H. C. OF A. 1921. STUDEBAKER CORPORATION OF AUSTRALASIA LTD. v. COMMISSIONER OF TAXATION (N.S.W.).

Appeal allowed. Decisions of Supreme Court and Court of Review set aside. Question of law raised by question 2 of the special case answered in the negative. Assessments appealed against quashed. Any money paid under the assessments to be repaid. Respondent to pay appellant's costs in High Court and Courts below.

Foll *R v Mills* [1986] VR 617

Solicitors for the appellant, *Norton, Smith & Co.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

STEWART . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921. SYDNEY, *April* 26, 29. Knox C.J., Gavan Duffy, Rich and Starke JJ.

High Court—Jurisdiction—Appeal from Supreme Court of State—Court of Criminal Appeal of New South Wales—Whether separate Court from Supreme Court—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 3, 10, 12, 24 (2)—*The Constitution* (63 & 64 *Vict.* c. 12), *sec.* 73 (II.).

Criminal Law—Evidence—Admissibility—Evidence of accused given in former trial—Evidence as to character—Miscarriage of justice—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 407

Held, that the *Criminal Appeal Act* 1912 (N.S.W.) does not create a new Court, but merely directs that the Supreme Court, constituted as therein prescribed, shall act as the Court of Criminal Appeal, and, therefore, that an appeal lies from the Court of Criminal Appeal to the High Court under sec. 73 (II.) of the Constitution.

Held, also, that the voluntary statements of an accused person on his trial for an offence, which has been inconclusive, are admissible in evidence against him on his second trial for the same offence; that the fact that the statements were made under cross-examination does not destroy their voluntary character; but that when on the second trial he does not repeat evidence in support of good character given on the first trial, statements made by him under cross-examination on the first trial tending to show his bad character are irrelevant, and therefore inadmissible in evidence against him.

Decision of the Supreme Court of New South Wales reversed.

APPEAL from the Supreme Court of New South Wales.

At the Central Criminal Court James Stewart was tried on an indictment charging that he did without her consent ravish and carnally know a certain girl. There was a second count charging an indecent assault on the same girl. The jury having convicted him, Stewart appealed to the Court of Criminal Appeal, and that Court dismissed the appeal.

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

The grounds of appeal were: (1) that the verdict of the jury was against the evidence and the weight of the evidence; (2) that in his summing up to the jury the presiding Judge was in error in stating that, because the prosecutrix admitted in her evidence that she had said to the prisoner "If I allow anybody to touch me it will be you," this admission went to prove the truthfulness of the rest of her evidence as she could have easily denied that she had ever made such a statement; (3) that, although there were two counts in the indictment on which the prisoner was charged, the jury in returning their verdict did not state on which count they found the prisoner guilty; (4) that after the jury had been discharged and had dispersed the presiding Judge was in error in calling before him one of the alleged jurymen who represented that he was the foreman of the jury and taking from him the verdict of the jury as to the count of the indictment on which the jury had found the prisoner guilty, in the absence of the rest of the jury; (5) that there has been a miscarriage of justice in that (*a*) the presiding Judge in his summing up to the jury referred to the character of the appellant and his relationship to the prosecutrix in such a manner as was

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calculated to prejudice the jury against him and prevent them from coming to a proper conclusion on the facts, and (*b*) that the presiding Judge was in error in allowing Alfred Bedford Page, the official shorthand writer, to give the following evidence—" I am an official shorthand writer of the Court. I was present at the trial of the accused, James Stewart, on 1st September last here, in the capacity of official shorthand writer. I saw him go into the box and give evidence. I took down the evidence word for word. I have it here. I have examined the transcript of the evidence. It is word for word with what I have in my shorthand book," and in allowing him to read as part of his evidence the evidence given by the appellant at a former trial.

The other material facts are stated in the judgment hereunder.

Jaques and *A. W. Ralston*, for the appellant.

Coyle K.C. and *Hammond*, for the respondent, took a preliminary objection. This Court has no jurisdiction to entertain an appeal from the Court of Criminal Appeal. That Court, as established by the *Criminal Appeal Act* 1912, is a new tribunal, and is not the Supreme Court; and, as it was not existing at the time the Commonwealth was established, an appeal does not lie under sec. 73 (II.) of the Constitution. That the intention of the Legislature was to create a new Court, and not to confer a new jurisdiction upon the Supreme Court, is borne out by the definition in sec. 2 of the word " Court " as meaning the Court " established by this Act," and by sec. 3, which adopts the machinery of the Supreme Court, and by sec. 4, which provides for the appointment of officers of the Court, and by sec. 28, giving power to make rules. As the Act gives a new right of appeal to the Court of Criminal Appeal, that is the only remedy that can be had (*Bailey* v. *Bailey* (1)), and an appeal would not lie now to this Court from the original conviction.

[STARKE J. That principle cannot be used to take away a right of appeal given by sec. 73 of the Constitution.]

That section does not confer a right of appeal irrespective of the provisions of State laws. [Counsel also referred to *Parkin* v. *James* (2).]

(1) 13 Q.B.D., 855, at p. 860.

(2) 2 C.L.R., 315.

THE COURT, without giving any binding decision on this objection, proceeded with the hearing of the appeal.

Jaques. The statement made by the accused was not a voluntary statement so as to be admissible in evidence under sec. 407 of the *Crimes Act* 1900. By its admission the appellant was deprived of his right either to make or to refrain from making a statement. The cases as to the admissibility of previous statements on oath made by an accused do not apply to a new trial. In any event the statements made by the appellant in cross-examination as to his credit and character were inadmissible. They would only have been admissible if the appellant had on the second trial given evidence of good character, and then only by leave of the presiding Judge. The Courts do not approve of novel methods of procedure in criminal trials (*R.* v. *Bertrand* (1)).

[RICH J. referred to *Ibrahim* v. *The King* (2).]

[Counsel also referred to *R.* v. *Bloom* (3).]

Coyle K.C. The evidence given by the appellant on the first trial was admissible on the second trial whether given on examination or cross-examination. The evidence given by him on cross-examination as to his credit and character, having been relevant when given, was relevant on the second trial, and was therefore properly admitted. The prosecution was entitled to put in the whole of the statement made by the appellant. [Counsel referred to *R.* v. *Erdheim* (4) ; *R.* v. *Meehan* (5) ; *R.* v. *Colpus* (6) ; *R.* v. *Hunt* (7) ; *R.* v. *McCoy* (8) ; *R.* v. *Sharpe* (9) ; *R.* v. *Chapman* (10) ; *R.* v. *Bird* (11) ; *R.* v. *Boyle* (12) ; *R.* v. *Turner and Cleary* (13).]

[RICH J. referred to *R.* v. *Kurasch* (14) ; *R.* v. *Brotherton* (15).]

Jaques, in reply, referred to *R.* v. *Gibson* (16).

Cur. adv. vult.

(1) L.R. 1 P.C., 520.
(2) (1914) A.C., 599, at p. 615.
(3) 4 Cr. App. R., 30, at p. 35.
(4) (1896) 2 Q.B., 260, at p. 269.
(5) 8 S.C.R. (N.S.W.), 289.
(6) (1917) 1 K.B., 574, at p. 579.
(7) 8 N.S.W.L.R., 38.
(8) 5 N.S.W.L.R., 429, at p. 431.
(9) 5 W.A.L.R., 125.
(10) 29 T.L.R., 117.
(11) 15 T.L.R., 26.
(12) 20 T.L.R., 192.
(13) 34 N.S.W.W.N., 106.
(14) (1915) 2 K.B., 749.
(15) 10 N.S.W.W.N., 56.
(16) 18 Q.B.D., 537.

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April 29.

THE COURT delivered the following written judgment :—

This is an appeal by special leave from the judgment of the Court of Criminal Appeal (New South Wales) which dismissed the appeal of the prisoner from his conviction at the Central Criminal Court holden at Sydney on 30th November last. The indictment contained two counts, the first charging rape and the second indecent assault. There had been a previous trial of the prisoner on the same charges on 1st September last, and he had been convicted, but the conviction was set aside because of the improper reception of evidence. On the first trial the appellant gave evidence on oath on his own behalf, and was cross-examined among other matters as to his character. At the second trial the Crown Prosecutor tendered, through an official shorthand writer, the whole of this evidence. Counsel for the prisoner objected to so much of it as consisted of cross-examination as to character, but the whole was admitted. In this evidence, during his examination-in-chief, the prisoner admitted having had connection with his niece, but stated that it was with her consent. In the course of his examination-in-chief he also said :—"It is correct what has been said by my niece, that I was away on service with the Forces. First of all in Egypt, and then on the Western Front. I obtained my majority in the ranks, and also got decorated. When I was away I was in hospital three times in all—in Egypt and twice in England. At Denmar Hill, England, I was in hospital through shell-shock. I remember 4th June this year." In cross-examination the prisoner said :—"I am decorated for services in the Mechanic Warfare Department. I was never left to protect women and children anywhere except in France. . . . I am a married man. I am not living with my wife. I was born in New South Wales. My father is a farmer. In my marriage certificate I described my father as a colonel. I supplied the information that he was a colonel of the 7th Seaforth Highlanders. I did it for a reason [interrupted]—I did it. I also supplied the information that my birthplace was Aberfeldy, Perthshire, Scotland. All that is quite untrue." The cross-examination then continues :—Question—"Do you know that this information is not taken just for the purpose of knowing about colonels in Scotland? It is supposed to be information that is true

on which people may act." Answer—"I did not know it at the time. You will notice my age on it. My age is incorrect on that. I was not nineteen years of age, and I put my age down as twenty-four; so that, whatever my reason was, most of the information was untrue. Just now I took the Scotch oath. It does not matter if I am not a Scotchman. I can take an oath. My father is not a Scotchman. I do not know if he was born in County Mayo, Ireland. I took the Scotch oath merely because it was more binding upon my conscience than any other. I have heard the Scotch oath taken before. That was not a Scotch oath. I did take a form of Scotch oath. I used the wrong text of the words. I know the Scotch oath and have used it before. The oath I took is binding on me." At the second trial the presiding Judge in his summing-up dealt with the evidence in this way:—"The statement as to his marriage certificate you can consider as to whether he is a truthful person; but it is a matter of knowledge to us all that persons give false information when about to be married, so that the marriage shall be solemnized. If they were not of age and could not get consent, the marriage would not be performed. So over and over again people make false declarations in this regard. It was not only in regard to his age that he made that, but for some reason he wanted to make out that his father was a colonel and lived in Scotland. It may throw some light on his character for truthfulness."

Before the Court of Criminal Appeal four written grounds of appeal (the same as those taken before us) were argued, but counsel for the appellant was also allowed to argue generally a fifth ground, namely, that there had been a miscarriage of justice. It was not then argued that the evidence already set forth was inadmissible and that the learned Judge was in error in commenting upon it in a sense unfavourable to the appellant. The appellant now contends that there has been a miscarriage of justice (*a*) in that the presiding Judge, in his summing up to the jury, referred to the character of the appellant and his relationship to the prosecutrix in such a manner as was calculated to prejudice the jury against him and prevent them from coming to a proper conclusion on the facts; and (*b*) in that the presiding Judge was in error in allowing Alfred Bedford Page, the official shorthand writer, to give the following

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evidence—"I am an official shorthand writer of the Court. I was present at the trial of the accused, James Stewart, on 1st September last here, in the capacity of official shorthand writer. I saw him go into the box and give evidence. I took down the evidence word for word. I have it here. I have examined the transcript of the evidence. It is word for word with what I have in my shorthand book," and in allowing him to read as part of his evidence the evidence given by the appellant at a former trial.

A preliminary objection was taken that this Court had no jurisdiction, under sub-sec. II. of sec. 73 of the Constitution, to hear an appeal from the Court of Criminal Appeal, which was said to be a new Court established in 1912 by the *Criminal Appeal Act* 1912, and not one of the Courts from which an appeal lay to this Court. In our opinion, that Act does not create or constitute a new Court distinct from the Supreme Court, but merely directs that the Supreme Court shall act as the Court of Criminal Appeal (sec. 3). The statute prescribes how the Court shall be constituted for hearing appeals (sec. 3); gives certain supplemental powers (sec. 12), and prescribes the procedure to be followed in the Court (sec. 10). But all this is as consistent with the view that the Supreme Court is to act as a Court of Criminal Appeal as with the view that a new Court is created by the statute. If there can be no appeal to this Court unless the Supreme Court and the Court of Criminal Appeal are one, the Legislature evidently thought they were one, because sec. 24 (2) assumes that an appeal lies to this Court.

Another preliminary point was that this Court could not entertain the grounds now relied on as constituting a miscarriage of justice, as it had no jurisdiction to entertain an objection which was not taken below. The question raised in *Hicks* v. *The King* (1) does not arise in this case, because, as we have already pointed out, the question of miscarriage of justice was allowed by the Supreme Court to be argued generally, although the reasons now relied on as constituting miscarriage were not placed before that Court. We come, therefore, to the substantial point of appeal. We do not doubt that the voluntary statements of a prisoner on a trial for an offence, which has been inconclusive, may be used on a second trial for the

(1) 28 C.L.R., 36.

same offence. The fact that the statements were made under cross-examination does not destroy their voluntary character. The extent to which such evidence can be used is the question here. In the first place, it is proper to observe that the evidence above set out relates to the prisoner's character, or, more precisely, to his truthfulness, and was extracted under cross-examination because the learned Judge who presided at the first trial was of opinion that he had then given evidence of good character. At the second trial the prisoner gave no evidence whatever. Evidence of a prisoner's bad character is clearly inadmissible, as a general rule, for the purpose of raising a presumption that the prisoner committed the offence charged against him. It is excluded as irrelevant. On the other hand, a prisoner on grounds of humanity is allowed, in criminal cases involving punishment, to prove his good character for the purpose of raising a presumption of innocence; but the rule is exceptional. But how is it that in this case the Crown was allowed to give evidence of the prisoner's want of character or untruthfulness? The learned Crown Prosecutor said (1) that the prisoner's statement must be taken as a whole and admitted as a whole, and (2) that his statement bearing on his character was relevant on the occasion on which it was made and was therefore relevant on all other occasions, particularly on the second trial. No doubt a party who has given evidence is entitled to insist that his opponent who tenders that evidence on another occasion shall prove the evidence as a whole and not in a detached form. Even this right is subject to limitations in respect of statements wholly unconnected with the statements relied upon by the party using the evidence. (See *Prince* v. *Samo* (1).) But the Crown was not, in the present case, in this position, and could not rely upon any such principle. It was bound to prove the charge laid against the prisoner by evidence relevant to that charge, and by no other evidence. Evidence of character was irrelevant, for the prisoner on the second trial had given no evidence of good character. The suggestion that the relevancy of the evidence as to character must be determined by its relevancy on the occasion on which it was first given is quite untenable. The Crown must tender evidence relevant to the charge on which the prisoner is

(1) 7 A. & E., 627.

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presented, and not merely relevant on another occasion and in wholly different circumstances. The statements derogatory to the prisoner's character contained in his evidence on the first trial ought, therefore, to have been excluded. No difficulty arose in doing so in this case: they were wholly unconnected with the relevant portions of that evidence. (See *R* v. *Coulter* (1).) The effect of the evidence was accentuated in a manner unfavourable to the prisoner by the charge of the learned trial Judge.

It is unnecessary for us to discuss the other grounds taken by the learned counsel for the prisoner, but we feel bound to say that there are some general observations of the learned trial Judge, in his charge to the jury, affecting the prisoner's moral character, which might have been omitted without any prejudice to the proper administration of justice.

In the circumstances, there has been a miscarriage of justice, or, to adopt what was said in *Ibrahim* v. *The King* (2) (citing *R.* v. *Bertrand* (3)), there has been something which has deprived the accused of the substance of fair trial and the protection of the law, or which in general tended to divert the due and orderly administration of the law into a new course which might be drawn into an evil precedent in future.

For the reasons already given we have come to the conclusion that it is our duty to order a new trial.

Appeal allowed. Order appealed from discharged. Conviction set aside and new trial to be had. Case remitted to the Supreme Court for that purpose.

Solicitor for the appellant, *E. G. Maddocks Cohen.*

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

B. L.

(1) 5 Cr. App. R., 147.

(2) (1914) A.C., at p. 615.

(3) L.R. 1 P.C., 520.