offences mentioned might be grouped as homicidal violent and sexual. The point to be noticed, however, with these specific offences is that the crime itself, not the circumstances in which it was committed, carried liability to whipping. In consequence, as we are told, of representations made by the judges as to the desirability of a more general power to order whipping, ss. 28 and 29 of the *Crimes Act* 1891 (No. 1231) (Vict.) were enacted. By s. 28 a power to order a whipping of a male of sixteen years of age was conferred if he were guilty of any offence under Pt. I of that Act, which, among a varied category of crimes mostly sexual, included assaults occasioning actually bodily harm. Section 28, however, excepted in express words any assault unaccompanied by circumstances of indecency. The effect of this provision was contained in s. 509 of the *Crimes Act* 1928 before its repeal. There followed in the Act of 1891, s. 29, introducing the provisions upon which the power to order a whipping in the present cases depends. It is claimed in support of the application that, at all events at that stage, assaults occasioning actually bodily harm were excluded from the power. We can pass by the consolidation contained in the *Crimes Act* 1915 ; for on the point with which we are concerned the provision is the same as s. 510 of the *Crimes Act* 1928.

The *Crimes Act* 1949 (No. 5379) (Vict.), s. 11 repealed both s. 509 and sub-s. (1) of s. 510 of the *Crimes Act* 1928. The consequence was that the power to order a whipping was no longer annexed to

H. C. OF A. 1958.

O'MEALLY v. THE QUEEN.

Dixon C.J. Williams J. Webb J. Fullagar J. Taylor J.

specifically enumerated crimes. As will appear, it thereafter depended entirely on the general descriptive words of sub-s. (2) of s. 510, words traceable to s. 29 of the *Crimes Act* 1891 (No. 1231). It is upon sub-s. (2) of s. 510 that the case depends. Sub-section (3) of s. 510 substantially reproduces the proviso to sub-s. (2) of s. 519 of the *Crimes Act* 1890 and deals with the maximum number of strokes, the time from the passing of sentence within which the punishment must be inflicted and the function of the gaol medical officer at the whipping. By s. 11 of the *Crimes Act* 1949 (No. 5379) amendments were made and the maximum number of strokes was reduced from fifty to twelve.

Sub-section (2) is as follows : " Where any male person apparently of the age of sixteen years or upwards is convicted of an indictable offence against the person of another, and in the opinion of the court the commission of the offence was attended with or accompanied by cruelty or great personal violence the court may in addition to the punishment awarded direct that he be once twice or thrice privately whipped." The argument that this provision does not cover the offence of which the jury convicted Taylor and O'Meally depends upon the interpretation, in the context, of the words " the commission of the offence was attended with or accompanied by cruelty or great personal violence ". It is of course clear that unless the judge sentencing the prisoners was of opinion that the commission by them of the offence under s. 14 of the *Crimes Act* 1928 of wounding with intent to inflict grievous bodily harm was, within the true meaning of the words, attended with or accompanied by cruelty or great personal violence, his authority to order the prisoners to be whipped did not arise. The contention on behalf of the prisoners is that, while inherent in the crime of which they were convicted there may have been great personal violence, it is not true to say that, within the meaning of sub-s. (2), it was " attended with or accompanied by cruelty or great personal violence ". The argument seeks to place on those words a significance which would limit their application to cases where, in addition to the essential elements of the crime, there are circumstances of cruelty or great personal violence. Where the essential elements of the crime either *ex necessitate rei* or in the particular circumstances of the case involve cruelty or great personal violence that, acccording to the argument, lies outside sub-s. (2) of s. 510 : it lay formerly within sub-s. (1) of s. 510 and perhaps to some extent within s. 509, provisions which dealt with it in the course of picking out specific crimes and designating them, in the case of s. 510 (1), by naming the sections dealing with them and, in the case of s. 509,

the divisions where they occur in the statute. Such a case, so the argument runs, never did and does not now, lie within the application of sub-s. (2). The course taken by the legislature had been to decide what particular crimes were of such a nature that what was done in committing them ought to expose the offender to whipping and those crimes had been designated. The purpose of sub-s. (2) of s. 510 had been to deal not with such cases, but with cases in which cruelty or great personal violence, although inherent neither in the crime *ex sua natura* or in the essential elements of the crime as it might be committed in a given case, yet were introduced by the offender into the transaction comprising the crime as additional accompanying or attendant elements in his behaviour in the course of committing the offence. That was the argument. It was claimed that it represented the *prima facie* sense of the words as they stand in s. 510 (2) and that, if there were any doubt or ambiguity, that meaning was supported by the history of the provision, a history which has already been briefly stated. The suggestion was made that to include within sub-s. (2) of s. 510 such an offence as the present against s. 14 really meant that by the repeal of sub-s. (1) of s. 510 and s. 509 the operation of sub-s. (2) had been enlarged. For, so it was said, s. 510 (1) did not include s. 14 and s. 28 of the Act of 1891 on which s. 509 was based had specifically excluded assaults aggravated or simple if there were no circumstances of indecency. But the fact is that the repeal of sub-s. (1) and s. 509 necessarily did throw more under the application of s. 510 (2), although neither its meaning nor the legal effect of its words was changed. The existence of s. 509 and s. 510 (1) meant that certain offences were specified or designated absolutely which otherwise might have fallen within the denotation of s. 510 (2). Connotatively the sub-section might have covered them, but whether it did so would then have been only an abstract inquiry for a logician, immaterial to a lawyer; because, for a lawyer, ss. 509 and 510 (1) dealt with the designated or specified offences and annexed the punishment of whipping to them. But once ss. 509 and 510 (1) were repealed the question whether the connotation of sub-s. (2) of s. 510 brought any given case of an offence against a provision theretofore covered by s. 509 or s. 510 (1) within the denotation or application of sub-s. (2) necessarily arose as a consequence, that must be taken to have been intended, of the repeal. Sub-section (2) of s. 510 provides a general test, and the fact that previously the liability to whipping was specifically annexed to certain offences, cannot withdraw them from the application of the test once the specific provisions are repealed. Let it be supposed that in 1891

H. C. OF A. 1958.

O'MEALLY v. THE QUEEN.

Dixon C.J. Williams J. Webb J. Fullagar J. Taylor J.

the provisions of ss. 28 and 29 of Act No. 1231 would have supported an implication that the words of what became s. 510 (2) were not to include any assault whether simple or aggravated, not being indecent. It is indeed an extremely dubious assumption. But if it be made, it could have no effect upon the operation of s. 510 (2) as it appeared in the consolidations of 1915 or 1928. Accordingly it cannot influence the meaning and application or operation of sub-s. (2) of s. 510 of the Act of 1928 after the repeal of s. 509 and of sub-s. (1) of s. 510 by s. 11 of the *Crimes Act* 1949 (No. 5379). In the end, therefore, the question comes back to the natural meaning of the words " the commission of the offence was attended with or accompanied by cruelty or great personal violence " construed in the context of the *Crimes Act* 1928. *Prima facie* one would understand the expression to cover every case where in committing an offence the prisoner was guilty of acts of cruelty or great personal violence whether those acts formed part of the essential elements of the crime or were concomitants thereof. One would not suppose that the judge in forming his opinion should go outside the facts which he would take the jury to have accepted in finding a verdict of guilty. It is not easy to believe that the judge was intended to go beyond the facts constituting the transaction which comprises the crime. But on the other hand neither the form of the words nor the context really supplies any ground for saying that, when the cruelty or great personal violence consists in those very facts which constitute the essential elements of the crime or in some of the parts and details which in the given case make up those, sub-s. (2) is inapplicable. There can be complete agreement with the statement of *Mann* J. on behalf of the Full Court in *R.* v. *Perkins* (1) that " a section of this character should not be held to confer power to impose a whipping when the intention of the legislature is not perfectly clear " (2). But the intention seems clear enough to include offences where the cruelty or great personal violence is " involved " in the essential elements of the offence itself as well as those where, in the transaction comprising that offence, they are so to speak superadded by the offender to the essential elements making up the actual *corpus delicti*. It may be added that on the facts of the case there can be no doubt that great personal violence was constituted by the shooting of the officer in the thigh. Further, in the language used by *Mann* J. in *R.* v. *Perkins* (1) great personal violence of the kind involved in the shooting was intended and assented to by O'Meally as well as used by Taylor. The chief ground on which the application for special leave was based therefore fails.

(1) (1925) V.L.R. 235.

(2) (1925) V.L.R., at p. 238.

The alternative ground may be dealt with briefly. It is that the reasons guiding the learned judge imposing the sentences were not within, or not wholly within, the discretion conferred by s. 510 (2). A study of the reasons which his Honour gave seems to show that he based the sentences on the violence which the shooting involved, but that at the same time his Honour would not have used the power of ordering a whipping as part of the sentence for that crime, had it not been for all the surrounding circumstances, including the fact that the men were prisoners, that they had already broken gaol, that the grievous bodily harm had been inflicted on a prison official and in order to effect an escape and that the men respectively had before them the terms of imprisonment already stated. These circumstances are not irrelevant to the character of the great personal violence and there is no sufficient reason for regarding them as inadmissible considerations in determining that a crime under s. 14 attended with or accompanied by such violence should be punished under s. 510 (2).

For the foregoing reasons the application for special leave to appeal should be refused.

Application for special leave refused.

Solicitors for the applicants, *J. W. & F. Galbally.*

Solicitor for the respondent, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.