[HIGH COURT OF AUSTRALIA.]

SPARRE . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY.

H. C. OF A. 1942.

SYDNEY, *Aug.* 19, 28.

Starke, McTiernan and Williams JJ.

Criminal Law—Unlawful carnal knowledge—Defence—Reasonable cause to believe girl over the age of sixteen years—Proof "to the court or jury"—Jury—Agreement as to carnal knowledge—Disagreement re belief as to girl's age—Accused found guilty by direction of judge—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—*Seat of Government Acceptance Act* 1909-1938 (*No.* 23 *of* 1909—*No.* 12 *of* 1938), *sec.* 6—*Seat of Government* (*Administration*) *Act* 1910-1940 (*No.* 25 *of* 1910—*No.* 14 *of* 1940), *secs.* 3, 4.

Australian Capital Territory—Supreme Court—Appeal to High Court in criminal matter—Power of High Court to order new trial—Seat of Government Supreme Court Act 1933-1935 (*No.* 34 *of* 1933—*No.* 27 *of* 1935), *sec.* 52—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *sec.* 36.

Sec. 71 of the *Crimes Act* 1900 (N.S.W.) as amended by sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910 (both of which Acts are in force in the Australian Capital Territory) provides that whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years, with a proviso that it is a sufficient defence to any charge under this section where the girl in question was over the age of fourteen years if it shall be made to appear to the court or jury before whom the charge is brought that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years.

Held that whether the person charged had reasonable cause to believe that the girl was of or above the age of sixteen years is a question for the jury. If the jury (while agreeing that the person charged carnally knew the girl) are unable to agree on this question no verdict can be given; a direction that as the person charged has not made out his defence he must be found guilty is erroneous.

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Upon an appeal under sec. 52 of the *Seat of Government Supreme Court Act* 1933-1935 by a person convicted on indictment before the Supreme Court of the Australian Capital Territory the High Court has power to order a new trial.

APPEAL from the Supreme Court of the Australian Capital Territory.

The laws of New South Wales which are in force in the Australian Capital Territory by virtue of sec. 6 of the *Seat of Government Act* 1909 and sec. 4 of the *Seat of Government Administration Act* 1909-1933 include sec. 71 of the *Crimes Act* 1900. By that section, as amended by sec. 2 of the *Crimes (Girls' Protection) Act* 1910, it is an offence punishable by penal servitude for ten years unlawfully and carnally to know any girl of or above the age of ten years and under the age of sixteen years: provided that it is a sufficient defence to any charge which renders any person liable to be found guilty of this offence where the girl in question was over the age of fourteen years if it shall be made to appear to the court or jury before whom the charge is brought that the person so charged had reasonable cause to believe that she was of or above the age of sixteen years.

Patrick Holger Sparre was tried at Canberra before the Judge of the Supreme Court of the Australian Capital Territory and a jury upon an indictment charging that at Canberra he did unlawfully and carnally know a named girl then above the age of ten years and under the age of sixteen years, to wit of the age of fourteen years.

The Judge put the following questions to the jury:—(*a*) Did the accused carnally know the girl then above the age of ten years, and under the age of sixteen years, to wit of the age of fourteen years? (*b*) Did the accused at the time of the commission of the alleged offence have reasonable cause to believe that the said girl was of or above the age of sixteen years? (*c*) Did the accused, at the time of the commission of the alleged offence, in fact believe that the girl was of, or above the age of sixteen years?

The jury answered the first question in the affirmative, but they did not agree upon any answer to the second or third question. They did not give a general verdict.

The Judge told the jury that he had purposely left out of the first question the word "unlawful" in order to obtain a special finding whether carnal knowledge took place or not, and upon the affirmative answer being given the right view was that the carnal knowledge was unlawful. His Honour then directed them that "as a matter of law they must find" that Sparre did unlawfully and carnally know the girl and asked them to make that finding. The jury

retired to consider this direction and after returning to the Court said they had agreed that Sparre did unlawfully and carnally know the girl. His Honour said: "Of course I take the responsibility of that direction and now the question arises whether I should direct the jury to return a verdict of guilty." Again the jury made known that they could not agree about the answer to the second and third questions. His Honour then addressed the jury using these words: —"That being so, I must find as a fact that the accused has not established his defence. In these circumstances it becomes my duty to direct you that you must find him guilty. The position is that, if I am wrong in my judgment, the Court of Appeal will remedy the matter and, if I am right, no injustice will be done. Therefore I direct that a finding be entered that the accused is found guilty of the offence charged." The foreman of the jury then said: "At your Honour's direction we find the accused guilty." Sparre was subsequently sentenced to imprisonment for seven years with hard labour.

Sparre appealed to the High Court.

Jenkyn, for the appellant. The trial Judge was in error in directing the jury to convict the accused. Upon a criminal trial the judge has no power in any circumstances to direct a verdict of guilty (*Thomas* v. *The King* (1); *R.* v. *Farnborough* (2)). In all criminal trials the verdict of the jury must be unanimous (*Newell* v. *The King* (3); *Ford* v. *Blurton* (4); *R.* v. *Armstrong* (5)). Should the jury disagree there can be neither a verdict of guilty nor one of not guilty. The trial is abortive and the case must be retried. The foregoing propositions are not affected by the proviso to sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910—see also sec. 77 of the *Crimes Act* 1900, as amended. The proper construction of that proviso is that the word "court" refers to the magistrate or justices before whom the accused is brought with a view to his committal for trial, and the "jury" when he is put upon his trial: See *R.* v. *Forde* (6).

Badham, for the respondent. The section under which the accused was charged was taken from and is the same as sec. 5 of the Imperial *Criminal Law Amendment Act* 1885. That section was amended by the Act of 1922, and this was again amended by the Act of 1928, the effect of these amendments being to make clear what was very doubtful in the Act of 1885. The fact

(1) (1937) 59 C.L.R. 279, at p. 293.
(2) (1895) 2 Q.B. 484.
(3) (1936) 55 C.L.R. 707, at p. 713.
(4) (1922) 38 T.L.R. 801, at p. 805.
(5) (1922) 2 K.B. 555, at p. 568.
(6) (1923) 2 K.B. 400, at p. 403.

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that the Imperial legislature substantially altered the relevant section indicates that there were doubts as to its meaning, more particularly as the substantive defence available in cases of this kind was not deleted. It is submitted therefore that the words must be read in their ordinary meaning and, being a criminal matter, should not be strained against the accused. There is no decision directly on the point, but in *R.* v. *Forde* (1) it was suggested, though not definitely decided, that the word " court " in the proviso must mean the magistrate's court. It is submitted that this cannot be so, because the court referred to is that " before whom the charge shall be brought," and this must mean for the purpose of the trial. The magistrate's court has no jurisdiction to try this offence, so that it is sufficient if the defence is made out to the satisfaction of either the court or jury. Therefore the converse must be the case, that is, if the defence is not made out to the satisfaction of court or jury the accused should be convicted. This is supported by the definition of " court " in the *Crimes Act*. In this case the Court held that the accused had not established the defence set up, which is the statutory defence allowed to an accused ; therefore he was rightly convicted.

Cur. adv. vult.

Aug. 28.

The following written judgments were delivered :—

STARKE J. The appellant was charged upon information in the name of the Minister for the time being acting for, and on behalf of, the Attorney-General of the Commonwealth, before the Supreme Court of the Australian Capital Territory, with unlawfully and carnally knowing a girl above the age of ten years and under the age of sixteen years, to wit of the age of fourteen years.

The charge was based upon sec. 71 of the *Crimes Act* 1900 of New South Wales as amended by the *Crimes (Girls' Protection) Act* 1910 of New South Wales, which have effect as a law of the Territory by force of the provisions of the *Seat of Government Acceptance Act* 1909, secs. 2, 6, and the *Seat of Government (Administration) Act* 1910-1931, secs. 3 and 4. These provisions enact as a law of the Territory that whosoever unlawfully and carnally knows a girl of or above the age of ten years and under the age of sixteen years shall be liable to penal servitude for ten years. Provided that it is a sufficient defence to any charge which renders a person liable to be found guilty of this offence where the girl in question was over the age of fourteen years if it shall be made to appear to the court or jury before whom the charge is brought that the person so charged

(1) (1923) 2 K.B. 400.

had reasonable cause to believe that she was of or above the age of sixteen years. The charge was tried before the Judge of the Supreme Court of the Territory with a jury which was unable to agree upon a verdict.

The learned Judge then put the following questions to the jury :— 1. Did the accused carnally know (the) girl then above the age of ten years, and under the age of sixteen years, to wit of the age of fourteen years ? 2. Did the accused, at the time of the commission of the alleged offence, have reasonable cause to believe that the said (girl) was of or above the age of sixteen years ? 3. Did the accused, at the time of the commission of the alleged offence, in fact believe that (the girl) was of, or above the age of sixteen years ?—See *R.* v. *Banks* (1) ; *R.* v. *Harrison* (2).

The jury answered the first question in the affirmative, but were unable to agree upon the second and third questions, whereupon the learned Judge directed them that they must find the accused guilty because he had not established his defence. The jury acting upon this direction found the accused guilty and he was subsequently sentenced to imprisonment for seven years with hard labour.

An appeal has been brought to this Court pursuant to the provisions of the *Seat of Government Supreme Court Act* 1933-1935, sec. 52 ; *Acts Interpretation Act* 1901-1932, sec. 27.

There is no doubt that the burden is upon the accused of proving that he had within the meaning of the proviso already mentioned reasonable cause to believe that the girl was of or above the age of sixteen years. Normally in criminal proceedings it is for the jury to determine all questions of fact, subject of course to the direction of the court whether in point of law there is any evidence of any particular fact fit for their consideration. The Act in the present case makes the fact mentioned in the section a sufficient defence if it shall appear to the court or jury.

According to the decision of *R.* v. *Forde* (3) the court is not empowered to determine whether the accused had reasonable grounds for believing that the girl was of or above the age of sixteen years. The words " the court," it was said, have always been construed to apply respectively to the court, that is to say, the magistrates or justices before whom the accused is brought with a view to his committal for trial, and the jury when he is put upon his trial.

In *R.* v. *George* (4) the Supreme Court of New Zealand held that the words of the section gave the accused a double chance of acquittal,

(1) (1916) 2 K.B. 621.
(2) (1938) 26 Cr. App. R. 166 ; (1938) 3 All E.R. 134.
(3) (1923) 2 K.B., at pp. 402, 403.
(4) (1890) 9 N.Z.L.R. 541.

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or, in other words, that he established his defence if it appeared to the court that he had reasonable cause to believe that the girl was of or above the age of sixteen years notwithstanding the verdict of the jury, and, it follows, notwithstanding the disagreement of the jury. The reasoning of *R.* v. *Forde* (1) is not very convincing, though I am unable to adopt the construction of the section under consideration in the present case suggested by the decision of the Supreme Court of New Zealand.

The proviso to sec. 71 does not give an extraordinary and special jurisdiction to the court, but provides for the possible case of some court having or being thereafter given jurisdiction to try and determine the charge without a jury. But if the charge be tried before a jury then it is for the constitutional tribunal—the jury—to determine whether the accused had reasonable cause to believe that the girl was of or above the age of sixteen years.

The question is one of fact for the jury, subject to the direction of the court whether there is any evidence of it fit for their consideration. But if the jury cannot agree upon that question or issue of fact then it is not determined either in favour of or against the accused. The question whether the accused had reasonable cause to believe that the girl was of or above the age of sixteen years is still open and undetermined.

It follows that the learned Judge was in error in directing the jury that they must find the accused guilty because he had not established the fact necessary to constitute a defence under the provisions of the Act already mentioned, despite the fact that the jury disagreed and really because they were unable to determine whether the accused had or had not reasonable cause to believe that the girl was of or above the age of sixteen years.

The conviction of the accused must be quashed, and all that remains for consideration is whether this Court can grant a new trial. The *Seat of Government Supreme Court Act* 1933-1935, sec. 52, enables this Court to hear and determine the appeal. The *Judiciary Act* 1903-1940 provides that the High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury. Cause includes criminal proceedings: See Act, secs. 36 and 2. The appellate jurisdiction of this Court includes an appeal under sec. 52 of the *Seat of Government Supreme Court Act* 1933-1935, as it clearly did under sec. 34A, inserted in the *Judiciary Act* by the amending Act No. 9 of 1927, sec. 5, but repealed by the *Seat of Government*

(1) (1923) 2 K.B. 400.

Supreme Court Act 1933, sec. 4: See *R.* v. *Bernasconi* (1); *Porter* v. *The King*; *Ex parte Yee* (2).

The result is that the appeal should be allowed, the verdict set aside, the conviction quashed and a new trial of the accused had before the Supreme Court of the Australian Capital Territory at such time and place as it may appoint upon the information already filed in that Court. The accused is remanded to his present custody with liberty to apply to the said Supreme Court for bail pending his retrial.

McTIERNAN J. The laws of New South Wales, which are in force in the Australian Capital Territory by virtue of sec. 6 of the *Seat of Government Acceptance Act* 1909 and sec. 4 of the *Seat of Government* (*Administration*) *Act* 1910-1933, include sec. 71 of the *Crimes Act* 1900 and sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910. By sec. 71 it was an offence punishable by penal servitude for ten years, unlawfully and carnally to know any girl of or above the age of ten years and under the age of fourteen years; by sec. 2 of the latter Act the age of sixteen years was substituted for the age of fourteen years and a proviso was added which, so far as its terms are now material, says that it is a sufficient defence to this charge where the girl was over the age of fourteen years, if it should be made to appear to the court or jury before whom the charge is brought that the person charged had reasonable cause to believe that she was of or above the age of sixteen years. The phrase "had reasonable cause to believe" means had reasonable cause to believe and did believe (*R.* v. *Banks* (3); *R.* v. *Harrison* (4)).

The appellant was indicted for this offence and tried by a jury before his Honour Judge *Lukin* in the Supreme Court of the Australian Capital Territory and he directed the jury to find the appellant guilty. The jury acted upon this direction and found the appellant guilty. He appeals against the conviction under sec. 52 of the *Seat of Government Supreme Court Act* 1933-1935.

The indictment on which the appellant was convicted was in substance that he did unlawfully and carnally know a girl whose age was alleged to be fourteen years. It was not necessary for the indictment to negative the defence available to the appellant under the proviso to sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910: See *R.* v. *James* (5); *R.* v. *Audley* (6). The circumstances in which his Honour directed the jury to find the appellant guilty were that,

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432, at pp. 440, 446, 449.
(3) (1916) 2 K.B. 621.
(4) (1938) 3 All E.R. 134.
(5) (1902) 1 K.B. 540, at p. 545.
(6) (1907) 1 K.B. 383, at p. 386.

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as it appeared the jury would not agree upon any verdict, his Honour put three questions to them which he asked them to answer. The first question was whether the appellant did carnally know the girl, and the second and third questions sought special findings on the two issues, as explained in *R.* v. *Banks* (1), raised by the statutory defence, the appellant having relied on it. The jury answered the first question in the affirmative, but did not agree upon any answer to the second or third question. They did not give a general verdict. The matter that agitated the jury was conveyed to his Honour by the foreman, who said: "The jury feels that when the young lady was dressed in the clothes she wore on the night in question she looked older. That caused them to think that possibly an ordinary layman might form the same opinion as they have formed after seeing her in the other dress." His Honour stressed that there was no difference between the legal and what the jury called the "lay point of view" about the question whether the appellant had reasonable cause to believe that the girl was of or above the age of sixteen years, and invited them to consider whether the appellant did advert at all to the question of the girl's age. The jury, however, failed to reach any agreement on the second and third questions. His Honour told them that he purposely left the word "unlawful" out of the first question in order to obtain a special finding whether carnal knowledge took place or not, and further directed the jury that as they had given an affirmative answer to that question the right view to take was that the carnal knowledge was unlawful. His Honour then directed them that "as a matter of law you must find" (these are the judge's words) that the appellant did unlawfully and carnally know the girl and asked them to make that finding. The jury retired to consider this direction and after returning to court said they had agreed that the appellant did unlawfully and carnally know the girl. His Honour said: "Of course I take the responsibility of that direction and now the question arises whether I should direct the jury to return a verdict of guilty." Again the jury made it known that they could not agree about the answer to the second or third question. His Honour then addressed the jury, using these words: "That being so, I must find as a fact that the accused has not established his defence. In these circumstances it becomes my duty to direct you that you must find him guilty. The position is that, if I am wrong in my judgment, the Court of Appeal will remedy the matter and, if I am right, no injustice will be done. Therefore I direct that a finding be entered that the accused is found guilty of the offence charged." The foreman of

(1) (1916) 2 K.B. 621.

the jury then said : " At your Honour's direction we find the accused guilty." The appellant was remanded for sentence and we have been informed that a sentence of seven years' imprisonment was afterwards imposed upon him.

The burden of proving the statutory defence under the proviso to sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910 rests upon the person charged if he relies upon that defence. There could be no finding by the jury that it was not made to appear to them that the accused did not sustain that defence, unless the jury unanimously so found. It was necessary for the jury to find unanimously either that the appellant sustained the defence or did not sustain it before they could find any verdict. In the present case the issues raised by the second and third questions were not determined by the jury. His Honour was, in my opinion, wrong in ruling that the failure of the jury to agree that the accused had established his defence was equivalent to a finding of the jury that he had not established his defence. The jury could only act unanimously. It was within the province of the jury to find that the accused either had established the defence or had not established the defence. In the former event, there should be a verdict of not guilty, in the latter a verdict of guilty. But a failure to agree whether a defence has been established or not does not amount to a finding that the defence has not been established. The position, therefore, is that in a criminal trial the jury has been unable to reach a decision as to whether a defence has been established or not. The result is that no verdict can be given.

The proviso does in terms leave the question whether the defence is substantiated to the judge or the jury. Sec. 4 of the *Crimes Act* 1900 provides that " ' Court ' and ' Judge ' respectively shall be equally taken to mean the Court in which or the Judge before whom the trial or proceeding is had in respect of which either word is used." Literally the proviso is capable of meaning that if the person charged satisfies either the judge or the jury of the matters constituting the defence he is entitled to be acquitted. This has been decided in New Zealand to be the effect of similar statutory provisions (*R.* v. *George* (1)). Another view of the meaning of the word " Court " was taken in the case of *R.* v. *Forde* (2). It does not appear how a charge under sec. 2 of the *Crimes* (*Girls' Protection*) *Act* 1910 could, at the time the Act was passed, be tried otherwise than before a judge sitting with a jury. However, the proviso does not make the accused liable to be convicted if he has not made it appear to the judge that his defence has been sustained. The accused is entitled to be acquitted if he has made it appear to the jury that he

(1) (1890) 9 N.Z.L.R. 541.

(2) (1923) 2 K.B., at p. 403.

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has sustained the defence. But a verdict of guilty cannot be entered unless the jury agree that he has not sustained the defence.

Sec. 52 (*a*) of the *Seat of Government Supreme Court Act* 1933-1935 provides that a person convicted on indictment before the Supreme Court of the Territory may appeal to the Full Court of the High Court and the section further provides that such Court shall have jurisdiction to hear and determine the appeal. The power of Parliament to vest this appellate jurisdiction in the High Court is derived from sec. 122 of the Constitution: see *R.* v. *Bernasconi* (1); *Porter* v. *The King* (2); *Tuckiar* v. *The King* (3).

For the reasons which I have given I think that the learned trial Judge was in error in directing the jury to find a verdict of guilty and the conviction should be set aside. This Court has power under sec. 52 to set aside the conviction. This section does not in terms give power to the High Court when exercising the appellate jurisdiction vested in it by the section to order a new trial. In *Tuckiar* v. *The King* (3), where the appeal was from a conviction before the Supreme Court of the Northern Territory, the Full Court of the High Court did not doubt that it had power under the Northern Territory Ordinance No. 12 of 1918 to order a new trial. And in the circumstances the Court ordered that the prisoner be discharged. That Ordinance, however, provides that the High Court sitting as a Full Court may upon an appeal brought under the Ordinance make such order as it thinks just. Sec. 52 provides merely that the Full High Court may hear and determine the appeal. Sec. 36 of the *Judiciary Act* 1903-1940 provides that the High Court in the exercise of its appellate jurisdiction shall have power to grant a new trial in any cause in which there has been a trial whether with or without a jury. The word " cause " is defined by sec. 2 of this Act to include any criminal proceeding. Sec. 36 is not expressed to be limited to the jurisdiction of the Court to hear and determine appeals from a justice exercising the original jurisdiction of the Court or from a State court. In my opinion this Court may, in exercising the appellate jurisdiction which sec. 52 of the *Seat of Government Supreme Court Act* 1933-1935 confers on it as the High Court, exercise the power conferred on the High Court by sec. 36 of the *Judiciary Act*.

I should allow the appeal. The order of the Court should, in my opinion, add that the conviction be set aside, a new trial had, and that bail be as the Supreme Court of the Territory should think fit to order.

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432.
(3) (1934) 52 C.L.R. 335.

WILLIAMS J. On 18th, 19th and 20th May 1942 the appellant was tried at Canberra before the learned Judge of the Supreme Court of the Australian Capital Territory and a jury upon an indictment charging that on 7th March 1942 at Canberra in the Australian Capital Territory he did unlawfully and carnally know a certain girl then above the age of ten years and under the age of sixteen years, to wit of the age of fourteen years. The charge was laid under sec. 71 of the *Crimes Act* 1900 (N.S.W.) as amended by sec. 2 of the *Crimes (Girls' Protection) Act* 1910 (N.S.W.), both of which Acts are in force in the Territory by virtue of sec. 6 of the *Seat of Government Acceptance Act* 1909 and sec. 4 of the *Seat of Government (Administration) Act* 1910. Sec. 71 of the *Crimes Act* as amended provides that whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, shall be liable to penal servitude for ten years. The *Crimes (Girls' Protection) Act*, sec. 2, contains a proviso that it shall be a sufficient defence to this charge if it is made to appear to the court or jury before whom the charge is brought that the person so charged had at the time of the offence reasonable cause to believe that she was of or above the age of sixteen years. " Reasonable cause to believe " includes believing in fact that she was of or above the age of sixteen years (*R.* v. *Harrison* (1)).

The learned trial Judge left three questions to the jury, viz. :— (1) Did the appellant on 7th March 1942 at Canberra in the Australian Capital Territory carnally know the girl she being then above the age of ten years, and under the age of sixteen years, to wit of the age of fourteen years ? (2) Did the appellant, at the time of the commission of the alleged offence, have reasonable cause to believe that the girl was of, or above the age of sixteen years ? (3) Did the appellant, at the time of the commission of the alleged offence, in fact believe that she was of or above the age of sixteen years ?

The jury agreed to answer the first question in the affirmative but disagreed upon the answers to the second and third questions. Upon this answer and disagreement his Honour formed the opinion that an offence had been proved to have been committed under sec. 71 of the *Crimes Act* (as amended) and that the appellant had failed to prove his defence under the proviso to sec. 2 of the *Crimes (Girls' Protection) Act*. He therefore directed the jury to find the appellant guilty, which the jury did, as the foreman expressly stated, at his Honour's direction. Subsequently his Honour sentenced the appellant to seven years' imprisonment with hard labour and he is now in gaol serving his sentence.

(1) (1938) 3 All E.R. 134.

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In my opinion the appellant was wrongly convicted. It was for the jury to say whether the accused at the time had reasonable cause to believe and did in fact believe the girl was of or above the age of sixteen years. The onus lay on the appellant to establish these facts, but the failure of the jury to agree whether he had done so or not does not mean that the appellant failed on this issue. Otherwise, whenever the jury disagreed, the party on whom the onus lay would lose the case. This would generally be the plaintiff in a civil case or the Crown in a criminal case. Where the jury disagree on an issue of fact which must be determined in order to dispose of the proceedings, the trial fails because the tribunal of fact has been unable to fulfil its function. But, whenever a new trial can be granted, a fresh jury can be empanelled to try the facts again.

Mr. *Badham*, who appeared for the Crown, attempted to support the verdict on the ground that sec. 2 of the *Crimes (Girls' Protection) Act* 1910 would be complied with if the court or jury before whom the charge is brought is satisfied that the defence has been established or failed. But the reference to the court or jury can only be intended to cover the possible case of a trial taking place before a judge sitting without a jury as well as that of a trial by a judge sitting with a jury. In the latter case the issue must be left to the jury as the tribunal of fact (*R.* v. *Forde* (1)). Otherwise the judge might come to the one and the jury to the other conclusion, which would create an impossible position.

This appeal was brought under the provisions of sec. 52 of the *Seat of Government Supreme Court Act* 1933-1935. On such an appeal this Court has, in my opinion, power to order a new trial under sec. 36 of the *Judiciary Act* 1903-1940.

The appeal should be allowed.

1. *Appeal allowed.* 2. *Verdict set aside and conviction quashed.* 3. *Direct new trial of the prisoner before the Supreme Court of the Australian Capital Territory on the information already filed in that Court at such time and place as it appoints.* 4. *Remand prisoner to his present custody with liberty for him to apply to the said Supreme Court or the Judge thereof for bail pending his retrial.*

Solicitor for the appellant, *John L. Maguire*, Queanbeyan, by *Maddocks, Cohen & Maguire.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1923) 2 K.B. 400.