during the whole period without means except such as she could earn by her own labour of nursing. We think that the appeal should be allowed, and that in view of the statement of the learned Judge as to domicile the cause should be remitted to his Honor to be dealt with as to that point as in his discretion he thinks just.

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Appeal allowed. Order dismissing petition discharged. Declaration that it has been proved that during the period of five years mentioned in sub-sec. (d) of sec. 16 the respondent left the petitioner habitually without means of support. Cause remitted to Supreme Court to be dealt with as it thinks just, subject to the above declaration.

Solicitor for the appellant, *S. Bloomfield.*

Cons *Challita & Makhlouf* 37 ACrimR 175 | Dist *R v Palmer* (1992) 64 ACrimR 1 | Cons *Bridge v R* (1964) 118 CLR 600 | Cons *R v Greatorex* (1994) 74 ACrimR 496 | Discd *R v L* [1996] 1 NZLR 53

B. L.

[HIGH COURT OF AUSTRALIA.]

JACKSON . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *August* 8.

Criminal Law—Trial—Comment upon accused person refraining from giving evidence on oath—Statement made not on oath—Summing-up—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 407.

By sec. 407 of the *Crimes Act* 1900 (N.S.W.) it is enacted that every accused person in a criminal proceeding shall be competent but not compellable to

Barton, Isaacs, Gavan Duffy and Rich JJ.

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give evidence in such proceeding, provided that (2) "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."

At a criminal trial the accused made, under sec. 405 of the *Crimes Act* 1900, a statement not on oath. In reference to that statement the Judge in his summing-up to the jury said: "That statement is something which the law requires you to take into consideration together with the evidence, but it is not in itself evidence in the same sense as the statement of a witness given upon oath; it is not subject in any way to test by cross-examination."

Held, that what was said by the Judge was not, within the meaning of sec. 407, a comment upon the fact that the accused had refrained from giving evidence on oath on his own behalf.

Special leave to appeal from the decision of the Supreme Court of New South Wales refused.

APPLICATION for special leave to appeal.

At the Court of Quarter Sessions at Sydney, William Henry Jackson was tried before his Honor Judge *Docker* and a jury on a charge of larceny, and at the trial he made a statement not on oath, but refrained from giving evidence on oath on his own behalf. The learned Judge, in summing up to the jury, said in reference to the statement made by the accused: "That statement is something which the law requires you to take into consideration together with the evidence, but it is not in itself evidence in the same sense as the statement of a witness given upon oath; it is not subject in any way to test by cross-examination." The accused, having been convicted, appealed to the Full Court sitting as the Court of Criminal Appeal, but the appeal was dismissed and the conviction was affirmed.

The accused now applied for special leave to appeal to the High Court from that decision.

Flannery, in support of the application. What was said by the learned Judge as to the statement made by the accused was a comment on the fact that he had refrained from giving evidence on his own behalf, within the meaning of the *Crimes Act* 1900. To tell a jury, who must now be taken to know that it is competent for an accused person to give evidence on oath on his own behalf, that the statement made by the accused is not subject to test by

cross-examination is to comment upon the fact that he has not given evidence on oath (*Bataillard* v. *The King* (1)). The position is the same as if the jury had been told in so many words that the accused had not made a statement upon oath. Whether what was said by the Judge is a statement of fact or a statement of law, it is equally forbidden by sec. 407.

[ISAACS J. May not the jury be told that an unsworn statement is not entitled to so much weight as a sworn statement ?]

Yes; but they may not be told that the statement of the accused is not as weighty as it could have been made. Any comment on the weight of the evidence, if in substance it informs the jury that the accused has not gone into the witness-box and been sworn, is forbidden. [Counsel also took another ground of appeal, which is not material to this report.]

PER CURIAM. We do not think there is any ground for disturbing the decision of the Full Court. Special leave will be refused.

Special leave to appeal refused.

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

B. L.

(1) 4 C.L.R., 1282, at p. 1288.