PAYNE.

v.

THE KING.

REASONS FOR JUDGMENT. **LATHAM C.J.**

No 17 of 1943

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This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal of Tasmania. The applicant, George William Payne, was presented together with one Reginald Waters, on an indictment containing five counts for forgery and uttering. The applicant was convicted on all five counts but on appeal to the Court of Criminal Appeal the conviction on the fifth count was set aside.

It is necessary to show that there are some special circumstances affecting the case which would entitle this Court to exercise the power conferred upon it by the Judiciary Act, sec. 35, sub-sec. (1), paragraph (b), under which this Court is empowered to grant special leave to appeal from any judgment in a civil or criminal matter as to which the High Court thinks fit to give special leave to appeal. The Court does not sit as a Court of Criminal Appeal from a Court of Criminal Appeal. In my opinion there are no special circumstances affecting this case and no principles of general importance involved which would make it proper to grant special leave.

The first objection is that the counts charged more than one crime. Sec. 311 of the Criminal Code (1924) of Tasmania provides in sub-sec. (1) that an indictment shall contain and be sufficient if it contains a statement of the specific crimes with which the accused person is charged, together with sufficient particulars. Sub-sec. (2) provides that, except in the case of murder, charges of more than one crime may be joined in the same indictment if they are founded on the same facts, or are, or form part of, a series of crimes of the same or a similar character. No objection is based upon either of those provisions. Sub-sec. (4) of this section provides that the statement of the crime, or where more than one crime is charged in the same indictment, as in

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this case, the statement of each crime, with the particulars thereof, shall be set out in a separate paragraph called a count.

In the first count the accused persons were charged with forgery - that they did forge certain documents, to wit three cheques. That is a charge of three crimes. It should strictly have been made in three separate counts. But no objection was raised to this at the time, either before or after verdict, and I am not satisfied that the objection can be taken after verdict. My brother Starke has referred to the case of Re Thompson 1914 2 K.B. p. 99 on this point. Mr. Justice Inglis Clark in the Court of Criminal Appeal was of opinion that sec. 352, sub-sec. (3), supported the view that such an objection could be taken at any time. I do not think that this provision is conclusive on this matter. The words are: "If at any stage of the trial it appears to the Judge that there is any defect in the indictment, and the Judge does not see fit to amend it, he may quash the indictment, or may leave the objection to be taken in arrest of judgment". It is only when the objection is taken at an earlier stage that it may, by leave of the Judge, and then only by leave of the Judge, be taken in arrest of judgment. This provision therefore appears to me rather to assume, though it does not absolutely provide, that the objection can be taken only during the trial. But sec. 402 of the Criminal Code provides that on appeal the Court shall allow the appeal if it is of opinion that, on any ground whatsoever there was a miscarriage of justice. Accordingly, if the Court was of opinion that the irregularity resulted in a miscarriage of justice, the matter could be taken into account upon appeal.

In my opinion, however, there is no ground for belief that the accused was embarrassed or prejudiced by the joining of several crimes in single counts. In each case of forgery and in each case of uttering the counts relate to several cheques. The effect of joining, for example, in count No. 1, three charges of forgery, instead of charging them separately, was that the accused could not be convicted on this count unless all three forgeries were regarded by the jury as having been proved.

Accordingly, in this case it appears to me that the objection not only is not supported by any considerations showing that the accused was prejudiced, but the fault operated rather in favour of the accused than against him.

The other objections raised relate to matters of evidence and to the directions given by the learned Chief Justice, before whom the case was tried, to the jury. There was evidence that all the cheques mentioned, some 11 cheques in all, were forged. That was not disputed. In fact, the persons whose names were written on the cheques as the drawers of the cheques were called and evidence, unchallenged, was given that they had not written their names on the cheques, and so plainly there was evidence that the cheques were forged. Further, there was evidence that they were forged by Waters, who was presented together with the accused, and who pleaded guilty. The fact that he pleaded guilty is not, however, evidence against the accused. Evidence identifying Waters' writing upon the cheques was given. Some of this evidence was not very strong, but it was not challenged. The case was conducted by both sides on the footing that Waters had forged the cheques.

The accused was, at the time when the cheques were passed, a prisoner in the Hobart Gaol, but the evidence shows that he had methods of exit and access which enabled him to pursue activities elsewhere than in the gaol. Evidence was given that he was out of gaol from time to time. The false cheques were taken from a cheque book in the Governor's house and the accused was a servant in that house. There is evidence that Payne took steps to procure a set of rubber stamps. He explained what he did by varying accounts, the credibility of which was a matter for the jury. Impressions of these, or similar, stamps, appeared on the false cheques and it was open to the jury to say that his explanations were completely unconvincing. He was identified as the man who, on three occasions, passed the cheques. This identification was challenged in cross-examination and it was argued that the evidence was unreliable. The learned Judge in his summing up referred to these matters: "In considering these questions of identification

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you will take all these considerations in and you will say: 'I know there are dangers of identification and there may be mistakes'. What has happened in this case? Is there a likelihood of a mistake, or have they picked the right man?" His Honour referred to the various criticisms which were made in relation to the unreliability of memory, the uncertainty of identification after a lapse of time, the showing of photographs at one stage or another to the person summoned to identify the accused person, and also to certain criticisms as to the way in which the line-up for purposes of identification was conducted. The learned Judge warned the jury that they had to take into account the various criticisms which could be, and had been, directed against the identification.

The evidence showed that all these cheques were for the same amount, £12:10:0. They were in the same handwriting. They were passed with what may be called the same technique and procedure on each occasion. Articles of relatively small value were bought and change was taken. There was evidence that accused was in possession of a considerable sum of money, £75. The account which he gave to explain his possession of this money might well be regarded by the jury as entirely unsatisfactory. When the money which he had in his possession was added to the value of certain articles bought, the total approximately corresponded with the face value of the cheques in question. There was evidence to show that some of the articles which were bought were found at the gaol - a watch and sleeve-links. It was also shown that the prisoner was in a cell in a group of three cells, one of which was occupied by Waters, and that there were facilities of access and communication which are not usually either provided or allowed in His Majesty's Gaol. I am of opinion that a strong case was made against the prisoner and that he had a fair trial. I see no reason to believe that there was a substantial, or, indeed, any, miscarriage of justice in this case. For all these reasons I am of opinion that the application should be refused.

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JUDGMENT. RICH J.

I agree. Consideration of the circumstances in this case does not in my opinion disclose any sufficient ground for granting special leave. Before parting with the case I cannot help saying that the evidence appears to justify the question quis custodiet custodes, the answer to which may emerge during the inquiry which Counsel has told us will shortly be held.

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JUDGMENT. STARKE J.

Special leave to appeal should not be granted in criminal cases unless substantial and grave injustice has been done. Mere informality in proceedings, such as duplicity in one of the counts, is not a sufficient ground for this Court granting special leave to appeal, unless it can be established that there was a grave injustice in the particular case. In this case there was no injustice, the point is a mere technicality. The other matters which have been raised are hardly matters which should be investigated in this Court at all. I agree that special leave should not be granted.