

R. v. SIMPSON.

FULL COURT (Herring C.J., Gavan Duffy and Monahan JJ.).

MARCH 19, 20, 21, 22, MAY 24, 1956.

Criminal Law—Evidence—Unsworn statement made by accused from the dock—Forms part of evidentiary material of case and fact that unsworn merely affects weight to be given it by jury—Misdirection for trial Judge to inform jury that unsworn statement only comparable to argument of barrister or solicitor appearing for accused—Unsworn statement inadmissible as evidence against another accused tried at same time—Evidence Act 1928 (No. 3674), sec. 25—Crimes Act 1928 (No. 3664), sec. 432.

An unsworn statement from the dock by an accused person pursuant to sec. 25 of the *Evidence Act* 1928 is part of the probative material the jury has to consider along with all the evidence given on oath, and it is a misdirection for the jury to be told that an unsworn statement is something in the nature of persuasive argument such as might be presented to the Court if the accused had counsel appearing for him.

Peacock v. The King (1911), 13 C.L.R. 619, applied.

Semle: Such an unsworn statement is not evidence for or against another accused person being tried at the same time.

APPEAL.

The applicant, having been convicted by a Court of General Sessions of the Peace on two charges of receiving, applied for leave to appeal against such convictions, on grounds which, *inter alia*, claimed that the trial Judge had misdirected the jury by charging it that an unsworn statement which the applicant had made from the dock was

in the nature of a persuasive argument such as might be put up if he had a solicitor or barrister appearing for him.

Further facts appear in the judgment.

The applicant appeared in person.

Winneke Q.C., S.-G., (with him *Bidstrup*), for the Crown.

Cur. adv. vult.

HERRING C.J. delivered the written judgment of the Court: The applicant was found guilty on two counts of receiving and applied for leave to appeal against his conviction.

Finding that there had been a misdirection by the learned trial Judge as to the use the jury should make of an unsworn statement made by the applicant from the dock we granted his application, allowed the appeal and ordered a new trial, but thought it desirable to defer giving our reasons.

To make clear why we were of opinion that there had been a misdirection, it would be sufficient to refer to the judgment of the High Court in *Peacock v. The King* (1911), 13 C.L.R. 619, but in the course of argument before us the question was raised whether an unsworn statement from the dock could be used either against or in favour of another accused tried with the accused who made the statement. We are of course well aware of the un wisdom of expressing opinions that are plainly *obiter*, that are not relevant to the case being heard, but this question is of such immediate practical importance in the business of

the Courts and is so wholly without direct authority, that we have thought it proper to infringe on a wholesome rule and express our opinion.

In the instant case, the accused made an unsworn statement from the dock and the trial Judge dealt with it thus. After pointing out that the accused had, from the various courses open to him elected that of making an unsworn statement and that the accused could not be cross-examined on such statement His Honour continued:—

It is entirely for you to say what you think his statement unsworn is worth. You may think that because it is unsworn it is not worth anything. You may think it is worth something, and if you do so think, give it such weight as you think proper. On the other hand you may believe every word of it, if you think you ought to, but I point out now, gentlemen, it is not on oath and it is not evidence. The only testimony, let me say, which is evidence in this Court is evidence on oath. There are a couple of exceptions to that. Little children in indecent cases are allowed to speak from the witness box, but those matters, gentlemen, do not concern us here. Where adults are concerned, anything that is not on oath is not evidence. That is all about it. As I say, the accused was allowed to do what he has done. What he has done is something in the nature of persuasive argument such as might be put up if he had a solicitor or barrister appearing for him. But because it is not on oath you are not entitled to say, "We are not even going to listen to it." You have got to listen to it. Consider it and give it such weight as you think it deserves.

It is certainly convenient and it may be justifiable to keep the term evidence for such probative matter as is admitted to the consideration of the jury authenticated by oath affirmation or other means allowed by the law. But the words,

What he has done is something in the nature of persuasive argument such as might be put up if he had a solicitor or barrister appearing for him,

would certainly and we should think, correctly, be taken as equivalent to this unsworn statement is argument, not evidence—it has no probative quality.

In our opinion this was a misdirection in law.

Before turning to the authorities, we would mention several legislative enactments which must be kept in mind.

The *Evidence Act* 1928, sec. 25, provides:

It shall be lawful for any person who in any criminal proceeding is charged with the commission of any indictable offence or any offence punishable on summary conviction (whether such person does or does not make his answer or defence thereto by counsel or solicitor) to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf.

The *Crimes Act* 1928, sec. 432, (which deals with the competency of a person "charged" to give evidence) by paragraph (g) provides:

Nothing in this section shall affect the provisions of section forty-five, paragraph (a) of sub-section (1) of section forty-six section forty-eight or section forty-nine of the *Justices Act* 1928 or any right of the person charged to make a statement without being sworn.

The *Crimes Act* 1928 sec. 449, provides:

Where any person is charged upon indictment presentment or information with the commission of any indictable offence and upon his trial makes answer or defence thereto by his counsel, and such person desires also to make a statement of facts (without oath) in lieu of or in addition to any evidence on his behalf, such statement of facts shall only be made by such person, but where it is intended to be so

made may be opened by the counsel of such person. Such statement shall in all cases be made by such person after the counsel appearing for the defence of such person or for the defence of other persons also charged in such indictment presentment or information has or have concluded his or their final addresses to the jury. Whenever any such statement is made the counsel for the Crown shall have the right of reply.

It is unnecessary and we think would be unhelpful to pursue the unsworn statement delivered in Court through its troubled history. Should it be allowed when accused had counsel appearing for him? If allowed in such a case could the accused make his statement and his counsel also address the jury? If allowed when should it be made, before counsel for the Crown summed up to the jury, or did the making of it give the Crown a right of reply? These have all been matters of contention.

To answer the question, whether an unsworn statement is to be regarded as merely argument or as probative matter, we have a decision of the High Court to guide us and need concern ourselves no further. *Peacock v. The King* (1911), 13 C.L.R. 619, was an appeal from the Supreme Court of this State. The applicant had been convicted of murder. He had made an unsworn statement from the dock. The trial Judge, Madden C.J., in redirecting the jury spoke as follows:

I have told you that whenever the prisoner's statement does not come in conflict with the sworn evidence you are at liberty to believe it, but where it comes in conflict with the sworn evidence you are not to accept it. Counsel thinks you might understand that, that you would not even accept the statement although you did not believe the sworn evidence which it contradicted. It is only when it is in conflict with sworn evidence which you can accept as true, that you must not accept it (at p. 640).

All the members of the High Court held that Madden C.J.'s redirection was a misdirection. Griffith C.J. said (at pp. 640-1) that the proper direction to be given was:

that the jury should take the prisoner's statement as *prima facie* a possible version of the facts and consider it with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by evidence.

Barton J. said at p. 645,

Returning to sec. 38 of Act No. 1231 [now sec. 25 of the *Evidence Act* 1928], I proceed to consider the nature of the statement which is authorized by that Act as a matter of right. First, it is to be "a statement of facts". Next, it is to be "in lieu of or in addition to any evidence on his behalf." Thirdly, the section expressly gives the counsel for the Crown the right to reply wherever any such statement is made, a right which apparently did not previously exist in Victoria except when some evidence was given by or on behalf of the accused. "A statement of facts" as the phrase is used in the section, means, I think, a statement consisting of assertion of the matters which the accused wishes to be accepted as facts. They may or may not be facts in the signification of truths, but they are to be facts as distinguished from arguments; that is, the statement is allowed in addition to any arguments which the accused or his advocate may put forward. Now this statement is to be in lieu of or in addition to any "evidence" on his behalf—which term is obviously used in the sense of evidence which, so far as it is oral, is under the usual sanction of an oath, or of an affirmation when the law permits that sanction. If it is *in lieu* of such evidence, it is put in the place of it for some purpose or other. I cannot imagine any purpose for which it can take the place of sworn evidence other than the ordinary purpose with which evidence is tendered—that is, the obtaining of credence for the thing alleged. Every such statement, whether in

lieu of or in addition to any sworn evidence, is of necessity an endeavour to gain credence for the version put forward by the accused in opposition to the case for the prosecution; whether in contradiction of statements of the opposing witnesses, or by way of explanation, so as to detract from the force which their statements would or might otherwise have. Like evidence in its usual meaning, it is included among "all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact which is submitted to judicial investigation"—*Taylor on Evidence* p. 1. In allowing a statement *in addition* to any ordinary evidence on behalf of the accused, the legislature must have considered it capable of adding to the weight of such evidence, if the statement is believed. Otherwise the grant would have been illusory. It is intended, then, whether given in place or in support of sworn evidence for the accused, to benefit him to the extent to which it gains credence from the jury against the Crown evidence. If it fails to gain credence, the accused has taken the risk of that.

In either aspect, the statement which takes the place of or is added to sworn testimony by or for the prisoner, must be conceded to have some evidentiary status, though he who makes it is not called as a witness, nor does his version go by the name of evidence.

He said later at p. 647:

It follows then from the terms of the section that the accused is entitled to have his statement considered by the jury, not only where it gives an explanation consistent with the assertions of facts sworn to for the prosecution, but where it flatly contradicts such assertions by its own. It is the right of the accused in such circumstances that the jury be asked to decide how much credence they will give it where the two sides are in absolute conflict.

O'Connor J., for his part, said at pp. 673-4,

... it would be impossible in my opinion to give effect to the right conferred upon the prisoner by sec. 142 of the Victorian *Evidence Act* 1890 if the prisoner's statement were not put before the jury for their full consideration. Any statement of a prisoner not on oath carries on the face of it certain infirmities. It has not the sanction of an oath and the prisoner who made it is deeply interested in asserting his innocence. On the other hand, it may explain matters in evidence which otherwise would tell against him. Section 52 of the Victorian *Evidence Act* 1890 permits the prisoner "to make a statement of facts (without oath) in lieu of or in addition to any evidence in his behalf," clearly implying that the prisoner is entitled to have his statement as fully considered as his evidence would be, if he gave evidence.

Peacock v. The King (*supra*), in our opinion is adequate authority that it is a misdirection to tell a jury that an unsworn statement from the dock is something in the nature of persuasive argument such as might be put up, if he had a solicitor or barrister appearing for him.

Turning now to the question whether an unsworn statement from the dock can be used as evidence for or against a fellow accused tried at the same time, the matter is perhaps not quite so clear.

There is authority that such evidence is not so available where there is no such legislation as in the Victorian *Evidence Act* 1928 sec. 25 (*R. v. Gunewardene*, [1951] 2 All E.R. 290, [1951] 2 K.B. 600; *R. v. Riley* (1940), 40 S.R. (N.S.W.) 111), but the question is whether our local legislation, sec. 25 of the *Evidence Act* 1928, has made these decisions inapplicable.

Beyond question to treat an unsworn statement by one accused as evidence against another tried with him would offend our sense of justice. Such evidence is not given on oath nor is it subject to any testing by cross-examination. Yet it is suggested that if the effect of sec. 25 of the

Evidence Act 1928 is to make such unsworn statement part of the general body of evidence or probative matter which the jury may take into account, that section compels the conclusion that it can be so used. In our opinion we are not forced to such a conclusion. A statement by the accused made outside the Court is evidence only against the accused who made it and so far as it is evidence for him is evidence for him alone. The fact that he is allowed to make such a statement in Court does not change its nature. Cave J. illustrated this when he said in *R. v. Shimmin* (1882), 15 Cox C.C. 112, at p. 123, that

Every prisoner was entitled to have an opportunity of making a statement, and offering his explanation of the charges alleged against him. When before the magistrates the law had provided that he should be afforded the opportunity of making a statement in answer to the evidence adduced against him; and if he does make any statement at that stage of the proceedings it is returned with the depositions to the court of trial, and is put in by the prosecution as a matter of course. When, however, a prisoner does not choose to avail himself of his privilege of making a statement when before the magistrates, he may still make it at the trial, whether he be defended by counsel or not; in the former case at the conclusion of his counsel's speech, with this proviso, that what he states from the dock is subject to the right of reply on the part of the prosecution, as being in the nature of new matter laid before the jury.

For ourselves, and in this we have the support of Cussen J. who was of opinion that the law in England and in Victoria was the same (see *R. v. Peacock* (1911), 33 A.L.T. 120 at p. 139), we should have supposed that, quite apart from sec. 25 of the *Evidence Act 1928* if a prisoner were allowed to make an unsworn statement of facts in Court the jury would assuredly take them into consideration as part of the general body of evidence against him or in his favour giving them what weight they deserved when comparing them with the evidence that was given on oath and subject to cross-examination; and it appears plain enough that this fact was recognized under the English practice. That this is so appears from the fact that where such statements were made the Crown was given the right to reply (*R. v. Doherty* (1887), 16 Cox C.C. 306 and *R. v. Shimmin* (*supra*). Lord Coleridge in *R. v. Millhouse* (1885), 15 Cox C.C. 622), showed that he recognized that this was so when, refusing to permit the prisoner to make a statement of fact to the jury, he said:

To allow such a course would be to give him a most unfair advantage, especially if he were an intelligent man. If it were to be allowed, the result would be that after counsel had made a defence and called witnesses to facts, that then the person who was not liable to be cross-examined could supplement what had been said by his counsel and witnesses, and supply facts by means of a statement made without the sanction of an oath which it would be impossible to test by the ordinary means of cross-examination.

However, *R. v. McKenna*, [1951] St. R. Qd. 299, with the New South Wales cases quoted therein, is authority for the proposition that, apart from sec. 25 of the *Evidence Act 1928*, unsworn statements from the dock are not evidence of the facts stated and are to be regarded rather as argument than as evidence.

That Victorian legislation has given unsworn statements from the dock an evidentiary character need not, and in our opinion should not, result in making them evidence for or against another accused tried at the same time.

There is certainly no authority making such statement equivalent in all respects to sworn evidence given by the accused. The most that can be found in the judgments of the High Court in *Peacock v. The King*

(1911), 13 C.L.R. 619, and the judgments of the Supreme Court in *R. v. Peacock* (1911), 33 A.L.T. 120, is that, to use the words of Cussen J. at p. 139:

[it] may be a statement of fact in the fullest sense of the word, that is to say, it may contain denials, explanations, or supplementary statements; it may contain matter from which inferences can be drawn—in fact, to put it shortly, it may contain everything which the evidence of other witnesses may contain . . . I think it is entitled to have its effect as an unsworn statement, to have the effect that the jury shall consider it is entitled to . . .

It is a statement which the jury may or may not accept as true.

All this is in our judgment quite consistent with the general principle that unsworn statements by an accused are evidence only against him. As far as legislation or practice makes them evidence for him a like limitation should apply, they should be evidence in his favour alone.

At most, our legislation has done no more than settle the question whether the jury in considering the guilt or innocence of an accused may treat his statement of facts as unsworn evidence that the facts stated are true.

In our opinion, therefore, an unsworn statement from the dock is part of the probative material the jury is to consider in determining whether the accused who makes the statement is guilty or not guilty. As regards him it is not in law a separate and lower class of evidence to that given on oath. It goes to the jury, like all other evidence, with its infirmities on its head, but weight is entirely for the jury. It is, however, still an unsworn statement made by the accused and like other unsworn statements is evidence for or against him alone.

We add that in charging a jury it is sufficient simply to tell them to take the unsworn statement of the accused into account along with all the evidence given on oath in considering whether he is innocent or guilty, adding of course what comment is thought proper.

Application granted. New trial ordered.

Solicitor for the Crown: *Thomas F. Mornane*, Crown Solicitor.

P.A.W.
