doubt, but in cases such as these, the true view is what we have just said." This perhaps means that in cases of serious crime, the fact that it is punishable by law is enough to show the prisoner that it is something which he ought not to do, although the final test is that it is wrong according to the standard adopted by reasonable men. The truth perhaps is that, from a practical point of view, it cannot often matter a great deal whether the capacity of the accused person is measured by his ability to understand the difference between right or wrong according to reasonable standards, or to understand what is punishable by law, because in serious things the two ideas are not easily separable. But in certain cases, where the insane motives of the accused arise from complete incapacity to reason as to what is right or wrong (his insane judgment even treating the act as one of inexorable obligation or inescapable necessity) he may yet have at the back of his mind an awareness that the act he proposes to do is punishable by law.

In the present case we would have indeed hesitated to order a new trial for the reason alone that the learned judge directed the jury that the test of insanity was whether the accused knew that firing a shot at another person was against the law. But as the question of the correctness of the decision in *R.* v. *Windle* (1) was raised by the summing up we have thought it better to deal with it.

That decision was not given as a considered judgment and, besides M'Naghten's case no authority was cited except *R.* v. *Rivett* (2). We think that the decision should not be followed.

While as we have said it is not probable that because of this direction alone we would have ordered a new trial, it is desirable to say that if a jury were to lay hold of this point that the accused must be incapable of understanding that he was acting contrary to law as distinguished from appreciating that his act was wrong according to the ordinary standards adopted by reasonable men, the distinction would tell against the appellant.

It is proper to deal with some further grounds relied upon in support of the appeal. It was said that the learned judge should have excluded the evidence given by Sergeant Mannion of what the appellant said in answer to his question when the appellant was brought to the police station after his arrest. As has already been said, although the accused was under arrest on a charge of murder, no warning was given before the questions were put. The answers were not, however, inadmissible at common law as involuntary. True it is that Sergeant Mannion was a person in authority within the meaning of that rule. But there was no pressure or insistence, no fear of prejudice raised or hope of advantage held out, no induce-

(1) (1952) 2 Q.B. 826.

(2) (1950) 34 Cr. App. R. 87.

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ment raising a presumption against the voluntariness of the prisoner's statements. Counsel for the appellant did not contend to the contrary. What he maintained was that in the exercise of the judge's discretion he ought to have excluded the evidence. cf. *McDermott* v. *The King* (1); *R.* v. *Lee* (2). We think that in the circumstances of the case it was within the discretion of the Judge at the trial to admit the evidence and that it is no ground for a new trial that he did so. We do not think, however, that the evidence was of any importance as part of the proofs of the affirmative case for the prosecution, because there was no contest as to the shooting or as to the identification of the prisoner and there was no point in adding it to the ample proofs given of these matters. Up to the last sentence it bore rather in the appellant's favour as to intent and the defence of insanity. The last sentence no doubt was used by the prosecution on the defence of insanity but, whatever it meant, no one who really understood the considerations upon which the issue depended could find in it any assistance in forming a conclusion as to the condition of the appellant's mind some thirteen hours earlier when he fired the fatal shot or as to what insane influences prompted him. To canvass it or stress it before the jury would do anything but help the jury to a true understanding of the problem. Justice would not therefore suffer if it were not tendered for the prosecution or if it were thought wiser to exclude it.

There is a further question, one relating to the jury panel and to the qualification of some of the jurors. The *Jury Ordinance* 1912-1938 (N.T.), s. 4 (1), continues the application to the Northern Territory of *The Jury Act* 1862 (S.A.), subject to the provisions of the ordinance and the laws of the Territory. References to courts officers localities jurisdictions and other matters and things are to be construed as references to courts officers localities jurisdictions and other matters and things in and of the Territory: s. 4 (2). Section 27 of *The Jury Act* 1862 requires the sheriff to cause a copy of every panel of jurors to be kept in his office for seven days at least before the sitting of the court to attend which the jurors are summoned. It provides that the parties in all cases civil and criminal to be tried at such sitting and their respective attorneys shall have full liberty to inspect such list and that in criminal cases a copy of the panel shall be suspended in a conspicuous part of the common gaol nearest the place of sittings for seven days before the date of the sittings. Section 30 enables a prisoner to object to six names on the panel whereupon those names are not to be put in the box. Section 31 provides that for the purpose of enabling parties to make their objections in manner aforesaid, the sheriff

(1) (1948) 76 C.L.R. 501. (2) (1950) 82 C.L.R. 133.

shall, upon demand, of every person, including the prisoner, or his attorney or agent, give him a copy of the panel of jurors on payment of not more than a shilling.

It appears that the foregoing provisions were not followed and the prisoner's legal advisers could not obtain a copy of the panel until a short time before the trial.

No objection on this score was taken at the trial nor was an adjournment sought. We do not think that these irregularities regrettable though they were would in themselves have afforded a ground for setting aside the verdict. But it was suggested at the close of the argument that two of the jurors were not qualified. If this were so the irregularities in question might have more significance and make it more difficult for the Crown to rely on the appellant's failure to challenge the jurors: cf. *R.* v. *Sutton* (1); *R.* v. *Kelly* (2).

To be qualified as a juror in the Northern Territory a man must, among other things, be a natural born or naturalized British subject: s. 5 of the *Jury Ordinance* substituted by Ordinance No. 3 of 1919. It appeared that two of the jurors had been born in Ireland and had not given notice under s. 8 of the *Nationality and Citizenship Act* 1948-1950. It was conceded that, therefore, they were not qualified as British subjects, but the question was raised suddenly and sufficient consideration could hardly be given to the matter before the concession was made. In view of s. 9 (2) and perhaps of s. 24 and s. 25 of the last mentioned Act, the correctness of the view conceded is open to doubt. The question was not argued before us and we think it better to refrain from entering upon a consideration of a ground depending upon it which will not affect the new trial we have ordered for the reasons we have already stated. We shall therefore say no more about it.

Leave to appeal granted and order that the motion be treated as an appeal and heard instanter. Appeal allowed. Order that the verdict and sentence be set aside and that there be a new trial upon the information for murder.

Solicitors for the applicant-appellant, *Butler, McIntyre & Butler*, Hobart, by *Finlayson, Phillips, Astley & Hayward*, Adelaide, and *Blake & Riggall*, Melbourne.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

B. H.

(1) (1828) 8 B. & C. 417, at p. 419 [108 E.R. 1097, at p. 1098].

(2) (1950) 2 K.B. 164, at p. 174.

[HIGH COURT OF AUSTRALIA.]

GALE . . . . . APPELLANT;
PLAINTIFF,

AND

GALE AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 22, 23.

MELBOURNE, *Nov.* 3.

Dixon C.J., Webb and Kitto JJ.

Matrimonial Causes—Dissolution of Marriage—Adultery—Connivance—Acquiescence in continuance of adulterous relationship—Condonation—Matrimonial Causes Act 1929-1941 (*S.A.*) (*No.* 1946 *of* 1929—*No.* 50 *of* 1941), *s.* 11 (*a*).

The parties were married in 1940. In 1941, the wife began an adulterous relationship with the co-defendant, which continued until 1950. From March 1947, the husband was aware of the relationship, but he acquiesced in its continuance. He continued to live with his wife and to share the same bed with her until April 1949. They parted shortly afterwards, and in August 1949, the husband instituted a suit for dissolution of the marriage on the ground of adultery.

Held: (1) That the husband had connived at the adultery from March 1947 (including the adultery committed after he and his wife had parted). *Douglas* v. *Douglas* (1951) P. 85 and *Haevecker* v. *Haevecker* (1936) 57 C.L.R. 639, explained.

(2) That, by his continuance of cohabitation and connivance at the continuance of his wife's adultery, he had condoned the adultery committed prior to March 1947.

The question whether condonation can be absolute and final discussed.

Decision of the Supreme Court of South Australia (*Ligertwood* J.) affirmed.

APPEAL from the Supreme Court of South Australia.

On 29th August 1949 Ralph Bernard Gale commenced an action in the Supreme Court of South Australia, in which he claimed an order for divorce from his wife, Ada Georgina Gale, on the ground

that she had committed adultery with Lloyd Osmond (1) during September or October 1947, at Portland, Victoria, (2) on divers occasions during February and March 1949, at Melbourne and Horsham, Victoria, (3) on occasions in 1941 at Millicent, South Australia, and other places, and (4) in or about April 1950, at places unknown. The wife admitted the adultery alleged against her, with the exception of the occasion of 9th April 1949, but alleged against her husband connivance, conduct inducing or contributing to her adultery, condonation and unreasonable delay. She also counterclaimed an order for divorce on the ground of adultery alleged to have been committed by her husband.

The parties were married on 17th June 1940. In 1941 they became friendly with Lloyd Osmond, who visited their home and for a time boarded with them. During 1941 an adulterous relationship began between the wife and Osmond, and thereafter habitual adultery between them continued until about April or May 1950. After a period of increasing suspicion, the husband, in March 1947, became aware that his wife was committing adultery with Osmond. He took no steps to stop it but acquiesced in its continuance. Until April 1949 he and his wife continued to live as husband and wife and to occupy the same bed. In May 1949, they parted. The wife and Osmond continued their adulterous relationship until about April or May 1950.

The trial judge (*Ligertwood* J.) found that the husband either had connived at all the acts of adultery proved or, alternatively, had connived at the acts of adultery down to 9th April 1949, and was guilty of conduct inducing or contributing to the acts of adultery subsequent to that date. He, accordingly, dismissed the husband's claim for divorce. He found that the wife's charge of adultery against the husband had not been established and, accordingly, dismissed her counterclaim also.

The husband appealed to the Full Court of the Supreme Court of South Australia, which allowed the appeal and set aside the findings of connivance or, alternatively, of connivance as to one period and conduct inducing or contributing to the adultery as to the other period. The action was remitted to *Ligertwood* J. to consider and determine whether the husband had been guilty of unreasonable delay and, if so, whether an order for divorce should be refused.

After a further hearing *Ligertwood* J. made an order which, after reciting that the court was satisfied that the wife had habitually committed adultery with the co-defendant at divers places from some time in the year 1941 until about April or May 1950, but that

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the husband had been guilty of unreasonable delay, dismissed the husband's claim.

From that order the husband appealed to the High Court.

H. G. Alderman Q.C. (with him *E. F. Skewes*), for the appellant.

L. J. Elliott, for the respondent Gale.

The respondent Osmond was not represented.

Cur. adv. vult.

Nov. 3.

THE COURT delivered the following written judgment :—

This appeal arises out of a husband's suit for dissolution of marriage on the ground of his wife's adultery. The suit was defended. Adultery was admitted, except as to one specific occasion alleged, but both the wife and the co-defendant set up connivance, conduct inducing or contributing to the adultery and condonation (ss. 11 and 12 of the *Matrimonial Causes Act* 1929-1941 (S.A.)). The wife on her part alleged adultery against the husband and by counterclaim sought a dissolution of marriage, but *Ligertwood* J. who heard the suit found that the adultery she alleged was not committed by her husband. On the other hand *Ligertwood* J. found in her favour on the plea of connivance and as an alternative found that in respect of part of the period during which the wife had committed adultery there had been connivance and, for the rest, conduct inducing, or contributing to, the adultery. Accordingly his Honour dismissed the suit. From that decision the husband appealed to the Full Court of the Supreme Court of South Australia. The appeal was allowed and the findings of connivance, or, alternatively, of connivance as to one period and conduct inducing or contributing to the adultery as to the other, were set aside. The cause was remitted to *Ligertwood* J. to consider and determine whether the husband had been guilty of unreasonable delay, and if so whether relief by way of divorce would be refused. After a further hearing *Ligertwood* J. made an order which, after reciting that he was satisfied that the wife had habitually committed adultery with the co-defendant at divers places from some time in the year 1941 until about April or May 1950, but that the husband had been guilty of unreasonable delay, dismissed the husband's claim for relief. From that order the present appeal is now brought.

For the purpose of our decision very little need be said about the facts of the case, which are dealt with in detail in the reasons and

further reasons for judgment given by *Ligertwood* J. It is enough to state a few particulars concerning the parties and the conclusions of fact upon which the appeal turns.

The husband was born in South Australia on 19th December 1916 according to his evidence, but according to the certificate of marriage in or about the year 1914, and the wife was born in Victoria and is about a year younger. When she was eighteen years of age she had a female child by a man with whom she had associated. When she was twenty-one years of age she and the appellant, who had come to Victoria, began to live with one another as man and wife, but for some reason deferred the ceremony of marriage until they had had two children. Then, on 17th June 1940, at Geelong they were married. Six months later they returned to South Australia and set up a house at Millicent. In March 1947 they moved to Naracoorte. They had two more children, a girl born on 8th December 1941 and a boy born on 19th May 1947. At Millicent the appellant became friends with the co-defendant Osmond, a saw miller by whom he was employed as a bench hand. Osmond visited his house and during part of 1942 and the greater part of 1943 boarded with him and his wife. Osmond, who was a divorced man, then remarried. He set up an establishment at Millicent but afterwards removed to Tarpeena. It is admitted that from some time in 1941 Osmond and the appellant's wife carried on an adulterous relation which continued until about April or May 1950. During those years they were guilty of habitual adultery. The appellant began the suit for dissolution of marriage on 29th August 1949. Up to a date shortly after 9th April 1949 the appellant and his wife lived together as man and wife and shared the same bed. A few days after 9th April 1949 he was informed by a friend that the latter had on that night caught the appellant's wife and Osmond committing adultery. *Ligertwood* J. believed that by this time the appellant had made up his mind to get rid of his wife. At all events he had consulted a solicitor on the question in February 1949. He taxed her with having committed adultery on 9th April. She denied it. He threatened a divorce. It is unnecessary for present purposes to go into the circumstances in which they parted or the subsequent occurrences. It is enough to say that we do not think that they add anything very material to the case against the appellant upon conduct inducing or contributing to the continuance of the adultery or to the case of connivance thereat and they do not appear to us to have any bearing upon the question of unreasonable delay.

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The question of connivance depended upon the appellant's state of knowledge concerning his wife's relations with Osmond between 1941 and April 1949 and the course he took with reference to those relations.

An examination of the evidence has satisfied us that the findings made by *Ligertwood* J. on these matters go no further than, and perhaps not as far as, the evidence warrants. In effect his Honour found that, although at the beginning in 1941 and for sometime afterwards, the appellant had no knowledge or suspicion that a guilty relationship between his wife and Osmond was contemplated or had been established, nevertheless by the end of 1946 or the beginning of 1947 he had come to suspect that they were committing adultery, but for various reasons he preferred not to put his suspicions to the test. From March 1947 onward, however, knowledge took the place of suspicion. He acquiesced. His Honour states what his motives were, but whatever they may have been, we agree in the conclusion that he knowingly assented to and acquiesced in the continuance of the adulterous relation between his wife and Osmond.

As we understand the reasons of *Napier* C.J. and *Reed* J. in the Full Court, they considered that this conclusion went too far in attributing actual knowledge to the appellant. But their Honours say that the finding in respect of this period that the appellant wilfully acquiesced in the continuance of his wife's adultery may be discussed on the footing that it involves a finding that he acted during that period with a corrupt intention, that is to say, the intention of encouraging the continuance of the adultery. Their Honours then say " There appears to be ample evidence to support such a finding ". We agree in this latter view, and needless to say regard it as involving connivance at the continuance of the adultery. This means that there is an absolute bar to the appellant's reliance on acts of adultery covered by his connivance. Neither *Douglas* v. *Douglas* (1) nor *Haevecker* v. *Haevecker* (2) mean that, if you do get a corrupt intention on the part of a husband that an adulterous relation already established by a wife shall continue, it does not amount to connivance at the continuance of the adultery. These decisions are both to the same effect in saying that once a husband knows or believes that his wife has formed an adulterous connection, the fact that he allows or affords opportunities for a further act or acts of adultery in order to obtain proof does not mean that he has a corrupt intention and connives.

(1) (1951) P. 85. (2) (1936) 57 C.L.R. 639.

"In applying the tests of connivance to facts, it is necessary to remember that while every act of adultery is a matrimonial offence, the important question is whether the establishment of a guilty relationship was connived at. When an adulterous relation has been established the injured spouse is placed in an entirely different position. In point of time connivance precedes or coincides with the commission of an offence. When the adulterous connection is formed the offence is complete and the other spouse is not expected to take measures to prevent its continuance": per *Dixon and Evatt* JJ., *Haevecker* v. *Haevecker* (1). It is true that in *Douglas* v. *Douglas* (2) *Denning* L.J., after quoting the often cited passage from Lord *Chelmsford's* speech in *Gipps* v. *Gipps* (3) and saying that the material event is the inception of the adultery and not its repetition, says:—"It follows that the consent of the husband which is to bar his claim must be a consent to the adultery before it starts". But his Lordship proceeds: "When this is realized it becomes plain that, once a husband suspects that an adulterous intrigue has already started, he is not guilty of connivance simply because he watches for proof of it. He is not then consenting to the inception of adultery, but only seeking for proof of its repetition. In order to obtain the proof, he may even acquiesce in its continuance, but that is not connivance. In every case where a husband or his agents keeps watch on his wife, to see if she is keeping an illicit assignment, he can be said to acquiesce in her adultery, because he has only to warn her beforehand that she will be watched and she will of course abstain from keeping the appointment. But such acquiescence has never been held to be connivance. The reason is because, in connivance, it is essential that there should be a corrupt intention on his part". In such circumstances there is no corrupt intention to encourage or promote the continuance of the adultery. It must be rare to find circumstances in which, an adulterous connection having been formed by a wife, its continuance is the subject of a corrupt intention on the part of a husband amounting to connivance. But it is to be noticed that in *Woodbury* v. *Woodbury* (4) *Bucknill* L.J. said: "In the present case, once the adulterous intercourse had started without any fault on the part of the wife, her position, when she did discover it, was very difficult. If she, with a corrupt intention, then behaved in such a way as to promote or encourage the continuance of the adultery, to quote the words used by Lord *Merriman* P. in

(1) (1936) 57 C.L.R., at pp. 653, 654.
(2) (1951) P., at p. 97.
(3) (1864) 11 H.L.C. 1, at p. 28 [11 E.R. 1230, at p. 1241].
(4) (1949) P. 154, at p. 159.