[HIGH COURT OF AUSTRALIA.]

COATES . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA.

H. C. OF A. 1957.

MELBOURNE, *Feb.* 21, 22;

SYDNEY, *Mar.* 4.

Dixon C.J., McTiernan and Taylor JJ.

Criminal Law—Evidence—Admissibility—Provision for reception in evidence at trial of deposition taken in committal proceedings if proved that witness out of State at time of trial—Police inquiries as to whereabouts of witness—Reception in evidence of telegram from police outside State as to whereabouts and intention of witness not to appear—Some oral testimony of prior movements of witness—Whether basis for reception of deposition properly laid—Evidence Act 1906-1948 (*No.* 28 *of* 1906—*No.* 73 *of* 1948) (*W.A.*), *s.* 107.

Section 107 of the *Evidence Act* 1906-1948 (W.A.) provides that a deposition taken in any proceeding under Pt. V of the *Justices Act* 1902 (W.A.) which covers proceedings for committal, may be produced and given in evidence at the trial of the person against whom it is taken if, *inter alia*, it is proved that the witness is out of Western Australia. At a trial a detective sergeant gave evidence that a witness on the committal proceedings had sailed from Fremantle on 31st August 1956 on the inter-State liner M.V. *Duntroon*. At the date of the trial the ship was again at Fremantle. But the sergeant said that he had made inquiries through official channels and that he had received from the police in Melbourne a telegram which he produced to the effect that the witness had been interviewed in Melbourne on the first day of the trial and had said that she would not appear in Perth but was going to another State. The witness's deposition was thereupon admitted and read in evidence. The accused was convicted.

Held, that the telegram was not admissible in evidence, but whether there was sufficient other evidence to justify an inference that the witness was absent from the State was not a matter as to which special leave to appeal should be granted.

Special leave to appeal from the decision of the Court of Criminal Appeal of Western Australia, refused.

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APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA.

By indictment dated 2nd October 1956 George Alfred Coates was charged with that on 28th August 1956 at Fremantle he with intent to do grievous bodily harm to Karl Kristian Lauridsen unlawfully did grievous bodily harm to the said Lauridsen.

On 26th October 1956 at his trial before *Wolff* J. and a jury the accused was found guilty and sentenced to be imprisoned with hard labour for a term of five years.

The accused appealed against his conviction to the Court of Criminal Appeal constituted by *Dwyer* C.J., *Jackson* and *Virtue* JJ. which, on 7th December 1956, ordered that the appeal be dismissed.

From this decision the accused applied to the High Court for special leave to appeal.

The facts appear in the judgment hereunder.

J. M. Cullity, for the applicant.

A. J. Dodd, for the respondent.

Cur. adv. vult.

Mar. 4.

THE COURT delivered the following written judgment :—

Upon consideration we have reached the conclusion that this is not a case for special leave to appeal.

The applicant was convicted under s. 294 of *The Criminal Code* (W.A.) upon an indictment charging that with intent to do grievous bodily harm to one Lauridsen he unlawfully did grievous bodily harm to him. An inspection of the section will be enough to show that, notwithstanding the somewhat peculiar description of the crime, the indictment states the elements which constitute it. Under the indictment the applicant might have been convicted, had the jury so chosen, of doing grievous bodily harm *simpliciter* : see ss. 297 and 594.

He was sentenced to five years imprisonment.

The date of the commission of the crime was 28th August 1956 and the place Fremantle. The S.S. *Bungaree*, upon which the applicant was a seaman, had arrived at Fremantle on the morning of that day. The M.V. *Duntroon*, an inter-State liner on which the applicant had formerly served, was in port. Ashore that evening in an hotel the applicant saw a stewardess of *Duntroon* named Puzey whom he knew as a result of having served in that ship. Lauridsen, another seaman, said that he was drinking with Puzey and one or two other stewardesses in the hotel and that

about 9 p.m. he drove them back in a taxi to *Duntroon*. According to the evidence for the prosecution they and others went to Puzey's cabin, where more beer was drunk. The applicant then came aboard carrying a number of bottles of beer some of which he passed through the scuttle. He then came to the door of the cabin. There are different accounts of what next happened, but it may be taken for present purposes that the applicant smacked Puzey across the face, that she went away to the " glory hole " or to another cabin, that in her cabin a fight ensued, chiefly between the applicant and Lauridsen, in the course of which the applicant was struck heavily about the face and head and sustained a wound at the back of the head behind the right ear and that the applicant departed bleeding. The applicant said that he was hit with a bottle. The cabin was in great disorder and there was much broken glass. This was cleaned up but after a time, variously estimated, the applicant returned armed with the nozzle of a hose and perhaps a bottle. With one of these weapons he struck Lauridsen some blows upon the head. When one of the stewardesses attempted to shield Lauridsen she too was similarly struck. Lauridsen sustained a compound fracture of the skull and contusions of the left side of the neck and a fracture of the index finger of the right hand. In the evidence called by the prosecution and the defence details of the fracas were given somewhat elaborately and by no means without contradictions. But for the purposes of the question before us the details are not of importance.

The applicant's defence at the trial was that he was not drunk or much effected by liquor but that he received from Lauridsen and one of the stewardesses in the earlier encounter violent blows to the head which resulted in concussion and an inability to know what he was doing or to control his actions. He said that he had no memory of the sequence of events after he was hit with a bottle and he had no recollection of getting the nozzle of the hose. His defence is stated to have been " that the acts were done at a time that the applicant was acting independently of his will and that there existed a state of post traumatic automatism ".

There is no full report of the judge's charge to the jury but we have been furnished with a note from which it is to be gathered that the defence was presented to the jury as one which, if accepted in full, entitled the applicant to an acquittal. If, however, the jury considered that he was so drunk as not to know what he was doing they might convict him of doing grievous bodily harm *simpliciter*, that is to say without the intent alleged in the indictment.

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The appeal to the Supreme Court as the Court of Criminal Appeal was based on an objection to the admissibility of a deposition that was received in evidence at the trial. The deposition was that of the stewardess Puzey, who, although bound over by the magistrates to attend the trial, did not do so. Her deposition was that taken by the magistrates when the applicant was committed for trial. Section 107 of the *Evidence Act* 1906-1948 (W.A.) provides that a deposition taken in any proceeding under Pt. V of the *Justices Act* 1902, which covers proceedings for committal, may be produced and given in evidence at the trial of the person against whom it was taken if, among other things, it is proved that the witness is out of Western Australia and if the deposition purports to be signed by the justice of the peace by or before whom it purports to have been taken, unless it is proved not in fact to have been so signed. To lay a foundation for the admission of the deposition under this provision a witness was called who said that Puzey had sailed from Fremantle on *Duntroon* on 31st August. The trial began on 24th October 1956 and apparently the ship was then again at Fremantle. But the witness, a detective sergeant, said that through official channels he had made inquiries and that he had received from the police in Melbourne a telegram which he produced. The effect of the telegram was that on 24th October Puzey had been interviewed in the suburb of Essendon and had said that she would not appear in Perth but was going to another State. On this the deposition was admitted and read in evidence. In the Court of Criminal Appeal *Dwyer* C.J. appears to have regarded the telegram as probably inadmissible as evidence of Puzey's absence from Western Australia but he considered that the evidence otherwise sufficed reasonably to satisfy the judge. *Jackson* J. and *Virtue* J. concurred in the reasons of the Chief Justice. When the contents of the deposition are considered and compared with the oral evidence given at the trial it is difficult to see what value the deposition could have for the prosecution as an addition to the testimony of the witnesses. For according to Puzey she left the cabin when the applicant smacked her face and after that time she speaks of nothing throwing light on what occurred. She says she heard sounds of breaking bottles or glass, women screaming and of a battle going on and that after perhaps twenty minutes the ship's watchman called her and she found Lauridsen lying unconscious on the floor of her cabin. Had the Court of Criminal Appeal ruled that the deposition was inadmissible it would have been clearly open to that court, but for one thing, to treat its erroneous reception in evidence as involving no substantial miscarriage of justice and

accordingly to dismiss the appeal under the proviso to s. 689 (1) of the *Criminal Code*. The thing which might make that a doubtful course is that the applicant, when he gave evidence on his own behalf at the trial, was cross-examined by reference to the deposition for the purpose of compelling him to admit that Puzey, although a friend of old, had given evidence which was in conflict with his then present testimony and must, according to him, be false or erroneous.

The case has caused us some hesitation but we do not think that it is of a nature justifying the interference of this Court in the exercise of its jurisdiction to give special leave to appeal.

The objection to the admission of the deposition rested on nothing but the failure on the part of the prosecution to adduce sufficient formal proof of the fact of Puzey's absence from the State. The question whether, apart from the clearly inadmissible telegram, the proof that was offered of Puzey's absence did or did not suffice is one of degree and involves no real question of law. It is difficult in the extreme to suppose that the use of the deposition really accounts for the verdict, which was based on abundant evidence, and the answer made by the applicant to that evidence hardly accorded with probability.

What made us hesitate in reaching the conclusion that this Court should not intervene in the exercise of its power to give special leave to appeal is the existence in our minds of more than doubt whether the evidence did lay a sufficient foundation for the admissibility of the deposition and the consciousness that, having regard to the heavy sentence imposed on the applicant, the case is a serious one.

It seems clear enough that the telegram was not admissible in evidence and without it it is by no means clear that there was sufficient evidence to warrant a judicial conclusion that Puzey was out of Western Australia at the time of the trial. The question whether the conditions which s. 107 specifies are fulfilled is of course, for the judge. It concerns the admissibility of evidence and that he must decide. But so far as it involves matter of fact, that must be proved to his satisfaction by direct evidence and not by evidence of information and belief.

There is some authority which may support the reception of evidence by affidavit: see *Reg.* v. *Stewart* (1), where *Lindley* J. received proof by affidavit that a ship aboard which were the witnesses was at sea; he received it certainly for the purposes of the grand jury and probably also on the trial of the indictment. Doubtless the prisoner would be entitled to cross-examine the depo-

(1) (1876) 13 Cox C.C. 296.

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nent, even if an affidavit may be used, and in any case the better practice must be for the proof to be given by oral evidence before the judge as on a *voir dire*. Circumstantial evidence may, of course, enable the judge to reach a reasonably satisfactory inference that a witness is out of the State. The decided cases show that if one of the circumstances is the failure of a ship to call at a port within the State, that may be proved from the absence of records of her arrival which otherwise would necessarily be made: *Reg.* v. *James Conning* (1); *Reg.* v. *James Anderson* (2). Questions of that sort, however, do not arise here. It is simply a question whether, the telegram being rejected, enough remains to justify a positive judicial inference concerning, not a matter going to the merits, but the absence from the State of a witness who certainly did not appear at the trial although bound over and who had left the State two months earlier. Supposing the evidence to be insufficient to exclude judicially the hypothesis that she might have returned to some part of the State, nevertheless that is not the kind of question upon which this Court should give special leave to appeal.

The application should therefore be dismissed.

Application refused.

Solicitors for the applicant, *Gibson & Gibson*, Perth.

Solicitor for the respondent, *R. V. Nevile*, Crown Solicitor for the State of Western Australia.

R. D. B.

(1) (1868) 11 Cox C.C. 134.

(2) (1868) 11 Cox C.C. 154.