[HIGH COURT OF AUSTRALIA.]

GREEN . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF VICTORIA.

H. C. OF A. 1939.

MELBOURNE, *Mar.* 21, 22.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Criminal Law—Appeal—New trial—Miscarriage of justice—Discovery of fresh evidence—Crimes Act 1928 (*Vict.*) (*No.* 3664), *sec.* 594.

The chief evidence implicating a prisoner upon a charge of murder consisted in a piece of paper which shortly before the date of the crime had been in his possession and was found beside the bodies of the victims. Some further circumstances were also relied upon by the prosecution, and among them the discovery near the scene of the crime of a bicycle pump which might have belonged to a bicycle ridden by the prisoner on the night of the crime. The bicycle, which on the day after the crime was seen to have lost its pump, belonged to a boy who swore at the coroner's inquest that the pump was not his and who described his own pump in terms indicating that it differed in appearance from the one which had been found. Later another pump was produced to the police by persons living in the vicinity of the prisoner's house as having been found by their children close at hand; it corresponded with the description given by the boy at the inquest, but it would not fit between the attachments on the bicycle. The Crown Prosecutor made the proofs of this evidence available to the prisoner's counsel but told him that he would not call it or the boy. The prisoner's counsel elicited from a police witness the fact that the second pump had been handed in as found at a specified place, and the prisoner swore that it was similar to the pump belonging to the bicycle and that he had lost that pump on the day of, but before the time of, the commission of the crime. The prisoner's counsel did not call the boy or the evidence of the finding of the pump. The prisoner was convicted and appealed on the ground that this further evidence was material and that,

H. C. OF A. 1939. GREEN v. THE KING.

having regard to it, the reliance by the Crown on the finding of the first pump had resulted in a miscarriage of justice. The Court of Criminal Appeal of Victoria, by a majority, refused a new trial.

Held that the case was not one in which the High Court should grant special leave to appeal.

Observations on the circumstances in which a new trial should be granted in criminal proceedings on the ground of the discovery of fresh evidence.

Special leave to appeal from the decision of the Court of Criminal Appeal of Victoria refused.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of Victoria.

On 24th February 1939 the prisoner, George Green, was convicted in the Supreme Court of Victoria before *Lowe* J. and a jury of the murder of two women, Annie Constance Wiseman and Phyllis Vivian Wiseman. The prisoner was a sweep living at Heidelberg. The murders were alleged to have been committed in a house at Glenroy on 12th or 13th November 1938, medical evidence pointing to the night of the former day as being the probable time. At the trial the Crown adduced evidence of the finding near the bodies of the murdered women of a piece of paper which was shown to have been in the possession of the prisoner shortly before the date of the crime and also called two witnesses, a Mrs. Brannigan and a Mr. Hewat, whose evidence tended to show that the prisoner had some knowledge of the locality where the crimes were committed. Part of the Crown case consisted in the discovery at Glenroy, within about two hundred yards of the house where the crimes were committed, of a bicycle pump. There was evidence that this pump belonged to a bicycle which the prisoner was using on the night of 12th November. It was a nickel pump with a purple connection, not dented and with round ends, and of the "Britannia" brand. The prisoner was arrested on 17th November 1938, and the pump was discovered on 22nd November. There was also evidence that the bicycle had a pump on it on 12th November and that the pump was missing on 13th.

The coroner's inquest was held on 19th and 20th December 1938, and there the owner of the bicycle, a boy named George Read, was called as a witness; he gave evidence that the pump found at Glenroy

was not the pump which had been on the bicycle, and he described the pump which he said had been on the bicycle as a nickel pump with a green connection, dented near the handle and flat at the ends. The prisoner was committed for trial by the coroner. On 28th December 1938 there came into possession of the police another pump, of the "Apex Inflator" brand, which was discovered by children at Heidelberg on 5th December and which corresponded with the description of his pump given at the inquest by the boy Read.

The trial began on Monday, 20th February 1939, and continued till Friday 24th. The statements of the two children who had found the pump at Heidelberg and of two other persons living at Heidelberg concerning the finding were given to the prisoner's legal advisers on 20th February, before the trial began. On Tuesday, 21st February, the Crown Prosecutor informed Green's counsel that he did not propose to call the boy Read. On the day following, Wednesday, counsel for the defence cross-examined a police witness with respect to the pump found at Heidelberg and tried to obtain from the witness a statement repeating the evidence given by Read at the inquest, but, on objection being taken, *Lowe* J. ruled that such questions were not admissible. The Crown Prosecutor put in evidence the pump which had been found at Heidelberg. The salesman who had sold the bicycle to the boy's mother was called by the Crown as a witness. He deposed that the pump discovered at Glenroy was of a kind commonly supplied by his company with bicycles of the make of the boy's bicycle, but he could not definitely swear that the pump in question or a pump of the same brand had been supplied with the bicycle, though he believed that it or a pump of the "Victor" brand had been so supplied. Several photographs taken on 13th November 1938, showing the bodies of the victims lying in the rooms at the time of their first discovery, were sought to be used as exhibits by the Crown; to such a course counsel for the defence objected on the ground that verbal descriptions by witnesses would serve the same purpose and that the tendency of the photographs would be to inflame the minds of the jury and so operate to the prejudice of the accused. *Lowe* J. allowed the photographs to be used. His Honour said that if, as was conceded, a verbal description of the positions of the bodies was permissible, he could see no ground upon which

H. C. OF A. 1939. GREEN v. THE KING.

the photographic evidence recording those positions could be rejected; that the one point which counsel for the defence pressed and which had impressed him was that the prejudice to the accused from the admission of the photographs would be out of all proportion to their probative value; but that there was no peculiar prejudice to the prisoner as distinct from anyone else in the photographs and it seemed to him, if the jury were entitled to have evidence of the positions of the bodies, he could not shut out on the supposed ground of prejudice the admission of the photographs. The Crown case concluded before the luncheon adjournment on the Thursday.

Green gave evidence on his own behalf. He denied that the pump found at Glenroy was the pump which had been on the bicycle he had been using on 12th November; he said that he had not been at Glenroy on that night, that the pump which had been on his bicycle was a nickel pump with a green connection, dented and with flat ends, that he had missed the pump from the bicycle on the afternoon of 12th November at Heidelberg and that the pump found at Heidelberg was similar to the pump belonging to the bicycle. He was, however, unable to fit this pump on to the points provided for a pump on the bicycle. It was suggested that the points or one of them had been bent so as to prevent the pump fitting on to them, but inspection of the bicycle showed that they had not been bent in any way. The pump found at Glenroy, on the other hand, fitted the bicycle readily and easily. No other witness than the prisoner was called for the defence. The boy Read, who was at the court throughout the trial, was not called by either side.

After the trial the boy Read was interviewed by the applicant's advisers; he made an affidavit describing his pump as he had done at the inquest and again stating that the pump found at Glenroy was not his pump.

The prisoner applied to the Court of Criminal Appeal of Victoria for leave to appeal from his conviction on a number of grounds, including one that the photographic evidence of the bodies of the two women should not in the way the Crown case was presented have been admitted, and another that the evidence of the witnesses Brannigan and Hewat should not have been admitted; but the substantial ground was the discovery of fresh evidence, namely, the

evidence of the boy Read and the evidence relating to the finding of the pump at Heidelberg.

On 10th March 1939 the Court of Criminal Appeal of Victoria, refused leave to appeal. The court (*Mann* C.J., *Gavan Duffy* and *Martin* JJ.) was unanimous that leave should be refused on all grounds except that relating to the discovery of fresh evidence: On that ground *Gavan Duffy* and *Martin* JJ. thought that leave should be refused; *Mann* C.J. dissented, being prepared by reason of the exceptional nature of the case and the possibility of a miscarriage of justice to grant a new trial.

The prisoner applied to the High Court for special leave to appeal from this decision.

Leo Little, for the applicant. In this case there are exceptional circumstances within the meaning of *Ross* v. *The King* (1). The judgment of the Chief Justice in the Court of Criminal Appeal is correct. If the evidence in question had been fresh evidence, newly discovered since the trial, it would justify an order for a new trial; as it is, its importance has come into greater prominence through the events of the trial and the proceedings on appeal, and a new trial should be granted. The omission of the evidence gives rise to the possibility of a miscarriage of justice. As to the photographs, they should not have been used at the trial. They had no probative value; the defence was an alibi, and their only tendency was to inflame the minds of the jury and prejudice the accused (*R.* v. *Christie* (2), per Lord *Moulton*).

Book K.C. (with him *Maurice Cussen*), for the Crown. None of the matters of evidence alleged is sufficient to warrant the court in granting a new trial. The fresh evidence relied on was available at the trial and was not put to the court, and the evidence has to be fresh before a court will order a new trial (*R.* v. *Allen* (3); *R.* v. *Hewitt* (4); *R.* v. *Starkie* (5)).

[DIXON J. referred to *R.* v. *Weisz* (6).

[LATHAM C.J. referred to *R.* v. *Warren* (7).]

(1) (1922) 30 C.L.R. 246.
(2) (1914) A.C. 545, at p. 559.
(3) (1910) 4 Cr. App. R. 181, at p. 187.
(4) (1912) 7 Cr. App. R. 219, at p. 222.
(5) (1921) 16 Cr. App. R. 61, at p. 63.
(6) (1920) 15 Cr. App. R. 85.
(7) (1919) 14 Cr. App. R. 4.

H. C. OF A. 1939. GREEN v. THE KING.

[Counsel referred to *R.* v. *Cronan* (1) and *Mattson* v. *The King* (2); and, as to the value of the fresh evidence, to *R.* v. *Starkie* (3) and *Craig* v. *The King* (4).] If all the fresh evidence were brought to the attention of the jury, then the weight of all the evidence as a whole would not induce the jury to acquit. Where evidence is not fresh a new trial will not be ordered unless there has been a miscarriage of justice. The matter must be looked at from both points of view.

Leo Little, in reply, referred to *R.* v. *Dutt* (5).

The following judgments were delivered :—

LATHAM C.J. This is an application for special leave to appeal from an order of the Court of Criminal Appeal (Victoria) dismissing an appeal by George Green against two convictions for murder. He was charged with the murder of a woman (Miss Annie Constance Wiseman) and a girl (Phyllis Wiseman) at Glenroy on the night of 12th November 1938. He was convicted. An appeal was brought to the Court of Criminal Appeal and was dismissed. The accused now applies to this court for special leave to appeal.

It is objected that certain photographs showing the bodies of the murdered women were inadmissible in evidence and should not have been shown to the jury and that certain evidence given by a witness, Mrs. Brannigan, and another witness, Mr. Hewat, also was inadmissible. I can see no reason for holding that any of this evidence was inadmissible. No principle of law was stated the application of which would result in the exclusion of the evidence in question.

Objection was also taken to the summing up so far as it dealt with the subject of circumstantial evidence, but, taking the summing-up as a whole, I regard it as most unlikely that the jury would have been or even might have been misled.

The principal ground of this application is that the Court of Criminal Appeal should have ordered a new trial by reason of the discovery of fresh evidence. The alleged fresh evidence related to the identification of certain bicycle pumps.

(1) (1924) 41 Can. Crim. Cas. 320, at p. 326.
(2) (1919) 27 C.L.R. 176.
(3) (1921) 16 Cr. App. R. 61.
(4) (1933) 49 C.L.R. 429, at p. 439.
(5) (1912) 8 Cr. App. R. 51.

There was circumstantial evidence of various kinds upon which the jury could properly find the accused guilty. The accused lived at Heidelberg. Part of the evidence consisted in the discovery at Glenroy, within about two hundred yards of the house where the crime was committed, of a bicycle pump which it was contended belonged to a bicycle which the accused was using on the night of 12th November 1938. The accused denied that he had been at Glenroy on that night. The pump was discovered on 22nd November, after the arrest of the accused, which had taken place on 17th November. There was evidence that a pump was on the bicycle on 12th November but that it was missing on 13th November. The accused gave evidence that he missed the pump on the afternoon of 12th November at Heidelberg. The salesman who sold the bicycle to the mother of the boy, George Read, who owned it, was called as a witness. He said that the pump discovered at Glenroy was of a kind commonly supplied by his company with bicycles of the make of the boy's bicycle but he could not and did not definitely swear that the pump in question or a pump of the same brand ("Brittania") had been supplied with the bicycle, though he believed that it or a pump of the "Victor" brand had been so supplied.

At the coroner's inquest on 19th and 20th December the boy was called as a witness and gave evidence that the pump found at Glenroy was not the pump which had been on the bicycle, and he gave a description of the pump which he said was on the bicycle. He described it as a nickel pump with a green-covered rubber connection and said that it was dented and had a flat end. The pump discovered at Glenroy was a nickel pump with a purple connection, not dented and with round ends. This evidence was known to the accused and his advisers. The accused was committed for trial by the coroner.

On 28th December another pump came into the possession of the police. It was said to have been discovered by children at Heidelberg on 5th December. It corresponded with the description of his pump given by the boy. The statements of the two children who found the pump and of two other persons living at Heidelberg concerning the finding was given to accused's advisers on the morning of Monday, 20th February, before the trial began. On the next day

H. C. OF A. 1939. GREEN v. THE KING. Latham C.J.

the Crown prosecutor informed counsel for the accused that he did not propose to call George Read, the boy who owned the bicycle and who had given evidence at the inquest. On the following day (Wednesday) counsel for the accused cross-examined a police witness with respect to the pump found at Heidelberg and the Crown prosecutor put the pump in as evidence. Counsel endeavoured to obtain from the witness a statement repeating the evidence given by George Read at the inquest, but the learned trial judge ruled that evidence of evidence given on another occasion by a witness who was available but had not been called was inadmissible.

The accused gave evidence. He denied that the Glenroy pump belonged to the bicycle. He asserted that the Heidelberg pump was similar to the pump belonging to the bicycle. But he could not fit the latter pump on to the points provided for a pump on the bicycle. It was suggested that these points, or one of them, had been bent so as to prevent the pump fitting on to them. But an inspection of the bicycle shows that they have not been bent in any way. The Glenroy pump fits the bicycle readily and easily.

No other witness than the accused was called for the defence. George Read, who was at the court throughout the trial, was not called by either side. Counsel for the accused had the last address to the jury—a benefit which he would not have had if he had called either George Read or the witnesses as to the finding of the pump at Heidelberg. The accused was convicted.

After the trial George Read was interviewed by the advisers of the accused, and he made an affidavit describing his pump as he had done at the inquest and again stating that the Glenroy pump was not his pump.

Upon appeal to the Court of Criminal Appeal the accused applied for a new trial upon the ground of discovery of fresh evidence.

It is a ground for a new trial that fresh evidence has been discovered, but the courts have always been most cautious in granting such applications. It has been required that the evidence should be evidence that could not with reasonable care have been discovered previously and that it should be of such a character that, if it had been tendered, it would have been of such weight as, if believed, to

have an important influence on the result. These are general principles which should be applied to both civil and criminal trials (*R.* v. *Copestake*; *Ex parte Wilkinson* (1); *Guest* v. *Ibbotson* (2); *R.* v. *Sayegh* (3); *R.* v. *Stone* (4); *Craig* v. *The King* (5)). Reference may also be made to cases in which the Court of Criminal Appeal in England, which itself has power to hear fresh evidence, though not to order a new trial, has dealt with the question of fresh evidence (*R.* v. *Watkins* (6); *R.* v. *Soper* (7); *R.* v. *Starkie* (8)).

But those principles are not in themselves directly applicable in the Court of Criminal Appeal. They are applicable, not as independent rules, but as related to the subject of miscarriage of justice. They should not, particularly in the Court of Criminal Appeal, be regarded as absolute or hard and fast rules. The relevant proposition in that jurisdiction is that (in Victoria, though not in England) a new trial may be granted if the court thinks "that on any ground there was a miscarriage of justice" (*Crimes Act* 1928, sec. 594 (1)). In considering whether there has been a miscarriage of justice the court should consider all the circumstances of the case. If, for example, there being no elements of fraud, mistake or surprise, an accused person has, by himself or by his legal advisers, deliberately decided to set up a particular defence, he cannot complain as of a miscarriage of justice for the sole reason that, that defence having failed, he comes to the conclusion, or a court comes to the conclusion, that he might succeed if he set up another defence. Thus, if an accused person deliberately chooses to abstain from calling evidence which is available to him, it cannot be said that the course of justice has miscarried for the sole reason that it cannot be asserted with certainty that the result would have been the same if such evidence had been given. There is no miscarriage in such a case. Thus the rules as to the availability of alleged fresh evidence and the weight of that evidence must enter into a consideration of the propriety of granting a new trial in a criminal case. These rules, as stated in the reasons for judgment of the Court of Criminal Appeal in this case,

(1) (1927) 1 K.B. 468, at p. 477.
(2) (1922) 91 L.J. K.B. 558.
(3) (1924) 25 S.R. (N.S.W.) 61; 42 W.N. (N.S.W.) 1.
(4) (1926) 26 S.R. (N.S.W.) 394; 43 W.N. (N.S.W.) 129.
(5) (1933) 49 C.L.R. 429.
(6) (1908) 1 Cr. App. R. 183.
(7) (1908) 1 Cr. App. R. 63.
(8) (1921) 16 Cr. App. R. 61.

H. C. OF A. 1939.

GREEN v. THE KING.

Latham C.J.

are based upon important principles of public policy. There is grave risk of impeding the administration of justice if new trials are readily granted upon the ground of discovery of fresh evidence. If persons who become subject to the processes of the law were allowed to try again because they had chosen not to use evidence which was available or which with reasonable diligence could have been discovered by them, legal proceedings would tend to become interminable and grave injustice would, in practice, result in many cases.

In the present case the evidence with respect to the finding of the pump at Heidelberg was available to the accused at the trial. So also was the evidence of George Read. It was known that he would or could say that the Glenroy pump was not his pump. But it is said that it was not known at the trial that George Read would positively say that the Heidelberg pump was his pump. But it was known at the trial that he would or could say that the Heidelberg pump possessed all the characteristics of his pump mentioned by him at the inquest. In the affidavit now sworn by him he goes no further.

It may be added that there would have been no difficulty whatever in arranging for him to see the Heidelberg pump at the trial.

Thus, in my opinion, the evidence now relied upon was fully available to the accused at the time of the trial. Further, even if the evidence was believed, it would not have been decisive and might, for all we know, have been of but little importance. It would have disposed of the contention that the presence of the pump at Glenroy about ten days after the crime went to establish the probability of the presence of the accused at Glenroy at the time of the crime. It would have given support to the statement of the accused that the pump disappeared at Heidelberg. But the actual establishment of the truth of this statement would not have displaced the other evidence which tended to implicate the accused. That other evidence is very strong indeed. It is unaffected by any evidence as to the pumps. I summarize my view by saying that the complete acceptance by the jury of the unpresented evidence would still leave a very strong case against the accused. In my opinion it cannot be said that there was a miscarriage of justice.

In my opinion the application for special leave to appeal should be refused.

RICH J. I consider that there has not been a mistrial or any substantial miscarriage of justice.

In the circumstances I am of opinion that a case has not been made for granting special leave.

STARKE J. In my opinion this application for special leave to appeal should be refused.

I think this court approaches these motions for special leave to appeal from an entirely wrong angle. I have expressed in *Cornelius* v. *The King* (1) my views upon the subject, and I shall not repeat them here. The judgment of the Chief Justice and his meticulous examination of the facts of this case indicate how far this court goes beyond what I conceive to be its proper function.

In this case it is not suggested that the learned judge misdirected the jury in any way whatever either as to law or as to the facts. It is not suggested that the regular course of criminal procedure has not been followed with absolute fairness and propriety. All that is suggested is that the learned counsel for the prisoner was somewhat surprised at the course which the Crown took in not calling a witness and in not supplying him earlier than it did with some statements of some boys who found a pump in the district where the prisoner lived. It is possible that such matters might in some cases be a ground for a Court of Criminal Appeal exercising its jurisdiction and granting a new trial. But I cannot believe that it is the function of this court to go into such matters as that. The Court of Criminal Appeal has fully investigated the matters and has thought right not to grant a new trial. The matter should rest there without this court going further. Its constant irruption into the administration of criminal justice lessens the confidence of the public in the State courts and in the administration of criminal justice. It is, indeed, a very serious matter.

DIXON J. I agree that special leave to appeal should be refused.

Jurisdiction is given to this court to grant special leave in cases where special circumstances appear. A review of the circumstances

(1) (1936) 55 C.L.R. 235.

H. C. OF A. 1939. GREEN v. THE KING.

in the present case fails, in my opinion, to disclose any sufficient ground for exercising the discretion by granting special leave.

McTIERNAN J. I agree.

I do not see any grounds for deciding that there was a miscarriage of justice in this case. In my opinion the case is not one in which the court should exercise its discretion to grant special leave to appeal.

Special leave to appeal refused.

Solicitor for the applicant, *Joseph Barnett.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.