REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1917.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

EYLES . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1917.

MELBOURNE, *March* 12, 13.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Criminal Law—Appeal—Conviction for murder—Quashing conviction—New trial—Miscarriage of justice—Allusions by prosecuting counsel to rejected evidence—Lapse of time—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 6, 8.

Sec. 6 of the *Criminal Appeal Act of* 1912 (N.S.W.) provides (1) that on an appeal against a conviction the Court shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the Court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice; (2) that, subject to the special provisions of the Act, the Court shall, if it allows an appeal against a conviction, quash the conviction. Sec. 8 (1) provides that "on an appeal against a conviction on indictment, the Court may, either of its own motion, or on the application of the appellant, order a new trial . . . if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court is empowered to make."

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The respondent was convicted on a charge of murder, the evidence being purely circumstantial. He appealed to the Full Court of the Supreme Court of New South Wales. The trial Judge stated in his report that he had no reason to think that the evidence did not fully justify the conviction. The Full Court held that certain conduct of the Crown Prosecutor during his address to the jury amounted to an invitation to them to assume that certain evidence which had been rejected had been given, and a persistence in that invitation notwithstanding the Judge's rebuke. They also thought that the case for the prosecution was very weak. On these grounds they quashed the conviction. On an appeal by the Crown to the High Court, which was heard three months after the conviction,

Held, that a new trial should be directed.

Decision of the Supreme Court of New South Wales: *R.* v. *Eyles*, 17 S.R. (N.S.W.), 206, varied.

APPEAL from the Supreme Court of New South Wales.

William Graham Eyles was, on 13th December 1916, at the Central Criminal Court, before *Ferguson* J. and a jury, convicted of the murder of his wife. From that conviction he appealed to the Full Court of the Supreme Court on the grounds (*inter alia*): (1) that the verdict was against the evidence and the weight of evidence; (2) that the facts disclosed on evidence clearly showed that the evidence, being purely circumstantial, did not point to the accused and only the accused; (3) that the Crown Prosecutor in addressing the jury stated that it was a pity that hearsay evidence could not be admitted, for, if it was, it could have been shown where the accused was just about the time the act was committed.

In his report *Ferguson* J. stated that the evidence against the accused was purely circumstantial, but that he had no reason to think that it did not fully justify the conviction. In reference to the third ground of the appeal he said:—

"The third ground of appeal raises a question which I think deserves serious consideration. Mrs. Pike in her evidence said that about 11 a.m. on the Friday the deceased said something to her, after which she watched the house. No evidence was then tendered as to what the deceased had said, but the matter arose again in the evidence of Detective Hooper. The following is part of his account, according to my notes, of a conversation between himself and the prisoner after his arrest:—

Prisoner: She was all right the last time I saw her on Thursday.

Detective : According to Mrs. Pike, you saw her on the Friday.

Prisoner : No, she is mistaken.

Detective : Mrs. Pike is very emphatic about it, and she says——.

It being admitted that what Mrs. Pike said was a repetition of the statement made to her by the deceased, I expressed my opinion that the evidence should not be given, and the Crown Prosecutor did not press it.

"In his address to the jury the Crown Prosecutor referred to this incident. He reminded the jury that the deceased had said something to Mrs. Pike which had led her to watch the house, and he went on to say—I am speaking from my recollection—that while the Judge was bound by law to reject evidence of what the deceased had said, it was in his opinion a very unfortunate thing in the interests of justice that hearsay evidence in such cases should not be allowed ; that if he had been able to elicit what it was that the deceased had said to Mrs. Pike, it might have removed any shadow of doubt from their minds as to whether the accused was then in the house or not.

"I at once interrupted the Crown Prosecutor, and told the jury that there was no evidence before them as to what the deceased had said to Mrs. Pike, and that they would not be justified in drawing the inference that it had any reference to the accused. I added something to the effect that this was a case in which a man's life was at stake, and that such an inference could not be drawn in an action for the price of six penn'orth of groceries. As the Crown Prosecutor wished to argue the matter, I expressed the opinion that it was most improper to endeavour to make use of rejected evidence in that way. He thereupon said that he would not press the matter further, but repeated that he was entitled to say that in his opinion it was a great pity that such evidence could not be given.

"It was obvious that the Crown Prosecutor wished the jury to believe that the deceased had told Mrs. Pike that the accused was then in the house. It is of course impossible for me to say how far the attempt was successful."

On the hearing of the appeal the Full Court were of opinion that

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the case for the prosecution was a very weak one. As to the third ground of appeal they came to the conclusion that the evidence above referred to had been properly shut out, but that the Crown Prosecutor had invited the jury to assume that the evidence had been given and, notwithstanding the rebuke of the Judge, had still endeavoured to press the matter. They, therefore, quashed the conviction and ordered the accused to be discharged: *R.* v. *Eyles* (1).

From that decision the Crown, by special leave, now appealed to the High Court.

Knox K.C. (with him *White*), for the appellant. The conviction should have been upheld. The evidence was sufficient to support it. As to the third ground, the evidence which was rejected was properly admissible, although it would not have been evidence of the truth of what Mrs. Pike had said. The position cannot be worse than if the evidence had been given and the Judge had directed the jury that they should disregard it, and then the Crown Prosecutor had said that it was a pity such evidence was not admissible. It is to be assumed that the jury did what the Judge told them to do. What was done by the Judge to warn the jury was reasonably sufficient, and there was no miscarriage of justice: *R.* v. *Lucas* (2); *R.* v. *Cutting* (3); *R.* v. *Loates* (4); *R.* v. *Yousry* (5); *R.* v. *Kurash* (6); *R.* v. *Smith* (7); *Peacock* v. *The King* (8); *R.* v. *Banks* (9).

[ISAACS J. referred to *Dallimore* v. *Williams and Jesson* (10).]

Even if the conviction should not be upheld, a new trial should be directed under sec. 8 (1) of the *Criminal Appeal Act of* 1912. The miscarriage of justice, if there was one, could have been more adequately remedied by a new trial than by quashing the conviction.

[Counsel was stopped.]

[GRIFFITH C.J. Even if we thought that there was no miscarriage of justice, it is a question whether, after the lapse of time which has occurred and in view of what has been done by the Supreme Court, we should not direct a new trial rather than restore the conviction.]

(1) 17 S.R. (N.S.W.), 206.
(2) 1 Cr. App. R., 234.
(3) 2 Cr. App. R., 150.
(4) 5 Cr. App. R., 193.
(5) 11 Cr. App. R., 13.
(6) 11 Cr. App R., 166.
(7) 11 Cr. App. R., 229.
(8) 13 C.L.R., 619, at pp. 643, 658.
(9) (1916) 2 K.B., 621.
(10) 58 Sol. J., 470.

L. J. McKean, for the respondent, did not argue that a new trial should not be directed.

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The judgment of the COURT, which was delivered by GRIFFITH C.J., was as follows :—

Having regard to all the circumstances of the case, the Court are of opinion that the proper order to make is that there should be a new trial. It is obviously undesirable to express any opinion as to the merits of the case.

Order appealed from varied by ordering a new trial.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *W. D. McMahon*, Sydney.

B. L.

[HIGH COURT OF AUSTRALIA.]

CLARKE AND ANOTHER . . . . APPELLANTS ; DEFENDANTS,

AND

THE UNION BANK OF AUSTRALIA LIMITED RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1917.

MELBOURNE, *May* 17.

Barton A.C.J., Isaacs and Rich JJ.

Practice (Supreme Court of Victoria)—Specially indorsed writ—Final judgment—Arguable defence—Rules of the Supreme Court 1916 (*Vict.*), *Order XIV., r.* 1.

Guarantee—Security for mortgage—"Mortgagor"—Fluctuating advance—War Precautions (Moratorium) Regulations 1916 (*Statutory Rules* 1916, *No.* 284 *and No.* 324), *regs.* 2, 3, 4.