

two affidavits filed on behalf of the respondent to the Justices, and asked them, with the affidavit filed on behalf of the applicant also before them, to state whether they desired to say anything about the matter. An answer has now come from the Clerk of Courts, stating that there were three Justices sitting, and that two have made affidavits, and that the Police Magistrate has not made an affidavit, as he is unable to recollect the details. The affidavits filed by the two Justices state that, to the best of their belief, the statements in the respondent's affidavits are correct.

I had occasion to refer to this matter of sending copies of a respondent's affidavit to the Justices in *Larkin v. Penfold*, 12 A.L.R. 337, and I adhere to what I then said as to the desirability of doing it in certain cases; and, in the absence of any general rules on the subject, as far as I am concerned, I will not consider that there is any impropriety in a party forwarding to the Clerk of Courts for the Justices copies of the affidavits filed by the respondent without comment. If any attempt were made to prevent such a course being effectively taken by serving the copies late, that would have to be provided for by special application. That is all I consider it necessary to say.

Order nisi discharged.

[Solicitors—For the complainant, W. S. Doria; for the defendant, J. W. McComas.] S. K. H.

High Court of Australia.

FULL COURT—(Barton, Isaacs,) Dec. 11, 20.
Gavan Duffy and Rich, JJ.) 1917.
(Sydney.)

TITHERADGE, Appellant v. THE KING, Respondent.

Criminal law—Appeal—Power of Judge to call and examine witness—Substantial miscarriage of justice
—"Criminal Appeal Act 1912" (N.S.W.), sec. 6—
"Evidence Act 1898" (N.S.W.), secs. 54, 55 *—
"Crimes Act 1900" (N.S.W.), sec. 404.

The appellant was charged with indecently assaulting a girl. It appeared from the evidence of the girl that *P* might be a material witness, but both the Crown and the appellant declined to call him. The Judge at the trial

* Cf. "Evidence Act 1915" (Victoria), sec. 32, which is as follows:—

"A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character but may contradict him by other evidence or (in case the witness in the opinion of the court proves adverse) may by leave of such court prove that he has made at other times a statement inconsistent with his present testimony. But before such last-mentioned proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement."

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called and examined *P*. After reading a paper handed to him by the Crown Prosecutor, the Judge asked *P* whether he had not on a former occasion, not in Court, made a statement inconsistent with his testimony, *P* having denied this, the Judge recalled two witnesses, and questioned them as to *P*'s alleged inconsistent statement. They deposed to such a statement. In his direction to the jury the Judge told them that the case depended in effect on *P*'s veracity, and that depended upon the conflict between *P* and the witnesses recalled as to *P*'s former statement, and added that the evidence of these witnesses as to that statement should not be taken as evidence against the appellant of guilt. The appellant having been convicted,—

Held, that the course adopted by the Judge was not justified by law, that the defence had been thereby materially prejudiced, and that the case should go for retrial.

Section 404 of the "Crimes Act 1900" (N.S.W.), which provides that every accused person on his trial may, if so advised by Counsel, give any consent which might lawfully be given in a civil case, requires an affirmative consent, after affirmative advice by Counsel. Non-objection is not sufficient.

The sections in Part V. of the "Evidence Act 1898" (N.S.W.), with the exception of the proviso to section 55, were passed for the purpose of defining the rights of parties at trials.

Per Barton, J.—A trial is a proceeding *inter partes*, whether the Crown is a party or not, and the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties. The right, where it exists, of a Judge to take conduct of the examination of persons not called by either party must be used with extreme caution.

R. v. Titheradge, 34 W.N. 168, reversed.

APPEAL, by special leave by the accused from the decision of the Court of Criminal Appeal—*R. v. Titheradge*, 34 W.N. 168.

The material facts are sufficiently stated in the judgments hereunder.

Mack and McGhie for the appellant.

C. A. White for the Crown.

Reference was made to—*In re Enoch and Zaretsky, Bock and Co.'s Arbitration*, (1910) 1 K.B. 327; *R. v. Oldroyd*, Russ. and Ry. 88; *R. v. Cliburn*, 62 J.P. 232; *R. v. Bertrand*, L.R. 1 P.C. 520; *Laws of England*, vol. XIII. p. 599; *Archibald* (24th ed.) p. 484; *R. v. Stroner*, 1 Car. & Kir. 650; *R. v. Holden*, 8 C. & P. 606; *Greenough v. Eccles*, 5 C.B. (N.S.) 786; *Coulson v. Disborough*, (1894) 2 Q.B. 316.

Cur. adv. vult.

BARTON, J., read the following judgment:—The appellant was tried at the Dubbo Quarter Sessions in June last on two charges; the first that he had assaulted Edith Lennon, a girl under the age of sixteen, with intent carnally to know her, and the second that he had indecently assaulted her, she being under sixteen.

He was convicted and sentenced on the second charge. An appeal by him to the Supreme Court as the Court of Criminal Appeal was dismissed. The case comes to this Court on special leave to appeal. The argument was in effect limited to the grounds of

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appeal which complained of the action of the learned Judge at the trial in himself calling, examining and cross-examining one Payne, and in recalling and examining two witnesses named respectively Dobbin and Irwin. It is urged that His Honour's action amounted to a mis-trial and that there was a miscarriage of justice.

In the evidence of the girl Edith Lennon for the prosecution she swore to the facts on which the Crown relied as having taken place at the railway Rest House at Narromine, whither she had gone to perform some work usually performed by her mother, who was then away. She had to set the place in order and make the beds. The offence was said to have been committed in one of the front rooms where she was making or had made a bed. In the course of her examination by the Crown Prosecutor she swore that Payne came to an open window of the bedroom in question, looked in so that she could see his face, and passed by. If her evidence was true Payne could see her and the appellant there. At that time, as she said in cross-examination, the appellant had hold of her, and this Payne could see. When she came out later on Payne was not there.

The case for the Crown was closed, Payne not having been called. The defence consisted in an absolute denial of the material facts. The appellant swore that he was never in that portion of the house that morning until long after the girl had left. Another man named Blatch gave evidence to the same effect, and swore that Payne did not go by the front of the house. The defence also closed without Payne having been called. It should be mentioned that the appellant, Blatch and Payne are all employees of the railways.

The learned Judge, ascertaining that the attendance of Payne as a witness could not be secured until the next morning, adjourned the case till next day, when Payne was in attendance. The Crown Prosecutor and the advocate for the defence were each asked whether he desired to call Payne. Neither of them would do so. The Judge then called and examined Payne. He corroborated the appellant and Blatch, and denied that he had passed the window or seen the appellant and the girl in the room together. The Crown Prosecutor, Mr. Mason, was asked whether he had any questions to put. I quote now from the learned Judge's report:—"He" (the Crown Prosecutor) "thought that it would be inadvisable for him to do so, but that as the witness had been called by the Court, he asked me to look at certain statements which he handed up to me. This I did, and I then specifically asked the witness whether he had, on the evening of the alleged assault, made statements to Messrs. Dobbin and Irwin (relieving officer and night officer respectively at Narromine) inconsistent with the evidence then given by him. He denied having made such statements." The solicitor for the defence declined to ask Payne any ques-

tions, stating that he had already closed his case. The Judge goes on to say—"I thereupon recalled the two men Dobbin and Irwin, and they repeated the statements made to them by Payne, viz., that he had walked past the window, had seen Titheradge and the girl in the room together and had seen them on the bed." This concluded the evidence. The learned Judge in summing up emphasised the fact that the evidence last given by Dobbin and Irwin did not affect the guilt of the appellant, but that it should only be considered on the question of the veracity of Payne.

The learned Judge is satisfied of the guilt of the appellant, and that he, Blatch and Payne concocted the story which they told.

There was no express objection by the Crown or the defence to the calling of Payne, Dobbin or Irwin.

In the Court of Criminal Appeal neither Pring, J., nor Sly, J., who concurred, appears to have thought that there was any substantial irregularity. Pring, J., said—"I cannot doubt that the Judge acted rightly in calling Payne and offering Mr. Mason the privilege of cross-examination. Unfortunately, Mr. Mason appears to have been under a misapprehension as to his right to cross-examine, and the Judge omitted to point out to him that he had such a right. And as Mr. Mason declined mistakenly to exercise his right it might have been better if the Judge had refused to look at the statements handed up to him and examine Payne on them. However, he did so, merely asking the questions which Mr. Mason, had he exercised his right, would have asked. On Payne's answers thereto the Judge would have been quite right in allowing Mr. Mason to call Dobbin and Irwin. Can it be said that as the Judge examined them there has been any substantial miscarriage of justice merely because the evidence has been elicited in a somewhat irregular manner? I think not. The prisoner has not been prejudiced in any way." Gordon, J., came to the same conclusion. He thought that in the absence of express objection from the Crown or the defence the learned trial Judge was right in calling and examining Payne, but in error in himself conducting the cross-examination, and should have informed the Crown Prosecutor that he must take on himself the responsibility and duty of cross-examining the witness or of leaving his evidence as it stood. He considered that the course pursued amounted at the most to an irregularity.

It thus appears that the Court of Criminal Appeal acted on sec. 6 (1) of the "Criminal Appeal Act 1912." If there was any miscarriage of justice they thought it was not substantial. See the proviso.

The most recent case on this subject is *In re Enoch and Zaretsky, Bock and Co.'s Arbitration*, (1910) 1 K.B. 327. That case arose on an application to remove an umpire for misconduct, but in the course of it two at least of the Lords Justices expressed them-

selves as to the duty of a Judge in a civil case. Certain dicta of Lord Esher, M.R., in the case of *Coulson v. Disborough*, (1894) 2 Q.B. 316, were extensively discussed, and Fletcher-Moulton and Farwell, L.JJ., appear to have thought that the learned Master of the Rolls had expressed himself rather too widely. But it may be gathered from their remarks that they were of opinion that there are instances in which a Judge in a civil case is justified in calling a witness with the assent or acquiescence of the parties. Such an instance would occur where the jury desired that a person who had not been called by either party but who was in Court should be examined. Other instances have occurred in criminal cases. The case of *Reg. v. Holden*, 8 C. & P. 606, was cited to us. There l'atteson, J., directed the prosecuting Counsel to call a person who was present, although she had been brought to the Assizes by the other side, and her name was not on the back of the indictment. The Judge gave this direction on the ground that every person who was present at the transaction out of which the charge arose ought to be called by the Crown. But His Lordship went further. It was a trial for murder. Three surgeons had examined the body, and it appeared that there was a difference of opinion between them. Two of them were called for the prosecution, but the third was not. His name not being on the back of the indictment, the prosecuting Counsel declined to call him, though he was in Court. At the conclusion of the case for the prosecution the Judge directed that he should be called, and himself examined him. Another case cited was *Reg. v. Stroner*, 1 Car. & Kir. 650. In that case Pollock, C.B., who presided, did not actually call any witness. He insisted, however, that two material witnesses, then present as witnesses for the prisoner, should be called by the prosecution. It was a case of rape, and the prosecutrix swore that soon after the commission of the offence she complained of it to one of these persons. On that person being examined for the Crown she denied that the prosecutrix had ever made any complaint to her, and on the suggestion of the learned Lord Chief Baron the prosecution was abandoned. Other cases were cited, but those mentioned were the only ones that can be said to have materially supported the argument for the Crown.

In the present case the learned Judge not only called Payne, the third person who, as the prosecutrix swore, was present at the time when, as she said, the offence was committed, but he examined that person in chief, and having done so made use of material, supplied by the Crown Prosecutor, for the purpose of testing his credit by cross-examination. It is true that neither the Crown nor the defence desired to call this person. The Judge went on to call and examine two other witnesses to contradict Payne by proving the statements which appear to have been contained in the papers supplied to him by the Crown Prosecutor. He appears to have had in mind

sec. 54 of the "Evidence Act 1898." But the whole of the three sections in Part V. of that Act were passed for the purpose of defining the rights of parties at trials. There is one exception only, and that is, the proviso to sec. 55, under which the Court may require the production for its inspection of a writing or deposition on which it is intended by a party to contradict a witness. In that case the Court may make use of the document as it thinks fit for the purposes of the trial. A rather similar course was taken by Graham, B., in *Rex v. Oldroyd*, Russ. & Ryl. 88, tried in 1805. There a person who had been examined before the grand jury was not at first called by the prosecution, but the Judge "thought it right "to have her examined, which was accordingly done." It does not appear, however, that the Judge actually examined this witness. But observing "... that "the evidence given by the woman was in favour of "the prisoner and materially different from her deposition," the Judge caused the deposition to be read, to affect the credit of her testimony on the trial. This does not appear to have been done under any Statute, and at a meeting of all the Judges they were of opinion that the course taken was competent to the Judge.

No one then will doubt that there are instances, not numerous, in which in furtherance of justice and in exceptional circumstances presiding Judges have rightly taken it upon themselves to actually examine a witness, and of course it happens every day that a Judge, in order to understand what a witness has said, asks him a question. But that is a very different matter from the assumption by the Court of the conduct of the case. A trial is a proceeding *inter partes*, whether the Crown is a party or not, and the conduct of the evidence, subject to questions of admissibility, is in principle the concern of the parties. Where departures from the rigid observance of this principle have occurred it has I think been upon necessity, as for instance in the case where the parties have definitely closed their evidence and the jury wish a person present to be called for their better information. But the right, where it exists, of a Judge to take the conduct of the examination of persons not called by either party must be used with extreme caution. In a civil case there must either be the consent of the parties or an acquiescence on their part from which the strong inference is consent. I have already pointed out that the sections of the "Evidence Act" cited at the bar are framed, save in a sole particular, upon the assumption that the parties themselves will lead the evidence. That is the normal and proper practice, and any deviation from it must be safeguarded by every precaution. This is especially true in a criminal case. Section 404 of the "Crimes Act" (No. 40 of 1900) enacts that "every accused "person on his trial may if so advised by Counsel "make any admissions as to matters of fact whatever the crime charged or give any consent which "might lawfully be given in a civil case." It seems

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to me that in a criminal case the defence ought to be asked whether it consents to the course which the Judge proposes to take when he desires (for strong cause) to examine a witness, and the examination ought not to take place without such consent. No such consent was asked or given here. That was I think a substantial irregularity. But if it were not so I cannot doubt that there was material irregularity in the course taken by the Judge of cross-examining that witness as to his credit on papers not produced to the defence, and of then calling other witnesses to depose to the statements in such papers in contradiction of the witness whom he had so cross-examined. No one can doubt that the Judge acted with a pure desire to secure the disclosure of the truth. But such a course as was taken, however well-intentioned, brings the tribunal into the arena of the parties, and to any extent that it does so it is a grave irregularity. Moreover, unless he becomes the mere channel for conveying the inquiries of a party, the Judge is involved in taking the responsibility of choosing the line of cross-examination, a responsibility which really rests on the party affected by the testimony. That there was a miscarriage of justice is scarcely to be doubted. The Crown almost admits this by calling it an irregularity. But I think it proceeded to lengths which rendered the miscarriage substantial. Our duty is to endeavour so to deal with the course taken that its recurrence may be avoided. It not only affects this case, but if adopted in future it is likely to affect the current of justice in other criminal cases.

Having regard to sec. 8 (1) of the "Criminal Appeal Act," and to all the circumstances, I am of opinion that the miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the Court has power to make.

ISAACS, J., read the judgment of himself and RICH, J., as follows:—It is only necessary to deal with one of the points raised. It appeared during the evidence of the girl alleged to have been assaulted that a man named Payne might be a material witness. Both the Crown and the accused declined to call him. The learned Judge *ex mero motu* called and examined him. After reading a paper passed to him by the Crown Prosecutor, the learned Judge asked Payne whether he had not on a former occasion, not in Court, made a statement inconsistent with his testimony. Payne denied having done so. The learned Judge then recalled two witnesses—Dobbin and Irwin—on this new point, and asked them as to Payne's alleged former inconsistent statement. They deposed to such a statement.

The learned Judge in his charge to the jury told them in effect that the case depended on Payne's veracity, and that depended on the conflict between him and Dobbin and Irwin, as to the former state-

ment. His Honour added that Dobbin and Irwin's evidence as to that statement was not to be taken as evidence against the accused of guilt.

In view of the decision of the Court of Appeal in *In re Enoch and Zaretsky, Bock and Co.'s Arbitration*, (1910) 1 K.B. 327, and the principle there enunciated, it is impossible to see any reason why a Judge has power to call any evidence *ex mero motu* in a criminal trial—except where the Crown raises no objection, and by Statute the accused may, and in fact does consent in manner provided by law, or where the Court has special statutory authority otherwise. The observations of Lord (then Lord Justice) Moulton are of general application to the administration of justice both civil and criminal.

In this case the Full Court in the first place said, adopting and applying the principle of *Enoch and Zaretsky's Case*, that the accused had not objected. But unless the Court had power to call the evidence *in invitum* its authority depended on sec. 404 of the "Crimes Act 1900." That section requires an affirmative consent after affirmative advice of Counsel. Non-objection is not sufficient.

Then the Full Court thought that there had been no substantial miscarriage of justice. If what was done was not justified by law—and we think it was not—the accused was very seriously prejudiced. It is impossible to escape the conclusion that if the jury believed Dobbin and Irwin in preference to Payne as to his alleged statement, made not on oath, and not in the presence of the accused, then since they were told his guilt or innocence depended on Payne's veracity, the irregularity materially prejudiced his defence. It is not the same thing as if the Crown had called Payne, and subsequently Dobbin and Irwin. The fact that it was the Judge who elicited the evidence of Payne, and who obtained its contradiction, leaving Counsel for accused without the right of cross-examining—as it is said—would probably give much more importance and effect to the evidence in the mind of the jury, than if the Crown had done it.

It is said that sec. 54 of the "Evidence Act 1898" was complied with by the Judge in particularly drawing Payne's attention to the circumstances of his alleged former statement. But sec. 54 refers to cross-examination; and once it is suggested that the Judge first examined Payne, and then cross-examined him, the confusion of function becomes apparent.

With regard to the Crown's reference to some older authorities allowing the Court to direct depositions to be put in, it may be observed that the concluding proviso of sec. 55 of the "Evidence Act" makes a specific enactment.

We think the appeal should succeed and the case go for re-trial.

GAVAN DUFFY, J.—In this case I do not propose to say more than that I am satisfied that there has been a miscarriage of justice within the meaning of

sec. 6 of the "Criminal Appeal Act 1912," and that I agree that there should be an order for a new trial.

Appeal allowed.

[Solicitors—For the appellant, Kelly and Waterford; for the respondent, J. V. Tillett, Crown Solicitor.]

C. E. W.

FULL COURT—(Barton, Isaacs, } Dec. 5, 6, 7,
Gavan Duffy and Rich, JJ.) } 20, 1917.
(Sydney.)

ZACHARIASSEN and Others, Plaintiffs v. THE COMMONWEALTH and Another, Defendants.

Shipping—Refusal to grant clearance to ship—Liability of Commonwealth and Comptroller-General of Customs — Officer of Commonwealth—War—Act of State — Power to refuse clearance to foreign ship voluntarily arriving in time of war unless master agrees to carry wheat to United Kingdom—Attempt to compel aliens to engage in the King's service on the open sea—"Customs Act 1901-1910," secs. 221, 225.

The plaintiffs were Russian subjects, and owners of a foreign ship, which arrived in Melbourne in July, 1916, and was duly discharged there. The plaintiffs, in their Statement of Claim, alleged that certain chartering agents of the Commonwealth informed the master of the ship that the Commonwealth had issued instructions to the Department of Customs that no clearance of the ship should be granted unless the ship was loaded with a cargo of wheat for the United Kingdom. They further alleged that the master of the ship had notified the Department of Customs of his intention to take the necessary steps to obtain a clearance, and had been informed by an officer of the said department that the taking of such steps would be useless, as an embargo had been placed on the ship. The plaintiffs sued the Commonwealth and Comptroller-General of Customs for damages for detention of the ship. The defendants in their statement of defence alleged (*inter alia*) that the plaintiffs had failed to comply with certain specified requirements of law, a compliance with which was a condition precedent to the granting of a certificate of clearance for the ship. They further alleged that the acts complained of were acts of a belligerent power in right of war, and were not justiciable by the Court.—

Held, on demurrer by the plaintiffs, and in answer to questions of law submitted for the determination of the Court—(1) That the law necessarily requires the making of an actual application as a condition precedent to the Collector of Customs determining whether a clearance should be granted or not. Once an application is made the requirements of law referred to in the statement of defence were not conditions precedent to the application being dealt with, but were conditions precedent to its being granted. (2) The failure to comply with these requirements afforded no defence to the action, in view of the refusal to consider any application whatever. (3) Under the circumstances alleged in the Statement of Claim, the Commonwealth was responsible for the acts and omissions of the Comptroller-General of Customs. (4) The Comptroller-General was not personally liable to the plaintiffs for non-feasance of the duty to issue a clearance. (5) The Comptroller-General is an "officer" within the mean-

ing of sections 221 and 225 of the "Customs Act 1901-1910."

Quare, whether the existence of war supports an attempt by the Crown to compel aliens to personally enter the King's service outside territorial waters, and there risk capture or death at the hands of the enemy.

DEMURRER.

This was the hearing of a demurrer by the plaintiffs to portion of the Statement of Defence. The action was brought in the High Court by the plaintiffs, who were Russian subjects, and owners of a ship called the *Samocna*, whose port of registry is in Finland. The defendants were the Commonwealth of Australia and Stephen Mills, Comptroller-General of Customs. The said ship arrived in Melbourne in July, 1916, with a cargo of oils from New York, which was duly discharged. The ship was subsequently chartered through agents in London to carry nitrates from Chili to Bilbao. The plaintiffs alleged that the chartering agents for the Commonwealth informed the master of the ship that the Commonwealth had issued instructions to the Department of Customs that no clearance of the ship should be granted unless she were loaded with wheat for the United Kingdom, and that the ship would not be allowed to leave port unless so loaded. On August 24th, 1916, the master notified the Department of Customs of his intention to take the necessary steps to obtain a clearance, and was then informed by an officer of the said department that the taking of such steps would be useless, as an embargo had been placed on the ship. The plaintiffs alleged that nothing had been done or omitted in contravention of the "Customs Act 1901-1910," or the Regulations or any other Statute or Regulations to disentitle the ship to a clearance. The plaintiffs alleged that the chartering agents and the Comptroller-General of Customs were acting under the direction of the Commonwealth, and that, owing to the refusal of the Comptroller-General to deal with an application for a clearance for the ship, except on her accepting a cargo of wheat, the plaintiffs were unable to make use of the ship. The plaintiffs claimed damages for the detention of the ship.

The defendants denied that the alleged chartering agents were the chartering agents for the Commonwealth, or that the Comptroller-General had any power or authority other than that conferred by the "Customs Act." Paragraph 8 of the Statement of Defence alleged that the plaintiffs failed to comply with certain specified requirements of law, a compliance with which was a condition precedent to the granting by the Comptroller-General of a certificate of clearance for the vessel. Paragraph 12 of the Statement of Defence was in the following terms:—The defendants further say that the alleged refusal to grant a certificate of clearance of the said vessel, and the imposition of the alleged restrictive conditions in regard to the granting of such certificate, in so far as the same were acts of the defendants or either of them, were acts of