[HIGH COURT OF AUSTRALIA.]

RASPOR . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

H. C. OF A. 1958.

MELBOURNE, *May* 26, 27;

BRISBANE. *June* 26.

Dixon C.J., Fullagar and Taylor JJ.

Criminal Law—Appeal—Court of Criminal Appeal of Victoria—Power to interfere with verdict—Whether only exercisable where finding unreasonable or whether exercisable where no reasonable evidence on which jury could reasonably find issue in favour of party bearing onus of proof—Distinction between verdict contrary to evidence and verdict against weight of evidence—Question of fact—Whether power of High Court to grant special leave to appeal should be exercised—Crimes Act 1957 (*No.* 6103) (*Vict.*), *ss.* 563, 564.

Section 564 of the *Crimes Act* 1957 (No. 6103) (*Vict.*), as amended, provides *inter alia* that on any appeal against conviction the Full Court " shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence ".

Held, that it is not the law that upon an issue which the Crown must establish beyond reasonable doubt a verdict against the prisoner must be sustained by a court of criminal appeal unless upon the evidence the finding is unreasonable in a case where there has been no misdirection erroneous reception or rejection of evidence and no other objection exists as to the course of the trial. The powers of the Court of Criminal Appeal of Victoria are not so restricted. It is within the powers of that court to set aside a conviction on the ground that it is against the weight of evidence.

Powers of the Court of Criminal Appeal of Victoria discussed.

Reg. v. *McGibbony* (1956) V.L.R. 424 considered.

On the trial of a man for assaulting a woman with intent to have carnal knowledge the evidence was that the alleged assault took place on a moonlight night with scudding clouds obscuring the moon from time to time. The victim did not know her assailant but she observed that he had a leather motor-cycle cap, a leather three-quarter coat, a moustache and that he spoke with a foreign accent. After committing the assault the man rode off on a motor cycle. Three weeks later the woman saw a man riding a motor cycle

whom she thought was her assailant. She took the number of the cycle and communicated with the police. Subsequently she identified as her assailant the motor cyclist at an identification parade. At the trial the chairman of general sessions advised the jury to acquit the accused because it was unsafe to convict upon the evidence as to identification. The jury, however convicted the accused. An appeal by him to the Court of Criminal Appeal of Victoria having been dismissed, he sought special leave to appeal to the High Court.

Held, that, in the circumstances, special leave should be refused.

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.

The applicant Rudi Raspor was charged that at Sydenham, Victoria on 15th April 1957 he assaulted Jean Stone with intent to have carnal knowledge of her without her consent.

On 26th February 1958 at his trial before the Court of General Sessions at Melbourne, constituted by Judge *Read* and a jury, the accused was found guilty and was subsequently sentenced to a term of imprisonment for four years, with a minimum of two years before being eligible for parole. The accused sought leave to appeal against his conviction to the Court of Criminal Appeal of Victoria, constituted by *Lowe*, *Gavan Duffy* and *O'Bryan* JJ., which, on 2nd May 1958, ordered that the application be dismissed.

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

The facts appear in the judgment hereunder.

A. H. Croxford, for the applicant.

Sir *Henry Winneke* Q.C., Solicitor-General for the State of Victoria, and *F. R. Moore*, for the respondent.

Cur. adv. vult.

June 26.

THE COURT delivered the following written judgment :—

This application for special leave to appeal from the decision of the Supreme Court of Victoria sitting as a court of criminal appeal has occasioned us some difficulty. On the surface the application appeared to be one of a kind which could not succeed consistently with the principles upon which the Court acts in exercising its jurisdiction to grant special leave in the case of indictable offences. Nothing but a question of fact seemed to be involved and the

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judgment of the Court of Criminal Appeal (*Lowe, Gavan Duffy* and *O'Bryan* JJ.) was based upon a consideration of the circumstances of the case and, almost in the very words of s. 564 (1) of the *Crimes Act* 1957 (No. 6103), expressed the conclusion that it did not appear that the verdict of the jury was unreasonable or could not be supported having regard to the evidence or that there was a miscarriage of justice. Prima facie, therefore, there was no reason for this Court's exercising the discretion which it possesses to admit an appeal in special cases. It is true that there were features in the prisoner's application to the Court of Criminal Appeal which must be unusual. For at the conclusion of the evidence the learned chairman of general sessions who presided at the trial had advised the jury to acquit the prisoner on the ground that the case against him depended upon evidence of identity upon the certainty of which they could not rely with sufficient assurance to make a conviction safe. The jury had rejected the advice, the trial had proceeded and notwithstanding an adequate warning the jury had convicted the prisoner. The conviction was upon a count for assaulting a woman with intent to have carnal knowledge of her. The woman was a sales girl, nineteen years of age, who was bicycling home from her work. The crime took place about seven o'clock on the evening of Monday, 19th April 1957. The place was in St. Alban's Road about a quarter of a mile from the Sydenham railway crossing. At that hour it was, of course, dark, except for a moon. There was a bright moon, but there were scudding clouds obscuring it as they passed. A man going in the same direction on a motor cycle passed the girl on her pedal cycle, stopped ahead of her and, when she caught up, accosted her and proceeded to commit the assault. She struggled with him, scratched his face and succeeded in escaping from his grasp. She ran down the road calling for help but pursued by the man. A neighbour whom she knew came to his gate in answer to her cries. The man turned and fled, and the sound of his retreating motor cycle could then be heard. The girl did not know him and her impression of his identity necessarily depended upon her view by the light of the moon of his clothing and of him, and particularly of his features which at times in the struggle were very close to her face. She noticed that he had a leather motor-cycle cap, a leather three-quarter coat, a moustache and that he spoke with a foreign accent.

Three weeks later, while standing waiting at the railway gates at Sydenham which were closed, the girl noticed a motor cycle draw up. She was attracted by the sound of the engine. She saw the rider side on, slightly from the rear, and she thought he was the

man who attacked her. She took the number of his motor cycle and communicated with the police. Subsequently she identified him at an identification parade at a police station. There she picked out the prisoner. He had a moustache and wore a leather jacket. At her request he put on a leather cap which he carried. He spoke with a marked foreign accent. It is obvious, however, that her identification of the man must have been based upon her inspection of him at the railway gates as much as, if not more than, upon her opportunities of seeing her assailant. At the time of the identification at the police station the prisoner's face seems to have borne no marks of scratching. But some evidence of his companions at work was called at the trial to say that scratches had appeared on his forehead and that when this was remarked on the prisoner had said that it had been done by brambles when during the week-end he had been out rabbiting. The girl's evidence was that she had scratched the man on the face or cheek. Still the appearance of scratches on the forehead immediately after the date of the crime might have been regarded as a significant coincidence; for in the struggle she could not be sure where her finger nails would leave their mark. But the witnesses said that the scratches were noticed on a Monday at the factory at which they all worked. The crime was on a Monday night and the following Monday was Easter Monday when it might be supposed that the factory would be shut. In these circumstances the learned chairman of general sessions put the evidence of his scratched forehead entirely aside and before this Court the Solicitor-General said that he placed no reliance upon it.

When the learned chairman of general sessions at the end of the evidence advised the jury to stop the case and acquit the prisoner he did so simply because of his view of the adequacy of the girl's opportunity by the light of the moon of obtaining a sufficiently reliable impression of her assailant's features and other characteristics to make it safe to convict upon her identification of the prisoner. Of her personal credibility his Honour seems to have formed a high opinion and there is every ground to suppose that she was accepted as a witness, careful, sincere, intelligent and responsible, who held a completely confident opinion that the prisoner was her assailant. The trial proceeded; both counsel addressed the jury. The learned judge gave a full, careful and correct direction to the jury with an appropriate caution concerning the identification. But the jury chose to convict. In the circumstances it was clearly a matter for the Court of Criminal Appeal to decide whether they considered that upon the evidence the conviction should be allowed

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to stand. If there were no more in the case, no ground for hesitation on our part would exist; there would be no foundation for an application to the special discretion of this Court.

But at the opening of the judgment of the Court of Criminal Appeal there is a reference to a recent decision, *Reg.* v. *McGibbony* (1), as a case in which the court (*Herring* C.J., *Hudson* and *Monahan* JJ.) had recently considered the principles upon which the Court of Criminal Appeal guided itself in cases of the kind. While upon the facts appearing from the report of *McGibbony's Case* (1) there is no reason to doubt the correctness of the decision in that case, the judgment contains expressions, which as it seemed to us, were capable of being read in a sense which would unduly narrow the functions of the Court of Criminal Appeal. Our hesitation in the present case has been due to a fear lest by reason of these expressions the Court of Criminal Appeal might not have applied an unfettered judgment to the question this case involved. But having given further consideration to the evidence as recorded, to the observations of the learned chairman of general sessions to the jury and to the reasons of the Court of Criminal Appeal, we have formed the opinion that it is not a case in which we can properly give special leave to appeal. Nothing but a question of fact is involved and there is no sufficient reason to suppose that the decision of the very experienced judges of the Court of Criminal Appeal was the result of any unduly restricted view of the functions of that court.

The expressions to which we refer in *McGibbony's Case* (1) might perhaps be taken to mean that upon an issue which the Crown must establish beyond reasonable doubt a verdict against the accused must be sustained unless upon the evidence the finding is unreasonable, there being no misdirection, erroneous reception or rejection of evidence and no other lawful objection having arisen to the course of the trial. If this were so the Court of Criminal Appeal would occupy much the same position as a Court of Crown Cases Reserved. For it has long been considered a question of law—that is a question for the court—whether there is reasonable evidence upon which a jury may reasonably find an issue in favour of the party upon whom the burden of proof rests. It is unlikely that it was intended by what was said in *McGibbony's Case* (1) to restrict the functions of the Court of Criminal Appeal to such cases. The express words of the statute say that upon a certificate of the judge of the Supreme Court or chairman of general sessions before whom a prisoner was tried or with the leave of the Full Court he may appeal against his conviction on a ground which

(1) (1956) V.L.R. 424.

involves a question of fact alone: s. 563. Moreover, the Full Court may examine witnesses or have them examined before a judge or an officer, send matters of certain descriptions for inquiry and report to a special commissioner and exercise any power which might be needed in an appeal in a civil proceeding: s. 570. It will be perhaps enough to cite by way of example from one early volume of the Criminal Appeal Reports three instances of the use of these powers: *R.* v. *Witton* (1); *R.* v. *Winkworth* (2); *R.* v. *Heartsch* (3). It is perhaps useful to add references to *R.* v. *Rice* (4); *R.* v. *Schrager* (5): *R.* v. *Chadwick* (6) and *R.* v. *Hayduk* (7). These cases, chiefly cases turning on identification, provide further illustrations of the exercise of the jurisdiction of a court of criminal appeal. However, no special powers were invoked in the present case and the question simply was whether the verdict was unreasonable or could not be supported having regard to the evidence or whether on any ground there was a miscarriage of justice It was not a question of a verdict being found in opposition to the evidence. In *Aladesuru* v. *The Queen* (8), an appeal from West Africa, the Privy Council decided that it is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence. What was the tribunal of fact in that case does not appear but presumably it was not a jury. The distinction between an attack upon a verdict on the ground that it is against evidence and an attack upon it on the ground that the weight of evidence is opposed to it is, or at all events was, well understood. It is well illustrated by *Mount Bischoff Tin Mining Co. Registered* v. *Mount Bischoff Extended Tin Mining Co. N.L.* (9), where a Tasmanian statute provided that a new trial should not be granted on the ground that the verdict is against the weight of evidence.

In the Supreme Court of Tasmania it has been said that the distinction between a verdict contrary to evidence and against the weight of evidence is that in the former case the court is ready to grant new trials to rectify the obvious miscarriage of justice while in the latter they are loth to disturb the decision of a competent tribunal: *Bennett* v. *Pierce* (10). It must be remembered that it was on the ground that verdicts were against evidence that the control of verdicts by granting new trials was first assumed, and, when new trials were still granted in cases of misdemeanour, convictions for perjury and other offences were set aside in the King's

(1) (1911) 6 C.A.R. 149.
(2) (1911) 6 C.A.R. 179.
(3) (1911) 6 C.A.R. 271.
(4) (1927) 20 C.A.R. 21.
(5) (1911) 6 C.A.R. 253.
(6) (1917) 12 C.A.R. 247.
(7) (1935) 4 D.L.R. 419.
(8) (1956) A.C. 49.
(9) (1913) 15 C.L.R. 549, at pp. 552, 559.
(10) (1872) Merc. (Newspr.) (Tas.) noted 1 Austn. Digest 259.

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Bench on this ground: see *R.* v. *Smith* (1). One may safely suppose that no court of criminal appeal at the present date could pronounce a conviction to be against the evidence and yet at the same time confirm it upon the ground that the court was unable to say that it could not be supported having regard to the evidence. For to be against the evidence means that the verdict is one which viewing the whole of the evidence reasonably the jury could not properly find: *Phillips* v. *Martin* (2). Verdicts of course ought not to be, and are not in practice, set aside except upon very substantial grounds. But it is one thing to exercise powers with caution and discrimination and another to deny their existence. We do not think, however, that there is any real reason to suppose that in the present case the decision of the Court of Criminal Appeal was the result of any restrictive view of the powers or functions of that court. It is not a case in which this Court should interfere by granting special leave to appeal.

The application should therefore be refused.

Application for special leave to appeal dismissed.

Solicitors for the applicant, *G. E. Delany & Co.*

Solicitor for the respondent, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.

(1) (1682) T. Jo. 163 [84 E.R. 1197.]

(2) (1890) 15 A.C. 193, at p. 194.