[HIGH COURT OF AUSTRALIA.]

MacDONALD . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *April* 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Criminal Law—"*Habitually consorts with reputed criminals*"—*Character of accused*—*Evidence*—*Admissibility*—*No warrant or summons*—*Jurisdiction of magistrate*—*Vagrancy Act* 1902-1929 (*N.S.W.*) (*No.* 74 *of* 1902—*No.* 30 *of* 1929), *sec.* 4 (1) (*j*)*—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 412*—*Justices Act* 1902 (*N.S.W.*) (*No.* 27 *of* 1902), *sec.* 133 (1).*

Sec. 412 of the *Crimes Act* 1900 (N.S.W.) does not enable the prosecution to give evidence of the bad character of an accused who has not raised the question of character.

Dictum in *R.* v. *Gibson*, (1930) 30 S.R. (N.S.W.) 282; 47 W.N. (N.S.W.) 119, disapproved.

One of the grounds of an appeal from the decision of a Court of Petty Sessions was that as neither a warrant nor a summons had been issued the magistrate had no jurisdiction to convict the accused. The objection was not taken at the hearing.

* Sec. 4 of the *Vagrancy Act* 1902 (N.S.W.), as amended by sec. 2 (*b*) of the *Vagrancy* (*Amendment*) *Act* 1929 (N.S.W.), provides that "(1) Whosoever . . . (*j*) habitually consorts with reputed criminals or known prostitutes or persons who have been convicted of having no visible lawful means of support, shall on conviction before any justice, by his own view or otherwise, be liable to imprisonment with hard labour for a term not exceeding six months."

* Sec. 412 of the *Crimes Act* 1900 (N.S.W.) provides that "Evidence to the character of the accused shall, in all cases, be received and dealt with as evidence on the question of his guilt."

* Sec. 133 (1) of the *Justices Act* 1902 (N.S.W.) provides: "Where the party convicted, or any party whose goods have been condemned or directed to be sold as forfeited, was present at the hearing of the case, the conviction or order shall be sustained, although there may have been no information or summons, unless such party objected at such hearing that there was no information or summons."

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Held that in view of the provisions of sec. 133 (1) of the *Justices Act* 1902 (N.S.W.) the objection could not be sustained.

Decision of the Supreme Court of New South Wales (*Maxwell* J.) reversed.

APPLICATION for special leave to appeal, and APPEAL, from the Supreme Court of New South Wales.

Norman MacDonald was, upon an information, charged under sec. 4 (1) (*j*) of the *Vagrancy Act* 1902 (N.S.W.), that he did, between 12th September 1934 and 7th February 1935, habitually consort with reputed criminals. Evidence was given by a number of police officers that on thirteen different occasions during the period referred to in the information they had " booked " MacDonald for being in the company of reputed criminals. Particulars were given of the reputed criminals referred to, and of the occasions on which MacDonald had been seen in their company. The reputed criminals so referred to were different on each occasion. During his evidence in chief one of the police officers stated, despite an objection made on behalf of MacDonald that it was inadmissible, " I know him (MacDonald) to be a reputed gunman of the worst calibre. He ' stands over ' s.p. bettors, sly grog sellers and other individuals. These people are afraid to prosecute as a rule. Some time ago the defendant was shot in the back of the neck, and from this he had a paralysed hand. That does not prevent him from carrying out his nefarious work." MacDonald stated in evidence that he did not know that the persons referred to by the police officers were criminals. The magistrate determined that the evidence afforded no grounds of answer or defence to the information, and that on the divers dates and places when MacDonald was in the company of reputed criminals it amounted to habitually consorting with reputed criminals within the meaning of sec. 4 (1) (*j*) of the *Vagrancy Act* 1902 (N.S.W.). MacDonald was convicted and sentenced to a term of imprisonment. Upon an appeal by him by way of case stated, in which the question for the determination of the Court was whether the magistrate's decision was erroneous in point of law, the Supreme Court of New South Wales answered the question in the negative, and held, also, that as objection had not been taken at the hearing that because the offence provided for in sec. 4 (1) (*j*) of the *Vagrancy Act* 1902

was of such a nature that MacDonald could not be fairly found committing an offence, and that as he was before the Court of Petty Sessions without a warrant having previously been obtained or a summons issued under the *Justices Act* 1902 (N.S.W.), the Court of Petty Sessions had no jurisdiction to hear and determine the information, the point was not open on appeal.

MacDonald now applied for special leave to appeal to the High Court from that decision upon the following grounds:—(*a*) that MacDonald was wrongly before the Court of Petty Sessions, and accordingly that Court had no jurisdiction to hear and determine the charge; (*b*) that there was not any evidence upon which the magistrate could find that MacDonald had habitually consorted with reputed criminals within the meaning of sec. 4 (1) (*j*) of the *Vagrancy Act* 1902; (*c*) that the admission of the evidence of the police officer as to MacDonald's character and antecedents when no evidence of good character had been given was wrongful, and, in the circumstances, constituted a miscarriage of the trial; and (*d*) that there was no evidence of any unlawful act, conduct or purpose on the part of MacDonald or of any guilty knowledge on his part.

Piddington K.C. (with him *Farrer*), for the applicant. Notwithstanding that the point was not taken at the Court of Petty Sessions that the magistrate did not, in the circumstances, have jurisdiction to deal with the matter, it can be raised on appeal (*Ex parte Anderson* (1); *George Hudson Ltd.* v. *Australian Timber Workers' Union* (2)).

[STARKE J. How can you go outside the case stated by the magistrate and the question framed by him?]

Not having jurisdiction the magistrate was not entitled to state a case. The applicant was not summoned; he was arrested by a constable without a warrant.

[DIXON J. Was it not competent for the magistrate to charge him orally once he was before the Court?]

No, because he was improperly before the Court (*Muller* v. *Murphy* (3)).

[McTIERNAN J. referred to sec. 133 of the *Justices Act* 1902 (N.S.W.).]

(1) (1920) 20 S.R. (N.S.W.) 207; 37 W.N. (N.S.W.) 58.
(2) (1923) 32 C.L.R. 413.
(3) (1935) 29 Q.J.P.R. 17.

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The provisions of sec. 133 of the *Justices Act* 1902 (N.S.W.), do not apply. The word "present" in that section must mean "lawfully present." "Consorting" does not mean mere accidental and momentary contact. It consists of three elements, namely, (*a*) a substantial and subsisting part of a person's mode of life; (*b*) an intimate and not a casual intercourse; and (*c*) a bond of common purpose or interest. Here, having regard to the fact that the *Vagrancy Act* is a penal statute and sec. 4 (1) (*j*) creates a new offence, the bond of common purpose or interest must be something pre-criminal, that is, something which will lead to a reasonable belief that some unlawful offence will occur as the result of the consorting. It is not sufficient that the person charged should meet different reputed criminals. It must be a consorting or associating with the same reputed criminal. "Consorting" was considered by the Court in *Muller* v. *Murphy* (1). The onus is upon the Crown to show that the person charged with the offence of consorting knows, or should know, that the person or persons with whom he is alleged to have consorted is or are a reputed criminal or criminals. Sec. 4 (1) (*j*) of the *Vagrancy Act* was introduced in 1929, for the purpose of suppressing gangs. Consorting has the meaning of long continued association with a definite purpose in view (see *Halsbury's Statutes of England*, vol. 4., p. 749). The character of the person charged does not constitute part of the offence. The evidence given in chief by the police officer as to the character of the applicant was inadmissible (*R.* v. *Morrisey* (2)). This inadmissible evidence had a prejudicial influence, and therefore the conviction should be quashed.

[Counsel was stopped on this point.]

McGhie, for the respondent, was called upon on the question only of the admissibility of the evidence as to character. Having regard to the practice obtaining in New South Wales the evidence was not evidence as to character. It is necessary that a magistrate should have before him some evidence from which he can draw an inference as to whether there was a true consorting. The Courts below were not addressed on this aspect. It is apparent that there was abundant other evidence before the magistrate to support the conviction, so

(1) (1935) 29 Q.J.P.R. 17.

(2) (1932) 23 Cr. App. R. 188.

that upon an application for special leave to appeal it is immaterial whether the evidence as to character was admissible or not. The admission of the evidence has not resulted in any miscarriage of justice. The facts apply only to this case. It is not a matter of general importance, and therefore the application for special leave to appeal should not be granted.

Piddington K.C., in reply.

The following judgments were delivered :—

RICH J. Three objections have been raised by Mr. *Piddington* to the conviction in this case. He contended in the first place that as there was no warrant or summons issued the magistrate had no jurisdiction to convict the accused. This objection was not taken at the hearing, and is clearly met by sec. 133 (1) of the *Justices Act* which reads as follows :—" Where the party convicted, or any party whose goods have been condemned or directed to be sold as forfeited, was present at the hearing of the case, the conviction or order shall be sustained, although there may have been no information or summons, unless such party objected at such hearing that there was no information or summons." Mr. *Piddington* next contended that the evidence did not support the charge of habitually consorting with reputed criminals. The offence connotes frequenting the company of reputed criminals and is a question of degree. It is inadvisable and, perhaps, impossible, to attempt an exhaustive definition of the offence, and, having regard to the order which the Court proposes to make, I shall not deal further with this question. The next objection was as to the inadmissibility of evidence as to the character of the accused. This evidence was objected to at the hearing. It is clearly inadmissible having regard to the manner in which and the time at which it was led. On this ground, therefore, the conviction should be set aside. The dictum in the case of *R.* v. *Gibson* (1), that it is open to the Crown to give evidence of the character of the accused, even though the question of character has not been raised by him, should not, I think, be followed.

STARKE J. I agree.

(1) (1930) 30 S.R. (N.S.W.) 282 ; 47 W.N. (N.S.W.) 119.

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DIXON J. I desire to add that I agree that our decision does involve the position that the Crown is not entitled under sec. 412 of the *Crimes Act* 1900 (N.S.W.) to lead evidence of the accused's bad character as appears to have been suggested in *Gibson's Case* (1).

EVATT J. As the matter is of general importance in the administration of criminal justice in New South Wales, I desire to emphasize that the decision we are giving rejects the interpretation of sec. 412 of the *Crimes Act* 1900 (N.S.W.) which commended itself to the Supreme Court in the case of *R.* v. *Gibson* (1).

McTIERNAN J. I agree. I do not wish to add anything to what has been said by *Rich* J.

Appeal allowed. Order of Maxwell J. discharged. In lieu thereof conviction set aside and case remitted to the magistrate with the opinion of the Court that the evidence objected to was inadmissible and the information should be reheard. No order as to costs.

Solicitor for the applicant, *Jack Thom.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1930) 30 S.R. (N.S.W.) 282; 47 W.N. (N.S.W.) 119.