dispense with a better one, in other words that he waived any objection to its literal terms.

On both grounds the appeal should succeed.

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FLANNAGAN v. MILNE.

Appeal allowed. Order appealed from discharged and order of Stipendiary Magistrate restored. Respondent to pay costs here and below.

Solicitors for the appellant, *Barwell, Kelly & Hague.*
Solicitors for the respondent, *Bakewell, Stow & Piper.*

B. L.

ppl *v Dolan* 1992) 58 ASR 501

Dist *Hicks* v *R* (1920) 28 CLR 36

Cons *M* v *R* (1994) 126 ALR 325

Appl *M* v *R* (1994) 69 ALJR 83

Cons *Gipp* v *R* (1998) 72 ALJR 1012

Cons *R* v *Gallagher* [1998] 2 VR 671

[HIGH COURT OF AUSTRALIA.]

HARGAN . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August* 20.

Barton, Isaacs and Rich JJ.

Criminal Law—Evidence—Sexual offence on young girl—Absence of corroboration—Effect of omission to warn jury—Misleading direction—Miscarriage of justice—Quashing conviction—New trial—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 6, 8—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 71—*Crimes* (*Girls' Protection*) *Act* 1910 (*N.S.W.*) (*No.* 2 *of* 1910), *sec.* 2.

Sec. 6 of the *Criminal Appeal Act* 1912 (N.S.W.) provides (*inter alia*) that on an appeal against a conviction the Court of Criminal Appeal shall allow the appeal if it is of opinion that on any ground whatsoever there was a miscarriage of justice, and that, subject to the Act, if it allows the appeal, it shall quash the conviction. Sec. 8 empowers the Court to order a new trial if it considers that the miscarriage can be more adequately remedied by an order for a new trial than by any other order which the Court may make.

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A man was tried for a sexual offence on a girl of between ten and sixteen years of age, and was convicted. Corroboration of the girl's story, which is not legally necessary, was absent. The Judge omitted to warn the jury of the danger of convicting on her uncorroborated evidence.

Held, that the conviction should be quashed, and that a verdict and judgment of acquittal should be entered :

By *Barton*, *Isaacs* and *Rich* JJ., on the ground that a miscarriage of justice had occurred by reason of the omission to warn the jury ;

By *Barton*, J., on the ground also that a miscarriage of justice had occurred by reason of the fact that the Judge had, in his summing-up, referred to the girl's evidence concerning a conversation she had had with the Crown Prosecutor in such a way as would mislead the jury with regard to the effect of such evidence.

Decision of the Supreme Court of New South Wales (Court of Criminal Appeal) : *R.* v. *Hargan*, 19 S.R. (N.S.W.), 257, reversed.

Appeal from the Supreme Court of New South Wales.

On 21st February 1919 James Hargan was indicted before the Court of Quarter Sessions at Narrabri under the *Crimes Act* (No. 40 of 1900), sec. 71, as amended by Act No. 2 of 1910, sec. 2, for unlawful carnal knowledge of a girl between the ages of ten and sixteen years. He was convicted, and appealed against the conviction to the Full Court of the Supreme Court, sitting as the Court of Criminal Appeal, on a number of grounds. That Court dismissed the appeal: *R.* v. *Hargan* (1).

Hargan now, by special leave, appealed to the High Court against the decision of the Full Court on several grounds, those material to this report being (1) that the Judge was in error in omitting to warn the jury of the danger of convicting on the uncorroborated evidence of the girl, and (2) that the Judge's direction in reference to the evidence of the girl respecting a certain conversation she had with the Crown Prosecutor outside the Court-room before the hearing was calculated to mislead the jury as to the effect of such evidence.

The material facts and the nature of the evidence sufficiently appear in the judgments.

Mack K.C. and *H. E. Manning*, for the appellant. The Judge's direction with regard to corroboration was insufficient. He should have pointed out to the jury the danger of accepting the girl's

(1) 19 S.R. (N.S.W.), 257.

evidence. She was in a different position from that of ordinary witnesses, for unfounded sexual charges are easily made and of frequent occurrence (*R.* v. *Graham* (1); *R.* v. *Brown* (2); *R.* v. *Cratchley* (3)).

[RICH J. referred to *R.* v. *Severo Dossi* (4) and *R.* v. *Warren* (5).

[ISAACS J. referred to *R.* v. *Rogers* (6).]

In view of the unsatisfactory nature of the girl's evidence, the duty of the Judge to warn was stronger (*R.* v. *Baskerville* (7)). The girl leaves in doubt whether the story was hers or her mother's. The conviction should be quashed: a new trial should be granted only in special circumstances (*Criminal Appeal Act* 1912, secs. 6, 8).

White, for the respondent.

[ISAACS J. referred to *R.* v. *Bloodworth* (8).]

The questions here are only questions of propriety. They are not matters of law (*R.* v. *Graham* (1)). The Crown Prosecutor's questions about what the girl told him merely illustrate the latitude allowed to counsel in such circumstances; they were means of extracting her story from her. (Counsel referred to *R.* v. *Biddulph* (9); *R.* v. *Mullins* (10); *Bataillard* v. *The King* (11).)

[ISAACS J. That case is the converse of this.

[BARTON J. There is great danger if the girl's story is accepted without corroboration.

[ISAACS J. referred to *R.* v. *Davies* (12).]

If the conviction is quashed, there should be a new trial. The Judge could not take the case from the jury, and unless this Court can say that the jury should have acquitted there must be a new trial.

[ISAACS J. referred to secs. 6 and 8 of the *Criminal Appeal Act*.]

It was proved beyond question that the appellant was with the girl at the time. The circumstances show that the relations between them were not what he said they were. The jury asked to hear the appellant. The girl's admission that her mother told her what to say merely goes to what words she should use in describing

(1) 4 Cr. App. R., 218.
(2) 6 Cr. App. R., 24, at p. 26.
(3) 9 Cr. App. R., 232.
(4) 13 Cr. App. R., 158, at p. 160.
(5) 14 Cr. App. R., 4.
(6) 111 L.T., 1115; 24 Cox C.C., 465.
(7) (1916) 2 K.B., 658, at p. 663.
(8) 9 Cr. App. R., 80, at p. 84.
(9) 4 Cr. App. R., 221.
(10) 5 Cr. App. R., 13.
(11) 4 C.L.R., 1282, at pp. 1288, 1291.
(12) 85 L.J. K.B., 208.

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events. This Court will not find that a jury with a proper direction could not reasonably convict.

Mack K.C., in reply.

Barton J. In this case the defendant was charged under sec. 71 of the *Crimes Act* 1900, as amended by Act No. 2 of 1910, sec. 2, wherein the word " sixteen " was substituted for the word " fourteen." The girl, the prosecutrix who laid the charge, was about fourteen and a half years of age. Mr. *Martin* cross-examined her. She no doubt testified to the commission of the offence ; but she did not complain to her mother, or indeed to anybody, after its alleged commission, and there is medical evidence that she had undoubtedly had frequent sexual relations with somebody — whether with the prisoner or with another or others the doctor's examination could not, of course, show. No corroboration of her story has been pointed out. The Judge in his summing-up dealt with this question of corroboration ; he said that it was not legally necessary that she should be corroborated. He said :—" It has been said that the evidence of the girl herself is uncorroborated. It is my duty to tell you that corroboration is unnecessary ; that is, if you believe the girl's evidence, it is not necessary to have corroboration. This case resolves itself into a question of fact. It is for you to say whether you believe the story of the girl or the story of the accused. I will have something to say about reasonable doubt later on." It was a misfortune, I think, that the case was so put on the subject of corroboration, and that his Honor coupled his statement that corroboration was not necessary with the further statement : " It is for you to say whether you believe the story of the girl or the story of the accused." His Honor further says :—" Then we have the girl's own evidence. She is the principal witness, and if you believe her you will naturally find the accused guilty ; but if you believe the accused's evidence against hers you must find him not guilty. You noticed the way she gave her evidence, she seemed terribly nervous and very much upset " ; and so on. Then, later, he says :—" As I said before, Gentlemen, it is a matter for you to say whose story you believe. If you believe the girl's story, then

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you must find the accused guilty. If you believe the accused, you must find a verdict of acquittal." To my mind this was putting the case to the jury in a very unsatisfactory shape. It was put to them more than once that it was a mere matter between two oaths. I will now mention some of the cases cited in this connection. In the case of *R.* v. *Graham* (1), heard in 1910, *Pickford* J. said to the jury :—" You have been told by counsel for the defence that you must have corroboration in this case. Now that is not quite correct. There are cases in which the Legislature requires corroboration, as, for instance, in the case of a child who is too young to understand the nature of an oath, and in the case of an accomplice who has taken part in the crime. But this is not one of those cases, and as corroboration is not required, you are entitled to act, if you think right, upon the evidence of the girl, but of course you have to be very careful in accepting the evidence of one witness against the evidence of another." On the appeal, *Channell* J., delivering the judgment of the Court, said among other things (2) :—" We think, however, that Mr. Justice *Pickford* was right in the way in which he dealt with that question. It is not a case in which corroboration is necessarily required. But it is one of those cases in which the Judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury ; that it is dangerous to act upon the evidence of one person, and in which the Judge should point out to the jury that they had one person saying one thing and another person another thing. Mr. Justice *Pickford* pointed out the risk of acting on the evidence of the girl, unless corroborated ; and at the same time he explained that strictly speaking the law did not require that her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it." In that case there was corroboration, in part, of the girl's story, so that while the Court approved of the terms in which *Pickford* J. put the case to the jury, the question of corroboration was not an essential ingredient in the case on which judgment was pronounced. Another case is that of *R.* v. *Brown* (3), and that was also heard in 1910. It was a charge

(1) 4 Cr. App. R., at p. 219. (2) 4 Cr. App. R., at p. 220. (3) 6 Cr. App. R., 24.

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of incest. There the Lord Chief Justice said (1) :—" In the second place the jury ought to have been cautioned against accepting the uncorroborated evidence of the girl. In our view the girl was an accomplice, but even if she were not, she was a witness who on her own story had been letting her father have connection with her, and was certainly an abandoned girl." I say, in passing, that the evidence in the present case is fairly strong as to the character of the girl who laid the charge. The case of *R.* v. *Pitts* (2), heard in 1912, was one of unlawfully and carnally knowing a girl under the age of thirteen. *Ridley* J. said (3) : " In this case the prosecutrix was not an accomplice, but she was a child of very tender years, and although a jury may act on her uncorroborated evidence, it is always wise for the Judge to address some caution to the jury as to the possibility of such a young child having a mistaken recollection of what happened." In that case the Court came to the conclusion that there was ample corroboration. Then there is the case of *R.* v. *Severo Dossi* (4), heard in 1918, in which *Atkin* J. made some remarks. The head-note is to the effect, so far as it is material to the present inquiry, that the Court does not take the view that it is " safer to accept the uncorroborated evidence of a young child than that of an adult." But *Atkin* J. said (5) :—" The substantial point made by Sir *Ernest Wild* was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but Judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care." Next is the case of *R.* v. *Warren* (6). In this case *Darling* J. gave the judgment of the Court. The prisoner had been convicted of sodomy, and the remarks are not perhaps on the actual point on which decision was given, but are accepted by the Court. *Darling* J. said (7) :—" The conviction is attacked on the ground that it depended upon the evidence of an accomplice which was uncorroborated. The accomplice was a boy of thirteen,

(1) 6 Cr. App. R., at p. 26.
(2) 8 Cr. App. R., 126.
(3) 8 Cr. App. R., at p. 128.
(4) 13 Cr. App. R., 158.
(5) 13 Cr. App. R., at p. 160.
(6) 14 Cr. App. R., 4.
(7) 14 Cr. App. R., at p. 5.

and whether or not the boy was an accomplice in the sense that he could be charged with the offence we think that the Judge ought to have warned the jury against acting on the evidence of an accomplice, and also a warning should have been given to them against acting on the evidence of a boy of that age. Nevertheless, if from the conduct of the case this Court is of opinion that the jury were in fact warned or cautioned, it will not interfere." So that it appears that in the case of persons detailing the commission of offences—not always persons of an age so tender as not to understand the nature of an oath, but young persons of a class or kind in respect of whom one would naturally and generally expect that their evidence would require some strengthening by way of corroboration—there are these statements by Judges that there ought to be some warning given to the jury by the presiding Judge. It would appear here that the Judge did point out that corroboration was not really necessary, and to that extent he did his duty, but the question is whether in this case his duty ended there. I do not think it did. Among the cases mentioned is *R.* v. *Rogers* (1). Lord *Reading* C.J. there said (2): "With regard to the evidence of corroboration, the Judge at the trial undoubtedly thought that some corroboration was required, but he appears to have overlooked the medical evidence which established that the general condition of the girl was equally consistent with causes not put forward by the prosecution, and was equally consistent with either the innocence or guilt of the accused." It does seem to me, giving their fair meaning to all these judicial utterances, that there is more for a Judge to do in trying such a case as the present than was actually done—I mean by way of direction. There is no doubt that in general a jury, properly directed, could act upon the evidence of one person against another, but in such cases as this they ought to be told that the uncorroborated evidence of the young person solely testifying to the commission of the crime upon her person is not by itself a very safe basis on which to rest a conviction. It is the whole case of the side having the *onus probandi*, and while it is not essential that there should be evidence corroborating it, the jury

(1) 111 L.T., 1115; 24 Cox C.C., 465.
(2) 111 L.T., at p. 1115; 24 Cox C.C., at p. 467.

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should be warned against accepting it unless after the most careful scrutiny. This girl was only fourteen and a half years of age, and the jury ought to have had their attention directed to the danger of acting on evidence like this where there is no corroboration. It is not enough to tell them, however truly, that corroboration is not necessary in law. In determining cases of this nature, where there is a very young person of a kind whose statements one would generally expect in the ordinary course of affairs to be made more convincing by circumstances or other persons, the jury ought to be told that, while they may act upon it as a matter of law, they should hesitate long before acting upon it in the absence of corroboration. Exception is not taken on the ground that corroboration is necessary, but on the ground of failure in such a case as this to warn or caution a jury against acting, probably to the utter ruin of a person accused, upon evidence which is uncorroborated, unless they are convinced, after close consideration, that it is in itself sufficient. For my part I think that, in order to convince, it should be very cogent indeed.

There is a further matter. During the trial it appears this evidence was given by the girl, in answer to questions put to her by the Crown Prosecutor :—" Q. : Do you remember this morning, in a room here, talking to me ?—A. : Yes. Q. : Do you remember telling me something then ?—A. : Yes. . . . Q. : Was what you told me in there true or not ?—A. : It was true." There is nothing more to show what it was that the girl had said in this adjacent room to the Crown Prosecutor. But coming to this in the summing-up, his Honor used these terms :—" The girl said she remembered telling Mr. *Browning* something this morning, and she said that what she told Mr. *Browning* was true. She said the accused carried her into the room, he put something between her legs, laid on top of her ; her drawers were half off and he undid the front of his trousers before he got on top of her." The evidence is that she remembered having told Mr. *Browning* something in the adjoining room, and it was not followed up by what she actually said. But his Honor continued thus : " She said the accused carried her into the room." If that portion of the direction stopped at " She remembered telling

Mr. *Browning* something this morning, and she said that what she told Mr. *Browning* was true," that might perhaps carry a meaning in itself that what she said to Mr. *Browning* as to the commission of the offence was repeated in evidence. An implication of that kind carried to the jury would be wrong as evidence of the commission of the offence, and the qualification effected when one of these remarks followed the other immediately was enough in itself to cause the jury to think that what was said by the girl to the Crown Prosecutor in the room was to the same effect as what she said in the Court.

On both of these grounds this conviction ought to be reviewed. The *Criminal Appeal Act* refers to what may be done by the Supreme Court by way of order on appeal, and this Court may make such an order as it thinks the Supreme Court should have made. Sec. 6 and sec. 8 deal with appeals, and empower the Court to make an order. Was there a miscarriage of justice? Well, when the summing-up conveys to the jury that which may be legally done without its being qualified by that warning which would deter them, except upon weighing the evidence with the utmost care, from taking what is technically the legal course—it seems to me that if the person is convicted in the absence of that guidance there is a miscarriage of justice. If, on the other hand, a piece of evidence is recounted by the Judge in his summing up to the jury in such a way as to convey to the jury, although unintentionally, that which is not in evidence in the due course of the case, then, again, it seems to me that a verdict of guilty arrived at after such a course of proceeding cannot be dissociated from it, and we cannot say to what extent it might have influenced the minds of the jury; and in such a case I think that is such a thing as the law means by a miscarriage of justice. I think that there was a miscarriage of justice by the separate force of either of the two matters alluded to, still more by the force of the two combined, and that the result must be a quashing of the conviction.

The only question that remains is: Can this miscarriage of justice, *quacunque viâ*, be remedied by a new trial, or by any other order the Court may be empowered to make? What is the prospect with

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regard to justice being served by a new trial? The prosecutrix has given certain evidence—evidence perhaps largely suggested to her by her mother, because she says her mother told her what to say. The Crown suggests that that may have meant that she was told what slang or coarse terms to avoid. It is, nevertheless, stated in the evidence in terms which most people would accept as meaning that she was "coached" in her testimony. When she has given evidence of that sort, when she is a person who at her tender age has had previous connection, whether with the person she accuses or with other persons, when the appearance of her clothing does not bear the traces usually observable after connection for the first time—one has to recollect what is the nature of the case that the Court is asked to send down for a new trial. Would the cause of justice be advanced? I do not think it would. The girl certainly would be placed in a very delicate position. If on a new trial the jury were properly warned and properly directed, so far as the previous evidence can disclose to us there would be a verdict probably of acquittal, for the jury might well come to a conclusion in favour of the prisoner because in such circumstances there would be an element of considerable doubt. In such circumstances, on a second trial she would either have to adhere to a story which, with a proper summing-up, would lead to acquittal, or vary her evidence in such a way as to avoid such a contingency. I do not think that either of these things should be allowed to occur, nor that any further order should be made by this Court than that the conviction should be quashed.

ISAACS J. read the following judgment:—This is an appeal from a judgment of the Court of Criminal Appeal dismissing an appeal from a conviction at Quarter Sessions. The fact that the appeal arises under the *Criminal Appeal Act* is of the essence of the case. There were several points taken, including mis-reception of evidence, and such reference to that evidence in the course of the learned Judge's summing-up to the jury as was calculated, so it was argued, to prejudice the accused. In the view I take, it is unnecessary to consider that question, though I must say the objection taken is very formidable. It is sufficient to address myself to a point of much more general importance in relation to what may be called sexual cases where there is no statutory provision as to corroboration; I refer to the necessity of cautioning the jury where there is an absence of corroboration: and before going further it is necessary to call attention to what I have described as of the essence of the case.

It is urged that there is no rule of strict law requiring such a caution; and that, at most, it is only a practice, a rule of propriety, which, however, if disregarded, cannot be made a legal ground to quash or set aside a conviction. The Supreme Court thought there was no obligation on the learned Judge to caution the jury specially; they considered the duty varied according to the facts of the particular case. The legal position was put thus (1): "The offence on which the prosecution was laid is one in which the consent of the girl is immaterial, and one in regard to which no prosecution could have been brought against the girl, so that the only duty lying upon the Judge was to point out to the jury matters which would affect the credibility of one witness or the other." That is treating this class of case exactly as all other classes of criminal prosecutions are treated.

Now, before the *Criminal Appeal Act*, doubtless, the question would have been whether there was error in law, that is, strict law, as distinguished from practice. But the essence of the matter here is that sec. 6 of the *Criminal Appeal Act* states three grounds on which an appeal "shall" *primâ facie* be allowed, viz.: (1) verdict unreasonable or not supportable on the evidence; (2) error in law; (3) miscarriage of justice on any other ground. It is the third ground that was relied on principally in the Supreme Court, was entertained and passed upon there, and is relied on here; and that is what I call the essence of the case. It is, therefore, not an answer to the appellant to say that what he complains of is not an error in strict law. If he can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance. Now, as

(1) (1919) S.R. (N.S.W.), at p. 259.

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shown by the cases cited—particularly *R.* v. *Graham* (1), cited by counsel, and the cases of *R.* v. *Severo Dossi* (2) and *R.* v. *Warren* (3), cited by my brother *Rich*, and the case of *R.* v. *Rogers* (4)—it is beyond doubt the deliberate and repeated opinion of a long array of eminent English Judges that, in sexual cases, such a caution as I have alluded to should be given. It is over and above the ordinary caution as to reasonable doubt. It is over and above the usual references to the particular facts of the case. These are common to all criminal cases. It is a recognition of the justice and fairness to the accused in that class of cases, that the jury should be warned—not in specific or set form of words, but in effect warned—that though corroboration is not strictly essential it is necessary to scrutinize with very special care the evidence of the prosecutrix before accepting it so as to condemn the accused. There are obvious reasons for the practice which need not be enumerated, because the practice is so well established as to have, as was said of the analogous case of accomplices, "almost the reverence of a rule of law."

If this were, as in *Peacock* v. *The King* (5), a case of strict law, the argument might or might not prevail as to the rule being one of practice only; but the distinction is as I have stated it. It is a question not of strict law, but of justice. There was no such warning given. The jury were left simply to decide between the evidence of the prosecutrix and the evidence of the accused. Though they were reminded as to reasonable doubt, they were not cautioned as to the danger in such a case of accepting the evidence of the prosecutrix without observing a necessary rule of prudence, that is, to subject it to specially careful scrutiny and examination. This, undoubtedly, according to the great mass of judicial opinion recorded in the cases, amounted to a miscarriage of justice, and so comes within the statutory provision of sec. 6; and as it cannot be said that the Court can be satisfied that no substantial miscarriage of justice actually occurred, the conviction must be set aside (*R.* v. *Schama* (6)). Having looked carefully at the evidence and weighed all

(1) 4 Cr. App. R., 218.
(2) 13 Cr. App. R., 158.
(3) 14 Cr. App. R., 4.
(4) 111 L.T., 1115; 24 Cox C.C., 465.
(5) 13 C.L.R., 619.
(6) 24 Cox C.C., 591.

the circumstances and the nature of the case, it does not appear to me that the miscarriage of justice could be more adequately remedied by a new trial, and so, in my opinion, the order should simply be to quash the conviction.

Rich J. I also agree that the conviction should be quashed on the ground that there has been a miscarriage of justice owing to the absence of warning to the jury not to convict on uncorroborated evidence except after carefully weighing the evidence.

Conviction quashed. Verdict and judgment of acquittal entered.

Solicitor for appellant, *J. M. McDonald*, Narrabri, by *Beehag & Simpson.*

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

N. McT.