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is that, having formally abandoned it, the original conviction stands. I agree therefore that the appeal should be allowed.

Appeal allowed. Order appealed from discharged. Conviction restored.

Solicitor, for appellant, *Barker* (Crown Solicitor).

N. G. P.

[HIGH COURT OF AUSTRALIA.]

MAURICE MYERSON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 22.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Criminal Law—Verdict—Recommendation to mercy—Ambiguous expression in rider—Meaning of jury's finding.

Where the jury in a criminal trial add to a verdict of guilty, and objection is taken to the conviction on the ground that the rider is a rider finding special facts which are alleged to be inconsistent with guilt, the Court must look at the whole finding including the rider, and if it then appears reasonably doubtful whether the jury have found the facts necessary to establish the offence charged, the accused is entitled to the benefit of the doubt and the conviction should be quashed ; but the effect of a clear finding of guilty is not cut down by a rider stating facts which, considered in the light of the circumstances of the case and the nature of the offence charged, are consistent with guilt.

Held, also, that, where there has been a verdict of guilty on several counts, some of which are subsequently held bad on demurrer, the nature of the material allegations in the defective counts and the fact that the jury have found them to be proved are relevant in ascertaining the meaning of a rider applicable to the verdict upon all the counts.

To a verdict of guilty upon three counts of an indictment against two persons for conspiracy the jury added a rider recommending one of the accused to mercy on the ground that he was an "unsuspecting tool" of the other.

Held, that, in view of the circumstances of the case, the nature of the offence, and the findings on other counts, the rider could not be regarded as equivalent to a verdict of not guilty as regards the accused to whom it referred.

Quære, whether special leave to appeal should have been granted.

Decision of the Supreme Court: *Rex.* v. *Myerson* (1907) 7 S.R. (N.S.W.), 748, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales upon a Crown case reserved under the *Crimes Act* 1900.

The appellant and his brother were convicted upon an indictment containing three counts for conspiracy to defraud. The jury added a rider recommending the appellant to mercy on the ground that he was the "unsuspecting tool" of the other accused. On a Crown case reserved the Supreme Court held that the second and third counts of the indictment were bad, and that a demurrer to them should have been allowed, but that the first count was good. Objection was then taken for the appellant that the rider was equivalent to a verdict of not guilty as regards the appellant. The Supreme Court decided against him and affirmed the conviction: *Rex* v. *Myerson* (1).

From that decision the present appeal was brought by special leave.

The facts are fully stated in the judgment of *Griffith* C.J.

G. H. Reid K.C. and *Garland*, for the appellant. The Court should look at the recommendation as well as the verdict. It is really part of the finding, and if it shows that the jury have

(1) (1907) 7 S.R. (N.S.W.), 748.

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found certain facts inconsistent with the guilt of the accused, the whole finding should be treated as equivalent to a verdict of not guilty: *Reg.* v. *Dickson* (1); *Reg.* v. *Gray* (2); *Reg.* v. *Crawshaw* (3). The dictum of Lord *Campbell* C.J. in *R.* v. *Trebilcock* (4), to the effect that the rider forms no part of the verdict is not supported by later cases on the subject. The rider is of equal weight with the verdict strictly so called in showing the conclusion at which the jury arrived on the facts. It is not necessary that the rider should clearly contradict the rest of the finding in order to avoid the conviction. It is sufficient if the result is to render it uncertain whether the jury really have found the facts necessary to support a conviction of the offence charged. If the words used by the jury are reasonably capable of a construction which will have that result the conviction should be quashed. The defect might have been cured by the Judge refusing to accept the verdict, but, that not having been done, it has become impossible to say that the jury have really found the accused guilty. The Supreme Court were in error in dealing with the finding in two parts; they thought that, because the first part was clear and the latter part ambiguous, they should disregard all but the mere finding of guilty.

The words used by the jury should be construed in their ordinary popular sense, not in any technical sense, and the Court should consider the words themselves and not speculate as to what the jury might or should have meant. [They referred to *Stewart and Walker* v. *White* (5).] So regarded, the words "unsuspecting tool" not merely render the finding uncertain, they plainly negative guilt. An intent to defraud was an essential element of the offence charged. The conspiracy alleged was an agreement to defraud creditors. It is impossible to conceive a person agreeing to defraud his creditors in the way alleged here without suspecting that the result of the agreement would be to defraud. The rider is equivalent to finding that the accused was unknowingly guilty. A "tool" may be guilty or not guilty, but an "unsuspecting tool" is an innocent tool.

(1) 4 S.C.R. (N.S.W.), 298.
(2) 17 Cox Cr. Ca., 299.
(3) 8 Cox Cr. Ca., 375; Bell C.C., 303.
(4) 1 Dears. & B., 453; 27 L.J.M.C., 103.
(5) 5 C.L.R., 110, at p. 119.

[They referred to *Reg.* v. *Moore* (1); *Mulcahy* v. *The Queen* (2); *Reg.* v. *Beirne* (3); *Hardgrave* v. *The King* (4).]

Pilcher K.C. (*Pollock* with him), for the Crown. Although the Court is entitled to consider all that the jury have said, the actual verdict and the rider do not stand on exactly the same footing. The verdict should be upheld if the rider is capable of any reasonable construction upon which the whole finding can stand together. The Court will endeavour to make sense of what the jury has said, and should construe the finding reasonably and in the light of the facts proved in the case: *Reg.* v. *Trebilcock* (5). In *Reg.* v. *Dickson* (6) the words of the rider were absolutely inconsistent with the verdict of guilty, and could not be construed otherwise. There were three counts here and the appellant was found guilty on all of them, and, though two of them were held bad on demurrer, the facts alleged must be taken to have been proved, as there is no suggestion that the evidence was insufficient to support the information. Looking at the allegations in the several counts, it is clear from the nature of the case that there are many senses in which the appellant may have been an "unsuspecting tool" and yet have been guilty. The jury may have meant that he did not realize the wrong he was doing, or that he was influenced by the stronger mind of his brother, without realizing where he was being led. But it is no excuse that a man did not know that he was doing wrong. [He referred to *Rex* v. *Esop* (7); *Bank of New South Wales* v. *Piper* (8).] The onus is on the appellant of showing that, under the circumstances of this case, an unsuspecting tool must have been an innocent tool. In other words, he must show that the jury really made a mistake when they found him guilty. At the most he has only shown that "unsuspecting tool" is capable of a construction consistent with innocence. He has not shown that those words necessarily negative guilt. [He referred to *Reg.* v. *Morce* (9).]

(1) 2 N.S.W.W.N., 6.
(2) L.R. 3 H.L., 306.
(3) 14 S.C.R. (N.S.W.), 351.
(4) 4 C.L.R., 232, at p. 239.
(5) 1 Dears. & B., 453; 27 L.J.M.C., 103.
(6) 4 S.C.R. (N.S.W.), 298.
(7) 7 C. & P., 456.
(8) (1897) A.C., 383.
(9) 13 A.L.T., 262, at p. 263.

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G. H. Reid K.C., in reply, referred to *Reg.* v. *Sleep* (1).

[GRIFFITH C.J. referred to *Reg.* v. *Orman* (2).]

GRIFFITH C.J. Special leave was granted in this case to appeal from an order of the Supreme Court affirming the conviction of the appellant upon a charge of conspiracy. The information presented against him, which was in somewhat vague terms, contained three counts. The first alleged that the appellant and another conspired together to cheat and defraud certain named creditors and others of "divers large quantities of goods and merchandise and divers large sums of money the property of the creditors aforesaid." The second count alleged that the accused were on 7th June 1907 made bankrupt, and that on 1st June in that year they, with intent to defraud the same creditors, conspired and agreed together that they should within four months before the sequestration order dispose of otherwise than in the ordinary way of trade certain goods and merchandise which they had obtained on credit from the creditors mentioned, and for which they had not paid. The third count I need not refer to. The jury found the accused guilty on all three counts and added :—"We strongly recommend the accused Maurice Myerson to mercy on account of ill-health, and because we believe that he was a tool, an unsuspecting tool, of Abraham, his brother," the other accused. The learned Judge before whom the case was heard reserved three points for the consideration of the Full Court. The first two related to a demurrer. The third, which is the only one for our consideration, is that the rider to the verdict of the jury was equivalent to a verdict of not guilty against Maurice Myerson, the appellant. When the case came before the Full Court they held that the demurrer to the second and third counts ought to have been allowed, and, considering the matter with reference to the first count, came to the conclusion that, under the circumstances, they were unable to say that the rider was equivalent to a verdict of not guilty. The matter cannot be put better than in the language of *Cohen* J. He pointed out that the question was what did the jury mean, and, after referring to the similarity of the meaning of the word "tool" to that of the word "dupe," which

(1) Le. & Ca., 44.

(2) 14 Cox Cr. Ca., 381.

had been the subject of decision in the Supreme Court of New South Wales, in *Reg.* v. *Beirne* (1), went on to say (2):—"Apart from that it is difficult to see what the jury had in their mind. Unsuspecting as to what? The jury came to a conclusion which, taken by itself, admits of no doubt that the accused were guilty. The Court must see that that part of the finding of the jury, which fixed the accused with guilt, is so affected by the subsequent recommendation, that the Court can see that the recommendation, taken with the verdict of guilty, cannot stand." It is contended for the appellant that the finding that the appellant was the unsuspecting tool of his brother is inconsistent with the finding of guilty.

As I have pointed out, the only question that now arises is as to the first count, and the question is, what is the meaning of the rider added by the jury? But, in considering that, we must not reject what was meant by the jury in finding a verdict of guilty. They found the accused guilty on the second count as well as on the first, and the fact that they found the material allegations in the second count proved is very relevant to the question what they meant by their finding, despite the circumstance that that count was subsequently found not to disclose an offence. The jury therefore found, in effect, not only that, in the language of the first count, the accused conspired together to cheat and defraud the creditors of large quantities of goods and merchandise and large sums of money, but also that they had conspired together to dispose of, otherwise than in the ordinary way of trade, goods and merchandise which they had obtained on credit from those creditors and for which they had not paid, with intent to defraud. Reference was made in argument to the case of *Reg.* v. *Trebilcock* (3), in which Lord *Campbell* C.J. expressed a doubt whether a rider of the jury recommending the prisoner to mercy ought to be referred to in order to ascertain what the jury meant, as it was not part of their finding. But subsequent cases go to show that that doubt cannot be supported, and that it is the duty of the Court, where a jury has found a prisoner

(1) 14 S.C.R. (N.S.W.), 351.
(2) (1907) 7 S.R. (N.S.W.), 748, at p. 760.
(3) 1 Dears. & B., 453; 27 L.J.M.C., 103.

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guilty and added a rider to their verdict, to look at the whole of the finding, and that if it appears reasonably doubtful, taking the whole finding together, whether the jury have found the facts necessary to establish the offence charged, the accused is entitled to the benefit of the doubt. The question is how is the rule to be applied in the present case. The main contention for the appellant is this: that in a charge of conspiracy to defraud intent is an essential element of the offence, and that there cannot be an intent to defraud on the part of one who is the unsuspecting tool of another. That, however, depends upon the meaning of those words, and the sense in which they are used. A conspiracy to defraud may be proved in various ways, and the means of carrying out the conspiracy may also be very varied. In the present case the jury have found that one part of the agreement between the accused was that they should dispose of, otherwise than in the ordinary way of trade, goods for which they had not paid. It is obvious that one person might agree with another to assist in an enterprise of that kind and yet truthfully be called the unsuspecting tool of the other. The words seem to me to be capable of various significations. They may mean that the person spoken of did not suspect that the enterprise was unlawful. But *ignorantia juris haud excusat.* The words must be taken with reference to the circumstances of the particular case. If the nature of the offence in the present case were such that a person, who could be fairly described in the ordinary meaning of the words as an unsuspecting tool, could not be guilty of the offence, I think that the conviction could not be supported. But it is impossible to come to that conclusion, having regard to the nature of the offence charged and the facts found. One meaning that the words are capable of bearing is that the accused did not know that there was any harm in what he was doing, or did not know that he was exposing himself to criminal liability, and it is extremely probable that that was what the jury meant. Having, then, a clear finding that the accused was guilty of conspiring with the other accused to defraud his creditors, and having only this ambiguous expression in the rider to qualify it, I think it is a case for the application of this principle that a clear statement or finding of fact is not to be cut down by the

subsequent use of ambiguous words. For my own part, I am disposed to think that we ought not to have granted special leave to appeal in this case, and I had grave doubt on the point at the time. But there has been no application to rescind the special leave, and I have expressed my opinion on the merits. The only question really involved is not one of general interest or importance in the administration of the criminal law, as to the right of an accused person to get the benefit of an uncertainty in the conviction, but is rather a question of the meaning of the particular words used by the jury in this case. That is not a matter of general importance.

When we granted special leave to appeal we had not the advantage of seeing the reasons of their Honors of the Supreme Court. If we had, it is still more doubtful whether we should have granted it.

BARTON J., O'CONNOR J., and ISAACS J. concurred.

Appeal dismissed.

Solicitor, for the appellant, *E. R. Abigail.*

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

C. A. W.