

1928.*Ex parte*
*BORG.**Street, C.J.*

still think that the application to make absolute the rule *nisi* for a writ of prohibition should not be granted.

Then comes the question of costs. Mr. Webb has submitted that, if the Court is against him, still the case is not one in which the applicant should be ordered to pay costs. He has called attention to a letter received by his client's solicitor from the Clerk of the Peace last April, the substance of which was that the Attorney-General led him to believe that he might still direct that the trial be proceeded with, after the matter of the summary proceedings before the magistrate had been dealt with. It is in those circumstances that Mr. Webb says that his client was compelled to apply to this Court to restrain further proceedings before the magistrate. I think that that is a sufficient justification for these proceedings, and I think that although the rule *nisi* must be discharged it should be discharged without costs.

FERGUSON and CAMPBELL, JJ., concurred.

Rule nisi discharged without costs.

Solicitor for applicant: *J. J. Davoren* (Broken Hill), by his agent *C. M. P. Horan*.

Solicitor for respondent: *J. V. Tillet* (Crown Solicitor).

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*James, J.***R. v. GOSPER.**

Criminal law—Criminal Appeal Act, 1912 No. 16, ss. 5, 6—Crimes (Amendment) Act, 1924 No. 10, s. 33 (5D)—Sentence—Severity—Reduction by Court of Criminal Appeal—Discretion of Court.

The Court of Criminal Appeal, in the exercise of the powers vested in it by virtue of s. 6 (3) of the Criminal Appeal Act, 1912, has an unfettered judicial discretion to review sentences imposed upon convicted persons without the necessity of considering whether, in imposing any sentence under review, the trial Judge proceeded upon any wrong principle, or upon any misapprehension of the facts.

R. v. Whittaker (2 A.L.J. 171) applied.

CRIMINAL APPEAL.

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This was an application on behalf of Leslie Eugene Gosper for the reduction of a sentence of penal servitude for fifteen years imposed upon him on his conviction at Quarter Sessions on a charge of having attempted to discharge a loaded firearm with intent to do grievous bodily harm to a certain woman. A statement of the facts appears in the judgment.

W. Walker (solicitor), for the appellant.

Weigall, K.C. (Solicitor-General), for the Crown.

STREET, C.J. This is an application on behalf of Leslie Eugene Gosper for reduction of a sentence of penal servitude for fifteen years imposed upon him last July, following upon his conviction on a charge of having attempted to discharge a loaded firearm with intent to do grievous bodily harm. That was the offence of which he was found guilty, and that was the offence for which he received the sentence of fifteen years penal servitude which he now complains of as excessive.

I think that we must consider in the first place what the position of this Court is in respect of applications either for an increase or for a reduction of sentence. Sect. 6 (3) of the Criminal Appeal Act provides that: "On an appeal against the sentence the Court, if it is of opinion that some other sentence whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor as it thinks fit and in any other case shall dismiss the appeal." In acting under the powers contained in that section, the practice followed by this Court has been that laid down by the High Court in *Skinner's Case* (16 C.L.R. 336), the decision in which was, in its turn, based upon English authority, to the effect that before this Court is justified in interfering with the exercise of his discretion by the trial Judge, in imposing a sentence, it must be satisfied that he has proceeded upon some wrong principle, or has misapprehended the facts. It was laid down in plain terms that the mere fact that members of this Court might think that, if they had been presiding at the trial, they would have imposed a different sentence, was not of itself sufficient ground for interfering with the exercise by the trial

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Judge of his discretion. After the Criminal Appeal Act was passed, an amending Act was passed, s. 5 (d) of which provides that, "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." The question of the extent of this Court's discretion under that section, and of the principles by which it should be guided in exercising the discretion conferred upon it by that section, came under review recently before the High Court, in the case of *R. v. Whittaker* (not yet reported), and, as I read their judgments, (copies of which have been supplied to us) in the opinion of a majority of that tribunal, what is meant by that section is that unlimited judicial discretion is conferred upon this Court. What is meant, I understand by unlimited judicial discretion is that the discretion conferred upon this Court is one in the exercise of which it cannot be interfered with, so long as it has acted in good faith. That is the interpretation put by the High Court on what the Legislature meant in enacting s. 5 (d) of the Criminal Appeal Act, and by that interpretation we are bound. Where do we stand, then, in exercising the powers conferred upon us by s. 6 (3) of the Criminal Appeal Act? The language of the two subsections is not the same, but I say again, as I said in *R. v. King* (25 S.R. 218 at p. 221), in my opinion there is no difference in meaning between the words used. If the effect of one is to give to this Court an unfettered judicial discretion in interfering with sentences, then I think that the same power is conferred by the other. I think, therefore, that in exercising our powers of review under s. 6 (3) of the Criminal Appeal Act, as we are doing in the present case, we must take it that it has been authoritatively declared that we have an unfettered judicial discretion as to what course we should take. That being so, the matter is one for our consideration, and, without considering whether the learned Judge proceeded upon any wrong principle or upon any misapprehension of the facts, we have to consider whether in our discretion the sentence which was imposed was too severe. Now, undoubtedly the crime of which the applicant

was found guilty was a very serious one—one which was viewed so seriously by the Legislature that I think it exposed him to the liability of being sentenced to penal servitude for life. In finding him guilty as they did, the jury must be taken to have formed the opinion that he attempted to discharge a loaded firearm at this young woman and that in doing so his intention was to do her grievous bodily harm. That is a serious offence, and one which cannot be lightly passed over. On the other hand, we have these circumstances which are matters to be taken into consideration in determining what the punishment ought to be. The applicant is apparently a poultry farmer of 35 years of age, and with one exception, *i.e.*, he was found guilty of uttering counterfeit coins 10 years ago, he appears to have been a man of good character. At the time at which he did this thing he was suffering, I have no doubt, and suffering severely, from the pangs of unrequited affection, and I have no doubt, too, that he was in a more or less muddled condition from drink. There is the further circumstance, too, that whatever his intention may have been, for some reason or other it was not carried into effect. He did not in fact fire this gun at this young woman. Whether that was an intervention of Providence, or how it came about that he did not do so, the fact is that he did not do so, and that also is a circumstance which I think should be taken into consideration in considering what the punishment for his wrongdoing is to be. For myself I think that, in all the circumstances, the sentence of 15 years imposed upon him by the learned Chairman of Quarter Sessions was too high. I quite agree with him as to the necessity for imposing sentences of such a character as will make people realize that crimes of violence of this kind cannot be committed with impunity, but that they will be severely punished. Giving full weight, however, to considerations of that character and to the necessity of protecting those who are obliged to live in surroundings in which they are exposed to danger of this kind, I still think that the sentence was so severe as to justify us in interfering with it. I have felt—and I think I may say for my colleagues that they also have felt—some difficulty in determining what a proper punishment would be in the circumstances, and it may be that we err on the side of leniency, but on consideration we have come to the con-

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clusion that a sentence of imprisonment for three years with hard labour would be a sufficient punishment. A sentence in those terms will therefore be substituted for the sentence imposed by the learned Chairman of the Quarter Sessions

[His Honour then dealt with other matters which do not call for report.]

FERGUSON and JAMES, JJ., concurred.

Appeal upheld. Sentence reduced to three years' imprisonment with hard labour.

Solicitor for the appellant: *W. Walker.*

Solicitor for the Crown: *J. V. Tillett* (Crown Solicitor).

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INTERSTATE INVESTMENT COMPANY LIMITED v. MOBBS.

Assignment—Contract for sale of land—Purchase by instalments—Action by assignee for instalments—Conveyancing Act, 1919 No. 6, s. 12.

M. purchased from P. several allotments of an estate that P. had subdivided, the purchase money to be paid by instalments. Subsequently P. assigned the whole of the subdivided estate and all contracts of sale in respect thereof to X., who in turn agreed to sell the land thus assigned to him to the I.I. Coy. The agreement for sale to the company contained a clause as follows:—"The purchasers take subject to and with the benefit of all the several contracts set out in the schedule hereto." The terms of sale stipulated for a deposit to be held in trust for both parties until the purchaser was satisfied with the title, the balance to be paid on completion of the transfer. Prior to completion of the transfer the I.I. Coy., claiming to be the assignee of the contract between M. and P. by virtue of the assignment from P. to X., and its agreement with X., sued M. to recover the instalments of purchase money due under his contract.

Held, that there had not been an absolute assignment in writing so as to enable the I.I. Coy. to maintain the action in its own name.

DISTRICT COURT APPEAL.

The facts sufficiently appear in the judgment.

Flannery, K.C., and *Shortland*, for the appellant.

Monahan, K.C., and *Shand*, for the respondent.

C.A.V.