Arthur Allan Thomas – – – – – – – *Petitioner*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 4TH JULY 1978

Present at Hearing:

LORD WILBERFORCE
LORD HAILSHAM OF SAINT MARYLEBONE
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON
LORD SCARMAN

[*Delivered by* LORD EDMUND-DAVIES]

Arthur Allan Thomas petitions for special leave to appeal to Her Majesty in Council from an " Opinion " of the Court of Appeal of New Zealand expressed in response to a reference to it by His Excellency the Governor-General. The reference, which was made under section 406 of the Crimes Act 1961, followed an application to the Governor-General to quash the petitioner's convictions of murder. Their Lordships defer for later consideration the terms of the reference and the petitioner's complaints of misdirection by the Court of Appeal. Something must first be said regarding the nature of the case itself.

The history is long and complicated, but it is sufficient to relate it only in outline. In June 1970 Harvey and Jeanette Crewe were missing from their farmhouse at Pukekawa. In mid-August Mrs. Crewe's body was discovered in Waikato River, wrapped in a blanket and tied with wire. There was a bullet wound in her head. In mid-September Mr. Crewe's body was also found in the river, again tied with wire, and underneath it was the axle of a trailer. He too had been shot in the head. Late in October, Detective Senior Sergeant Charles allegedly discovered a spent brass cartridge case (" Exhibit 350 ") in the Crewes' garden. In November the petitioner was arrested and charged with the murder of Mr. and Mrs. Crewe. During 1971 he was tried and convicted on both charges and received the statutory sentence of life imprisonment, and his appeal against conviction was dismissed. In February 1972, in response to several petitions for a new trial, the Governor-General referred the matter to the Hon. Sir George McGregor (a retired judge of the Supreme Court) who in his report advised against granting the petitions. Thereafter, further representations were made to the Governor-General and, by Order in Council, in August 1972 he referred the whole case to the Court of Appeal so that they could consider certain fresh evidence. This reference was

made pursuant to section 406 (a) of the Crimes Act 1961, the text of which must be considered later. Having considered the fresh material, in February 1973 the Court of Appeal ordered a new trial. This was concluded in April, and the petitioner was again convicted of both murders. The petitioner then applied for leave to appeal against these fresh convictions, but in July 1973 the Court of Appeal dismissed the application.

A year later, in response to an application (supported by affidavits and fresh evidence) to quash the convictions, the Governor-General, this time pursuant to section 406 (b) of the Crimes Act 1961, by Order in Council referred the application to the Court of Appeal, " with a request that the Court consider it and hear such submissions on it as it thinks fit and answer the following questions . . .". The text of the two questions posed will be considered later. On January 29, 1975, the " Opinion of the Court " was furnished, answering the first question in a manner adverse to the accused and reporting that, in the circumstances, no answer was required to the second question. It is in respect of this Opinion that the accused now seeks special leave to appeal to this Board.

Although it is not necessary for present purposes to consider the whole body of evidence called, it is essential to say something about one important feature of the Crown's case. Their Lordships have already said that both Mr. and Mrs. Crewe had been shot. Fragments of the bullets which killed them were recovered from their heads and there was forensic evidence that certain markings on these fragments indicated that both bullets *could* have been fired by a Browning pump-action 0·22 rifle which the accused owned. There was also evidence that this rifle *did* fire the cartridge case (Exhibit 350). The Crown relied upon this as indicating that the accused had been present in the Crewe's garden and had shot them with his rifle through an open window. Other evidence called need not now be gone into, for in its Opinion the Court of Appeal observed that it refrained " from any discussion of the considerable body of evidence against Thomas, other than that relating to Exhibit 350, which was before the jury for their consideration in reaching their verdict ". Having regard to the conclusion which their Lordships have come to regarding the competency of this Board to deal with the petition, it is sufficient to say that a fierce contest was waged regarding the important issue as to whether or not the cartridge case (Exhibit 350) could have been loaded with pattern 8 bullets, corresponding to those which undoubtedly killed both Mr. and Mrs. Crewe. In his petition to the Governor-General (which the Court of Appeal described in its Opinion as " . . . in effect an appeal to the royal prerogative of mercy, and not an appeal to this Court "), the accused sought the quashing of his convictions on the ground that that issue should have been resolved in his favour.

Section 406 of the Crimes Act must now be considered in its entirety. It reads as follows:—

> *Prerogative of mercy*—Nothing in this Act shall affect the prerogative of mercy, but the Governor-General in Council, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of any person by any Court or to the sentence (other than a sentence fixed by law) passed on any person, may at any time if he thinks fit, whether or not that person has appealed or had the right to appeal against the conviction or sentence, either—
>
> (a) Refer the question of the conviction or sentence to the Court of Appeal or, where the person was convicted or sentenced by a Magistrate's Court, to the Supreme Court, and the question so referred shall then be heard and determined by

the Court to which it is referred as in the case of appeal by that person against conviction or sentence or both, as the case may require; or

(b) If he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Governor-General with its opinion thereon accordingly ".

It is not unimportant to see how the Court of Appeal regarded its functions under the Governor-General's reference. After quoting sub-paragraph (b) of section 406 they continued:

" It is in pursuance of this particular statutory provision that the case has been referred to us. We have been asked to express our opinion on certain questions only, to assist His Excellency in Council in arriving at a decision upon the matters raised by the petition. There is no question of our ordering a new trial, nor is this a case of the usual kind, of an appeal against conviction.

His Excellency in Council has asked for our opinion on two questions which are as follows:—

1. Has it been established by the Petitioner that neither of the bullets of which fragments were found in the bodies of David Harvey Crewe and Jeanette Lenor Crewe could have been assembled with the cartridge case identified as Exhibit No. 350 in the course of the manufacture of an 0·22 rimfire round of I.C.I. ammunition?

2. If it is so established is such a finding inconsistent with the verdict of guilty, on both counts of murder, returned by the jury on the sixteenth day of April 1973 at the trial of Arthur Allan Thomas?"

Having considered the available material in detail, the Court of Appeal concluded their Opinion by saying:—

" In those circumstances our opinion is that Question 1 must be answered ' No '.

CONCLUSION

The Court's answers to the questions are as follows:

Question 1: No

Question 2: In view of the answer to Question 1, no answer to Question 2 is required. For that reason, and also because a determination on the applicant's petition is a matter for the Governor-General in Council, the Court refrains from any discussion of the considerable body of evidence against Thomas, other than that relating to Exhibit 350, which was before the jury for their consideration in reaching their verdict ".

In the petition to this Board for special leave, the principal grounds of complaints are these:—

" i. that the said " opinion " of the Court of Appeal is reviewable and properly the subject of a petition to Her Majesty in Council and further, having regard to the grounds below, ought to be so reviewed;

ii. that the Court of Appeal misdirected itself and/or otherwise erred in law in its interpretation of the onus, if any, resting on your Petitioner in relation to the said Question 1 posed in the reference of 1st July 1974. The Court of Appeal wrongly found that the onus required that your Petitioner ' must exclude a reasonable

possibility that either of the bullets was assembled with Exhibit 350' whereas, if an onus did rest on your Petitioner, the proper onus was that he need only do so 'on the balance of probabilities' as was accepted by the Crown;

iii. that the Court of Appeal erred in law in answering Question 1 in the negative and in not furnishing an answer to Question 2 since the Court accepted your Petitioner's submission, and his evidence in support thereof, on Question 1 'on the probabilities' and was only 'unable to exclude the reasonable possibility' that the bullets could not have been assembled with the cartridge case identified as Exhibit 350;

iv. that your Petitioner's case has become the subject of persistent national debate in New Zealand and there is widespread public concern as to the propriety of his convictions."

In support of the first submission, *viz.* that the "Opinion" is properly the subject of a petition to Her Majesty in Council, learned counsel for the petitioner relied upon section 3 of the Judicial Committee Act 1833, which provides as follows:—

> "3. *Appeals to King in Council from sentence of any judge, etc., shall be referred to the committee, to report thereon.* All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer . . . shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of His Privy Council . . ."

Mr. Blom-Cooper submitted that the Opinion rendered by the Court of Appeal was a "determination", within section 3, and that it is accordingly appealable to this Board, subject to the granting of the special leave which, in his submission, is shown by *Oteri v. The Queen* [1976] 1 W.L.R. 1272 to be capable of being granted in such cases as the present.

Reliance was likewise placed upon the New Zealand Order in Council (S.R. & O. 1910 No. 70, L.3) regulating all appeals to Her Majesty in Council from the Dominion of New Zealand, in respect of judgments of the Court of Appeal. The submission is that the Opinion of the Court of Appeal was a "judgment" within Rule 1, which provided that:

> "'*Judgment*' includes decree, order, sentence, or decision, whether in the exercise of the appellate or original jurisdiction of the Court, and whether in a proceeding removed into the Court from any other Court or on a case stated for the opinion of the Court or otherwise howsoever".

Turning to section 406 of the Crimes Act 1961, Mr. Blom-Cooper relied upon the power thereby conferred upon the Governor-General in Council, "on the consideration of any application for the exercise of the mercy of the Crown" to

> (a) Refer the question of the conviction or sentence to the Court of Appeal . . . and the question so referred shall then be heard and determined by the Court to which it is referred as in the case of an appeal . . ."

The submission was that the instant reference had resulted in a determination by the Court of Appeal, and that determination was appealable. Regarding that submission the following comments are called for:—

1. The present reference was expressly made pursuant to section 406 (b), and not to section 406 (a), and there are important differences in the wording of the two sub-paragraphs.

2. Sub-paragraph (a) requires the question referred to " be heard and *determined* by the Court . . . *as in the case of an appeal* ", and it will be recalled that, when the case was first referred by the Governor-General back in August 1972 to the Court of Appeal, that is precisely what happened, the Court itself ordering a new trial in February 1973, and that new trial promptly taking place in the following month.

3. The wording of sub-paragraph (b) makes clear that the reference to the Court of Appeal is simply to obtain its " assistance . . . with a view to the *determination* of the application ". The application in question relates to the exercise of the prerogative of mercy, and no one but the Governor-General himself has the ultimate power to deal with such an application. Its exercise by any other person or body being unconstitutional, the reference of " any point in the case " to the Court of Appeal is merely in order to obtain its " opinion " thereon. When its labours are over the Court of Appeal is required to furnish that opinion to the Governor-General so that he, and he alone, may determine whether the application for the exercise of the prerogative of mercy is to be granted or refused.

4. Finally, the wording of the reference itself (earlier quoted) makes clear that the Court of Appeal were free to conduct their " enquiry " in such a manner and in accordance with such procedure as they thought fit and were not obliged to conform to the rules governing criminal appeals.

Pausing there, it has accordingly to be said that the language of section 406 (b) itself seemed, in the judgment of their Lordships, wholly inconsistent with the notion that the " Opinion " formed by the New Zealand Court of Appeal in a reference thereunder is appealable to this Board. But, had their Lordships entertained any doubts on the matter, they would have been finally dispersed by the reply of the Solicitor-General in a speech the effectiveness of which, if their Lordships may say so, was in direct ratio to its admirable brevity. He made two submissions, and these must be considered in turn.

A. *The Court of Appeal were called upon by the Governor-General to perform statutory functions in relation to which no appeal was intended to lie.* In *Théberge v. Laudry* (1876) 2 App. Cas. 102 this Board was called upon to consider the Quebec Controverted Elections Act, 1875, which contained a provision (section 90) that a judgment of the Supreme Court " shall not be susceptible of appeal ". The petitioner whose election had been declared null and void by the Superior Court, sought special leave to appeal to this Board from that declaration. Dismissing the petition, Lord Cairns L.C. said (at page 106): —

> " Now, upon that 90th section it is contended on behalf of the Petitioner that it does not take away any prerogative right of the Crown; that the Crown and the prerogative of the Crown are not specially or particularly mentioned; and that the general rule is, that the prerogative of the Crown cannot be taken away except by a specific enactment. It is said that this section may be satisfied by holding that the intention of the Legislature was, that there should be no appeal from a Superior Court to the Court of Queen's Bench in the colony, which was the kind of appeal that existed in civil cases in the colony, and that the prerogative of the Crown is not in any way affected . . . (P. 108.) In the opinion of their Lordships . . . the 90th section . . . is an enactment which indicates clearly the intention of the Legislature under this Act . . . to create this tribunal for the purpose of trying election petitions in a manner which should make its decision final to all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative ".

Commenting on that decision, Lord Hobhouse said in *Moses v. Parker* [1896] A.C. 245, at 248:

> " The statute provided that the judgment of the Court should not be susceptible of appeal. Though that provision would destroy the right of a suitor to an appeal, it did not taken by itself destroy the prerogative of the Crown to allow one. But this Board held that they must have regard to the special nature of the subject; to the circumstance that election disputes were not mere ordinary civil rights; and that the statute was creating a new and unknown jurisdiction for the purpose of vesting in a particular court the very peculiar jurisdiction which up to that time had existed in the assembly. And they came to the conclusion that the intention of the Legislature was to create a tribunal in a manner which should make its decision final to all purposes, and should not annex to it the incident of being reviewed by the Crown under its prerogative ".

Those decisions have been consistently followed in a series of cases arising out of election petitions—see, for example, *Patterson v. Solomon* [1960] A.C. 579 and *Arzu v. Arthurs* [1965] 1 W.L.R. 676. But of far wider application is the underlying principle that regard must be had to the precise wording of the legislation upon which appeals to this Board are sought to be based, in order to determine whether it was ever intended that an appeal should lie. In the instant case, the Solicitor-General relied strongly upon the wording of sub-paragraph (b) of section 406, which he contrasted with that of sub-paragraph (a), submitting that, whereas an issue referred under the latter is *determined* by the Court of Appeal as if it were dealing with an appeal, the markedly different wording of sub-paragraph (b) clearly indicated that the " Opinion " (a word which nowhere appears in sub-paragraph (a)) could not be the subject matter of an appeal. It was determinative of no issue and in no sense bound the Governor-General in relation to his exercise of the royal prerogative, which was exclusively his concern and wholly outside the functions of any Court.

It may here be added that, were it even remotely conceivable that the Governor-General was intended to be fettered in any way by the Opinion of the Court of Appeal, one would have expected to find in the Crimes Act 1961 some express wording to that effect, such as was employed, for example, in the District Court of Western Australia Act, 1969, section 49, viz:

> " A District Court Judge may reserve any point of law arising in any trial of a person on indictment for the opinion of the Full Court sitting as a Court of criminal appeal, and defer passing judgment therein until that opinion has been given, and in such cases shall pass judgment in conformity with that opinion ".

This wording shows that the case of *Oteri v. The Queen* is no authority for the granting of special leave in the present case, since the opinion of the Full Court was given for a different purpose and had a different effect from the " Opinion " of the Court of Appeal of New Zealand.

B. *The Opinion of the Court of Appeal is not appealable under the relevant statutes.* The Solicitor-General secondly submitted that this petition for special leave does not lie unless it falls within the provisions of the Judicial Committee Act 1833, section 3 (which their Lordships have earlier quoted) or the succeeding statutory provisions in that regard, and that the petition does not come within the ambit of any of them. For any of the Acts to apply (so the submission went) there must have been in the lower Court from which the appeal is brought, a judicial decision binding on the parties. The decision in *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235 was cited in support. Dealing

with section 74 of the Commonwealth of Australia Constitution, 1900, Lord Porter there said (at page 294):

> "It deals with the Royal Prerogative to grant special leave to appeal and imposes certain limitations on . . . that right. But the appeal by special leave is what it always has been, an appeal from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is in the light of this consideration that the section must, if possible, be construed. To give effect to the appellants' submission would appear to involve the admission of an appeal not from a judicial act but from the pronouncement of an opinion on a question of law . . . As its opening words show, the section deals with 'appeals' to His Majesty in Council and, as already observed, an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court. It is only from such an order that an appeal can be brought. In section 74 the appeal is described as an appeal 'from a decision of the High Court' and so far no difficulty arises. 'Decision' is an apt compendious word to cover 'judgments, decrees, orders, and sentences', an expression that occurs in section 73. It was used in the comparable context of the Judicial Committee Acts of 1833 and 1844 as a generic term to cover 'determination, sentence, rule or order' and 'order, sentence or decree'. Further, though it is not necessarily a word of art, there is high authority for saying that even without such a context the 'natural, obvious, and prima facie meaning of the word "decision" is decision of the suit by the court': see *Rajah Tasadduq Rasul Khan v. Manik Chand* (1902, L.R. 30 I.A., 35, 39)".

Of the several other cases to a like effect cited by the Solicitor-General, their Lordships need mention only *Tata Iron & Steel Co. Ltd. v. Bombay Chief Revenue Authority* (1923) 39 T.L.R. 288. There this Board held, on a preliminary objection, that a "decision, judgment or order" of the High Court of Bombay upon a reference made to them by the Chief Revenue Authority pursuant to the provisions of an Income Tax Act were merely advisory and not final, and that an appeal to His Majesty in Council was therefore incompetent.

Their Lordships have not found it necessary to cite further authorities, for in their judgment this second submission of the Solicitor-General, like the first, was well-founded. The wording of section 406 (b) of the Crimes Act 1961 is such that no power or duty of determination binding upon the Governor-General was entrusted to the Court of Appeal. The Opinion they expressed impinged upon no legal right of the petitioner, nor did it place any fetter upon the exercise by the Governor-General of the royal prerogative of mercy. For these reasons, their Lordships were of the opinion that they had no jurisdiction to entertain the petition and humbly advised Her Majesty that it should be dismissed.

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In the Privy Council

ARTHUR ALLAN THOMAS

v.

THE QUEEN

DELIVERED BY
LORD EDMUND-DAVIES

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