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MISSIONER
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TAXA-
TION.

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for that purpose, they were made in the ordinary course of business, the profits made on such sales are taxable.

With those expressions of opinion, I think that the case must go back to the Court of Review in order that the facts may be further investigated, and that the liability may be determined.

I think, however, that there should be no costs allowed of this case.

FERGUSON and DAVIDSON, JJ., concurred.

Solicitors for the appellant : *Minter, Simpson & Co.*

Solicitor for the respondent : *Crown Solicitor.*

1927.**R. v. MADGE.**

Feb. 22 ;
March 11.

Criminal law—Appeal—Fresh evidence—Practice.

Street, C.J.
Gordon, J.
Ferguson, J.

The applicant was committed at the Children's Court and convicted at the Court of Quarter Sessions on a charge of carnally knowing a girl under the age of 16 years at Stanford Merthyr on or about the 10th July. At the lower Court the girl swore that intercourse took place during a party at "Spinekoff at Mrs. C.'s place" on the 10th July. At the Court of Quarter Sessions she said that it took place during a party at "Mrs. H.'s place" on the 10th July. The applicant asked for a new trial on the ground that fresh evidence was available to show that "Mrs. H." lived at Spionkop, a village about a mile away from Stanford Merthyr, and that there was a party at her place, at which both the applicant and the girl were present, on the 10th July. The fresh evidence would show what took place at the party at "H.'s." and would show that the party at "C.'s" place did not take place until two months later. Further, that the applicant was not present at "Mrs. C.'s" party. The attorney who defended the applicant explained that he was misled by the depositions, in which nothing appeared about "Mrs. H.," and he did not see the necessity for inquiring as to what took place there. He said that he did not know until the trial was over of the evidence now available.

The Court of Appeal accepted his explanation, and being satisfied as to the materiality of the fresh evidence, and that if it had been before the jury it might have affected the result, set the conviction aside and granted a new trial.

R. v. Sayegh (25 S.R. 61) and *R. v. Martin* (1 C.A.R. 33) considered.

CRIMINAL APPEAL.

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The applicant was convicted on a charge of carnally knowing a girl under 16 years of age at Stanford Merthyr on the 10th July.

It appeared from the depositions taken at the Children's Court, that the girl, when giving evidence, said that intercourse took place on the 10th July "at Spinekoff at Mrs. Charlton's place." When giving evidence at the Court of Quarter Sessions she said it was on the 10th July, but that it was at Mrs. Hadfield's where intercourse took place.

The applicant moved to set the conviction aside and for a new trial on, *inter alia*, the ground that witnesses are available who can give material evidence of what took place at Mrs. Hadfield's on the night of the 10th July, and who were not called at the trial.

On the hearing of this appeal, it appeared from a police report, that there is a village named "Spionkop," about a mile away from Stanford Merthyr, at which latter place Mrs. Charlton lived, and that Mrs. Harding lived at Spionkop.

It appeared from the affidavits of witnesses who are available to give evidence, and whose respectability is not questioned, that there was a party at Mrs. Harding's, on the 10th July, at which both the girl and the applicant were present; that the party at Mrs. Charlton's did not take place until the 11th September, and that though the girl was present at that party the applicant was not present. The evidence would also show what took place at the Hadfield's party. The attorney who defended the applicant explained that he had been misled by the girl's depositions in the Children's Court into thinking that he only had to direct his attention to what happened at Mrs. Charlton's place, and that he did not know until after the trial was over of the evidence that was available as to what took place at the Hadfield's.

Brian Clancy and *E. M. Martin*, for the applicant: *R. v. Martin* (1 C.A.R. 33 and 52) and *Taylor v. The King* (20 W.A.R. 47).

Weigall, K.C. (Solicitor-General), for the Crown.

C.A.V.

1927. March 11.

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STREET, C.J. The applicant was charged at the Children's Court at Kurri Kurri on the 22nd of last September with having carnally known a girl under the age of sixteen years at Stanford Merthyr on or about the 10th of last July, and he was committed for trial at the Court of Quarter Sessions at Maitland on a charge of having committed that offence at Stanford Merthyr on the 10th of last July. At the lower Court the girl swore—according to the shorthand writer's notes of the evidence—that intercourse took place on the date in question at "Spinekoff at Mrs. Charlton's place." At the Court of Quarter Sessions she swore that it took place on that date at Mrs. Hadfield's house. Spinekoff is, I have no doubt, a mistake for Spionkop, and we learn from a police report which has been furnished to us that it is a village about a mile away from Stanford Merthyr. Mrs. Hadfield lives at Spionkop, but Mrs. Charlton lives at Stanford Merthyr, practically opposite to the dwelling of the girl's parents. The trial took place on the 30th of November last, and the applicant was found guilty. He now asks that his conviction may be set aside, and that a new trial may be had, upon certain grounds, one of which—and the only one to which we need refer—is that witnesses are available who can give material evidence of what took place at Mrs. Hadfield's on the night of the 10th of July and who were not called at the trial.

It appears that there was a party at Mrs. Hadfield's house on the night of the 10th of July at which both the girl and the applicant were present, but that the party at Mrs. Charlton's did not take place until the 11th of September, and that, though the girl was present at it, the applicant was not. His solicitor, Mr. Enright, who defended him and who is an experienced advocate, says that, when discussing the question of his defence with him on the 29th of November, the day before his trial and some two months after the preliminary inquiry at the Children's Court, he did not discuss with him the question of what had taken place at Mrs. Hadfield's house and saw no necessity to search for any evidence on that point, as nothing was said about the Hadfield's in the copy of the girl's deposition supplied to him. He tells us, too, that since

the trial he has ascertained for the first time that material evidence as to that is available; and affidavits from witnesses who can give evidence, and whose respectability is not questioned, have been put before us.

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The Criminal Appeal Act confers powers upon the Court to order a new trial if it considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, that miscarriage can be more adequately remedied by an order for a new trial than by any other order which it can make. The power to grant a new trial is, however, a power which, as *Griffith*, C.J., said in *Peacock v. The King* (13 C.L.R. 619, at p. 641), should be used with great caution. It was not intended that a convicted person should have a second chance as a matter of course, and a new trial will not be granted to allow a case to be set up which obviously ought to have been set up, but was not, at the first trial. Before the Court can order a new trial it must be satisfied that there has been a miscarriage of justice, and, where a new trial is asked for upon the ground that evidence is available which was not put before the jury on the first trial, the Court must not only be satisfied as to its materiality, and as to the effect that it might have had upon the result if put before the jury, but in addition a satisfactory explanation must be given as to why it was that it was not called at the first trial. See *R. v. Henry Martin* (1 C.A.R. 33); *R. v. Sayegh* (25 S.R. 61, at p. 64).

In this case we are satisfied as to the materiality of the evidence put before us, and we are satisfied that if it had been before the jury it might have affected the result, but the question upon which we have felt some doubt is whether a satisfactory explanation has been given as to why it was not called at the first trial. Mr. Enright says in effect that he and his client were misled by the girl's evidence at the lower Court—as it appeared in her deposition—into thinking that the only case that had to be met was a charge of a crime committed at Mrs. Charlton's party on the night in question, and he says that consequently his attention was not directed to the necessity for making inquiry as to what happened at Mrs. Hadfield's on that night. An advocate who pins his faith to one particular line of defence, and, by concentrating on

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that to the exclusion of everything else, overlooks other material features, incurs a heavy responsibility. New trials are not to be had merely because advocates err in their judgment, or because tactics deliberately adopted fail of success, and we have felt some doubt whether in this case we should not let the conviction stand and leave it to the applicant to petition for a further inquiry under s. 475 of the Crimes Act. Upon consideration, however, we think that we should not take that course. We accept Mr. Enright's statement that he was misled by the girl's evidence at the lower Court into thinking that he only had to direct his attention to what took place at Mrs. Charlton's and that he did not know until after the trial was over of the evidence that was available as to what took place at Mrs. Hadfield's, and we have come to the conclusion that in all the circumstances—including the fact that the girl's story, though accepted by the jury, was uncorroborated—the case is one in which, consistently with principle, a new trial may be directed. That being so, we do not think it advisable to say anything further about the facts, and it must be understood that we are not expressing any opinion, one way or the other, as to the admissibility of any evidence that may be tendered on a new trial. That will be a matter for the presiding Judge to determine.

The conviction will be quashed and a new trial had.

GORDON and FERGUSON, JJ., concurred.

Solicitors : *Taylor & Kearney*, agents for *W. J. Enright & Skilton* (West Maitland).
