[HIGH COURT OF AUSTRALIA.]

TITHERADGE . . . . . APPELLANT,

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Dec. 11, 20.

Barton, Isaacs, Gavan Duffy and Rich JJ.

Criminal Law—Trial—Miscarriage of justice—Witnesses called by Judge—No consent of accused—Examination and cross-examination by Judge—Prior inconsistent statements by witness—Rebutting evidence—New trial—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 404—*Criminal Appeal Act* 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 6, 8—*Evidence Act* 1898 (*N.S.W.*) (*No.* 11 *of* 1898), *secs.* 54, 55.

At a criminal trial the presiding Judge has no power of his own motion to call and examine a witness without the consent of the accused where by law he can consent.

By sec. 6 (1) of the *Criminal Appeal Act of* 1912 it is provided that the Court of Criminal Appeal on an appeal against a conviction "shall allow the appeal if it is of opinion . . . that . . . there was a miscarriage of justice . . . : Provided that the Court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. 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 in such manner as it thinks fit, 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."

On the trial on indictment of an accused person on one count for an assault with intent upon a girl and on a second count for an indecent assault upon her,

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she being under sixteen years of age, the girl in her evidence said that P. came to the window of the room in which she said the assault had taken place and looked in while the assault was taking place, and could have seen what was happening. The case for the defence closed without P. being called as a witness. The Judge then, without any objection on the part of the Crown or the accused, but without any consent by or on behalf of the accused, called P. as a witness and examined him. P. denied that he had passed the window or had seen the accused and the girl in the room together. Counsel for the prosecution, having been asked by the Judge whether he desired to ask P. any questions, declined to do so, but handed certain papers to the Judge. The Judge thereupon asked P. whether he had on a certain occasion made an inconsistent statement to D. and I. P. denied that he had done so. Counsel for the accused declined to ask P. any questions. The Judge then recalled D. and I. and examined them, and both of them said that P. had on the occasion mentioned told them that he had passed the window and had seen the girl and the accused in the room, and upon a bed in it. The Judge told the jury in his summing-up that the evidence of D. and I. did not affect the guilt of the accused, but should only be considered on the question of the veracity of P. The prisoner was convicted on the second count. On an appeal by the accused,

Held, that by reason of the course taken by the Judge a substantial miscarriage of justice had taken place within the meaning of sec. 6 (1) of the *Criminal Appeal Act of* 1912, and that in the circumstances the miscarriage could be more adequately remedied by a new trial than by any other order which the Court had power to make.

Decision of the Supreme Court of New South Wales: *R.* v. *Titheradge*, 17 S.R. (N.S.W.), 428, reversed.

APPEAL from the Supreme Court of New South Wales.

At the Court of Quarter Sessions at Dubbo, Frederick Titheradge was tried on an indictment charging him on the first count with having on 14th March 1917 assaulted a girl under the age of sixteen years with intent to carnally know her, and on the second count with having indecently assaulted her, she being under the age of sixteen years. The accused, having been convicted on the second count, appealed to the Court of Criminal Appeal, but the appeal was dismissed: *R.* v. *Titheradge* (1).

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

The following statement of the material facts is taken from the report of the learned trial Judge:—

The girl's mother used to go daily to the Railway Rest House at

(1) 17 S.R. (N.S.W.), 428.

Narromine to tidy up the place and make the beds. On this day, however, she had to go away from Narromine for a couple of days, and the girl was sent to do the mother's work. She got there after nine o'clock in the morning, saw Titheradge (an engine-driver), Blatch (a fireman) and Payne (a guard) out at the back near the kitchen. They had all arrived there that morning. She spoke to them for a few minutes, and then entered the front portion of the premises, which consisted only of the bedrooms, to attend to her work.

According to the girl's evidence Titheradge came in and talked to her; then, when she went to make a bed in an adjoining room, followed her in. Blatch came to the door and closed it, saying he was going to bed, leaving her with Titheradge alone in the room. The only available exit from that bedroom was by the door Blatch closed. Titheradge caught her by the hand; she struggled to get away and called out; Payne passed the window and looked in, and saw her and Titheradge. Titheradge, still holding the girl's hand, pulled her towards the window, which he closed. He then put the girl on the bed, put his hands up her clothes and got on top of her. She, crying and struggling, managed to get away from him and ran outside. She tore off her apron and threw it into the house, and went off to a Mrs. Newton, who lived not far off, whom she knew well. Upon her arrival there she was very distressed, crying bitterly. To Mrs. Newton she made a complaint.

The girl appeared to be a modest, respectable child, and gave her evidence most unaffectedly.

The defence was an absolute denial of all the girl alleged took place in the house. Titheradge, who is a married man with a family, swore that he was never in the front portion of the house at all that morning until long after the girl had left. Blatch gave evidence to the same effect, and he also swore that he was not in the house and that Payne did not go round by the front.

The defence closed without the guard Payne being called. I ascertained that he was not present at the Court and that his attendance could not be secured until the morning. I considered his evidence so absolutely indispensable to a proper consideration

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of the case by the jury that I decided to send for him. The jury had to be locked up for the night.

The following morning Payne was in attendance, and I asked Mr. *Mason*, the Crown Prosecutor, and also Mr. *Kelly*, the advocate for the defence, whether either of them desired to call him, but neither of them would do so. I then put Payne in the witness-box and examined him. His evidence was very similar to that given by Titheradge and Blatch, and, in addition, he absolutely denied that he had passed the window or seen Titheradge and the girl in the room together.

At the conclusion of his evidence I asked the Crown Prosecutor whether he wished to ask the witness any questions. He, however, thought it would be inadvisable for him to do so, but, as the witness had been called by the Court, he asked me to look at certain statements, which he handed up to me. This I did, and then specifically asked the witness whether he had, on the evening of the alleged assault, made statements to Messrs. Dobbin and Irwin (relieving officer and night officer respectively) at Narromine inconsistent with the evidence then given by him. He denied having made such statements.

Mr. *Kelly* declined to ask the witness any questions, stating that he had already closed his case.

I thereupon recalled the two men Dobbin and Irwin, and they repeated the statements made to them by Payne, viz., that he had walked past the window, had seen Titheradge and the girl in the room together and had seen them on the bed.

This concluded the evidence in the case.

In summing up I emphasized the fact to the jury that the evidence given by Dobbin and Irwin did not in any way affect the guilt of Titheradge, but that it should only be considered on the question of the veracity of Payne.

Mack (with him *McGhie*), for the appellant. The Judge had no right on his own motion to call Payne as a witness without the express personal consent of the accused. Apart from sec. 404 of the *Crimes Act* 1900, which makes it lawful for an accused person to give a consent, the Judge would have had no right at all to call a

witness (*In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (1)). [Counsel was stopped.]

C. A. White, for the respondent. A Judge may call a witness whose evidence he thinks likely to elucidate the truth (*Halsbury's Laws of England*, vol. XIII., p. 599). The rights of all the parties are conserved by allowing cross-examination by the party to whom the evidence is adverse. [Counsel referred to *Archbold's Criminal Pleading*, 24th ed., p. 484; *R.* v. *Oldroyd* (2); *R.* v. *Cliburn* (3); *R.* v. *Stroner* (4); *R.* v. *Holden* (5); *Coulson* v. *Disborough* (6).] Under sec. 6 of the *Criminal Appeal Act of* 1912 the Court should not allow the appeal unless a miscarriage of justice has occurred. The mere fact that the evidence challenged was given did not prejudice the accused. If the proper course had been followed that evidence could have been given, and the mere fact that it was brought out in an irregular way does not constitute a miscarriage of justice. The cross-examination of Payne was under sec. 54 of the *Evidence Act* 1898, and that section also authorized the recalling of the two witnesses to whom it was alleged a prior contradictory statement had been made by Payne. [Counsel also referred to *Greenough* v. *Eccles* (7).]

Mack, in reply.

Cur. adv. vult.

Dec. 20.

The following judgments were read :—

BARTON J. The appellant was tried at the Dubbo Quarter Sessions in June last on two charges : the first, that he had assaulted a girl under the age of sixteen, with intent carnally to know her ; and the second, that he had indecently assaulted her, she being under sixteen. He was convicted and sentenced on the second charge. An appeal by him to the Supreme Court as the Court of Criminal Appeal was dismissed.

The case comes to this Court on special leave to appeal. The

(1) (1910) 1 K.B., 327.
(2) Russ. & R., 88.
(3) 62 J.P., 232.
(4) 1 Car. & K., 650.
(5) 8 C. & P., 606.
(6) (1894) 2 Q.B., 316.
(7) 5 C.B. (N.S.), 786.

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argument was in effect limited to the grounds of appeal which complained of the action of the learned Judge at the trial in himself calling, examining and cross-examining one Payne, and in recalling and examining two witnesses, named respectively Dobbin and Irwin. It is urged that his Honor's action amounted to a mistrial and that there was a miscarriage of justice.

In the evidence of the girl for the prosecution, she swore to the facts on which the Crown relied as having taken place at the Railway Rest House at Narromine, whither she had gone to perform some work usually performed by her mother, who was then away. She had to set the place in order and make the beds. The offence was said to have been committed in one of the front rooms where she was making or had made a bed. In the course of her examination by the Crown Prosecutor she swore that Payne came to an open window of the bedroom in question, looked in so that she could see his face, and passed by. If her evidence was true, Payne could see her and the appellant there. At that time, as she said in cross-examination, the appellant had hold of her, and this Payne could see. When she came out later on, Payne was not there. The case for the Crown was closed, Payne not having been called. The defence consisted in an absolute denial of the material facts. The appellant swore that he was never in that portion of the house that morning until long after the girl had left. Another man named Blatch gave evidence to the same effect, and swore that Payne did not go by the front of the house. The defence also closed without Payne having been called. It should be mentioned that the appellant, Blatch and Payne are all employees of the railways.

The learned Judge, ascertaining that the attendance of Payne as a witness could not be secured until the next morning, adjourned the case till next day, when Payne was in attendance. The Crown Prosecutor and the advocate for the defence were each asked whether he desired to call Payne. Neither of them would do so. The Judge then called and examined Payne. He corroborated the appellant and Blatch, and denied that he had passed the window or seen the appellant and the girl in the room together. The Crown Prosecutor, Mr. *Mason*, was asked whether he had any questions to put. I quote now from the learned Judge's report :—

"He" (the Crown Prosecutor) "thought that it would be inadvisable for him to do so, but, as the witness had been called by the Court, he asked me to look at certain statements, which he handed up to me. This I did, and I then specifically asked the witness whether he had, on the evening of the alleged assault, made statements to Messrs. Dobbin and Irwin (relieving officer and night officer respectively) at Narromine inconsistent with the evidence then given by him. He denied having made such statements." The solicitor for the defence declined to ask Payne any questions, stating that he had already closed his case. The Judge goes on to say: "I thereupon recalled the two men Dobbin and Irwin, and they repeated the statements made to them by Payne, viz., that he had walked past the window, had seen Titheradge and the girl in the room together and had seen them on the bed." This concluded the evidence. The learned Judge in summing up emphasized the fact that the evidence last given by Dobbin and Irwin did not affect the guilt of the appellant, but that it should only be considered on the question of the veracity of Payne.

The learned Judge is satisfied of the guilt of the appellant, and that he, Blatch and Payne concocted the story which they told.

There was no express objection by the Crown or the defence to the calling of Payne, Dobbin or Irwin.

In the Court of Criminal Appeal neither *Pring* J. nor *Sly* J., who concurred, appears to have thought that there was any substantial irregularity. *Pring* J. said (1):—"I cannot doubt that the Judge acted rightly in calling Payne and in offering Mr. *Mason* the privilege of cross-examination. Unfortunately, Mr. *Mason* appears to have been under a misapprehension as to his right to cross-examine, and the Judge omitted to point out to him that he had such a right. And as Mr. *Mason* declined—mistakenly—to exercise this right, it might have been better if the Judge had refused to look at the statements handed up to him and to examine Payne on them. However, he did so, merely asking the questions which Mr. *Mason*, had he exercised his right, would have asked. On Payne's answers thereto, the Judge would have been quite right in allowing Mr. *Mason* to call Dobbin and Irwin. Can it be said that as the Judge examined them, there

(1) 17 S.R. (N.S.W.), at p. 436.

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has been any substantial miscarriage of justice merely because the evidence has been elicited in a somewhat irregular manner? I think not. The prisoner has not been prejudiced in any way." *Gordon* J. came to the same conclusion. He thought that in the absence of express objection from the Crown or the defence the learned trial Judge was right in calling and examining Payne, but in error in himself conducting the cross-examination, and should have informed the Crown Prosecutor that he must take on himself the responsibility and duty of cross-examining the witness or of leaving his evidence as it stood. He considered that the course pursued amounted, at the most, to an irregularity.

It thus appears that the Court of Criminal Appeal acted on sec. 6 (1) of the *Criminal Appeal Act of* 1912. If there was any miscarriage of justice they thought it was not substantial. (See the proviso.)

The most recent case on this subject is *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (1). That case arose on an application to remove an umpire for misconduct, but in the course of it two at least of the Lords Justices expressed themselves as to the duty of a Judge in a civil case. Certain dicta of Lord *Esher* M.R. in the case of *Coulson* v. *Disborough* (2) were extensively discussed, and *Fletcher Moulton* and *Farwell* L.JJ. appear to have thought that the learned Master of the Rolls had expressed himself rather too widely. But it may be gathered from their remarks that they were of opinion that there are instances in which a Judge in a civil case is justified in calling a witness with the assent or acquiescence of the parties. Such an instance would occur where the jury desired that a person who had not been called by either party but who was in Court should be examined. Other instances have occurred in criminal cases. The case of *R.* v. *Holden* (3) was cited to us. There *Patteson* J. directed the prosecuting counsel to call a person who was present, although she had been brought to the Assizes by the other side, and her name was not on the back of the indictment. The Judge gave this direction on the ground that every person who was present at the transaction out of which the charge arose ought

(1) (1910) 1 K.B., 327.
(2) (1894) 2 Q.B., 316.
(3) 8 C. & P., 606.

to be called by the Crown. But his Lordship went further. It was a trial for murder. Three surgeons had examined the body, and it appeared that there was a difference of opinion between them. Two of them were called for the prosecution, but the third was not. His name not being on the back of the indictment, the prosecuting counsel declined to call him, though he was in Court. At the conclusion of the case for the prosecution, the Judge directed that he should be called, and himself examined him. Another case cited was *R.* v. *Stroner* (1). In that case *Pollock* C.B., who presided, did not actually call any witness. He insisted, however, that two material witnesses, both present as witnesses for the prisoner, should be called by the prosecution. It was a case of rape, and the prosecutrix swore that soon after the commission of the offence she complained of it to one of these persons. On that person being examined for the Crown she denied that the prosecutrix had ever made any complaint to her, and on the suggestion of the learned Lord Chief Baron the prosecution was abandoned. Other cases were cited, but those mentioned were the only ones that can be said to have materially supported the argument for the Crown.

In the present case the learned Judge not only called Payne, the third person who, as the prosecutrix swore, was present at the time when, as she said, the offence was committed, but he examined that person in chief, and, having done so, made use of material, supplied by the Crown Prosecutor, for the purpose of testing his credit by cross-examination. It is true that neither the Crown nor the defence desired to call this person. The Judge went on to call and examine two other witnesses to contradict Payne by proving the statements which appear to have been contained in the papers supplied to him by the Crown Prosecutor. He appears to have had in mind sec. 54 of the *Evidence Act* 1898. But the whole of the three sections in Part V. of that Act were passed for the purpose of defining the rights of parties at trials. There is one exception only, and that is the proviso to sec. 55, under which the Court may require the production for its inspection of a writing or deposition on which it is intended by a party to contradict a witness. In that case the Court may make use of the document as it thinks fit for the

(1) 1 Car. & K., 650.

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purposes of the trial. A rather similar course was taken by *Graham* B. in *R.* v. *Oldroyd* (1), tried in 1805. There a person who had been examined before the grand jury was not at first called by the prosecution, but the Judge "thought it right to have her examined, which was accordingly done." It does not appear, however, that the Judge actually examined this witness. But "observing . . . that the evidence given by the woman was in favour of the prisoner, and materially different from her deposition" the Judge caused the deposition to be read, to affect the credit of her testimony on the trial. This does not appear to have been done under any Statute, and at a meeting of all the Judges they were of opinion that the course taken was competent to the Judge.

No one, then, will doubt that there are instances, not numerous, in which in furtherance of justice and in exceptional circumstances presiding Judges have rightly taken it upon themselves to actually examine a witness, and, of course, it happens every day that a Judge, in order to understand what a witness has said, asks him a question. But that is a very different matter from the assumption by the Court of the conduct of the case. A trial is a proceeding *inter partes*, whether the Crown is a party or not, and the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties. Where departures from the rigid observance of this principle have occurred, it has, I think, been upon necessity, as, for instance, in the case where, the parties having definitely closed their evidence, the jury wish a person present to be called for their better information. But the right, where it exists, of a Judge to take the conduct of the examination of persons not called by either party must be used with extreme caution. In a civil case there must either be the consent of the parties or an acquiescence on their part from which the strong inference is consent. I have already pointed out that the sections of the *Evidence Act* cited at the Bar are framed, save in a sole particular, upon the assumption that the parties themselves will lead the evidence. That is the normal and proper practice, and any deviation from it must be safe-guarded by every precaution. This is especially true in a criminal case. Sec. 404 of the *Crimes Act*, No. 40 of 1900, enacts that "every

(1) Russ. and R., 88.

accused person on his trial may, if so advised by counsel, make any admissions as to matters of fact, whatever the crime charged, *or give any consent which might lawfully be given in a civil case.*" It seems to me that in a criminal case the defence ought to be asked whether the accused consents to the course which the Judge proposes to take when he desires (for strong cause) to examine a witness, and the examination ought not to take place without such consent. No such consent was asked or given here. That was, I think, a substantial irregularity. But if it were not so, I cannot doubt that there was material irregularity in the course taken by the Judge of cross-examining that witness as to his credit on papers not produced to the defence, and of then calling other witnesses to depose to the statements in such papers in contradiction of the witness whom he had so cross-examined. No one can doubt that the Judge acted with a pure desire to secure the disclosure of the truth. But such a course as was taken, however well-intentioned, brings the tribunal into the arena of the parties, and to any extent that it does so it is a grave irregularity. Moreover, unless he becomes the mere channel for conveying the inquiries of a party, the Judge is involved in the responsibility of choosing the line of cross-examination, a responsibility which really rests on the party affected by the testimony. That there was a miscarriage of justice is scarcely to be doubted. The Crown almost admits this by calling it an irregularity. But I think it proceeded to lengths which rendered the miscarriage substantial. Our duty is to endeavour so to deal with the course taken that its recurrence may be avoided. It not only affects this case, but if adopted in future it is likely to affect the current of justice in other criminal cases.

Having regard to sec. 8 (1) of the *Criminal Appeal Act*, and to all the circumstances, I am of opinion that the miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court has power to make.

ISAACS AND RICH JJ. It is only necessary to deal with one of the points raised. It appeared during the evidence of the girl alleged to have been assaulted that a man named Payne might be a material witness. Both the Crown and the accused declined to

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call him. The learned Judge *ex mero motu* called and examined him. After reading a paper passed to him by the Crown Prosecutor, the learned Judge asked Payne whether he had not on a former occasion, not in Court, made a statement inconsistent with his testimony. Payne denied having done so. The learned Judge then recalled two witnesses—Dobbin and Irwin—on this new point, and asked them as to Payne's alleged former inconsistent statement. They deposed to such a statement.

The learned Judge in his charge to the jury told them, in effect, that the case depended on Payne's veracity, and that depended on the conflict between him and Dobbin and Irwin as to the former statement. His Honor added that Dobbin's and Irwin's evidence as to that statement was not to be taken as evidence against the accused of guilt.

In view of the decision of the Court of Appeal in *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (1) and the principle there enunciated, it is impossible to see any reason why a Judge has power to call any evidence *ex mero motu* in a criminal trial—except where the Crown raises no objection and, by Statute, the accused may and in fact does consent in manner provided by law, or where the Court has special statutory authority otherwise. The observations of Lord (then Lord Justice) *Moulton* are of general application to the administration of justice both civil and criminal.

In this case the Full Court in the first place said, adopting and applying the principle of *Enoch and Zaretzky's Case* (1), that the accused had not objected. But unless the Court had power to call the evidence *in invitum* its authority depended on sec. 404 of the *Crimes Act* 1900. That section requires an affirmative consent after affirmative advice of counsel. Non-objection is not sufficient.

Then the Full Court thought that there had been no substantial miscarriage of justice. If what was done was not justified by law —and we think it was not—the accused was very seriously prejudiced. It is impossible to escape the conclusion that if the jury believed Dobbin and Irwin in preference to Payne as to his alleged statement, made not on oath, and not in accused's presence, then, since they were told his guilt or innocence depended on Payne's

(1) (1910) 1 K.B., 327.

veracity, the irregularity materially prejudiced his defence. It is not the same thing as if the Crown had called Payne, and subsequently Dobbin and Irwin. The fact that it was the Judge who elicited the evidence of Payne, and who obtained its contradiction, leaving counsel for accused without the right of cross-examining—as it is said—would probably give much more importance and effect to the evidence in the mind of the jury, than if the Crown had done it.

It is said that sec. 54 of the *Evidence Act* 1898 was complied with by the Judge in particularly drawing Payne's attention to the circumstances of his alleged former statement. But sec. 54 refers to cross-examination; and once it is suggested that the Judge first examined Payne, and then cross-examined him, the confusion of function becomes apparent.

With regard to the Crown's reference to some older authorities allowing the Court to direct depositions to be put in, it may be observed that the concluding proviso of sec. 55 of the *Evidence Act* makes a specific enactment.

We think the appeal should succeed, and the case go for retrial.

GAVAN DUFFY J. In this case I do not propose to say more than that I am satisfied that there has been a miscarriage of justice within the meaning of sec. 6 of the *Criminal Appeal Act of* 1912, and that I agree that there should be an order for a new trial.

Appeal allowed. Conviction set aside. New trial ordered. Respondent to pay costs of appeal.

Solicitors for the appellant, *Kelly & Waterford*, Wellington, by *Collins & Mulholland*.

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

B. L.