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BISHOP v. CHUNG BROS.

Higgins J.

In the present case, the penalty incurred is joint. Two or more persons are sued under a common firm name in pursuance of the Act; and the only matter in issue, the only matter as to which the justices can take evidence, is this, was a person working on the premises occupied by the firm during prohibited hours? Occupation by this firm is an essential part of the informant's case in this prosecution. I am therefore of opinion that the *Factories and Shops Act* allows an information and conviction against a firm as well as against a corporation; and that the prosecutor is entitled to have the conviction entered against the defendants by their firm name, and to take such means of enforcing the penalty as the law may allow him.

Appeal allowed. Order appealed from discharged. Case remitted to justices. Appellant to pay costs of the appeal.

Solicitor, for the appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitor, for the respondents, *Field Barrett*, Melbourne.

B. L.

Appl *R v Siebel & Waterman* (1992) 59 ACrimR 105

Appl *Siebel & Waterman v R* (1992) 57 SASR 558

Cons *Bridge v R* (1964) 118 CLR 600

Cons *Allen & Jackson v R* (1994) 77 ACrimR 99

Cons *RPS v R* (2000) 199 CLR 620

Foll *Spooner v Alexander* (1912) 13 CLR 704

Disod *R v L* [1996] 1 NZLR 53

Cons *R v Kostaras (No 2)* (2003) 86 SASR 541

Foll *Collis v Smith* (1909) 9 CLR 490

Refd to *R v Clune* (1999) 72 SASR 420

Cons *R v Greatorex* (1994) 74 ACrimR 496

[HIGH COURT OF AUSTRALIA.]

BATAILLARD . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

H. C. OF A. 1907.

SYDNEY, *May* 17.

MELBOURNE, *May* 24, 27.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Appeals to High Court in criminal cases—Special leave—Grounds for refusing—Question of fact involved—Comment upon accused person refraining from giving evidence on oath—Crimes Act 1900 (*N.S.W.*), (*No.* 40 *of* 1900), *sec.* 407, *sub-sec.* 2.

Griffith C.J., Isaacs and Higgins JJ.

The High Court will not entertain an appeal from the Supreme Court of a State in a criminal case on a mere question of fact.

Principle laid down by the Privy Council in *In re Dillet*, 12 App. Cas., 459, at p. 467, as to granting special leave to appeal in criminal cases, applied.

Sec. 407 of the *Crimes Act* 1900 of New South Wales provides, *inter alia*, that every accused person in a criminal proceeding shall be competent, but not compellable, to give evidence, but that it shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf.

Held, that the question whether a Crown Prosecutor, by referring to the fact that the accused had made a statement merely, not upon oath, did in fact under the particular circumstances of the case invite the jury's attention to the accused person's ability to give evidence on oath, was a question of fact, on which different minds might come to different conclusions, and, therefore, when the Supreme Court, on a special case stated for their opinion, held that under the circumstances there had not been a comment within the meaning of the section, special leave to appeal from their decision should be refused.

But *held*, that, though a mere statement of the fact that what the accused person had said in his own defence was not on oath did not in itself amount to a comment, yet if it were accompanied by any circumstance calculated to inform or remind the jury of the fact that the accused person had the right to give evidence on oath, and yet failed to do so, it would be a contravention of the section.

Rex v. *Macfarlane*, (1907) 7 S.R. (N.S.W.), 149, so far as it purported to lay down a contrary principle, dissented from.

Circumstances under which such a statement of fact would amount to a comment, considered.

Special leave to appeal from the decision of the Supreme Court rescinded.

APPEAL from a decision of the Supreme Court of New South Wales on a Crown case reserved.

The prisoner, when on his trial at the Quarter Sessions on a charge of larceny, made a statement from the dock, without being sworn, under sec. 405 of the *Crimes Act* 1900. He was convicted, but the learned Chairman of Quarter Sessions stated a special case for the Supreme Court, on the question whether certain remarks made at the trial by the Crown Prosecutor in addressing the jury amounted to a comment on the fact that the prisoner had refrained from giving evidence on oath, within the meaning of sec. 407 of the Act.

The Supreme Court following their own decision in *Rex* v.

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Macfarlane (1), held that there had been no comment, and sustained the conviction.

From this decision the present appeal was brought by special leave. The facts are fully stated in the judgments.

Breckenridge, for the appellant. Sec. 407, sub-sec. 2, is a re-enactment of the Act No. 30 of 1898, sec. 1, which was passed to get rid of the effect of the decision in *Kops* v. *The Queen*; *Ex parte Kops* (2). In that case the statement of the fact that the accused could have gone into the box and given evidence on oath but did not do so was assumed to be a comment, but comment was held to be permissible. The object of the section is to render an accused person competent to enter the witness box if he wishes to do so, and at the same time to prevent it being made practically compulsory on him to do so by the fear of judicial comment upon his refraining. The Act should be strictly construed in the prisoner's favour in order to give him the benefit the law intended. [He referred to *Butterworth, Criminal Evidence Act* 1898, pp. 17-21.] The Supreme Court have always proceeded upon a misconception of the section. In their opinion it is a mischievous one, to be restricted in its operation as far as possible. In that view they have held that a mere statement of fact, even if it amounts to saying that the prisoner was able to go into the box but did not do so, cannot be a comment: *Rex* v. *Macfarlane* (1). But a mere statement of facts may amount to a comment: *Odgers on Libel and Slander*, 3rd ed., p. 40; *Lefroy* v. *Burnside* (No. 2) (3); *O'Brien* v. *Marquis of Salisbury* (4); *South Hetton Coal Co. Ltd.* v. *North Eastern News Association Ltd.* (5); *Best on Evidence*, 10th ed., pp. 527, 528. But here there was more than a mere reminder to the jury of what they may have known before. There were suggestions as to the motives actuating the accused. There are many decisions of the Supreme Court in Canada on a similar provision, sec. 4 of the *Canadian Evidence Act* 1893, which show that any indirect or covert reference to the prisoner's

(1) (1907) 7 S.R. (N.S.W.), 149.
(2) (1894) A.C., 650.
(3) 4 L.R., Ir., 556.
(4) 6 T.L.R., 133.
(5) (1894) 1 Q.B., 133.

silence amounts to a comment: *The Queen* v. *Corby* (1); *The King* v. *Charles King* (2); *The Queen* v. *Weir* (No. 3) (3); *The King* v. *Hill* (4); *The King* v. *McGuire* (5). The reference to the fact that the statement was not subject to cross-examination suggests that the accused could have gone into the witness box and given evidence on oath, and therefore amounts to a comment on the fact that he refrained from doing so. [He referred also to *The Queen* v. *Rhodes* (6); *American and English Encyclopædia of Law*, vol. 29, pp. 679 *et seq.*]

Browning, for the Crown. There was no comment in the sense in which that word is used in sec. 407. If there was a comment, it was directed against the value or strength as evidence or *quasi* evidence of a statement made from the dock, *i.e.*, not on oath. The remarks of the Crown Prosecutor might have been made with equal force as to the weight the jury should give to the prisoner's statement as evidence, if there had been no Act giving him the right to give evidence on oath. There was nothing which implied that he could have given sworn evidence if he had wished. A statement not on oath has been held not to be evidence in the strict sense: *Reg.* v. *Morrison* (7). The Crown Prosecutor's remarks should be looked at in the light of that decision.

[GRIFFITH C.J.—But, as the law is that he may go into the box, the remarks must be considered in the light of that law, and the question is whether, when so considered, they refer to the non-exercise of that right.

ISAACS J.—If the Crown Prosecutor had said, "This is a mere statement. It is not on oath," the case might be different. But he has also used the words "from the dock," and so referred to the place from which the statement was made.

HIGGINS J.—I should not think that the words "from the dock" were enough to suggest that the accused "refrained" from giving evidence on oath.]

That is the contention of the Crown. There may be a criticism

(1) 1 Can. Crim. Cas., 457.
(2) 9 Can. Crim. Cas., 426.
(3) 3 Can. Crim. Cas., 262.
(4) 7 Can. Crim. Cas., 38.
(5) 9 Can. Crim. Cas., 554.
(6) (1899) 1 Q.B., 77.
(7) 10 N.S.W. L.R., 197.

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of the attitude of the accused without necessarily reflecting on the fact of his not going into the box: *The King* v. *Burdell* (1). It was held in *Rex* v. *Duffy* (2) that the Judge was entitled to point out that the prisoner's statement was not on oath. That was followed in *The King* v. *Livens* (3). In *The King* v. *Chapman* (4) criticism upon the value of the prisoner's statement as evidence was held justifiable. There is nothing in the enactment to prohibit such criticism. This Court should not reverse a series of decisions in the Supreme Court upon the construction of a State Act.

[GRIFFITH C.J.—I think those decisions are right, but the question is whether this case falls within them.]

Breckenridge, in reply. In those cases the words were very different. The real question is whether the reference was intended or calculated to direct the attention of the jury to the prisoner's neglect to avail himself of his legal right to give evidence on oath. The words used in this case might easily have had that result with the jury.

Cur. adv. vult.

May 24. GRIFFITH C.J.—Leave to appeal in this case will be rescinded. We will give our reasons on Monday.

May 27. The following judgments were read.

GRIFFITH C.J. This Court has hitherto followed the practice of the Judicial Committee with regard to granting special leave to appeal in criminal cases. That practice is thus stated in the case of *Kops* v. *The Queen, Ex parte Kops* (5), quoting from the opinion of the Board in *In re Dillet* (6):—"The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done." The same rule was again stated in the case of

(1) 10 Can. Crim. Cas., 365.
(2) (1901) 1 S.R. (N.S.W.), 20.
(3) (1907) 7 S.R. (N.S.W.), 151.
(4) 18 N.S.W. W.N., 254.
(5) (1894) A.C., 650, 652.
(6) 12 App. Cas., 467.

Ex parte Carew (1). In *Kops's Case* (2), a disregard of the express provisions of a Statute, passed for the benefit of accused persons on their trial, was assumed to come within this rule, but leave was refused on the ground that the decision appealed from was correct.

Special leave was granted in the present case, under the following circumstances. By the *Crimes Act* 1900 (No. 40), sec. 407 (2), it is provided that an accused person in a criminal proceeding shall be competent, but not compellable, to give evidence, and it is enacted that "it shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf." It was represented that, on the trial of the appellant on a charge of larceny, the Crown Prosecutor had called the attention of the jury to the fact that, although the appellant might have given evidence on oath, he had not done so, and that on a case reserved the Supreme Court had affirmed the conviction on the ground that a mere statement of the fact was not a comment within the meaning of the section. The language actually used by the Crown Prosecutor is thus stated in the special case:—"Bataillard's statement is a statement merely, not upon oath, and the Supreme Court of this State has gone so far as to hold that the statement cannot be regarded as evidence. It simply goes to the jury for what it is worth. A man makes a statement from the dock not on oath, not subject to the greatest of all tests—that of cross-examination. When people have their backs against the wall I don't think they will stick at telling a few lies."

When the appeal came before the Supreme Court, it was apparently thought that the case was concluded by a decision of that Court in the case of *R.* v. *Macfarlane* (3), in which the Court had held that it was not contrary to the enactment for the presiding Judge to remind the jury that a prisoner's statement in contradiction to sworn testimony was itself not on oath, the reason given being that a mere statement of fact was not a comment within the meaning of the Statute. The appellant's counsel accordingly did not argue the matter, and the conviction was

(1) (1897) A.C., 719. (2) (1894) A.C., 650.
(3) (1907) 7 S.R. (N.S.W.), 149.

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affirmed. I do not see any reason for dissenting from the actual decision in *Macfarlane's Case* (1), but I do not assent to the suggestion that a mere statement of a fact cannot of itself be a comment. What is forbidden by the Statute is commenting upon the fact that the accused person has "refrained from giving evidence on oath on his own behalf." In my opinion, the term "refrain" imports two ideas—opportunity to give evidence on oath, and failure to take advantage of that opportunity. And I think that to call the attention of the jury to the ability of the accused to give evidence on oath, whether that ability is regarded as a matter of fact or law, and to his omission to do so, is a comment forbidden by the Statute. So far I have no difficulty. But in the application of the rule to the facts in the present case, I find great difficulty. In the reasons furnished by the learned Judges to this Court for their decision, they say that the appellant's counsel said that, "seeing the way in which the case was stated and placed before the Court, he was not prepared to argue the case." It is admitted that, when saying so, he thought the case was concluded by *Macfarlane's Case* (1). But I am disposed to think that he was right for quite a different reason. I think that the words complained of are ambiguous, and need something in the nature of an innuendo to explain them. The material words are :—"A man makes a statement from the dock not on oath, not subject to the greatest of all tests—that of cross-examination." If such words had been used immediately after the passing of the Act, and when the competency of accused persons to give evidence on their own behalf was not a matter familiar to juries, they might, and probably would, have been innocent. But when the law has been in force for many years, and the trial takes place, as this did, in a Court which is in almost perpetual session, and where the spectacle of an accused person giving evidence on oath on his own behalf is familiar, I am not at all sure that it ought to be inferred that the words would not convey a reference to the fact of the accused person's competency. Again, a mere gesture on the part of the Crown Prosecutor, or a change of inflection in his voice, might have conveyed such a reference beyond all doubt. Suppose that when he used the words, "from the dock," he had pointed towards

(1) (1907) 7 S.R. (N.S.W.), 149.

the witness box, or suppose that the person jointly indicted with the appellant had himself given evidence on oath, the inference would have been unmistakeable, for we are told that the practice in New South Wales is for accused persons to give evidence from the witness box, and not from the dock.

The only question, therefore, that, on my view of the law, arises for decision in the present case, is whether the Crown Prosecutor did, or did not, in fact invite the jury's attention to the appellant's ability to give evidence on oath. I doubt whether the case as stated affords the necessary material for answering this question. And, if I were sitting in the Supreme Court, I should be disposed to order it to be restated. But I do not think that this Court can, consistently with the rule to which I have already referred, properly entertain an appeal in a criminal case on what turns out to be a mere question of fact, on which different minds might readily arrive at different conclusions. In my opinion, the leave to appeal was improvidently granted, and should be rescinded.

ISAACS J. The second sub-section of sec. 407 of the *Crimes Act* 1900 was passed after the decision in *Kops* v. *The Queen*; *Ex parte Kops* (1), and must be read in the light of that case. That was a special leave to appeal from a judgment of the Supreme Court upholding a conviction. The nature of the application appears from the following passage from the judgment of the Privy Council (2):—"The point on which special leave to appeal is sought in the present case is whether upon the trial of a prisoner since the passing of the New South Wales *Criminal Law and Evidence Amendment Act* (55 Vict. No. 5), it is legitimate for a Judge, in commenting upon the facts proved, to refer to the capacity of the prisoner to give evidence on his own behalf, and so explain matters which would be naturally within his own knowledge, and of which an explanation would be important in view of the evidence already given. The argument would have to go, and did go, to this length—either that in no case is a Judge entitled to comment upon the prisoner having refrained from giving evidence, or that in this particular case there were circumstances rendering such a comment illegitimate in point of law."

(1) (1894) A.C., 650.

(2) (1894) A.C., 650, at p. 652.

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Their Lordships refused leave to appeal, and, from what they say, evidently regarded it as a comment "to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases" (1).

At that time there were in force two special provisions with reference to the trial of an accused person. The first was contained in sec. 470 of the *Criminal Amendment Act* 1883, and is now repeated, so far as revelant to this case, in sec. 405 of the present *Crimes Act*; the other was found in sec. 6 of the *Criminal Law and Evidence Amendment Act* 1891, in the following terms:—"Every person charged with an indictable offence, and the husband or wife, as the case may be, of the person so charged, shall be competent, but not compellable, to give evidence in every Court on the hearing of such charge: Provided that the person so charged shall not be liable to be called as a witness on behalf of the prosecution nor to be questioned on cross-examination without the leave of a Judge as to his or her previous character or antecedents." In July 1898, an *Evidence Act* was passed, which made further provisions regarding the protection of persons accused in criminal proceedings. This so far left the law as laid down in *Kops' Case* (2) still subsisting. But in November 1898, a short Act was passed, called the *Accused Persons Evidence Act* 1898 (No. 30 of 1898), and enacting by sec. 1 that—"It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf." Sec. 407 now contains the enactments of 1898. The legislature appears to have taken the very words "comment" and "refrained" from the Privy Council's judgment in *Kops' Case* (2), and, reading the legislation by the light of that judgment, it appears to me to be plain. A new opportunity had been afforded to a prisoner to establish his innocence if he could. But reasons other than a sense of guilt, such as timidity, weakness, a dread of confusion or of cross-examination, or even the knowledge of a previous conviction, certainly in a summary proceeding, and perhaps in the case of a trial for an indictable offence, might easily prevent the accused person from

(1) (1894) A.C., 650, at p. 653. (2) (1894) A.C., 650.

availing himself of the new means permitted by law. Hence the legislature determined to prevent the enactment, if not used by the prisoner, from being employed as a means of inculpation. This leads me to the conclusion that sub-sec. 2 of sec. 407 is a limitation of the power of comment only so far as relates to the rest of that section, and contains no prohibition regarding sec. 405. It is necessary to bear this distinction in mind. So far as the latter-mentioned section is concerned, the law remains unchanged, and comment may still be made, either that the prisoner has not made any statement as permitted by that section, or that the statement, if made under it, is not on oath, and therefore may not be considered as weighty as the evidence of witnesses under oath. If, however, reference, direct or indirect, and either by express words or the most subtle allusion, and however much wrapped up, is made to the fact that the prisoner had the power or right to give evidence on oath, and yet failed to give, or in other words, "refrained from giving," evidence on oath, there would be a contravention of the sub-section now under consideration. The question whether the law has been so contravened must depend in each case on the words used and the circumstances in which they are used.

Here we have nothing but the case as stated before us, and on full consideration I think the words complained of, standing alone, and without any circumstances pointing to a further meaning than appears on their face, do not contain any express or implied statement or suggestion that the accused had the right, if he chose, to give evidence on oath, and yet abstained from doing so. In other words, they do not in themselves exceed the legitimate comment that a prisoner exercising his right (and for all that appears from the words in question the only right he has) of merely stating facts on his own behalf, is likely to overstep the truth to save himself, and that his statement, not being on oath, is not capable of being tested by cross-examination. The Supreme Court relied on *Rex* v. *Macfarlane* (1). With the judgment in that case I agree, though it is plain that the fact of a prisoner's statement not being on oath may well be presented as to amount to a comment, that it might have been made more

(1) (1907) S.R. (N.S.W.), 149.

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reliable by being given on oath. However, as I cannot see that any wrong principle of law has been applied to the facts of this case, and for the purpose of indicating the proper practice in such matters, I agree that the right order is to rescind the leave given.

HIGGINS J. I concur in the order proposed. The words used by the Crown Prosecutor have been set out in the judgment of the Chief Justice. According to the case as stated, there is no complaint against the Crown Prosecutor, except that he exceeded his duty by merely using the words. Nothing is alleged against him but the bare words. The New South Wales *Crimes Act* 1900, sec. 407, enables an accused person to give evidence on oath, but provides in sub-sec. (2) that "it shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf." The comment must be on the refraining—on the fact that he could have given evidence on oath and has not done so. In this case, I cannot find any such comment. Under another section—sec. 405—the prisoner can make a statement without oath; and the Crown Prosecutor merely pointed out to the jury, as he was entitled to point out, that this statement was not on oath, was not subject to cross-examination, and was made under such circumstances as to strongly tempt a prisoner to tell an untruth. There is no suggestion in the words of the Crown Prosecutor—so far as I can find—to the effect that the prisoner was at liberty to give evidence on oath, or that he had failed to avail himself of such a privilege. I am not able to take the view that a mere statement of the fact that the prisoner had this power, and failed to use it, cannot, under any circumstances, be a "comment," as the Full Court seem to have thought in *Rex* v. *Macfarlane* (1). But I agree with the Full Court in the result, that the Crown Prosecutor did not, in this case, or in *Macfarlane's Case*, exceed the limits of his duty.

I should like to add that the Full Court seems to have treated *Mr. Breckenridge* as having abandoned his appeal. I should have felt great difficulty in entertaining this appeal in the face of the expressions used to this effect by their Honors, but for *Mr.*

(1) (1907) S.R. (N.S.W.), 149.

Browning's frank admission. *Mr. Breckenridge*, it seems, merely intimated that, in view of the decision of the Full Court in *Macfarlane's Case* (1), he would not take up the time of their Honors with arguments which they had already overruled.

I understand that it has been the practice of the High Court to rescind the leave to appeal in such a case as the present; and I see no sufficient reason for departing from this practice under the circumstances.

Special leave rescinded.

Solicitor, for the appellant, *H. R. Clark.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

HAMILTON . . . . . APPELLANT;
RESPONDENT,

AND

WARNE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Insolvency Act 1890 (*Vict.*) (*No.* 1102), *secs.* 37 (VIII.), 45—*Petition for sequestration—Act of insolvency—Failure to satisfy judgment—Demand for more than is owing—Notice of objection, sufficiency of.*

Where judgment has been obtained against a debtor, and he has afterwards paid part of the amount due, a subsequent demand upon him for the whole amount of the judgment debt is not a good demand on the debtor to satisfy the judgment so as to constitute an act of insolvency within the meaning of sec. 37 (VIII.) of the *Insolvency Act* 1890.

(1) (1907) S.R. (N.S.W.), 149.