Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Powers & Jeffries.*

Solicitors for the respondent, *Scammell & Skipper.*

B. L.

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DEPUTY FEDERAL COMMISSIONER OF TAXATION (S.A.) *v.* KUHNEL & CO. LTD.

[HIGH COURT OF AUSTRALIA.]

THE KING . . . . . APPELLANT;

AND

ELLIS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 11, 18.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Criminal Law—Trial—Accused persons tried together—Comment made by one on fact that another has refrained from giving evidence—Substantial miscarriage of justice—New trial—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *secs.* 402, 405, 407—*Criminal Appeal Act* 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 6.

A comment made by one of two accused persons being tried together upon the fact that the other has refrained from giving evidence on oath on his own behalf is within the prohibition of sec. 407 (2) of the *Crimes Act* 1900 (N.S.W.), which provides that "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."

That comment having been made and the accused in respect of whom it was made having been convicted, there is a miscarriage of justice, but that miscarriage of justice is not necessarily substantial within the meaning of sec. 6 of the *Criminal Appeal Act of* 1912 (N.S.W.).

Special leave to appeal from the order of the Supreme Court of New South Wales (Full Court): *R.* v. *Ellis*, (1925) 25 S.R. (N.S.W.) 575, rescinded.

APPEAL from the Supreme Court of New South Wales.

John Matthew Ellis and James Beresford Harvey were on 30th September 1925 tried together before the Supreme Court in its

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criminal jurisdiction at Lismore on a charge of conspiracy. Ellis was represented by counsel, but Harvey was not and conducted his own defence. Ellis made a statement from the dock, and did not go into the witness-box. Harvey gave evidence on oath on his own behalf, and at the conclusion of his case addressed the jury. When referring to certain of the evidence he said to the jury: "I wish to call your attention to the fact that Ellis has not gone into the witness-box." *Ralston* A.-J., before whom the trial took place, immediately stopped Harvey in his address, and said to him:—"That is a matter to which you are not allowed to refer. It is prohibited by the provisions of the *Crimes Act*." Harvey made no further reference to the matter, and apologized for having done anything he ought not to have done. *Ralston* A.-J. then said to the jury:—"The remark which Harvey has just made to you ought not to have been made, and anybody is prohibited from referring to such a matter. It is your duty not to allow the remark he made to influence your minds in any way in considering any part of the case, and you ought as far as possible to dismiss it from your consideration and treat it as if it had not been made." Both the accused were convicted and were sentenced each to imprisonment with hard labour for eighteen months.

Ellis appealed to the Court of Criminal Appeal from his conviction and sentence on the ground that Harvey, in addressing the jury, had commented on the fact that Ellis had not gone into the witness-box to give evidence on his own behalf. The Court allowed the appeal, set aside the conviction and ordered a new trial of Ellis: *R.* v. *Ellis* (1).

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

Weigall, S.-G. for N.S.W. (with him *McDonald*), for the appellant. There was no breach of sec. 407 (2) of the *Crimes Act* 1900 (N.S.W.) in this case. Sec. 407 (2) should be read subject to the provision of sec. 402 that every accused person shall in all Courts be admitted to make full answer and defence. The other alternative is that sec. 402 is to be read as subject to the provisions of sec.

(1) (1925) 25 S.R. (N.S.W.) 575.

407 (2), and that alternative the Supreme Court felt constrained to adopt. The first alternative is the proper one. Sec. 402 appeared as sec. 342 of the *Criminal Law Amendment Act of* 1883 at the time the provisions of sec. 407 (2) were first enacted by sec. 1 of the *Accused Persons' Evidence Act of* 1898 as an amendment of sec. 6 of the *Criminal Law and Evidence Amendment Act of* 1891. The principle that a later enactment in general terms should not be construed so as to interfere with a specific right given by an earlier enactment is applicable. Sec. 407 (2) should be read subject to the rights of an accused person given by secs. 402, 405 and 407 (1). The word "comment" in sec. 407 (2) means adverse comment; that is, comment by someone on the other side of the record. The words of the sub-section are not plain and unambiguous, as the Full Court said they were. Some limitation must be placed upon them. The comment must obviously be made before verdict, and in the presence of the jury. The section would not, if literally construed, apply to a statement by the Crown Prosecutor in his opening address that the accused might give evidence on his own behalf and, if he did not, the jury might draw their own inferences. What the Legislature had in view when the provision in sec. 407 (2) was enacted was the Crown on one side and the accused on the other. Sec. 405 shows that the Legislature was not considering the position of two persons being tried together. The fact that one of two possible constructions of a section will give rise to difficulties is a ground for giving it the other construction (*Burwood Cinema Ltd.* v. *Australian Theatrical and Amusement Employees' Association* (1); *Shannon Realties Ltd.* v. *Ville de St. Michel* (2)). [Counsel also referred to *In re Cuno*; *Mansfield* v. *Mansfield* (3).] Assuming that there was a breach of sec. 407 (2) so as to bring about a miscarriage of justice, that miscarriage of justice was not substantial, and the case is within the proviso to sec. 6 of the *Criminal Appeal Act of* 1912 (N.S.W.) (see *Bataillard* v. *The King* (4)). The fact that a comment has been made is not by itself a substantial miscarriage of justice. In many cases in England where a comment has been made, the Court of Criminal Appeal has dismissed the appeal (*R.* v. *Cohen* (5); *R.* v. *Lee* (6); *R.* v.

(1) (1925) 35 C.L.R. 528, at p. 537.
(2) (1924) A.C. 185, at p. 192.
(3) (1889) 43 Ch. D. 12.
(4) (1907) 4 C.L.R. 1282.
(5) (1909) 2 Cr. App. R. 197.
(6) (1917) 13 Cr. App. R. 39, at p. 41.

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Dickman (1); *R.* v. *Russell* (2); *R.* v. *Broadhurst* (3); *R.* v. *Thomas* (4); see also *R.* v. *Neary* (5); *R.* v. *King* (6)).

[STARKE J. referred to *Director of Public Prosecutions* v. *Beard* (7).]

F. L. Flannery (with him *Dovey*), for the respondent. On the plain and ordinary meaning of the words of sec. 407 (2) a comment made by one accused person on the fact that another accused person being tried with him has refrained from giving evidence on oath on his own behalf is within the prohibition. The words "no such person" in sub-sec. 1 are perfectly general, and there is no reason for placing any limitation upon the generality of the provision in sub-sec. 2. [Counsel referred to *R.* v. *Hill* (8); *R.* v. *King* (6).] Where there has been a breach of sec. 407 (2), there should be a new trial in every case except when the comment has been made by an accused person on his own failure to give evidence on oath. In this case what was said by Harvey was a "comment."

[STARKE J. referred to *Allen* v. *Allen* (9).]

Weigall, S.-G. for N.S.W., in reply, referred to *R.* v. *Blais* (10); *R.* v. *Marriott* (11).

Cur. adv. vult.

Dec. 18. The following written judgments were delivered :—

KNOX C.J. Two questions are raised by this appeal: (1) whether sec. 407 (2) of the *Crimes Act* forbids comment by an accused person on the fact that another accused person who is being tried with him has refrained from giving evidence; (2) whether the Court of Criminal Appeal ought to have dismissed the appeal on the ground that no substantial miscarriage of justice had actually occurred.

The first question turns on the meaning to be given to the words of sec. 407 (2) of the *Crimes Act* 1900. Literally construed, that

(1) (1910) 5 Cr. App. R. 135, at p. 147.
(2) (1910) 6 Cr. App. R. 78.
(3) (1918) 13 Cr. App. R. 125, at p. 130.
(4) (1922) 17 Cr. App. R. 34.
(5) (1916) N.Z.L.R. 518.
(6) (1905) 9 Can. Cr. Cas. 426.
(7) (1920) A.C. 479.
(8) (1903) 7 Can. Cr. Cas. 38.
(9) (1894) P. 248, at p. 253.
(10) (1906) 10 Can. Cr. Cas. 354.
(11) (1908) 8 S.R. (N.S.W.) 350.

section prohibits such comment absolutely and without exception. It is said with considerable force that, read in this way, it is inconsistent with sec. 402 of the Act, which provides that every accused person shall in all Courts be admitted to make full answer and defence, and with sec. 405, which provides that every accused person on his trial, whether defended by counsel or not, may make any statement without being liable to examination thereon by counsel for the Crown or by the Court. On the other hand, it is said that as the words of sec. 407 are clear and unambiguous they should be construed according to their ordinary meaning. In the Court of Criminal Appeal the learned Judges took the view that the section in plain and unambiguous words prohibited comment by any person, and, although my mind is not free from doubt on the matter, I am not prepared to say that they were wrong in so deciding. I have the less hesitation in adopting this attitude because it is clear that, if the interpretation put upon the section by the Court of Criminal Appeal is not in accordance with the intention of Parliament, the section can be amended by Parliament so as unequivocally to express its intention. Probably the truth is that neither the draftsman of the section nor Parliament, when it passed it, had in mind the particular circumstances which have brought about the difficulty in the present case.

On the second question the Court of Criminal Appeal thought it impossible to say that there had been no substantial miscarriage of justice in a case in which comment had been made which Parliament had, for the protection of an accused person, declared to be unlawful. If the Court of Criminal Appeal had, after consideration of all the circumstances of the case, come to the conclusion that the Crown had failed to establish that no substantial miscarriage of justice had actually occurred, I should have hesitated long before expressing dissent from that conclusion, for Parliament has committed to that Court the duty of deciding the question and, in my opinion, it is only in extreme cases that this Court should exercise the power of reviewing a decision depending on an exercise of discretion by a Court occupying the position which the Court of Criminal Appeal occupies in relation to the administration of the criminal law in New South Wales. But in the present case the decision of the Court

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of Criminal Appeal appears to be founded on the proposition that in every case in which there has been a contravention of the provisions of sec. 407 (2) the Court is precluded by that fact from deciding that no substantial miscarriage of justice has actually occurred. In delivering the reasons for the decision *Street* C.J. said (1):—"Then it was contended that, even if what was said amounted to an unlawful comment, it was something that could not have been foreseen or guarded against; and that, as the presiding Judge at once told the jury to dismiss the matter from their minds, no substantial miscarriage of justice had occurred. No doubt, as *Barton* J. pointed out in *Peacock* v. *The King* (2), it is impossible to make the administration of justice proof against occasional accidents and every mistake does not necessarily render the whole proceedings abortive, but I do not think that it is open to us to deal with what took place here in the same way as if the case were merely one in which, inadmissible evidence having been admitted by inadvertence, the jury had been warned as soon as possible not to allow themselves to be affected by it. In this case there has been a violation of a statutory prohibition established for the protection of accused persons who do not wish to give evidence, and I do not think that we can say that there has been no substantial miscarriage of justice when comment has been made which the Legislature has positively declared to be unlawful." If these words mean, as I think they do, that in every case in which a comment forbidden by sec. 407 (2) has in fact been made, the Court of Criminal Appeal is precluded from inquiring whether a substantial miscarriage of justice has actually, that is to say, in truth and in fact, occurred, I respectfully dissent from the proposition. The decisions of the English Court of Criminal Appeal in *R.* v. *Dickman* (3) and *R.* v. *Russell* (4) are in point. In *Dickman's Case* the accused was charged with murder. At the trial counsel for the prosecution commented on the fact that the wife of the accused did not give evidence for the defence, a comment prohibited by sec. 1 (*b*) of the *Criminal Evidence Act* 1898. The jury were afterwards told to disregard the comment. It was

(1) (1925) 25 S.R. (N.S.W.), at p. 579.
(2) (1911) 13 C.L.R. 619, at p. 659.
(3) (1910) 5 Cr. App. R. 135; 26. T.L.R. 640.
(4) (1910) 6 Cr. App. R. 78.

argued that the prohibition was absolute and that there must be a new trial, but the Court refused to grant a new trial and dismissed the appeal. In *Russell's Case* (1) the irregularity was a contravention of sec. 37 of the *Coinage Act*, a provision apparently intended for the protection of an accused person. The Court of Criminal Appeal nevertheless applied the proviso in sec. 4 (1) of the English Act, which is in the same words as the proviso to sec. 6 (1) of the New South Wales Act.

In *R.* v. *Ratcliffe* (2) the recorder put a question prohibited by sec. 1 (*f*) of the *Criminal Evidence Act* 1898, a provision designed for the protection of an accused person who is called as a witness. Counsel for the Crown relied in argument on the proviso, but the Court refused to apply it; not because there had been a contravention of the section, but because they were not satisfied that the jury would have convicted the appellant if the questions had not been asked. And, apart from authority, I should arrive at the same conclusion. The appeal can only be allowed if the appellant establishes to the satisfaction of the Court of Criminal Appeal one or more of the grounds mentioned in the first part of the section. The objection that comment has been made which is forbidden by statute either is or is not covered by these grounds. If it is not, the Court has no power to allow the appeal. If it is, the Court may allow the appeal, but the right of the appellant to have his appeal allowed is subject to the proviso that, notwithstanding the Court is of opinion that the "point or points raised by the appeal" might be decided in his favour, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

In my opinion, the words of the section leave no escape from the position that, whatever may be the point on which the appellant relies, the proviso may be applied, that is to say, the Court has power in any case to examine all the relevant facts and circumstances and if, as a result of that examination, it considers that no substantial wrong or miscarriage of justice has actually occurred, it may dismiss the appeal. It may be that the Court of Criminal Appeal did this in the present case, though I do not gather from the observations of

(1) (1910) 6 Cr. App. R. 78. (2) (1919) 89 L.J. K.B. 135.

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the learned Chief Justice that it did. But, however that may be, I think this is a case in which the order granting special leave to appeal should be rescinded.

The appeal is from an order granting a new trial, and if the accused be guilty he may still be convicted of the offence charged against him. The substantial ground put forward in support of the application for special leave was that relating to the meaning of sec. 407 (2). On that ground the decision of the Court of Criminal Appeal is upheld. If the ground relating to the proviso to sec. 6 (1) of the *Criminal Appeal Act* had been the only ground put forward in support of the application for special leave, that application would almost certainly have been refused; and in the circumstances I think the proper order is to rescind the order granting special leave to appeal.

ISAACS J. Joseph Matthew Ellis was convicted of conspiring with James Beresford Harvey to defraud an insurance company. He was sentenced to eighteen months' imprisonment with hard labour. On appeal to the Supreme Court of New South Wales, sitting as the Court of Criminal Appeal, it was held unanimously by *Street* C.J. and *Ferguson* and *James* JJ. that Ellis had been convicted contrary to law, because he had been deprived of the specific statutory protection of sec. 407 (2) of the *Crimes Act*, and that a substantial miscarriage of justice had occurred, and therefore his conviction should be set aside and a new trial ordered. The Crown now appeals against that decision and asks that the conviction should be allowed to stand. The grounds of appeal are two: first, it is said the Supreme Court was wrong in its law—that is, there was no breach of the section; alternatively, it is said the Court was wrong in holding that a substantial miscarriage of justice had occurred.

Sec. 407 *of Crimes Act.*—The first question is as to the extent of sub-sec. 2 of sec. 407 of the *Crimes Act* (No. 40 of 1900). The Crown contends that the words "It shall not be lawful to comment" in that sub-section should be read: "It shall not be lawful for the Judge or prosecutor to comment." That is a very violent incursion to make in any enactment, and particularly in one for the protection

of liberty. The reasons advanced for undertaking it are various. One is that it is very inconvenient for the Crown when it chooses to indict persons jointly, and therefore the Court should discountenance the wider construction. Another is that the enactment must be read subject to, or at least so as to harmonize with, sec. 402. As to the first reason I decline to recognize it in any way. No doubt the Crown often has the option of proceeding against accused persons jointly or separately. But not only will the Court exercise some initial control over this in the interests of justice (see *R.* v. *Bradlaugh* (1)), but the Crown always adopts the course of joint indictment at its peril. In *R.* v. *Bywaters* (2) the Lord Chief Justice said that " if the result of trying together two persons who might have been tried separately had been a miscarriage of justice this Court would interfere." Crown inconvenience can never be a valid reason for denying an accused person an absolute right. The second ground is that, inasmuch as sec. 402 guarantees to the second accused person the right of " full answer and defence," he cannot be denied the right, if he thinks it advances his own defence, to comment on the failure of accused person number one to give evidence on behalf of himself. That is quite correct. But what follows ? It is said that it follows that, when accused number two comments in his own defence on the absence of accused number one from the witness-box, the latter must put up with it however much it prejudices his defence. In other words, the Crown can charge two men together so as to enable one to destroy the right of the other to his statutory protection. But sec. 402 is for the benefit of both the accused. Each has a right to make his " full answer and defence " according to law. He has a right among other things to make a statement under sec. 405 " without being liable to examination thereupon by counsel for the Crown, or by the Court," and he has that right free from any " comment " that he refrained from giving evidence on oath. Why is his right under sec. 402 to be cut down any more than is the right of the other accused ? That involves a direct and close consideration of the sub-section under construction. It is part of sec. 407 and that section is one of a special group of sections, secs. 406 to 424 inclusive, headed, " Rules respecting evidence." This group of sections,

(1) (1883) 15 Cox C.C. 217, at p. 220. (2) (1922) 17 Cr. App. R. 66, at p. 68.

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being directed to a specific subject, is a sort of code and must be obeyed before it can be said whether or not the general provisions elsewhere are satisfied or not. They are the dominant provisions in determining whether a prisoner has been allowed his full defence. Of these sections sec. 407 is of vital importance. Its anxiety to deal comprehensively with the subject of the competency and compellability of parties as witnesses is so marked that it begins with civil proceedings. But that is not without use on this occasion. It contents itself as to civil proceedings with declaring competency to give evidence. In criminal proceedings it makes, first, a general declaration that every accused person in a criminal proceeding is competent, but not compellable, to give evidence. That is because at common law a competent person was compellable. So far a great inroad has been made in the common law. And so it stood in 1894. "Compellable" meant, as the Privy Council held in *Kops* v. *The Queen* (1), "compellable by process of law." Their Lordships held that it did not mean "compellable by reason of comment," that is, by fear of comment. The section dealt with in that case (1) was limited to indictable offences, (2) had a proviso which is now found repeated in the proviso to sec. 407 of the Act of 1900. This accounts for the limitation of the proviso to indictable offences. That is a little complicated and perhaps deserves legislative attention, seeing that the "competency" provision now extends to all criminal proceedings. But, putting that aside, it is clear that the Legislature of New South Wales, finding that an accused person, according to *Kops's Case*, could be practically coerced into giving evidence by fear of comment, thought it right by Act No. 30 of 1898 to put an end to that state of the law. As an amendment of the *Criminal Law and Evidence Amendment Act of* 1891, sec. 1 of Act No. 30 of 1898 said: "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." It is somewhat important to see what the position was at the moment that short special Act was passed, namely, 4th November 1898. *Kops's Case* had been decided in 1894 and the Judicial Committee had expressed its view as to the policy of allowing comment. On 12th August 1898 the Imperial

(1) (1894) A.C. 650, at p. 653.

Parliament, by cap. 36, sec. 1 (*b*), said that the failure of an accused person or his or her wife or husband to give evidence should not be made the subject of any "comment by the prosecution." That left open two legitimate sources of comment, namely, by the Judge and by a fellow accused. In Canada, by an Act of 1893, the prohibition went to comment by either Judge or counsel. The New South Wales Parliament, however, deliberately chose a form of words, broad enough to include comment from any source from which it could otherwise come according to law. The law so made still stands, and is placed in its appropriate place as part of sec. 407 in the consolidating Act of 1900. The intention of Parliament is plain. Having before it the new English legislation, and probably the Canadian Act, and having before it the distinction appearing in *Kops's Case* (1) between legal compellability and virtual compellability, the Legislature obviously intended to make its law as to freedom from coercion to give evidence real and complete. The provision enabling a prisoner to testify was not to be turned into a provision for forcing him to testify, whoever tried to do it, not even by the expedient of putting up with an accused some other prisoner who could do what could not otherwise be done. The sub-section is intended primarily not as a restraint on Judge or prosecutor, but as an effective protection to an accused person. It must be looked at from the standpoint of that person. It may be a cunning rascal who is charged; it may, however, be a weak and simple woman, whose unguarded or mistaken answer to a skilful advocate might spell undeserved ruin. This it is manifestly the intention of the sub-section to prevent, and until the Parliament of New South Wales changes its mind, I feel bound, as the Supreme Court did, to give effect to it. It is, of course, desirable to state affirmatively what I understand to be the extent of the comment forbidden. The "comment" referred to in the enactment is hostile comment to disparage the accused, and necessarily comment which, but for the enactment, would be lawfully addressed to the Court or jury by any person entitled by law to make it in order to strengthen the effect of evidence against the accused or to weaken any evidence given or statement made in his favour. It is not, for instance,

(1) (1894) A.C. 650.

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intended to extend to the unlawful ejaculation of a spectator or to the deliberations of the jury in their room, which is *not* "at the trial." Other considerations apply there. If the other accused is entitled to make the comment, the Crown, by joining the two in a case where it is anticipated antagonism will or may prevail—as it actually did in this case—could seriously prejudice the defence of the accused. The Judge would be entitled, and perhaps bound, to comment upon it, and the accused affected would certainly have the right, and be morally coerced, to explain why he did not go into the witness-box. That, in effect, nullifies the sub-section, or aggravates its violation. There was, consequently, a distinct breach of the law and prima facie a plain miscarriage of justice, because the prisoner's statutory right of defence was infringed.

Sec. 6 of Criminal Appeal Act.—The first question must be what is the duty of the Court under sec. 6 of the *Criminal Appeal Act*? The primary duty of the Court under the section in a case like the present is to allow the appeal. But then comes the proviso which says that the Court "may" (that is, in its discretion) dismiss the appeal, if it considers that "no substantial miscarriage of justice has actually occurred." That is to say, first, the Court must form a definite affirmative opinion that "no substantial miscarriage of justice" has taken place. Those words have been the subject of very long and authoritative judicial exposition. I shall content myself with stating what I conceive to be the general working principle deducible from the long series of cases on this point. The working principle, as I understand it, is this: A conviction impeachable for any of the causes of error mentioned in the body of sec. 6 will be set aside unless the Court, upon considering the error relatively to such circumstances of the case as are relevant to that error, considers the improbability of the error having affected the result to be so great that it must be regarded as negligible.

The leave to appeal was granted only for the purpose of determining questions of general importance. These having been so far determined, the application of them to a particular case, particularly one in which a new trial is ordered, is beyond the purpose of the leave, which I agree should be rescinded.

HIGGINS J. I take substantially the same view of this case as the Chief Justice. I am not satisfied that the word "comment" used in sec. 407 (2) of the *Crimes Act* 1900 does not include comment by a fellow-prisoner, jointly indicted; although such a construction lends itself to collusion and absurdity. I concur heartily with the view of the Supreme Court that the Legislature should not allow a matter so intimately affecting the administration of the criminal law to remain any longer in doubt. Then, in applying sec. 6 of the *Criminal Appeal Act of* 1912 to the miscarriage of justice (on both sides it is admitted that there was a miscarriage if sec. 407 (2) has the meaning alleged, and if what the fellow-prisoner said was comment within that meaning), I confess that I should hesitate before saying, under sec. 6, that the miscarriage was "substantial." The comment added nothing to that which the jury saw with their own eyes, that Harvey had given evidence on oath and that Ellis had not. I cannot agree with the Chief Justice of the Supreme Court if his meaning is that every miscarriage of justice by way of disobedience of sec. 407 (2) is substantial. But this High Court does not affect to substitute itself for the special Court of Criminal Appeal which the State Legislature has provided; and we should not have given special leave to appeal but for the legal difficulty as to the meaning of the word "comment."

I think that the proper course is to rescind the order giving special leave to appeal.

RICH J. I concur in the order rescinding the special leave granted in this case.

STARKE J. The decision of the Supreme Court of New South Wales, as the Court of Criminal Appeal, as to the meaning and effect of sec. 407 (2) of the *Crimes Act* was, in my opinion, correct. An accused person is now a competent but not a compellable witness on his own behalf. That is a privilege or right conferred upon him by sec. 407. Though sec. 402 confers or reinforces the right of every accused person to make a full defence, still it does not, to my mind, destroy the privilege or right conferred upon other accused persons by sec. 407, or affect the preservation or protection of that privilege

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or right which is the object of the proviso to sec. 407, sub-sec. 2 (cf. *R.* v. *Payne* (1)).

As to the second argument, that no substantial miscarriage of justice actually occurred in this case, the Court of Criminal Appeal is not bound, as a matter of right in all cases, to set aside a conviction, if the provisions of sec. 407 (2) are infringed (*R.* v. *Dickman* (2); *R.* v. *Russell* (3)). Its duty is to consider the facts of each particular case, and to determine the matter in the circumstances of that case. That, I take it, the Court did in the present case, and we ought not to interfere with its order for a new trial.

Special leave to appeal rescinded.

Solicitor for the appellant, *A. R. Best*, Ballina, by *M. A. H. Fitzhardinge*.

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

B. L.

(1) (1872) L.R. 1 C.C.R. 349.
(2) (1910) 5 Cr. App. R. 135.
(3) (1910) 6 Cr. App. R. 78.