

## CHEATLEY v. THE QUEEN

1981. Court of Criminal Appeal: Green C.J., Nettlefold and Everett JJ.

May 29, Aug. 27, 1981.

*Criminal Law — Evidence — Witnesses and accused — Evidence as to character — Admissibility on question of guilt or innocence — Good character of accused — Good character of witness.*

*Criminal Law — Evidence — Presumptions of — Innocence — Not in respect of witness.*

*Criminal Law — Appeal and new trial — Misdirection — Evidence of accused's good character — Police evidence contradicted — Direction that police also of good character — Suggestion of balancing testimony — Distracting jury from issue.*

*Criminal Law — Appeal and new trial — Practice — Powers of Court of Criminal Appeal — Power to grant new trial — When to be exercised — Criminal Code, s. 402.*

While evidence of his good character raises a presumption that the accused has not committed a crime unlikely to be committed by a person of such a character and is therefore relevant to the issue of guilt, evidence of a witness's good character is not.

There is no presumption of innocence or good character in respect of a witness.

If the judge charges the jury on the effect of evidence of the accused's good character he must not lead the jury away from the issue to be tried to that of who has lied, the accused or the witness, or to that of whether the witness is guilty of perjury, or to think of the effect of their verdict on the witness.

The discretion of the Court of Criminal Appeal under the *Criminal Code*, s. 402, is to be exercised on consideration of the interests both of the public and the appellant and is not to be fettered by any supposed practice.

## APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION.

Roderick Duncan Cheatley was arraigned at Hobart Criminal Sittings before Cosgrove J. in November 1980 on a charge of stealing, contrary to the *Criminal Code*, s. 234, and pleaded not guilty. The case for the Crown was that he had stolen his secretary's purse from her handbag. The only substantial evidence of this was a confession contained in an unsigned record of interview made by police officers. The accused denied the truth of the record and led

evidence of his good character, which was not disputed. In charging the jury Cosgrove J. said:

[A]

"It is the confessional evidence which lies at the heart of this case. It seems to me that if you were satisfied beyond reasonable doubt that the accused confessed to taking the wallet, you could safely ignore all the other evidence. On the other hand, if you were not satisfied beyond reasonable doubt that he confessed to taking the wallet, you wouldn't have enough evidence to convict. . . . If the police officers are telling the truth, then there's a full confession and the other evidence is relatively unimportant. If you are not satisfied beyond reasonable doubt of the making of the confession, then it would not be proper, in my opinion, for you to convict, whatever you made of the other evidence.

[B]

"Now, in this case, evidence of the good character of the accused has been led. That evidence may be used for two purposes — firstly, to show that his testimony is more worthy of belief than that of a man of bad character. It goes to his credibility. But in this case, the conflict is between the accused who has good character — that is not contested by the Crown, and three police officers, who were certainly not shown to be of bad character. One of them is an Inspector of Police. So it may be difficult for you to see to what extent that evidence helps you, except by way of keeping the scores level, as it were. But that may be important when you come to consider the burden of proof.

[C]

"Now, the evidence may also be used in this way. You may use it as carrying the inference that the accused is a person who is by nature unlikely to have committed this crime. Whether that inference ought to be drawn, and if drawn is displaced by the evidence is a matter for you. But again, the police officers are persons of good character. In fact, so far as the evidence goes, all the witnesses are persons of good character. And although it is fashionable in some quarters these days to denigrate the police force, it is still the community's bulwark against crime and violence and dishonesty. It is the arm of the public service charged with the responsibility of preserving the peace, preserving law and order and enforcing some of the orders of these courts. Experienced and high ranking officers in that force can, and ought, in the absence of other evidence, to be considered as unlikely to commit crimes such as conspiring to pervert the course of justice or perjury. So, in this case, each side accuses the other of the commission of crime. The police say, and the Crown says, the accused committed the crime of stealing, and it is the inevitable inference from the Crown evidence that when he went into the witness box he committed perjury. On

the other hand, the accused says the police officers conspired to fabricate evidence, conspired to pervert the course of justice and have committed perjury. All parties come to this court as persons of good character. Your decision must turn on the evidence — always remembering of course that the Crown bears the burden of satisfying you beyond reasonable doubt.

[D]

“No real motive to commit the crime is shown on either side. It is not shown that the accused was desperately short of money. It is not shown that the police had any motive to frame him, to conspire to fabricate the evidence. But it is of course, one thing to yield to a temptation to steal. It is another thing to deliberately set about a conspiracy against justice. Those are the directions of law that I give you. I now turn to the evidence.

[E]

“There is no room in this case, it seems to me, it is a matter for you, but it seems to me, there is no room in this case for any possibility of mistake or error of memory. Either the police officers are lying or the accused is lying. That seems to me to be inevitable, but it is a matter for you to consider. And it would seem to me that if you concentrated on those two questions, while viewing all the evidence as it related to them, you would be concentrating on the heart of the matter.”

After deliberating for about four hours and seventeen minutes the jury sought more time, which the judge granted, saying:

“... I should point out to you that it almost inevitably means a retrial if you can't agree, but on the other hand, you must each individually be faithful to your oaths and reach the verdict as you see it.”

After another forty minutes the jury brought in a unanimous verdict of guilty.

The accused applied for leave to appeal against his conviction on grounds which after amendment were as follows:

- “1. That the learned trial Judge misdirected the Jury as to the evidence of the Applicant's good character and in particular:
  - (a) As to the use to be made of it;
  - (b) as to its applicability to police witnesses.
- “2. That the learned trial Judge misdirected the Jury by distorting the onus of proof in relation to the use to be made by the Jury of character evidence.
- “3. The learned trial Judge misdirected the Jury as to the onus of proof by inviting them to decide the case by resolving the conflict of evidence between the Applicant and the police officers.
- “4. That the learned trial Judge erred in law when he instructed

the Jury after they had deliberated for over four and a half hours and were unable to return a verdict that their failure to agree upon a verdict would mean that the accused would have to face a retrial."

*G. Hampel Q.C. and David Gunson for the appellant.*

*A. R. Jacobs and A. N. Hope for the respondent.*

*Hampel Q.C.* The summing up distorts the burden of proof and negatives the evidence of the appellant's good character. *Howe v. The Queen* (1980), 32 A.L.R. 478, 55 A.L.J.R. 5; *Attwood v. The Queen* (1960), 102 C.L.R. 353; *Reg. v. Deathe*, [1962] V.R. 650; *Reg. v. Lapuse*, [1964] V.R. 43. The jury could be misled: *Price v. The Queen* (Unreported, C.C.A., 8th June 1962); *R. v. Smith*, [1964] V.R. 217; *Reg. v. Murtagh and Kennedy* (1955), 39 Cr.App.R. 72; *R. v. Lobell*, [1957] 1 Q.B. 547; *Lucas v. The Queen* (1970) 120 C.L.R. 171; *Reg. v. Cartledge*, [1956] V.R. 225; *Reg. v. Olholm and McPherson*, [1925] V.L.R. 377; *Reg. v. Walhein* (1952), 36 Cr.App.R. 167; *Reg. v. Creasey*, (1953) 37 Cr.App.R. 179.

*Hope.* The directions as to character were not improper. *Reg. v. Trimboli* (1979), 21 S.A.S.R. 577; *Attwood v. The Queen* (1960), 102 C.L.R. 353; *Reg. v. Bellis*, [1966] 1 W.L.R. 234; *Reg. v. Thompson*, [1966] Q.W.N. 73; *Reg. v. Rowton* (1865), Le. & Ca. 520. The judge was entitled to comment on the policemen's evidence: *Howe v. The Queen* (1980), 55 A.L.J.R. 5; *Trotter v. The Queen* (Unreported, C.C.A., 27th October, 1977); *Brown v. The Queen*, [1971] Tas. S.R. 57; *Martin v. The Queen* (Unreported, C.C.A., 23rd June, 1961); *Reg. v. Umanski*, [1961] V.R. 242.

*Jacobs* on ground 4 referred to *Nelson v. The Queen* (Unreported, C.C.A., 7th November, 1967).

*Hampel Q.C.*, in reply.

*Cur. adv. vult.*

AUGUST 27.

GREEN C.J.: This is an application for leave to appeal against the appellant's conviction for stealing. The essential facts, the way in which the trial was conducted and the grounds of the application appear in the reasons for judgment of the other members of the court.

After directing the jury that they could use the evidence of the accused's good character when assessing his credibility as a witness, the learned trial judge went on: [His Honour set for the passages denoted by [C] and [D] (*supra*) and the later passage denoted by [E] and continued:]

The direction that the evidence of the accused's good character could be used by the jury not only as an aid to their assessment of the credibility of the accused as a witness, but also in their consideration of the question of whether it was unlikely that the appellant committed the crime charged, was unobjectionable: *Attwood v. The Queen* (1960), 102 C.L.R. 353, at p. 359. However, the latter part of that direction is only applicable to an accused person — it is quite inappropriate to apply it to witnesses. Further, there was no direct evidence that the witnesses for the Crown were of good character and there is no presumption that in the absence of evidence to the contrary a witness, whether he be a police officer or anyone else, is of good character, or, indeed, is of any particular character. But even if the jury could have properly inferred from the evidence which was before them that the police witnesses were of good character, the passage I have set out above was a misdirection because it might have led the jury to conclude that the question of whether or not the police witnesses had committed crimes such as perjury or conspiracy to pervert the course of justice was a proper question for their consideration. But that was not in issue in the trial: as the High Court said in *Howe v. The Queen* (1980), 55 A.L.J.R. 5, at p. 8, 32 A.L.R. 478, at p. 483: "An acquittal of the applicant would not imply any finding against the witnesses for the prosecution." In my view, the effect of the learned trial judge's directions would have been heightened by the following passage:

"No real motive to commit the crime is shown on either side. It is not shown that the accused was desperately short of money. It is not shown that the police had any motive to frame him, to conspire to fabricate the evidence. But it is of course, one thing to yield to a temptation to steal. It is another thing to deliberately set about a conspiracy against justice."

Those comments not only tended to reinforce the suggestion that in arriving at their verdict the jury should engage in the impermissible process of weighing the probability of the accused having committed the crime with which he was charged against the probability of the police having committed the crimes referred to, but they would also have tended to negative the directions as to the onus of proof because they could have been understood as implying that the latter was less probable than the former.

In my respectful view, the learned trial judge's understandable and laudable attempt to simplify the issues for the jury involved a real risk that the jury would have confined their deliberations to a consideration of whether they believed the evidence of the witnesses for the Crown, on the one hand, or the evidence of the accused, on the other, whereas their duty was to determine whether they were satisfied beyond reasonable doubt of the accused's guilt after considering all the evidence given by all the witnesses, including the

accused. As a result there was a risk that the jury would not have properly applied the general directions that they had earlier received as to the burden of proof and, further, it is likely that they would not have given adequate consideration to the third possibility that they should entertain a reasonable doubt as to the appellant's guilt because they did not find either side convincing or because they were not satisfied as to where the truth lay.

In my view, because the directions and comments in the passages I have set out above were specific and concrete, it is likely that they would have had more impact than the other, more general directions as to the burden of proof which were given by the learned trial judge and there must therefore be a real risk that the summing up as a whole might have misled the jury as to their function.

I do not consider that no substantial miscarriage of justice has actually occurred and, in my view, the appeal should be allowed. In those circumstances, by virtue of the *Criminal Code*, s. 402(3), it follows that the Court should order that the conviction should be quashed and a verdict of acquittal entered unless the Court is persuaded that it should of its own motion order a new trial. I am not persuaded that it should. In reaching that conclusion I have taken into account that apart from a matter not presently material which was corrected before the jury retired, counsel for the appellant made no submissions to the trial judge at the end of the summing up as to any of his directions or comments. However, I think that that factor is outweighed by the considerations that, relatively speaking, the crime charged was not serious, the appellant has already been put to substantial expense and inconvenience and it could not be said that upon a retrial it is probable that a properly directed jury would convict.

NETTLEFOLD J.: The critical passage in his Honour's summing up is the following: [His Honour set forth the passages denoted by [B], [C], and [D] *supra*, and continued:]

With respect, his Honour has fallen into error in that passage. A juror listening to that direction may well conclude that he was being told as a "*direction of law*" that "experienced and high ranking officers in that force (the Tasmanian police force) can *and ought*, in the absence of other evidence, to be considered as unlikely to commit crimes such as conspiring to pervert the course of justice or perjury". Of course, the law is that police officers, whether experienced and high ranking or not, are not entitled to have any presumption of that kind operating in their favour. They are not to be treated differently to any other witness.

No doubt a trial judge would be entitled, if he saw fit, by way of comment on the evidence, to observe that the police witnesses were experienced and high ranking and to leave it to the jury to give such weight to that comment as they saw fit. But to make such a

comment is a very different thing to giving a direction of law to the effect stated above.

As this case really turned on whether, at the end of the day, the jury had sufficient confidence in the police witnesses to reject the appellant's evidence and affirm guilt, the defective passage in the summing up is of particular importance.

But, unfortunately, the defects in the summing up do not end there. The view is open, on the authorities, that there is no duty on a judge to refer to character evidence when summing up. It is a matter for his discretion: see *Reg. v. Aberg* (1948), 32 Cr.App.R. 144, [1948] 2 K.B. 173; *Smith v. The Queen* (1970), 121 C.L.R. 572. However, in *Reg. v. Thompson*, [1966] Q.W.N. 73, at p. 74 Gibbs J. said:

"I would, with respect, agree with the remarks of Sholl J. in *R. v. Schmahl*, (1965) V.R. 745, at p. 750, that it would not be right to lay down that in every case where evidence of good character is given the Judge should give the jury a direction as to the way in which that evidence can be used. I would further agree that it would be wise to give such a direction in every case in which it is asked for."

The point is one of practice and it may well be that, if no direction were given in a future case, this Court would review the judge's exercise of his discretion and, depending on the particular facts of the case, decline to interfere with the verdict.

But, here, his Honour has exercised his discretion in favour of giving a direction on the evidence of the appellant's good character. Having exercised his discretion in that way, the appellant was entitled to a direction in accordance with current practice. I use the term "current practice" because I do not think that the older English practice was as favourable to accused persons as the current practice (see *Reg. v. Davison* (1809), 31 State Tr. 99; *Reg. v. Frost* (1840), 4 State Tr. N.S. 85, 386; *Reg. v. Broadhurst* (1918), 13 Cr.App.R. 125).

In accordance with current practice the appellant was entitled to a direction that the evidence of good character went, primarily, to the issue of credibility but has a more general significance best illustrated by what was said by Williams J. in *R. v. Stannard* (1837), 7 C. & P. 673, at p. 675 "It is evidence . . . to be submitted to the jury, to induce them to say whether they think it likely that a person with such a character would have committed the offence." His Honour did bring to the attention of the jury those two aspects of the evidence. But, with respect, his Honour, when doing so, and when giving what were described as "directions of law", proceeded to treat all the principal Crown witnesses as persons of good character and to give the direction concerning the police to which attention has been directed earlier in these reasons. There was no evidence that any of these witnesses were persons of good character. At best, the

position was that no steps had been taken during the trial to show that they were persons of bad character.

One cannot escape the view that the direction, read as a whole, could give the jury the impression that the appellant's ace had been trumped four times. To add to the difficulty, with respect, there was an emotive reference to police functions which begged the question in the case which, to a substantial degree, was whether they were discharging those functions properly and in accordance with the law, when they were dealing with the appellant.

These defects in the summing up were so significant that the verdict must be set aside. The underlying issue at the trial was credibility and these errors had a substantial and direct bearing on that issue.

I would set the verdict aside and decline to order a new trial. My reasons for taking the latter view are:

- (1) the nature of the alleged offence;
- (2) the trial lasted six days and the court was informed by the appellant's counsel that the appellant did not have legal aid;
- (3) the trial miscarried and that was not the fault of the appellant;
- (4) counsel informed the court that the appellant now resides in Canberra.

EVERETT J: I have had the advantage of reading in draft form the reasons for judgment of Nettlefold J. I share the views which his Honour has expressed, both as to the merits of the appeal and the course which should be followed as a result of this court's decision.

Because I wish to state my own reaction to the summing up of the learned trial judge and also to express my reasons for the order which the court has decided to make, it is convenient to state the basic facts as they emerged in evidence before the trial judge.

The appellant was charged with having, on 2nd July, 1980, stolen a wallet, a quantity of personal papers and approximately \$352.90 in money, the property of Jennifer Anne Grubb. He was at the time, and had been for a little more than a year, General Secretary of the Tasmanian Division of the Liberal Party of Australia. At the time of the alleged theft Mrs Grubb was his secretary. She had been a permanent employee of the Liberal Party organisation since November 1975. The Crown case was that on the morning of 2nd July, 1980, Mrs. Grubb arrived at her office, a building at 30 Patrick Street, Hobart, about 9.30 a.m. There were three other female persons at the Party headquarters on that morning — two of them employees and the third an official of the Liberal Party — and some tradesmen working on the building. The allegation was that, prior to his leaving to attend a pre-arranged meeting at Ross, the appellant removed a small purse from Mrs Grubb's handbag while she was absent from her office and that



the purse contained the property specified in the indictment. It was not in dispute that the appellant during the morning left his office for Ross after having been informed by Mrs Grubb that her purse was missing. A number of unconnected matters, claimed to point to the guilt of the appellant, formed part of the Crown case but counsel for the prosecution disavowed substantial reliance on such matters and, in his opening address to the jury, acknowledged that the Crown case rested "to a substantial degree" and "certainly primarily" on the evidence of three police officers. Their evidence was that five days after the alleged theft the accused unequivocally admitted his guilt in an interview with police officers and that a record, tendered in evidence, of the questions and answers during the interview was made, although the appellant declined to sign it. The essence of the defence, leaving aside the answers to the minor matters allegedly indicating guilt, was that the unsigned record of interview was a fabrication. It was in that sense that the learned trial judge used the word "conflict" in a passage from his summing up to which I shall later refer. His Honour also said: [Everett J. set forth the passage denoted by [A] *supra*.]

The grounds of appeal, as amended, and renumbered in accordance with the amendments, were:

[His Honour set forth the grounds of appeal and continued:]

The passage from the summing up which is reproduced at the beginning of the reasons for judgment of Nettlefold J. is contained in a section of the directions to the jury which were clearly expressed to be "directions of law" which the members of the jury were told they must accept. His Honour said: "The law must be fixed, so you must accept my directions as to that." In consequence, when the jury listened to the summing up in the passage quoted, it did so with the knowledge that it was directed that it was obliged to apply the propositions which it contained as "directions in law".

In my view the claim on behalf of the appellant which is embodied within grounds 1, 2 and 3 considered collectively is established for a number of reasons which have been stated by Nettlefold J. and which I need not repeat. But I wish to state my own view as to the effect which the passage in the summing up could have had on members of the jury who clearly would have understood that the summing up at that stage related to a "direction of law" which they were bound to accept and apply.

The introduction of the notion of "conflict" between the accused and three police officers into consideration of the evidence of good character tendered on behalf of the accused, could have distorted the judgment of the jury in respect of the burden of proof, despite the directions of the trial judge in relation to such burden at various stages of the summing up. I do not consider it was a justified use of such character evidence to direct the jury, in the forefront of

instructions stated to be "directions of law", in these terms: "So it may be difficult for you to see to what extent that evidence helps you, *except by way of keeping the scores level*, as it were." This followed an observation that the police officers "were certainly not shown to be of bad character".

I do not consider the trial judge was justified in introducing what amounted to an evidentiary equation in relation to the effect in law of proved good character of the accused and a purported inference, as a matter of law, of countervailing good character of the police officers *virtute officii*. When his Honour charged the jury as a matter of law that "experienced and high ranking officers in that force can, *and ought*, in the absence of other evidence, to be considered as unlikely to commit crimes such as conspiring to pervert the course of justice or perjury", he clothed them with the same presumption of innocence in respect of crimes such as conspiracy and perjury as the accused was entitled to have attributed to him as an enshrined legal right in relation to the crime charged. The complaint on behalf of the appellant reached its height in the directory force of the sentence I have quoted. In my view, and with the greatest respect to the trial judge, the effect of the summing up in its totality at this point was to weight the scales against the accused by a consideration contrary to law but given the description of a "direction of law".

There is significant similarity between the principle underlying the decision of the High Court of Australia in *Howe v. The Queen* (1980), 32 A.L.R. 478, 55 A.L.J.R. 5, and the basis of the attack on the summing up in the instant case. In a joint judgment in *Howe v. The Queen* their Honours said:

"It is misleading to speak of a presumption of innocence which is applicable to a witness. The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption." (A.L.R., p. 283, A.L.J.R., p. 7)

I consider it immaterial whether or not the actual expression "presumption of innocence" is used in relation to a police witness. The effect is the same if the jury is told, as in this case, that police officers, by virtue of their office, should be regarded as capable of "keeping the scores level" or that "experienced and high ranking officers . . . ought to be considered" as, in effect, incapable of any wrongdoing in relation to the charge against the accused. To say that is not in the slightest to denigrate the particular officers, whose conduct in all respects may well have been completely impeccable. Rather it is intended to recognise and apply the following words of

Barwick C.J. in *Pemble v. The Queen* (1971), 124 C.L.R. 107, at pp. 117, 118, as affirmed and applied in *Howe v. The Queen*:

“Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part.”

The result of weighing the strength of evidence of the accused’s good character against the assumed probity of police officers may, as the trial judge said, be “to keep the scores level”. However, such a process is not a legally permissible method of evaluating this class of evidence and ignores the historical basis on which it has for so long been admissible in all criminal cases, although until about the end of the eighteenth century its admissibility appears to have been confined in English law to capital cases. Its evidentiary value is thus described in *Wigmore on Evidence* 3rd edn., vol. 1, par. 55:

“A defendant’s character, then, as indicating the probability of his doing or not doing the act charged, is *essentially relevant*.

In point of human nature in daily experience, this is not to be doubted. The character or disposition — i.e. a fixed trait or the sum of traits — of the persons we deal with is in daily life always more or less considered by us in estimating the probability of his future conduct. In point of legal theory and practice, the case is no different. A defendant is allowed to invoke his own good character to aid in the demonstration of his innocence; and the prosecution is allowed to use the opposite fact for the opposite purpose. The Courts have made it clear that a defendant’s character is regarded as constantly having probative value on that question. . . . Character being thus relevant, it follows *that a defendant may offer his good character* to evidence the improbability of his doing the act charged, unless there is some collateral reason for exclusion; and the law recognizes none such.”

Two of the illustrations of this passage cited at p. 450 of *Wigmore (ibid.)* are:

Willes J. in *Reg. v. Rowton* (1865), Le. & Ca. 520, at p. 540:

“It is a mistake to suppose that because the prisoner only can raise the question of character, it is therefore a collateral issue. It is not. Such evidence is admissible because it renders it less probable that what the prosecution has averred is true; it is strictly relevant to the issue.”

Strong J. in *Cancemi v. People* (1858), 16 N.Y. 506:

"The principle upon which good character may be proved is that it affords a presumption against the commission of crime. This presumption arises from the improbability, as a general rule, as proved by common observation and experience, that a person who has uniformly pursued an honest and upright course of conduct will depart from it and do an act so inconsistent with it. Such a person may be overcome by temptation and fall into crime, and cases of that kind often occur; but they are exceptions; the rule is otherwise. The influence of this presumption from character will necessarily vary according to the varying circumstances of different cases."

The course of the trial up to the completion of the jury's deliberations shows how critical the summing up could well have been in the minds of members of the jury. After having deliberated for about four hours seventeen minutes the jury asked to be able to return to the courtroom, where the foreman said: "We have had six sessions and are still unable to reach a verdict." More time for discussion was sought and granted. Before the jury retired again his Honour said: "... I should point out to you that it almost inevitably means a retrial if you can't agree, but on the other hand, of course, you must each individually be faithful to your oaths and reach the verdict as you see it." (See ground 4 of the notice of appeal.) About forty minutes later the jury returned a unanimous verdict of guilty.

It is thus apparent that the jury found difficulty in reaching a verdict for comparatively a very long time in what was, on its face, a simple case, even though the trial occupied some five days. Even the slightest risk that some members of the jury were influenced in reaching their verdict by the passages in the summing up which have been impugned is, in my view, tantamount to a substantial miscarriage of justice, *Criminal Code*, s. 402(1), and the verdict of guilty cannot stand.

It is unnecessary for me to consider the fourth ground of the appeal and I express no opinion on it.

What then should be done with the indictment?

Surveying very broadly the consequences of successful appeals to the Tasmanian Court of Criminal Appeal over a period of about thirty years, I am of the view that in many cases the inevitability of an order for a new trial has been fatalistically accepted by counsel. In this case it was not. Counsel for the appellant argued that, if the appeal succeeded, it was not a case for the application of the proviso, *Criminal Code*, s. 402(2), and moreover that it was not appropriate that there should be a second trial.

With the former proposition I unhesitatingly agree.

As to the latter submission, I agree with the conclusions of the Chief Justice and Nettlefold J. For the reasons their Honours state,

and because of other factors to which I shall refer, I consider that this Court should not order a new trial.

In order to explain this consequence it is desirable to make some brief historical reference to criminal appellate jurisdiction in England and Tasmania and to consider the provisions of the Tasmanian *Criminal Code*.

The traditional English statutory approach to successful criminal appeals has been to deny the appellate court any power to order a new trial, except in strictly limited areas. Such was the effect of the *Criminal Appeal Act* 1907, the first English statute which conferred a right of appeal in criminal cases in the sense in which criminal appellate jurisdiction is now understood. Prior to the 1907 English Act the scope for formal review of error in criminal proceedings was confined to the ancient writ of error and the restricted jurisdiction of the Court for Crown Cases Reserved. However, the policy which led to the enactment of the 1907 Act did not include the concept of a new trial but merely provided that the Court of Criminal Appeal could order a *venire de novo* — usually in cases where the trial of the appellant must be said to have been a nullity — although other very limited scope for such a procedure existed and still exists: see *Hals. L.E.* 4th edn., vol. 11, par. 667, n. 1, and the cases there cited, and, generally, the speeches of the majority of the Appellate Committee of the House of Lords in *Crane v. D.P.P.*, [1921] 2 A.C. 299.

This restriction on the powers of the English Court of Appeal was substantially maintained in the *Criminal Appeal Act* 1964, which was repealed by the 1968 Act. However, since 1964 there has also been power to order a new trial in the rare cases in which an appeal against conviction is allowed by reason of fresh evidence received or available to be received by the appellate court. So far, but no farther, has been the approach in English law to the power of an appeal court to order a new trial after a successful appeal.

It was against the background of the 1907 English Act that the appellate provisions in Ch. XLVI of the Tasmanian *Criminal Code* were enacted. The *Code* (s. 403) reproduced in almost identical form the provisions of the English Act in respect of certain special powers of the Court of Criminal Appeal, but went further in that s. 404(1) provided:

“404—(1) On any appeal the Court may, either of its own motion or on the application of the appellant, order a *venire de novo* or new trial at such time and place as it thinks fit, if the Court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a *venire de novo* or new trial than by any other order which the Court is empowered to make.”

Section 404(1) remains unaltered. Within its terms, the duty of

the Court of Criminal Appeal is to determine whether a more adequate remedy for a miscarriage of justice is an order for a new trial rather than a resort to the primary power of the court to quash the conviction and direct a judgment and verdict of acquittal to be entered (*Criminal Code*, s. 402(3)).

The factors which should influence an appellate court in exercising such a discretion will depend basically on all the facts of each individual case, the circumstances which surrounded the trial, the nature of the miscarriage of justice, the strength of the prosecution case and a full and fair balancing of the public interest and the personal interests of the successful appellant. Such considerations are not exhaustive. In the well-known case of *Peacock v. The King* (1911), 13 C.L.R. 619, O'Connor J., after referring to a number of Victorian cases in some of which (as I understand the printed reasons for judgment, although some corruption in the text is evident) a new trial had not been ordered and in others of which the court did order a new trial, said (at pp. 674, 675):

"After carefully reading the decisions in those cases, I have been unable to gather that the Victorian Supreme Court has laid down any general principles on which it will exercise its discretion to grant a new trial in a criminal case. Perhaps it is as well that no exhaustive or rigid definition of principles should be attempted. The Court must, however, exercise a legal discretion, that is to say, must act upon some legal principle. It appears to me that one principle at least may be laid down. Where the facts proved a first trial would have been sufficient to support the conviction, if the jury had been properly directed, it seems to me that in general a new trial may be granted to enable the faulty direction to be remedied. In exercising the discretion given by the Statute the interests, not only of the prisoner, but of the efficient administration of justice ought to be considered, always providing that no injustice is done to the accused."

By a majority of two to one, a new trial was ordered in *Peacock v. The King*, in which the charge was murder.

In *Kelly v. The King* (1923), 32 C.L.R. 509, in which the appellant had been presented on a charge of murder, the High Court held there had been a miscarriage of justice related to defects in the summing up of the trial judge. It ordered a new trial on a charge of manslaughter only. In a joint judgment it was stated (at p. 517):

"The question whether the appellant in this case shall be again put upon his trial is one in which the interest of the community is involved as well as that of the individual. In the opinion of a majority of the Court the public interest will be best served by ordering a new trial on the charge of manslaughter only, which may be had on the existing presentment to which the accused

has already pleaded or, at the option of the Crown, on a new presentment for manslaughter.”

The discretionary nature of the exercise of a power to order a new trial was emphasised in *The King v. Wilkes* (1948), 77 C.L.R. 511, by Dixon J. (as he was then), at p. 518.

Consideration by the Tasmanian Court of Criminal Appeal, after argument, of its discretion not to order a new trial does not appear to have been frequent. One such case was *Frost v. The Queen*, [1969] Tas.S.R. 172, in which an appeal was allowed against the conviction of the appellant, who was jointly indicted with another for the murder of a taxi driver. The court unanimously quashed the conviction for murder and substituted a verdict of manslaughter therefor (*Criminal Code*, s. 403(2)). Crisp J., in whose reasons for judgment Burbury C.J. and Chambers J. concurred, said (at pp. 189, 190):

“But the fact remains that the appellant was entitled as of right in my opinion to have left to the jury on the evidence the alternative of manslaughter to the primary case made against him as an abettor of murder under s. 3. The fact that he was convicted of murder under s. 4, while a variant of the usual circumstances, does not seem to me to matter. Other courts have frequently said that despite a conviction for murder on a proper direction, if the alternative of manslaughter as a matter of law was not put, the accused has been deprived of an opportunity to which he was entitled and the verdict cannot stand despite his conviction on evidence which could, though not necessarily should, have satisfied the jury of his guilt. In such circumstances courts of appeal have frequently in a proper case substituted for the verdict of the jury a verdict of manslaughter.”

Some consideration — although the extent of legal argument is not clear — was given to the question of the propriety of an order for a new trial by the Tasmanian Court of Criminal Appeal in *Reg. v. Jenkins*, [1970] Tas.S.R. 13, at pp. 23, 24; and *Daley v. The Queen*, 1979 Tas.R. 75, at pp. 84, 87.

My conclusion is that there is no presumption in favour of a second trial being ordered when an appeal succeeds, and that the discretion of the court must be exercised on a consideration of all the relevant facts and circumstances. The accused should be accorded neither more nor less personal consideration than the overall justice of the case requires in recognition of the public interest in the fair and impartial administration of criminal justice. I do not accept the counter argument on behalf of the prosecution that “the ordinary course should apply”. I do not consider, for reasons I have expressed, that there should be any “ordinary” course. Each case is individual and should be determined on the basis of the facts and all relevant

considerations which apply to it — not to a different case. It is a negation of the wide discretion vested by statute in the Tasmanian Court of Criminal Appeal to suppose that a common mould exists and that all cases should be judged within its framework.

I am of the clear view that the just sequel to quashing the conviction of the appellant should, in the circumstances, be that a new trial should not be ordered. To the reasons for this result expressed by the Chief Justice and Nettlefold J., I would add the following:

- (a) It was common ground that without the confessional evidence, which I stress again was strongly disputed by the appellant, there was insufficient evidence to justify the appellant being charged with the alleged crime.
- (b) On the assumption that, on a new trial, the evidence for the prosecution and the defence would be substantially the same as on the first trial, it cannot in my view be asserted with confidence that, on a proper direction to the jury, a verdict of guilty would clearly be even probable. Much would depend on the weight accorded the character evidence.
- (c) In a plea in mitigation to the trial judge, counsel for the appellant outlined the personal consequences which he claimed would follow the conviction of the appellant. Although his Honour doubted that the appellant's capacity to obtain employment would be affected to the extent claimed by his counsel, I consider some significant effect was not unlikely. The point is that it is arguable that even the result of these appeal proceedings will not necessarily restore to the appellant the career prospects which he had at the time he was originally charged.
- (d) The cost to the State of a new trial cannot be calculated with any certainty, nor should the cost of administering the system of criminal justice inhibit proceedings, including a new trial, if the public interest fairly requires it. But I do not doubt that the cost will be very substantial and I am not persuaded that, when all factors are taken into account, it can be said that the public interest dictates the trial of the appellant for the second time.

I would allow the appeal, quash the conviction and, pursuant to the *Criminal Code*, s. 402(3), direct a judgment and verdict of acquittal to be entered.



*Leave to appeal — Appeal allowed — Conviction  
quashed — Verdict and judgment of acquit-  
tal to be entered.*

Attorneys for the applicant: *Thiessen, Gunson, Pickard &  
Hann.*

F.D.C.S.