

THE KING v. ELLIS.

FULL COURT — (Knox, C.J.,
Isaacs, Higgins, Rich. and } Nov. 26, Dec. 11,
Starke, JJ.) } 18, 1925.
(Sydney.)

THE KING, Appellant, v. ELLIS, Respondent.

*Criminal Law—Statement from dock—Right of comment by fellow-prisoner—Conviction—New trial—“Substantial miscarriage of justice”—“Crimes Act 1900 (N.S.W.) (No. 40 of 1900), sec. 407 (2)—“Criminal Appeal Act 1912.” (N.S.W.) (No. 16 of 1912), sec. 6 (1).**

The “Crimes Act 1900” (N.S.W.), section 407 (2) provides:—“It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf.”

“Criminal Appeal Act 1912” (N.S.W.), section 6 (1), provides (*inter alia*):—“That the Court may, notwithstanding that it is of opinion that the point raised by the appeal might be decided in favour of the appellant, dismiss the appeal, if it considers that no substantial miscarriage of justice has actually occurred.”

At the trial of two prisoners who were jointly indicted for conspiracy one of them did not give evidence on oath. The other gave evidence on oath, and when addressing the jury, he called their attention to the fact that his fellow-prisoner had not gone into the witness-box. He was immediately stopped by the presiding Judge, who told the jury that the remark should not have been made, and that they should dismiss it from their consideration. Both were convicted.—

Held.—1. That the prohibition in the “Crimes Act 1900” (N.S.W.), section 407 (2), against comment, is absolute, and applies to the comment by an accused person on the fact that a fellow-accused has not given evidence on oath. 2. That in view of the “Criminal Appeal Act 1912” (N.S.W.), section 6 (1), the Court of Criminal Appeal is not bound to order a new trial in every case where the provisions of section 407 (2) have been infringed, but the High Court will not, as a rule, interfere where the Court of Criminal Appeal has exercised its discretion in determining whether there has been a substantial miscarriage of justice.

Decision of the Supreme Court of New South Wales (Full Court), *R. v. Ellis*, 25 S.R. N.S.W. 575, affirmed.

APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

At Lismore Circuit Court on 1st October, 1925, before Ralston, A.J., and a jury, the appellant, Ellis, and a man named Harvey were tried together on an indictment which jointly charged them with conspiracy with intent to cheat and defraud. Ellis, who was defended by a solicitor, did not give evidence. Harvey, who was not represented by Counsel, went into the witness-box and gave evidence on oath, and when he was addressing the jury he called their attention to the fact that Ellis had not gone into the witness-box. He was at once stopped by the presiding Judge, who told the jury that it was their duty not to allow what had been said to influence their minds, and that they ought, as far as possible, to dismiss it from their consideration.

Both prisoners were convicted, and sentenced to terms of imprisonment. Ellis then appealed to the

Court of Criminal Appeal, on the ground that what was said by Harvey in the course of his address to the jury amounted to an unlawful comment within the meaning of the “Crimes Act 1900” (N.S.W.), sec. 407 (2). The Court of Criminal Appeal set aside the conviction, and ordered a new trial.

From that decision the Crown obtained special leave to appeal to the High Court.

Weigall, Solicitor-General for N.S.W., for the Crown.
F. L. Flannery and Dovey for the prisoner Ellis.

The following cases were referred to during argument:—*Ingham v. Hill Lee*, 18 A.L.R. 453; *Brunswick Corporation v. Baker*, 22 A.L.R. 170; *Sheldrick v. South African Breweries Ltd.*, (1923) 1 K.B. 173 at 185; *Bataillard v. The King*, 13 A.L.R. 408; *R. v. Russell*, 6 C.A.R. 78; *R. v. Howarth*, 13 C.A.R. 99; *R. v. Gildham*, 17 C.A.R. 18; *R. v. Graham*, 17 C.A.R. 40; *R. v. Moore*, 18 C.A.R. 29; *R. v. Dickman*, 5 C.A.R. 135, at 147; *Neary's Case*, (1916) N.Z. L.R. 518; *R. v. Thomas*, 17 C.A.R. 34; *R. v. King*, 9 Cox C.C. 426; *R. v. Shortus*, 17 S.R. (N.S.W.) 66; *R. v. Grills*, 17 A.L.R. 313; *Titheradge v. The King*, 24 A.L.R. 77.

The following judgments were given:—

KNOX, C.J.—Two questions are raised by this appeal, viz.:—(1) Whether sec. 407 (2) of the “Crimes Act” forbids comment by an accused person on the fact that another accused person, who is being tried with him, has refrained from giving evidence. (2) Whether the Court of Criminal Appeal ought to have dismissed the appeal on the ground that no substantial miscarriage of justice had actually occurred.

The first question turns on the meaning to be given to the words of sec. 407 (2) of the “Crimes Act 1900.” Literally construed, that section prohibits such comment absolutely and without exception. It is said with considerable force that, read in this way, it is inconsistent with sec. 402 of the Act, which provides that every accused person shall in all Courts be admitted to make full answer and defence, and with sec. 405, which provides that every accused person on his trial, whether defended by Counsel or not, may make any statement without being liable to examination thereon by Counsel for the Crown or by the Court. On the other hand, it is said that as the words of sec. 407 are clear and unambiguous, they should be construed according to their ordinary meaning. In the Court of Criminal Appeal the learned Judges took the view that the section in plain and unambiguous words prohibited comment by any person, and although my mind is not free from doubt on the matter, I am not prepared to say that they were wrong in so deciding. I have the less hesitation in adopting this attitude because it is clear that if the interpretation put upon the section by the Court of Criminal Appeal is not in accordance with the intention of Parliament, the section can be amended by Parliament so as unequivocally to express its intention. Probably the truth is that, neither the

* Cf. “Crimes Act 1915” (Victoria), sec. 432 (as amended by “Crimes Act 1915” (No. 2), sec. 2), and sec. 594 (1).

draftsman of the section nor Parliament, when it passed it, had in mind the particular circumstances which have brought about the difficulty in the present case.

On the second question the Court of Criminal Appeal thought it impossible to say that there had been no substantial miscarriage of justice in a case in which comment had been made which Parliament had, for the protection of an accused person, declared to be unlawful. If the Court of Criminal Appeal, after consideration of all the circumstances of the case, came to the conclusion that the Crown had failed to establish that no substantial miscarriage of justice had actually occurred, I should hesitate long before expressing dissent from that conclusion, for Parliament had committed to that Court the duty of deciding the question, and, in my opinion, it is only in extreme cases that this Court should exercise the power of reviewing a decision depending on an exercise of discretion by a Court occupying the position which the Court of Criminal Appeal occupies in relation to the administration of the criminal law in New South Wales. But in the present case the decision of the Court of Criminal Appeal appears to be founded on the proposition that in every case in which there has been a contravention of the provisions of sec. 407 (2) the Court is precluded by that fact from deciding that no substantial miscarriage of justice has actually occurred. In delivering the reasons for the decision, Street, C.J., said—"Then it was contended that, even 'if what was said amounted to an unlawful comment, 'it was something that could not have been foreseen 'or guarded against; and that, as the presiding Judge 'at once told the jury to dismiss the matter from 'their minds, no substantial miscarriage of justice had 'occurred. No doubt, as Barton, J., pointed out in '*Peacock v. The King*, 17 A.L.J. 566 at p. 601, it is 'impossible to make the administration of justice 'proof against occasional accidents, and every mistake 'does not necessarily render the whole proceedings 'abortive, but I do not think that it is open to us 'to deal with what took place here in the same way 'as if the case were merely one in which, inadmissible 'evidence having been admitted by inadvertence, the 'jury had been warned as soon as possible not to 'allow themselves to be affected by it. In this case 'there has been a violation of a statutory prohibition established for the protection of accused persons who do not wish to give evidence, and I do 'not think that we can say that there has been no 'substantial miscarriage of justice when comment 'has been made which the legislature has positively 'declared to be unlawful."

If these words mean, as I think they do, that in every case in which a comment forbidden by sec. 407 (2) has in fact been made, the Court of Criminal Appeal is precluded from inquiring whether a substantial miscarriage of justice has actually, that is to say in truth and in fact, occurred, I respectfully dissent from the proposition. The decisions of the English

Court of Criminal Appeal, in *Rex v. Dickman*, 5 C.A.R. 135, 26 T.L.R. 640; and *Rex v. Russell*, 6 C.A.R. 78, are in point. In *Dickman's Case* the accused was charged with murder. At the trial, Counsel for the prosecution commented on the fact that the wife of the accused did not give evidence for the defence, a comment prohibited by sec. 1 (b) of the "Criminal Evidence Act 1898." The jury were afterwards told to disregard the comment. It was argued that the prohibition was absolute, and that there must be a new trial, but the Court refused to grant a new trial, and dismissed the appeal. In *Russell's Case* the irregularity was a contravention of sec. 37 of the "Coinage Act," a provision apparently intended for the protection of an accused person. The Court of Criminal Appeal nevertheless applied the proviso in sec. 4 (1) of the English Act, which is in the same words as the proviso to sec. 6 (1) of the New South Wales Act.

In *Rex v. Ratcliffe*, 89 L.J. K.B. 135, the recorder put questions prohibited by sec. 1 (f) of the "Criminal Evidence Act 1898," a provision designed for the protection of an accused person who is called as a witness. Counsel for the Crown relied in argument on the proviso, but the Court refused to apply it, not because there had been a contravention of the section, but because they were not satisfied that the jury would have convicted the appellant if the questions had not been asked. And, apart from authority, I should arrive at the same conclusion. The appeal can only be allowed if the appellant establishes to the satisfaction of the Court of Criminal Appeal one or more of the grounds mentioned in the first part of the section. The objection that comment has been made which is forbidden by Statute, either is or is not covered by these grounds. If it is not, the Court has no power to allow the appeal, but the right of the appellant to have his appeal allowed is subject to the proviso that, notwithstanding the Court is of opinion that the "point or points raised by the appeal" might be decided in his favour, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

In my opinion, the words of the section leave no escape from the position that, whatever may be the point on which the appellant relies, the proviso may be applied, that is to say, the Court has power in any case to examine all the relevant facts and circumstances, and if as a result of that examination it considers that no substantial wrong or miscarriage of justice has actually occurred, it may dismiss the appeal. It may be that the Court of Criminal Appeal did this in the present case, though I do not gather from the observations of the learned Chief Justice that it did. But, however that may be, I think this is a case in which the order granting special leave to appeal should be rescinded. The appeal is from an order granting a new trial, and if the accused be guilty, he may still be convicted of the offence charged against him. The substantial ground put

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forward in support of the application for special leave was that relating to the meaning of sec. 407 (2). On that ground the decision of the Criminal Court of Appeal is upheld.

If the ground relating to the proviso to sec. 6 (1) of the "Criminal Appeal Act" had been the only ground put forward in support of the application for special leave, that application would almost certainly have been refused, and in the circumstances I think the proper order is to rescind the order granting special leave to appeal.

ISAACS, J.—Joseph Matthew Ellis was convicted of conspiring with James Beresford Harvey to defraud an insurance company. He was sentenced to eighteen months' imprisonment, with hard labour. On appeal to the Supreme Court of New South Wales, sitting as the Court of Criminal Appeal, it was held unanimously by Street, C.J., and Ferguson and James, JJ., that Ellis had been convicted contrary to law, because he had been deprived of the specific statutory protection of sec. 407 (2) of the "Crimes Act," and that a substantial miscarriage of justice had occurred, and therefore his conviction should be set aside, and a new trial ordered.

The Crown now appeals against that decision, and asks that the conviction should be allowed to stand. The grounds of appeal are two. First, it is said the Supreme Court was wrong in its law, that is, there was no breach of the section. Alternatively, it is said the Court was wrong in holding that a substantial miscarriage of justice had occurred.

Section 407 of the Crimes Act.—The first question is as to the extent of sub-sec. (2) of sec. 407 of the "Crimes Act" (No. 40 of 1900). The Crown contends that the words "it shall not be lawful to comment" in that sub-section should be read, "It shall not be lawful for the Judge or prosecutor to comment." That is a very violent incursion to make in any enactment, and particularly in one for the protection of liberty. The reasons advanced for undertaking it are various. One is that it is very inconvenient for the Crown, when it chooses to indict persons jointly, and therefore the Court should discountenance the wider construction. Another is that the enactment must be read subject to, or at least so as to harmonise with, sec. 402.

As to the first reason, I decline to recognise it in any way. No doubt the Crown often has the option of proceeding against accused persons jointly or separately. But not only will the Court exercise some initial control over this in the interests of justice—see *Bradlaugh's Case*, 15 Cox. C.C. at 220—but the Crown always adopts the course of joint indictment at its peril. In *Bywater's Case*, 17 C.A.R. 66, the Lord Chief Justice said that—"If the result of trying together two persons who might have been tried separately had been a miscarriage of justice, this Court would interfere." Crown inconvenience can

never be a valid reason for denying an accused person an absolute right.

The second ground is that, inasmuch as sec. 402 guarantees to the second accused person the right of "full answer and defence," he cannot be denied the right if he thinks it advances his own defence to comment on the failure of accused person Number 1 to give evidence on his behalf. That is quite correct. But what follows? It is said that it follows that when accused Number 2 comments in his own defence, on the absence of accused Number 1 from the witness-box, the latter must put up with it, however much it prejudices his defence. In other words, the Crown can charge two men together so as to enable one to destroy the right of the other to his statutory protection. But sec. 402 is for the benefit of both the accused. Each has a right to make his "full answer and defence" according to law. He has a right, among other things, to make a statement under sec. 405, "without being liable to examination thereupon by counsel for the Crown or by the Court," and he has that right free from any "comment" that he refrained from giving evidence on oath. Why is his right under sec. 402 to be cut down any more than is the right of the other accused? That involves a direct and close consideration of the sub-section under construction.

It is part of sec. 407, and that section is one of a special group of secs. 406 to 424 inclusive, headed, "Rules Respecting Evidence." This group of sections being directed to a specific subject, is a sort of code, and must be obeyed before it can be said whether or not the general provisions elsewhere are satisfied or not. They are the dominant provisions in determining whether a prisoner has been allowed his full defence. Of these sections, 407 is of vital importance. Its anxiety to deal comprehensively with the subject of the competency and compellability of parties as witnesses is so marked that it begins with civil proceedings. But that is not without use on this occasion. It contents itself as to civil proceedings with declaring competency to give evidence. In criminal proceedings it makes first a general declaration that every accused person in a criminal proceeding is competent, but not compellable, to give evidence. That is because at Common Law a competent person was compellable. So far a great inroad had been made in the Common Law. And so it stood in 1894. "Compellable" meant, as the Privy Council held in *Kop's Case*, (1894) A.C. p. 650, "compellable by process of law." Their Lordships held that it did not mean "compellable by reason of comment," that is by fear of comment. The section dealt with in that case (1) was limited to indictable offences, (2) had a proviso which is now found repeated in the proviso to sec. 407 of the Act of 1900. This accounts for the limitation of the proviso to indictable offences. That is a little complicated, and perhaps deserves legislative attention, seeing that the "competency" provision now extends to all criminal proceedings. But putting

that aside, it is clear that the Legislature of New South Wales, finding that an accused person, according to *Kop's Case* (*supra*), could be practically coerced into giving evidence by fear of comment, thought it right, by 1898 (No. 30), to put an end to that state of the law. As an amendment of the "Criminal Law and Evidence Amendment Act," sec. 1 of No. 30 of 1898, said—"It shall not be lawful to comment at the trial of any person upon the fact that he has refrained from giving evidence on oath on his own behalf."

It is somewhat important to see what the position was at the moment that short special Act was passed, namely, 4th November, 1898. *Kop's Case* had been decided in 1894, and the Judicial Committee had expressed its view as to the policy of allowing comment. On 12th August, 1898, the Imperial Parliament, by chapter 36, sec. 1 (b), said the failure of an accused person or his or her wife or husband to give evidence should not be made the subject of any "comment by the prosecution." That left open two legitimate sources of comment, namely, by the Judge and by a fellow-accused. In Canada, by an Act of 1893, the prohibition went to comment by either Judge or Counsel. The New South Wales Parliament, however, deliberately chose a form of words, broad enough to include comment, from any source from which it could otherwise come according to law. The law so made still stands, and is placed in its appropriate place as part of sec. 407 in the consolidating Act of 1900. The intention of Parliament is plain. Having before it the new English legislation, and probably the Canadian Act, and having before it the distinction appearing in *Kop's Case* (*supra*) between legal compellability and virtual compellability, the Legislature obviously intended to make its law as to freedom from coercion to give evidence real and complete. The provision enabling a prisoner to testify was not to be turned into a provision for forcing him to testify, whoever tried to do it, not even by the expedient of putting up with an accused some other prisoner who could do what could not otherwise be done. The sub-section is intended primarily not as a restraint on Judge or prosecutor, but as an effective protection to an accused person. It must be looked at from the standpoint of that person. It may be a cunning rascal who is charged; it may, however, be a weak and simple woman, whose unguarded or mistaken answer to a skilful advocate might spell undeserved ruin. This it is manifestly the intention of the sub-section to prevent, and until the Parliament of New South Wales changes its mind, I feel bound, as the Supreme Court did, to give effect to it.

It is, of course, desirable to state affirmatively what I understand to be the extent of the comment forbidden. The "comment" referred to in the enactment is hostile comment to disparage the accused, and necessarily comment, which but for the enact-

ment would be lawfully addressed to the Court or jury by any person entitled by law to make it in order to strengthen the effect of evidence against the accused, or to weaken any evidence given or statement made in his favour. It is not, for instance, intended to extend to the unlawful ejaculation of a spectator or to the deliberations of the jury in their room, which is not "at the trial." Other considerations apply there. If the other accused is entitled to make the comment, the Crown, by joining the two in a case where it is anticipated antagonism will or may prevail—as it actually did in this case—could seriously prejudice the defence of the accused. The Judge would be entitled, and perhaps bound, to comment upon it, and the accused affected would certainly have the right and be morally coerced to explain why he did not go into the witness-box. That in effect nullifies the sub-section or aggravates its violation. There was consequently a distinct breach of the law, and *prima facie* a plain miscarriage of justice, because the prisoner's statutory right of defence was infringed.

Section 6 of Criminal Appeal Act.—The first question must be, what is the duty of the Court under sec. 6 of the "Criminal Appeal Act?" The primary duty of the Court under the section in a case like the present is to allow the appeal. But then comes the proviso, which says that the Court "may" (that is in its discretion) dismiss the appeal, if it considers that "no substantial miscarriage of justice has actually occurred." That is to say—first the Court must form a definite affirmative opinion that "no substantial miscarriage of justice" has taken place. Those words have been the subject of very long and authoritative judicial exposition. I shall content myself with stating what I conceive to be the general working principle deducible from the long series of cases on this point. The working principle as I understand it is this: A conviction impeachable for any of the causes of error mentioned in the body of sec. 6 will be set aside unless the Court, upon considering the error relatively to such circumstances of the case as are relevant to that error, considers the improbability of the error having affected the result to be so great that it must be regarded as negligible.

The leave to appeal was granted only for the purpose of determining questions of general importance. These having been so far determined, the application of them to a particular case, particularly one in which a new trial is ordered, is beyond the purpose of the leave, which I agree should be rescinded.

HIGGINS, J.—I take substantially the same view of this case as the Chief Justice. I am not satisfied that the word "comment" used in sec. 407 (2) of the "Crimes Act 1900" does not include comment by a fellow-prisoner jointly indicted, although such a construction lends itself to collusion and absurdity. I

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concur heartily with the view of the Supreme Court that the Legislature should not allow a matter so intimately affecting the administration of the criminal law to remain any longer in doubt. Then, in applying sec. 6 of the "Criminal Appeal Act 1912" to the miscarriage of justice (on both sides it is admitted that there was a miscarriage if sec. 407 (2) has the meaning alleged, and if what the fellow-prisoner said was comment within that meaning), I confess that I should hesitate before saying, under sec. 6, that the miscarriage was "substantial." The comment added nothing to that which the jury saw with their own eyes, that Harvey had given evidence on oath and that Ellis had not. I cannot agree with the Chief Justice of the Supreme Court if his meaning is that every miscarriage of justice by way of disobedience of sec. 407 (2) is substantial. But this High Court does not affect to substitute itself for the special Court of Criminal Appeal which the State Legislature has provided, and we should not have given special leave to appeal but for the legal difficulty as to the meaning of the word "comment."

I think that the proper course is to rescind the order giving special leave to appeal.

RICH, J.—I concur in the order rescinding the special leave granted in this case.

STARKE, J.—The decision of the Supreme Court of New South Wales, as the Court of Criminal Appeal, as to the meaning and effect of sec. 407 (2) of the "Crimes Act" was, in my opinion, correct. An accused person is now a competent but not a compellable witness on his own behalf. That is a privilege or right conferred upon him by sec. 407. Though sec. 402 confers or reinforces the right of every accused person to make a full defence, still it does not, to my mind, destroy the privilege or right conferred upon other accused persons by sec. 407, or affect the preservation or protection of that privilege or right which is the object of the proviso to sec. 407; sub-sec. (2)—*cf. R. v. Payne*, L.R. 1 C.C.R. 349.

As to the second argument, that no substantial miscarriage of justice actually occurred in this case, the Court of Criminal Appeal is not bound, as a matter of right in all cases, to set aside a conviction, if the provisions of sec. 407 (2) are infringed—*R. v. Dickinson*, 5 C.A.R. 135; *R. v. Russell*, 6 C.A.R. 78. Its duty is to consider the facts of each particular case, and to determine the matter in the circumstances of that case. That, I take it, the Court did in the present case, and we ought not to interfere with its order for a new trial.

Order giving special leave to appeal rescinded.

Appellant to pay costs.

[Solicitors—For the appellant, the Crown Solicitor for N.S.W.; for the respondent, M. A. H. Fitzhardinge, Sydney agent for A. R. Best, Ballina.] T. F. W.

Supreme Court.

Before Weigall, A.J.

Dec. 9, 16, 1925.

NODEN and Another v. MASON.

Vendor and purchaser—Action by vendor for specific performance — Pleading—Default of appearance—Judgment as upon allegations in statement of claim—Contract incorporating conditions of Table A in 25th Schedule to "Transfer of Land Act 1915"—Application for order for rescission and re-sale of land in accordance with conditions—Rules of the Supreme Court 1916, Order XXVII., r. 11.

Upon a judgment based solely on the allegations in the statement of claim, no order will be made based upon evidence by affidavit of contractual rights not alleged in the statement of claim, and not necessarily conferred by a judgment ordering specific performance of such a contract as by the pleading alleged.

The plaintiff (the vendor), in an action for specific performance of two contracts for the purchase of land, had obtained judgment in the usual form under Order XXVII., r. 11, in default of appearance and of defence. The contract incorporated clause 6 (*inter alia*) of the general conditions of sale contained in Table A under the 25th Schedule to the "Transfer of Land Act 1915," which purports to enable the vendor, upon any default by the purchaser, to forfeit the deposit, and without notice to rescind the contract and to re-sell, and recover from the purchaser as liquidated damages any deficiency occasioned by such re-sale. The statement of claim indorsed on the writ contained no allegation of the incorporation of this clause in the contracts. Under liberty to apply reserved, the plaintiff subsequently applied for an order: "that he be at liberty to re-sell the land referred to in the statement of claim in this action, according to the provisions of the respective contracts of sale referred to in the said statement of claim."

Held, that since there was nothing in the allegations of the statement of claim which entitled the plaintiff to the order sought, the application must be refused.

Griffiths v. Vezey, (1903) 1 Ch. 796, distinguished.

MOTION under liberty to apply.

William H. G. Noden and Ronald Stuart McConchie, by two written contracts, agreed to sell to Reuben Lionel Mason certain pieces of land. The purchaser having failed to carry out his contract, the vendors brought an action against him for specific performance.

The facts leading to this motion were stated in the Judgment of Weigall, A.J., as follow:—

By their Statement of Claim indorsed on the writ, dated the 23rd June, 1925, the plaintiffs alleged two separate agreements in writing, dated the 28th March, 1925, by each of which respectively the plaintiffs agreed to sell and the defendant agreed to purchase certain land. As to each of these contracts the Statement of Claim set forth the purchase money and the terms of payment thereof, providing for interest at 6 per cent., and alleged that the defendant had accepted the title, but had refused and was still refusing to carry out these terms, and that he had not paid any of the