[HIGH COURT OF AUSTRALIA.]

KEMP . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES.

H. C. OF A. 1951.

SYDNEY, *July* 17.

Dixon, Williams and Webb JJ.

Criminal Law—Indecent assault—Evidence of similar acts—Acts in respect of which accused had been acquitted—Admissibility.

An accused charged with indecent assault upon a boy aged thirteen years on three counts in respect of separate occasions, was acquitted on the first and second counts and was convicted on the third count. The conviction was set aside and a new trial ordered. Upon that trial, in proof of similar acts by the accused, evidence was admitted of the occasions in respect of which he had been acquitted. The accused was convicted. Upon appeal,

Held that the evidence was not admissible, therefore the conviction must be quashed.

Sambasivam v. *Public Prosecutor, Federation of Malaya*, (1950) A.C. 458, at p. 479, applied.

Decision of the Court of Criminal Appeal of New South Wales: *R.* v. *Kemp*, (1949) 50 S.R. (N.S.W.) 1; 66 W.N. 234, reversed.

APPEAL from the Court of Criminal Appeal of New South Wales.

Oliver James Alfred Kemp was indicted upon three counts for indecent assault upon a male person, a boy aged thirteen years, each count being in respect of a different occasion. The accused was acquitted on the first and second counts and was convicted on the third count. That conviction was quashed on appeal and a new trial was ordered in respect of the third count. Upon the second trial the prosecutor tendered evidence of similar acts by the accused, consisting of offences against the boy and including the

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occasions in respect of which the accused had been acquitted. Although objected to, the evidence was admitted and the accused was convicted.

An appeal to the Court of Criminal Appeal of New South Wales (*Street* A.C.J., *Maxwell* and *Dwyer* JJ.) was dismissed (*R.* v. *Kemp* (1)).

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

F. C. Hidden, for the appellant.

Rod. R. Kidston, for the respondent.

The following judgment of the Court was delivered by:—

DIXON J. This is an appeal by special leave from an order of the Court of Criminal Appeal dismissing the prisoner's appeal from his conviction.

The prisoner was indicted upon three counts for indecent assault upon the same boy. The first count laid the offence on 12th July 1948; the second on 15th July 1948; and the third on 22nd July 1948. On his first trial the prisoner was acquitted on the first and second count and convicted on the third count. A new trial was ordered on the third count. On that second trial evidence was tendered of similar acts consisting of offences by the prisoner on the boy prior to 22nd July. At one stage the boy said there were only two such offences. Clearly if that was so they must have been the subject of the two counts on which the prisoner was acquitted. It is however suggested that they were in fact other occasions. The decision of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya* (2) is decisive to show that the prisoner must be taken to have been innocent of the charges covered by the two first counts of the indictment for such a purpose as that for which the evidence was tendered. As to the effect of issue estoppel based upon acquittal see also *R.* v. *Wilkes* (3).

The boy may have been uncertain as to dates and confused. But it seems to us to be clear upon the evidence that the occasions covered by the indictment were at least included in the evidence of similar acts which was tendered and received. Evidence of these occasions was, in our opinion, inadmissible. The evidence was admitted after objection. Moreover, no direction was given

(1) (1949) 50 S.R. (N.S.W.) 1; 66 W.N. 234.
(2) (1950) A.C. 458, at p. 479.
(3) (1948) 77 C.L.R. 511, at pp. 518, 519.

to the jury enabling them to understand that they should discard any evidence covering the same matters as were the subject of the two first counts. The conviction, therefore, in our opinion, cannot be supported.

We would, in these circumstances, order a new trial, were it not that the prisoner has been serving his sentence under the conviction, and that sentence commenced on 26th July 1949, nearly two years ago. As it is we think that it is enough to allow the appeal and quash the conviction.

Appeal allowed. Conviction quashed.

Solicitor for the appellant, *R. W. Hawkins*, Public Solicitor (N.S.W.).

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.