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SCSL-03-01-PT
(9437-9482)

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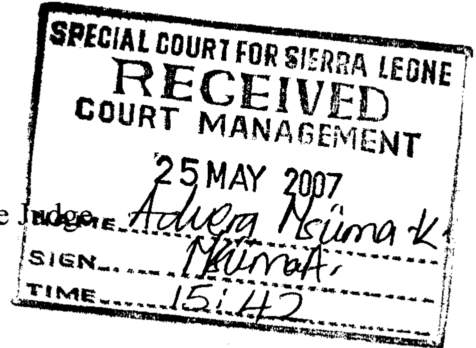
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone



Before:	Justice Julia Sebutinde, Presiding Justice Richard Lussick Justice Teresa Doherty Justice El Hadji Malick Sow, Alternate Judge
Acting Registrar:	Mr. Herman von Hebel
Date filed:	25 May 2007

THE PROSECUTOR **Against** **Charles Taylor**

Case No. SCSL-03-01-PT

PUBLIC

PROSECUTION'S RESPONSE TO "DEFENCE MOTION REQUESTING LEAVE FOR CHARLES GHANKAY TAYLOR TO GIVE AN UNSWORN STATEMENT FROM THE DOCK"

Office of the Prosecutor:

Ms. Brenda J. Hollis
Ms. Ann Sutherland

Defence Counsel for Charles Taylor:

Mr. Karim A. A. Khan
Mr. Roger Sahota

I. INTRODUCTION

1. Pursuant to Rule 7 of the Rules of Procedure and Evidence ("Rules"), the Prosecution files this response to the "Defence Motion Requesting Leave For Charles Ghankay Taylor To Give An Unsworn Statement From The Dock" ("Motion"), filed on 18 May 2007.[1]

2. The Accused seeks relief[2] pursuant to Rules 26*bis*,[3] 54[4] and 89(B)[5] of the Rules. The Accused states that the practice of giving an unsworn statement is "sufficiently prevalent in domestic and international jurisdictions, in particular the [ICTY]."[6] The Accused asserts that he should be allowed to make an unsworn statement from the dock (of no more than one hour's duration), immediately after the Prosecution's opening statement on 4 June 2007[7] because (1) he has refrained from making "public pronouncements" during his pre-trial detention in regard to the court or the proceedings against him, and (2) the Prosecution would suffer no "discernable prejudice."[8] In addition, the Accused states that it is in the interests of justice to allow him to make such a statement and requests the Trial Chamber to exercise its discretion and grant his request.

3. The Prosecution opposes the Motion for the reasons stated below.

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[1] *Prosecutor v. Taylor*, SCSL-03-01-PT-244, Prosecution's Response to "Defence Motion Requesting Leave For Charles Ghankay Taylor To Give An Unsworn Statement From The Dock", filed on an urgent basis on 18 May 2007.

[2] As a preliminary matter, the Accused seeks a scheduling order for expedited filing of any response by the Prosecution. Motion, para. 3.

[3] Rule 26*bis* provides that "[t]he Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

[4] Rule 54 is a general provision, contained under Section 2 of the Rules dealing with the issuing of Orders and Warrants. This rule allows the Trial Chamber, upon request of a party, to issue such orders, summons, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

[5] Rule 89(B) provides that "[i]n cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

[6] Motion, para. 1. ICTY Rule 84*bis* provides that:

(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

(B) The Trial Chamber shall decide on the probative value, if any, of the statement.

[7] Motion, paras. 1 and 3.

[8] Motion, paras. 1.

II. APPLICABLE LAW

4. The law to be applied by the Trial Chamber in considering the matter is set forth in Rules 84 and 85 of the Rules. Rule 84 provides that "[a]t the opening of his case, each party may make an opening statement *confined to the evidence he intends to present in support of his case.*" (emphasis added). Rule 85(C) provides that "[t]he accused may, if he so desires, appear as a witness in his own defence. If he chooses to do so, he shall give his evidence under oath or affirmation and, as the case may be, thereafter call his witnesses."

III. SUBMISSIONS

SCSL Rules

5. As noted by the Accused, there is no provision in the Rules which allows the Accused to make an unsworn statement "from the dock."[9] The Rules are clear with respect to the procedure to be followed at the SCSL in relation to statements made by the parties or the Accused. Pursuant to Rule 84 of the Rules, each party may make an opening statement at the commencement of *his* case. This Trial Chamber intimated at the recently held Pre-Trial Conference that this had been the practice in other cases before the SCSL, and the practice which the Chamber wished to observe in this case.[10]

6. The Accused relies on ICTY Rule 94*bis*, adopted on 2 July 1999,[11] which allows an accused to make an unsworn statement after the opening statement of the Prosecutor, and under the control of the Trial Chamber, which is not subject to cross-examination. However, the Prosecution respectfully submits that had the

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[9] Motion, para. 4.

[10] Presiding Judge, Pre-Trial Conference, T. 38, lines 24-29. *Cf.* the practice by SCSL Trial Chamber I: In the *Prosecutor v. Norman et al.* case, SCSL-04-14-T, the accused Norman made an opening statement on 15 June 2004 (T. 3-4) subsequent to the Prosecution's opening statement on 3 June 2004. The Norman Defence was then precluded from making a second statement at the commencement of his case (Status Conference, 18 January 2006, T. 5). In the *Sesay et al.* case, SCSL-04-15-T, after the Prosecution's opening statement, the accused Sesay began to make an opening statement pursuant to Rule 84 (5 July 2004, T. 69), however, was stopped by the Chamber due to the political nature of the statement. The following day counsel for Sesay stated that the Defence would not be making an opening statement pursuant to Rule 84 (6 July 2004, T. 1-6). Counsel for the accused Kallon made an opening statement pursuant to Rule 84 after the Prosecution's opening statement (5 July 2004, T. 71-79). The accused Gbao began to make an opening statement, however, was also stopped by the Chamber due the political nature of the statement (6 July 2004, T. 7-10).

[11] (IT/32/Rev.16).

SCSL Judges wished to extend this right to SCSL accused, a similar Rule would have been adopted during one of its nine Plenary Sessions held to date.

7. The Accused is requesting the Trial Chamber exercise its discretion and allow the Accused to give an unsworn statement pursuant to Rules 26*bis*, 54 and 89 of the Rules.[12] Such a ruling pursuant to these Rules leaves room for Defence counsel to later argue that he wishes to make an opening statement at the commencement of the Defence case, pursuant to Rule 84 of the Rules. Two defence opening statements are not envisaged by the Rules, and are not acceptable trial practice in the Prosecution's submission.

8. Moreover, the Accused has made no compelling arguments which would justify departure from the current application of Rules 84 and 85 of the Rules. Where the Accused seeks to make a statement, there is provision that such a statement may be made through his counsel at the commencement of *his* case. The Rules allow for the Accused to give evidence under oath or affirmation in his case and be subject to cross-examination. The Accused's argument that he should be allowed to make an unsworn statement because he has refrained from making "public pronouncements" during the pre-trial phase is without merit. There is nothing in the Rules or the Statute which confers upon an accused the right to make "public pronouncements" in court prior to or during trial. However, Defence Counsel, on behalf of the Accused, has availed himself of the opportunity to make "public pronouncements."[13] The Accused's rights are not curtailed in any way by respecting the Rules.

Domestic and other International Jurisdictions

9. The Accused asserts that "[o]ther Trial Chambers in international tribunals have *consistently* pronounced themselves in favour of allowing the accused to give an unsworn statement from the dock, even when not explicitly mandated to do so by the rules, and exercised due control over the statement itself."[14] The Accused

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[12] Motion, para. 2.

[13] Press conference held in Monrovia by Mr Karim Khan on 8 February 2007 (see the report on the press conference at http://www.afrika.no/Detailed/13510.html) and press conference held on 15 March 2007 in Freetown by Mr Karim Khan (see report on the press conference at http://allafrica.com/stories/200703191385.html).

[14] Motion, para. 2. Emphasis added.

cites two ICTY cases in support of the assertion, one of which was limited to mitigation in sentence.[15] The Accused also states that "national jurisdictions are no strangers to unsworn statements from accused persons either",[16] and the "practice is sufficiently prevalent in domestic [...] jurisdictions."[17] In support, the Accused cites to practice in the United States of America (the State of Massachusetts and the United States Code of Military Justice), India, an article about English law,[18] and civil law jurisdictions.

10. The Accused further states that, "[a]lthough abolished in England, the practice survives in most commonwealth jurisdictions."[19] The Prosecution disputes this assertion. In Canada, since the enactment of the *Canada Evidence Act* (1893), which gave an accused the right to testify in his own defence, an accused does not have the right to make an unsworn statement from the dock.[20] However, defence counsel can ask for leave to make an early opening statement.[21] A ruling would be made only in exceptional circumstances and if granted, the accused would not have the right to make a second opening statement prior to the opening of the defence case.[22] In the United Kingdom, section 72 of the *Criminal Justice Act*, 1982, abolished the right of an accused to make an unsworn statement from the dock.[23] In Australia, section 3 of the *Evidence (Unsworn Evidence) Act* 1993 abolished an accused's right to make an unsworn statement or to give unsworn evidence.[24] The Prosecution suggests that the stated practice cannot be viewed as "sufficiently prevalent" in domestic jurisdictions as asserted by the Accused.

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[15] Motion, paras. 1 and 5.

[16] Motion, para. 6.

[17] Motion, para. 1.

[18] Motion, para. 6.

[19] Motion, para. 6.

[20] *Rex v. Bluske* [1948] O.R. 129. With some minor exceptions relating to sentencing and preliminary hearings, see s. 541 of the *Criminal Code*.

[21] If it would be an infringement of an accused's s. 11 *Charter* right to have a fair trial, a ruling can be made to allow counsel to make an early opening statement.

[22] *R. v. Dalzell* (2003), 180 C.C.C. (3d) 319; *R. v. G.L*, 2004 CanLII 53048; *R. v. White* [2006] A.J. No. 1565.

[23] *See R. v. Tonner; R v Evans* [1985] 1 ALL ER 807 (C.A.).

[24] See *The Queen v. Allen and Anor*, 1994 Vic Lexis 1246 Supreme Court of Victoria (Court of Criminal Appeal).

11. Notwithstanding the absence of an explicit rule governing the making of an unsworn statement, the Accused asserts that it is in the interests of justice to allow him to do so.[25] In support of this assertion, it is stated that the Accused "has refrained from making public statements in regard to the court or the proceedings preferred against him"[26] or "on the merits of the allegations against him,"[27] and that his "preferred forum to offer his voice to the one-sided narrative so far presented" is the courtroom.[28] In apparent contrast, the Accused comments on the Prosecution leaving its "media imprint across West Africa, Europe and North America." This statement mischaracterizes the efforts of the Prosecution in collaboration with the Outreach office of the Special Court to raise public awareness of the coming trial in a way that is not prejudicial to the rights of the Accused. In addition, as noted above, the Accused has no right to make public statements prior to trial, nor during trial except his right to testify under oath. The Defence Counsel, however, has made such public statements, on behalf of the Accused.

12. The submissions made regarding the frequency and nature of the Prosecution's contact with the media do not provide support for the Accused "to be allowed to state his position, prior to presentation of evidence."[29] Rules governing the contact which Defence and Prosecution may have with the media are set out in Article 13 of the "Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone".[30] Concerns regarding a party's contact with the media should be raised by the Defence within the context of the Code, rather than by the Accused in an unsworn statement. In addition, the rules in the Code concerning contact with the media apply to "counsel" and make

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[25] Motion, para. 7.
[26] Motion, para. 1.
[27] Motion, para. 7.
[28] Motion, para. 7.
[29] Motion, para. 12.
[30] Adopted 14 May 2005. as amended 13 May 2006 ("Code"). Article 13 of the Code provides that:

(A)` Counsel shall not publish or assist in the publication of any material concerning any current proceeding which:
   (i) is false; or
   (ii) discloses any confidential information.

(B) Counsel shall not comment on any matter which is *sub judice* in any case in which he is involved.

9443

no distinction between the Prosecution and the Defence. Accordingly, there is no imbalance, unfairness or disparity to be remedied.

13. As discussed above, there is also no "one-sided narrative."[31] Counsel acts on behalf of his client. Counsel for the Accused has had contact with the media.

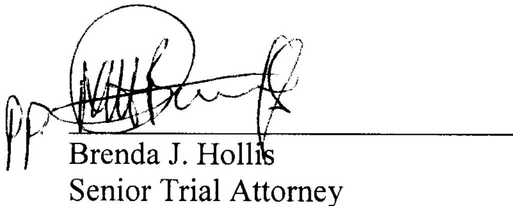
14. Finally, if the Accused's request were granted, the statement will not have any evidentiary value,[32] is designed to sway the court without challenge by cross-examination and therefore is not consistent with the interests of justice to grant such a request.

15. Assuming that the motivation behind the Accused's request is to address media concerns, counsel will continue to be entitled to have contact with the media on behalf of the Accused, as provided for under the Code. It is not in the interests of justice for the Accused to use the court forum to approach the media. The SCSL's Rules and procedures should be fully respected.

IV. CONCLUSION

16. For the reasons stated above, the Prosecution respectfully requests the Trial Chamber to deny the Motion.

Filed in Freetown,
25 May 2007
For the Prosecution,



Brenda J. Hollis
Senior Trial Attorney

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[31] Motion, para. 7.

[32] It is not under oath and not subject to cross-examination. *Cf. Prosecutor v. Blagojević*, Case No. IT-02-60-T, Decision on Blagojević's Oral Request, 30 July 2004, page 7.

9444

LIST OF AUTHORITIES

SCSL - *Prosecutor v. Taylor* – Case No. SCSL-03-01-PT

Prosecutor v. Taylor, SCSL-03-01-PT, Pre-Trial Conference, 7 May 2007, Transcript.

Prosecutor v. Taylor, SCSL-03-01-PT-244, Prosecution's Response to "Defence Motion Requesting Leave For Charles Ghankay Taylor To Give An Unsworn Statement From The Dock", filed on an urgent basis on 18 May 2007.

National Cases

Canada

Rex v. Bluske [1948] O.R. 129.

R. v. Dalzell (2003), 180 C.C.C. (3d) 319
http://www.canlii.org/en/on/onsc/doc/2003/2003canlii43624/2003canlii43624.html

R. v. G.L, 2004 CanLII 53048
http://www.canlii.org/en/on/onsc/doc/2004/2004canlii53048/2004canlii53048.html

R. v. White [2006] A.J. No. 1565.

United Kingdom

See R. v. Tonner; R v Evans [1985] 1 ALL ER 807 (C.A.).

Australia

The Queen v. Allen and Anor, 1994 Vic Lexis 1246 Supreme Court of Victoria (Court of Criminal Appeal)

Rex v. Bluske [1948] O.R. 129.

9445

9446

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[*129] REX v. BLUSKE.

Indexed As: Rex v. Bluske.

COURT OF APPEAL

[1948] O.R. 129; 1948 Ont. Rep. LEXIS 51

December 15, 1947; December 16, 1947

January 22, 1948

[**1] Evidence -- Swearing Witnesses -- Position where Witness Objects to be Sworn -- The Canada Evidence Act, R.S.C. 1927, c. 59, s. 14

While it may not be the duty of the presiding judge, or of Crown counsel, in every case to inform a prospective witness who objects to being sworn that he has a right, under s. 14 of The Canada Evidence Act, to give his evidence upon affirmation if his objection is based "on grounds of conscientious scruples", it is a proper and fair thing to do where it is the accused who wishes to give evidence, and he is not defended by counsel.

An accused, who had no counsel, wished to give evidence but refused to take the oath on the ground that his "philosophy of life" did not permit it. He was asked if he could suggest any procedure that would bind his conscience and said he could not. The trial judge then refused to permit him to give evidence.

Held, there must be a new trial. The failure to apply s. 14 of The Canada Evidence Act, and the misdirected inquiry actually undertaken, made the trial unsatisfactory, and meant that the accused did not have a full and fair opportunity to give his evidence. Rex v. Pine (1932), 24 Cr. App. R. 10, applied. Had the trial [**2] judge's attention been called to s. 14, he could have ascertained clearly and without difficulty whether the accused's objection was based "on grounds of conscientious scruples", and if it was on such grounds the trial judge would no doubt have advised him of his right to affirm in the words of the statute.

Criminal Law -- Trial -- Accused Not Represented by Counsel -- Abolition of Accused's Right to Make Unsworn Statement from Dock -- The Canada Evidence Act, R.S.C. 1927, c. 59, s. 4

Since the enactment of The Canada Evidence Act, giving an accused person a right to testify in his own defence, such a person has no longer the right, even when not defended by counsel, to make an unsworn statement from the dock. Rex v. Krafchenko (1914), 24 Man. R. 652; Rex v. Kelly (1917), 27 Man. R. 105, affirmed 54 S.C.R. 220; Rex v. Frederick (1931), 44 B.C.R. 547, followed.

AN APPEAL by the accused from his conviction.

15th and 16th December 1947. The appeal was heard by ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A. The argument is reported only on the point dealt with in the reasons for judgment.

ROBERTSON C.J.O. and LAIDLAW and ROACH JJ.A.

Arthur Maloney, for the accused, appellant
C. P. Hope, K.C., [**3] for the Attorney-General, respondent

Arthur Maloney, for the accused, appellant: The accused was not informed, as he should have been, of his right to affirm [*130] under s. 14 of The Canada Evidence Act, R.S.C. 1927, c. 59. [ROACH J.A.: Was his objection to being sworn "on grounds of conscientious scruples"?] I submit so.

The facts stated by the accused in the affidavit now filed, which he says he would have given in evidence if he had been permitted to do so, would have constituted a good defence, if believed by the jury, under such cases as *Reg. v. Hemmings (1864), 4 F. & F. 50, 176 E.R. 462,* and Rex v. Ford and Armstrong (1907), 13 B.C.R. 109, *12 C.C.C. 555.*

C. P. Hope, K.C., for the Attorney-General, respondent: The accused's objection was not "on grounds of conscientious scruples", but was an objection to any "ritual". He said himself that he could suggest no procedure that would bind his conscience. [LAIDLAW J.A.: How could an uninformed layman be expected to know of his right to affirm under s. 14 of The Canada Evidence Act?]

The English Oaths Act, 51-52 Vict., c. 46, s. 1, is similar to s. 14 of The Canada [**4] Evidence Act. Phipson on Evidence, 8th ed. 1942, p. 452, says that the statutory conditions must be strictly complied with before affirmation is permitted. A decision under the English statute, which is of assistance in this country, is *Nash v. Ali Khan (1892), 8 T.L.R. 444,* which was referred to in Rex v. Duff, 23 Sask. L.R. 151, *50 C.C.C. 246, [1928] 3 W.W.R. 550, [1929] 1 D.L.R. 152 at 158.* [ROBERTSON C.J.O.: Do you not think that the wording of s. 14 is narrower than that of the English Act?] The objection, in any case, must be clearly "on grounds of conscientious scruples".

Arthur Maloney, in reply: The English cases should be applied with caution, because their statute differs from ours in important respects. Where a witness presents himself and objects to being sworn, the trial judge must determine whether his objection comes within the terms of s. 14, and if it does he is entitled to affirm. No such inquiry was made here, obviously because s. 14 was not present to the mind of either the trial judge or Crown counsel.

Cur. adv. vult.

22nd January 1948. The judgment of the Court was delivered by

LAIDLAW J.A.:--An [**5] indictment against the appellant contained three counts: (1) wounding with intent to do grievous bodily [*131] harm to one Norman Smith; (2) wounding with intent to do grievous bodily harm to one Andrew Campbell; (3) that being armed with an offensive weapon he did assault with intent to rob one Percy Smith. After trial on the 8th September 1947, before His Honour Judge Fuller and a jury, in the Court of General Sessions of the Peace in and for the County of Wentworth, the appellant was found guilty on counts 1 and 3 and not guilty on count 2. He was sentenced on count 1 to a term of twenty years' imprisonment and to the same term on count 3, the sentences to run concurrently. He now appeals from the convictions on each count and the sentences imposed on him.

The accused was not defended by counsel at trial, but was represented by counsel in this court.

There is only one ground of appeal that requires particular consideration. The appellant maintains that he has the right under s. 14 of The Canada Evidence Act, R.S.C. 1927, c. 59, to affirm to the truth of evidence he desires to give on his own behalf, instead of taking an oath in the usual manner, and that he was not permitted [**6] to exercise that right at trial.

It is desirable to outline the proceedings at trial after the close of the case for the prosecution, and to quote certain parts of the record. The accused was asked if he proposed to call any evidence. He said he had some witnesses he wanted to use but had not made arrangements to call them because he thought defence counsel "would take care of them", and at the last minute realized he didn't have defence counsel and was obliged to conduct his own defence. After some discussion as to the testimony those witnesses might give, the learned judge addressed the accused, and I quote from the record of proceedings as follows:

"HIS HONOUR: Do you propose to give evidence yourself?

"ACCUSED: I do.

"HIS HONOUR: In that case we will go on and hear your evidence now.

"ACCUSED: Am I obliged to offer my testimony now?

"HIS HONOUR: What is that?

"ACCUSED: Am I obliged to give my testimony now?

9448

"HIS HONOUR: You are. If you are going to give evidence you will have to give it now. I am not going to keep the jury.

[*132] "ACCUSED: I would like to cross-examine them before I give my own testimony."

There was then further discussion between the presiding judge and counsel [**7] for the Crown as to the attendance of the witnesses on behalf of the accused. The learned judge gave his ruling and expressed his views in the matter under discussion. It is unnecessary to refer in detail to that ruling. It is sufficient to say that permission was given to send for one of the desired witnesses. The learned judge then stated to the accused: "In the meantime I will hear your evidence if you wish to give it."

The accused entered the witness box and the record is as follows:

"FRANK BLUSKE, called in his own behalf.

"(On being handed the Bible to be sworn, Frank Bluske said):

"Your Honour, my philosophy of life does not incorporate this ritual of being sworn in on the Bible. I feel quite capable of giving testimony on my own behalf without the ritual.

"HIS HONOUR: Do I understand you refuse to be sworn?

"ACCUSED: That is right, sir.

"HIS HONOUR: for what reason?

"ACCUSED: I have just stated the reason, my philosophy of life.

"HIS HONOUR: Do you belong to any church?

"ACCUSED: No.

"HIS HONOUR: It is your own idea you should not be sworn in court?

"ACCUSED: I have nothing to do with the Bible at any time, I don't agree with the doctrines found therein, and I do not believe [**8] in the ritual.

"HIS HONOUR: Mr. Crown Attorney, what do you suggest under the circumstances?

"MR. McCULLOUGH: Is there any procedure the accused suggests to the Court, that would bind his conscience?

"HIS HONOUR: What do you say, Bluske? Is there any procedure which you may suggest that will bind your conscience?

"ACCUSED: No.

"MR. McCULLOUGH: Did I hear the accused say No?

"HIS HONOUR: He says there is none.

"MR. McCULLOUGH: There is no procedure that would bind this witness's conscience in giving his evidence?

[*133] "HIS HONOUR: He says No.

"MR. McCULLOUGH: I believe the Code provides for the accused making a statement without giving evidence. In Tremeear, I am reading from page 1175, there is a paragraph there which I think is material, and your Honour can read it. I will pass it up.

"HIS HONOUR: Does it refer to any particular section?

"MR. McCULLOUGH: Yes, I think that answers the problem.

"HIS HONOUR: My own idea about it is, that if an accused person asks to give evidence, he is then bound by the rules of evidence, which include being properly sworn. I gather that is what the effect of this is.

"MR. McCULLOUGH: I had in mind where the accused asks for it, and by the way [**9] he indicates part of the defence, it makes it very clear he became a competent witness, it has been held that the accused no longer has a right to make an unsworn statement, but tending the other way. I see a Canadian case down below, which appears to be a

9449

Supreme Court of Canada case, 'It may be quite permissible for the accused, when undefended, to state his version of what has been given in evidence.' Your Honour sees the paragraph I am referring to.

"HIS HONOUR: Yes, I see that. In view of what you have said I will rule that you have no right to give evidence in this trial unless you are sworn.

"ACCUSED: Whatever you say.

"HIS HONOUR: That will not prevent you making a statement to the jury when you are addressing the jury.

"(accused retired from witness box)."

Two witnesses were called for the defence. They were examined by the accused but were not cross-examined by counsel for the Crown. There was no evidence adduced in reply. The accused was then told by the learned judge that if he wished to address the jury he might do so. The accused stated that he would refrain from addressing them and counsel for the Crown did not do so. The learned judge thereupon delivered his charge [**10] without objection being made thereto by the accused, or by counsel for the Crown.

I now reproduce s. 14 of The Canada Evidence Act, as follows:

"14. If a person called or desiring to give evidence, objects, on grounds of conscientious scruples, to take an oath, or is [*134] objected to as incompetent to take an oath, such person may make the following affirmation:--

"'I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth, and nothing but the truth.'

"2. Upon the person making such solemn affirmation, his evidence shall be taken and have the same effect as if taken under oath."

It is not altogether plain to me from the proceedings after the accused was handed the Bible to be sworn, that he objected to take the oath "on grounds of conscientious scruples". It may be that the proceedings can be fairly interpreted in that way, The view I hold makes it unnecessary to determine that question. After the accused objected to take an oath, there was no reference or regard to the relevant provisions in law as contained in s. 14 of The Canada Evidence Act. Those provisions were entirely overlooked and no consideration was given to the right of the accused [**11] under certain circumstances to affirm to the truth of the evidence he desired to give on his own behalf. An inquiry was launched on the suggestion of counsel for the Crown, to determine whether the accused could suggest to the Court any procedure that would bind his conscience. That inquiry was entirely inappropriate and it was entirely unfair to the accused. He could not be expected to have knowledge of any such procedure and he did not say, as stated by counsel for the Crown, that there was no procedure that would bind his conscience. He simply said he could not suggest such a procedure. If the attention of the Court had been called to the provisions of s. 14 of The Canada Evidence Act, it would have been ascertained clearly and without difficulty, whether the objection of the accused to take the oath was "on grounds of conscientious scruples". If that objection had been made apparent to the learned judge he would no doubt have advised the accused of his right to make the affirmation in the words of the statute. I do not say that there is a duty in law on the part of the presiding judge, or of counsel for the Crown, in every case to advise a person called or desiring to give evidence, [**12] and who objects to take an oath, that he may make an affirmation if his objection is based on grounds of conscientious scruples. But where an accused person is not defended by counsel, it is a proper and fair thing to do. In this case, the omission to give any consideration to the provisions of law relevant to [*135] the rights of the accused to give evidence, and the misdirected inquiry carried on after he objected to take an oath, makes the trial unsatisfactory. In my opinion, the appellant did not have a full and fair opportunity to give his evidence, and for that reason, he is entitled to a new trial: *Rex v. Pine (1932), 24 Cr. App. R. 10.*

There is another error apparent in the proceedings, to which my attention has been directed by my Lord The Chief Justice of Ontario. I am indebted to him for doing so and for the references to decisions bearing on the point. The learned judge properly told the accused that he would hear his evidence if he wished to give it and the accused was sufficiently informed of his right to give evidence: see *Rex v. Warren (1909), 2 Cr. App. R. 194; Rex v. Graham (1922), 17 Cr. App. R. 40;* [**13] *Rex v. Villars (1927), 20 Cr. App. R. 150.* But, after ruling that the accused had no right to give evidence unless he was sworn, the learned judge said to the accused: "That will not prevent you making a statement to the jury when you are addressing the jury." In my opinion, the learned judge was wrong in law in extending that privilege to the accused. Since The Canada Evidence Act was passed, permitting an accused person to give evidence on his own behalf, the right to make an unsworn statement does not exist. The statute does not preserve such a right to the accused and in this respect our Act differs from the English law. A learned review and discussion of the

9450

matter appears in Rex v. Krafchenko (1914), 24 Man. R. 652, *22 C.C.C. 277, 6 W.W.R. 836, 28 W.L.R. 76, 17 D.L.R. 244.* That decision was followed in Rex v. Kelly, 27 Man. R. 105, *27 C.C.C. 140,* [1917] 1 W.W.R. 46; affirmed sub nom. *Kelly v. The King, 54 S.C.R. 220, 27 C.C.C. 282, 34 D.L.R. 311,* [1917] 1 W.W.R. 463. (The point under consideration was apparently not a ground [**14] of appeal to the Supreme Court, but see reference to it at p. 244 and pp. 262-3). See also Rex v. Frederick, 44 B.C.R. 547, *51 C.C.C. 340,* [1931] 3 W.W.R. 747 at 751.

The accused in this case refrained from making any statement to the jury and the error of the learned trial judge in giving the accused that privilege does not, in itself, result in a mistrial, but it does in part add to the reasons for holding that the trial was unsatisfactory.

The appellant has filed in this court an affidavit made under affirmation by him and showing the statements he desires to give [*136] in evidence on his own behalf. I refrain from making any comment as to the weight or merit of the proposed testimony. In my opinion that is a matter for consideration and judgment in the first instance of a tribunal of fact, and the appellant is entitled to have a jury pass upon the evidence.

I would quash the convicion and direct a new trial for the reasons I have given, and it is unnecessary to consider any other ground advanced in argument in support of the appeal.

New trial ordered.

Solicitors for the accused, appellant: Croll and Borins, Toronto

R. v. White [2006] A.J. No. 1565.

9451

9452

Between Her Majesty the Queen, and Michael James White, Accused

INDEXED AS: R. v. White [Order of Opening Addresses]

Docket No. 050830629Q1

Alberta Court of Queen's Bench
Judicial District of Edmonton

JUDGES: Moreau J.

[2006] A.J. No. 1565; 2006 ABQB 883; 2006 AB.C. LEXIS 1553

DATE INFORMATION: October 26, 2006 Judgment: October 31, 2006. Filed: December 7, 2006.

JUDGMENT DATE: December 7, 2006

COUNSEL:
[*1]

Troy Couillard
Domina Hussain
for the Crown

Laura K. Stevens, Q.C.
Robert C. Shaigec
for the Accused

JUDGMENT:
VOIR DIRE RULING

MOREAU J.:--

I. INTRODUCTION

[1] Michael James White faces charges of second degree murder and indecently offering an indignity to human remains in the death of his wife. The trial is set to proceed before a jury on November 2nd, 2006 and is expected to conclude on December 1st, 2006. Counsel for Mr. White applied for leave to make an opening statement immediately after the Crown makes its opening statement.

[2] Defence counsel argues that there are special circumstances that warrant the Court's exercise of its discretion in favour of his request. The Crown opposes the application on the basis that there are no special circumstances here and that there is a risk of prejudice to the trial process if the defence application is granted.

II. DISCUSSION

[3] Section 651(2) of the *Criminal Code* provides:

> (2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when [*2] all the evidence is concluded to sum up the evidence.

[4] While s. 651(2) does not state that the examination of witness be conducted "immediately" after the opening, and the *Criminal Code* is silent as to the Crown opening its case, the established practice is to permit the Crown to make an opening statement at the beginning of its case and the defence to make its opening statement at the beginning of its case, if the defence calls evidence. The trial judge has a discretion, however, to permit the defence to make an opening

statement immediately after that of Crown counsel in special circumstances: ***R. v. Paetsch*** *[1993] A.J. No. 366* (C.A.), at p. 2. The Court of Appeal did not elaborate on the types of situations in which this discretion may be applied. Authorities from other provinces are helpful in identifying factual situations considered to be special circumstances, among them, the length of the trial: ***R. v. Barrow*** *(1989), 48 C.C.C. (3d) 308* (N.S.S.C.), at p. 314 (in that case a five to six week trial); complex factual issues: ***Barrow, R. v. D.(A.)*** (2003), *180 C.C.C. (3d) 319* [*3] (Ont. Sup. Ct.), at para. 19; a defence not expected to be apparent to the jury during the Crown's evidence: ***D.(A.)***, at para. 19; and competing and significant expert evidence: ***D.(A.)***, at para. 19.

[5] Some of the authorities reviewed require that the accused undertake to call evidence as a condition for granting a request to make an opening statement immediately after the Crown's: ***R. v. Vitale*** *(1987), 40 C.C.C. (3d) 267* (Ont. Dist. Ct.); ***R. v. Edwards*** *(No. 2) (1987), 2 W.C.B. (2d) 220* (Ont. H.C.J.). Others, such as ***Barrow*** (at p. 313) and ***R. v. Morgan*** *(1997), 125 C.C.C. (3d) 478* (Ont. Gen. Div.), at p. 480, expressed the view that the defence should be permitted to tell the jury what evidence it expects to elicit on cross-examination of Crown witnesses. I need not determine this question as unlike the situation in ***Barrow*** and in ***Morgan***, where the defence was not prepared to say whether it was going to call evidence, in the present case, counsel for Mr. White has undertaken to call evidence. He has also advised that he will not ask to make [*4] a second opening statement at the conclusion of the Crown's case.

[6] Defence counsel argues that the trial is lengthy, the evidence circumstantial and, along with the amount of expert evidence involved, complex, and that there is no unfairness to the Crown resulting from its request being granted.

[7] Crown counsel maintains that the case is not complex, that four to five weeks of trial is not particularly lengthy having regard to the nature of the charges, that there is not likely to be competing expert evidence, and that the defence can put its theory to the jury through cross-examination of Crown witnesses. Crown counsel also urged the Court to consider the risks associated with early openings having regard to the potential for evidence not panning out as expected by the defence in the Crown and/or the defence cases, followed by possible mistrial applications by defence: see ***R. v. Gervais***, *[2001] O.J. No. 4942* (Ont. Sup.Ct.), at para. 3. This factor would, in their submission, work an unfairness to the Crown in potentially having to remount its case in the event of a successful mistrial application.

[8] Crown counsel referred to ***R. v. Ekman*** *(2006), 209 C.C.C. (3d) 121,* [*5] in which the British Columbia Court of Appeal noted (at para. 31) that it is open to the defence to shift its position and its theory in light of the way the Crown's case goes in. This flexibility is compromised by an undertaking to call evidence and an early opening statement summarizing the expectations of counsel with respect to cross-examination of Crown witnesses and its own evidence.

[9] However, it would seem to me that having requested an early opening, the defence would be hard-pressed to use the granting of their request as a basis for a mistrial application if the evidence does not unfold as expected. This eventuality must be carefully weighed before the request for an early opening statement is made and an undertaking to call evidence is offered.

[10] Another risk of an early defence opening, also associated with the unpredictability of trial and identified in ***Barrow***, is that the defence may not be able to prove everything it tells the jury it expects to elicit from Crown and/or defence witnesses. However, prudent counsel would be mindful of this difficulty and carefully tailor their opening to address this risk. In ***Barrow***, this danger was minimized as [*6] it was a re-trial. The transcripts from the preliminary inquiry and first trial were available, and the Crown proposed to call the same or very similar witnesses at the second trial, which permitted the defence to make their opening with confidence that their preview of the evidence was accurate. That is not the case here, although a preliminary inquiry was conducted.

[11] In ***D.(A.)***, the trial was expected to last five to six weeks and the jury would hear what the defence described as "powerful" Crown DNA evidence. Dambrot J. did not consider the length of trial, of itself, to be an unusual circumstance. As to the DNA evidence, he found that it would be difficult for defence to address it without slipping into argument. He concluded that the defence would not be prevented from getting its position on important issues before the jury at an early opportunity through cross-examination of Crown witnesses and refused the defence's application to make an early opening statement.

[12] It was noted, however, in ***Barrow*** (at p. 313) that the matter of slipping into argument during an opening statement is something the trial judge should be in a position to control. I would [*7] also note that this is a risk that would be present whether the defence makes its opening immediately after the Crown's or following the close of the Crown's case.

[13] Nathanson J. in ***Barrow*** referred to a particular advantage of an earlier defence opening at p. 313, namely, that the jury will be assisted in knowing near the beginning of the case what evidence they will be expected to hear during

9454

the entire course of the trial and any conclusions they might jump to after hearing the Crown's opening statement can be offset with a more timely defence opening. McKinnon J. commented in ***Morgan*** (at p. 480) that in this way, fairness extends not only to the accused, but to the jurors themselves.

[14] The purpose of an opening statement is to provide a general outline of the evidence to be presented and to relate the parts of the evidence to the whole. It is not an occasion for argument: Ewaschuk: *Criminal Pleadings and Practice*, Vol. 1, at 16:2224. Defence counsel advised that they intend to remind the jury to be open minded given it will be some time before they hear defence evidence, and will outline the evidence they expect to elicit through Crown witnesses and defence [*8] witnesses. Crown counsel has confirmed that he will not use the opening address for argument.

[15] Ultimately, as noted in ***D.(A.)*** at para. 10, the purpose of the opening statement is to make it easier for the jury to follow the evidence, and to relate parts of the evidence to the whole. It is difficult to assess the issue of complexity at this stage. Defence counsel maintains that the case will be complex, involving a number of expert witnesses, while Crown counsel maintains that it will not be complex. It is a circumstantial case whose length results from the number of witnesses, many of them expected to supply very small pieces of the circumstantial puzzle.

[16] Considering all the factors, including the risks associated with an early defence opening, I am of the view that on balance they weigh in favour of granting the application. The trial involves circumstantial evidence and expert witnesses and it is not expected that the defence will reach its case for at some two weeks, without factoring in the prospect of one or more additional *voir dires* to be conducted within the Crown's case. The defence has defined a course which it expects to put to the jury in undertaking [*9] to call evidence. I am of the view that in these special circumstances, it will be fairer to the accused and to the jury that the jury receive a "preview" from Crown counsel and defence counsel, early in the trial, of the evidence each expects to elicit.

[17] The defence, however, will not be permitted a second opening at the conclusion of the Crown's case: ***R. v. J.C.***, *[2002] O.J. No. 4042* (Ont. S.Ct.), at para. 13. Counsel will use the opening for the purposes I earlier identified, and not for argument.

[18] I wish to thank counsel for their helpful submissions.

MOREAU J.

See R. v. Tonner; R v Evans [1985] 1 ALL ER 807 (C.A.).

9456

R v Tonner and others; R v Evans

COURT OF APPEAL, CRIMINAL DIVISION

[1985] 1 ALL ER 807, [1985] 1 WLR 344, 80 Cr App Rep 170

HEARING-DATES: 25, 26, 28 JUNE 1984

28 June 1984

CATCHWORDS:

Criminal law -- Conspiracy -- Fraud -- Conspiracy to defraud -- Conspiracy to evade payment of value added tax -- Some acts of conspiracy constituting substantive offences and some not -- Whether Crown entitled to charge common law conspiracy -- Whether complexity of offence and greater penalties at common law entitling Crown to charge common law conspiracy -- Criminal Law Act 1977, ss 1(1), 5.

Criminal law -- Trial -- Commencement of trial -- Whether trial begins on arraignment or only when jury sworn and seised of issue -- Criminal Justice Act 1982, s 72.

HEADNOTE:

The appellants conspired by diverse and complex transactions to evade paying to the Revenue large sums of value added tax. The Crown did not charge the appellants with conspiracy contrary to s 1(1) of the Criminal Law Act 1977, as it could have done by alleging conspiracy to cheat the Revenue contrary to s 32(1) of the Theft Act 1968 or conspiracy to commit acts contrary to s 38(1) of the Finance Act 1972, but with common law conspiracy to defraud, that being the only form of common law conspiracy not abolished by s 5 of the 1977 Act. The trial judge ruled that the Crown could properly proceed with the charges as laid. The appellants were convicted of common law conspiracy. They appealed, contending that the charges were improperly laid because the appropriate charges were conspiracy to commit substantive offences contrary to s 1(1) of the 1977 Act. The Crown contended that the purpose of conspiracy to defraud at common law being preserved by s 5(2) of the 1977 Act was to enable prosecuting authorities to charge common law conspiracy to defraud not only where the agreement in question was to perform conduct which did not constitute any substantive offence at all but also where the agreement was to perform a combination of acts some of which would constitute substantive offences and some of which would not, or where the conduct agreed on was so diverse and complicated as to warrant laying an all-embracing charge of common law conspiracy to defraud which a jury could more easily understand than a series of charges alleging conspiracies to commit various substantive offences arising out of the same circumstances. The Crown further contended that it was legitimate for the Crown to have regard to the seriousness of the defendants' conduct and to charge common law conspiracy to defraud in order to attract the greater penalties available for that offence.

One of the appellants, E, had been arraigned for trial in April 1983 but in June the jury were discharged and a retrial was ordered. On 24 May 1983 s 72 of the Criminal Justice Act 1982 abolished the right of an accused to make an unsworn statement from the dock, but the abolition was not to apply to 'a trial . . . which began before' s 72 came into force. The appellant's retrial commenced in October 1983 and the question arose whether his trial began before s 72 came into force so that he was entitled to make an unsworn statement from the dock at his retrial.

Held -- (1) If a conspiracy involved the commission of any substantive offence the only charge that could be brought was conspiracy contrary to s 1(1) of the 1977 Act, even if some of the conduct involved in the conspiracy would not amount to a substantive offence and even though the charge might result in serious criminal conduct being inadequately punished. Furthermore there were, in the circumstances, no grounds for the court to apply the proviso to s 2(1)d of the Criminal Appeal Act 1968 and dismiss the appeal on the basis that the evidence established the offence of cheating the Revenue contrary to common law, since the appellants had not had the opportunity of meeting such a charge and the jury had not been directed on it. Accordingly, the convictions of common law conspiracy to defraud would be quashed. However, the court would exercise its power under s 3e of the Criminal Appeal Act 1968 to

substitute of its own accord convictions for conspiring to act contrary to s 38(1) of the 1972 Act (see p 813 j, p 814 b c e f and j to p 815 b, p 819 e and p 820 g, post) R v Ayres [1984] 1 All ER 619 applied.
(2) A trial only began when the jury had been sworn and were seised of the issue, and not when the accused was arraigned to plead to the indictment. It followed that E's trial began in October 1983, when the jury at the retrial were sworn, and that he had therefore not been entitled to make an unsworn statement from the dock at the retrial (see p 818 g to j, post) dicta of Ritchie CJ in Morin v R (1890) 18 SCR at 415, of Scarman LJ in R v Vickers[1975] 2 All ER at 948 and of Shaw LJ in R v Williams (Roy) [1977] 1 All ER at 879 applied.

NOTES:

For conspiracy to defraud, see 11 Halsbury's Laws (4th edn) para 61, and for cases on the subject, see 15 Digest (Reissue) 1398--1403, 12236--12297.
For unsworn evidence of a defendant, see 11 Halsbury's Laws (4th edn) para 465.
For the Criminal Appeal Act 1968, ss 2, 3, see 8 Halsbury's Statutes (3rd edn) 690, 691.
For the Theft Act 1968, s 32, see ibid 802.
For the Finance Act 1972, s 38, see 42 ibid 195.
For the Criminal Law Act 1977, ss 1, 5, see 47 ibid 145, 151.
For the Criminal Justice Act 1982, s 72, see 52 ibid 580.
As from 27 August 1981, s 1(1) of the 1977 Act was substituted by s 5(1) of the Criminal Attempts Act 1981.

CASES-REF-TO:

Catherwood v Thompson [1958] OR 326, Ont CA.
Morin v R (1890) 18 SCR 407, Can SC.
R v Ayres [1984] 1 All ER 619, [1984] AC 447, [1984] 2 WLR 257, HL.
R v Duncalf [1979] 2 All ER 1116, [1979] 1 WLR 918, CA.
R v Ellis (1973) 57 Cr App 571, CA.
R v Hudson [1956] 1 All ER 814, [1956] 2 QB 252, [1956] 2 WLR 914, CCA.
R v Lovelock [1956] 3 All ER 223, [1956] 1 WLR 1217, CCA.
R v Paling (1978) 67 Cr App R 299, CA.
R v Quinn [1978] Crim LR 750.
R v Vickers [1975] 2 All ER 945, [1975] 1 WLR 811, CA.
R v Walters (1979) 69 Cr App R 115, CA.
R v Williams (Roy) [1977] 1 All ER 874, [1978] QB 373, [1977] 2 WLR 400, CA.

CASES-CITED:

R v Jones (1974) 59 Cr App R 120, CA.
R v McCarthy [1981] STC 298, CA.
R v McLaughlin (1982) 76 Cr App R 42, CA.
R v McVitie [1960] 2 All ER 498, [1960] 2 QB 483, CCA.
R v Molyneux (1980) 72 Cr App R 111, CA.
R v Nelson (1977) 65 Cr App R 119, CA.
R v Parker and Bulteel (1916) 25 Cox CC 145.
R v Simmonds [1967] 2 All ER 399, [1969] 1 QB 685, CA.
R v Welham [1960] 1 All ER 260, [1960] 2 QB 445, CCA affd [1960] 1 All ER 805, [1961] AC 103, HL.

INTRODUCTION:

Appeals

R v Tonner and others

On 6 May 1983 in the Central Criminal Court before his Honour Judge Lowry QC and a jury the appellants, Gordon Campbell Tonner, Wilfrid Haydn Rees and William Harding, were convicted on an indictment charging Tonner with two counts of conspiracy to defraud contrary to common law and Rees and Harding with one count of conspiracy to defraud contrary to common law. Further counts in the indictment charging the appellants with conspiracy contrary

to s 1(1) of the Criminal Law Act 1977 were ordered to be left on the file. Tonner was sentenced to a total of 7fD years' imprisonment and fined a total of £400,000, Rees was sentenced to 2fD years' imprisonment and Harding was sentenced to 2 years' imprisonment. The appellants appealed against the convictions on a point of law, namely that the judge erred in law in failing to direct the Crown that the conspiracies to defraud contrary to common law were wrongly charged and that in the counts in question the statement of offence should have been conspiracy contrary to s 1(1) of the 1977 Act. The appellants also applied for leave to appeal against sentence. The facts are set out in the judgment of the court.

R v Evans

On 14 January 1984 in the Central Criminal Court before his Honour Judge Lowry QC and a jury the appellant, Ronald Evans, was convicted, following a retrial which commenced in October 1983, of conspiracy to defraud contrary to common law and was sentenced to 3fD years' imprisonment. He appealed against his conviction on the ground that the indictment should have charged conspiracy contrary to s 1(1) of the Criminal Law Act 1977 and not conspiracy to defraud contrary to common law. He also appealed against conviction on the further ground that the trial judge erred in law in ruling that his trial began when the second jury were sworn, in October 1983, and that therefore, by virtue of s 72 of the Criminal Justice Act 1982, he was not entitled to make an unsworn statement from the dock, submitting that the judge should have ruled that his trial began when he was arraigned, in April 1983, prior to the first, abortive, trial, so that his trial began before the commencement of s 72 of the 1982 Act, and s 72 did not apply to him. Evans also appealed against sentence. The facts are set out in the judgment of the court.

COUNSEL:

Stephen Leslie (assigned by the Registrar of Criminal Appeals) for Tonner, Rees and Harding.

Anthony Arlidge QC and Peter Rook for the Crown in the appeals of Tonner, Rees and Harding.

William Clegg and Richard Whittam (assigned by the Registrar of Criminal Appeals) for Evans.

Paul Purnell QC, Anthony Glass and Peter Finnigan for the Crown in the appeal of Evans.

PANEL: WATKINS LJ, KENNETH JONES AND WATERHOUSE JJ

JUDGMENTBY-1: WATKINS LJ

JUDGMENT-1:

WATKINS LJ delivered the following judgment of the court. The appellants Tonner, Rees and Harding on 6 May 1983 in the Central Criminal Court, after a trial lasting 41 days, were convicted and sentenced by his Honour Judge Lowry QC as follows: Tonner, for conspiracy to defraud, seven years' imprisonment and a fine of £300,000 on a second count for a like offence, seven years' imprisonment concurrent and a fine of £100,000. He was also ordered to pay £20,000 prosecution costs and £10,000 legal aid costs. Those fines were ordered to be paid by 5 November 1983, with 12 months' imprisonment consecutive in default. A suspended sentence of 18 months' imprisonment imposed on 5 June 1981 for handling stolen property was ordered to take effect as six months' imprisonment consecutive. That meant a total term of imprisonment of 7fD years. Rees, for conspiracy to defraud, was sentenced to two years' and six months' imprisonment consecutive to a sentence which he was then serving. His parole licence, which had been effective until then, was revoked, and by order he was deprived of two roughcast fine gold bars. Harding, for conspiracy to defraud, was sentenced to two years' imprisonment, and he too was by order deprived of two rough-cast fine gold bars.

A number of counts on the indictment were left, by order of the judge, on the file. They were: count 3, conspiracy to defraud, against Tonner alone of these appellants count 5, conspiracy to contravene s 38(1) of the Finance Act 1972 count 6, a like offence, those two counts being laid against all three appellants and count 7, conspiracy to contravene the provisions of s 170(2) of the Customs and Excise Management Act 1979, against Tonner alone. All three appellants appeal against conviction.

There were a number of co-accused. One Bingham was found not guilty of conspiracy to defraud and of other conspiracies, as also was a man called Falco. One Furness was sick the judge discharged the jury from returning a verdict in respect of him. Stahl pleaded guilty to count 1, conspiracy to defraud, and was sentenced to two years' imprisonment, 12 months of which was suspended. Another man, Tryniszewski, was not to be found, despite the issue of a bench warrant, so he was not tried.

The facts are these. Between June 1981 and April 1982 the three appellants were involved in a conspiracy to evade payment of value added tax by obtaining gold without paying tax on it and selling it and charging tax on the sale. That

tax they failed to account for to the Customs and Excise. It was asserted that Tonner was the prime mover and succeeded in respect of a few companies in depriving the Revenue of a total of £3m in value added tax. Rees and Harding co-operated effectively to the extent of playing notable roles in the operation of one company.

This was an extremely well-conceived, artful and daring plan to deprive the Revenue of vast sums of money. In effect, they or someone on their behalf smuggled into this country gold on which no tax was paid, melted it down and sold it on to bullion dealers in Hatton Garden. In addition, they bought a substantial number of Krugerrand and Canadian coins which they also melted down into gold bars and sold at very substantial cost to bullion dealers in Hatton Garden.

As for some of the transactions, a scheme of self-invoicing was resorted to by the buyers, and as for others there was direct invoicing to one or more of the three companies to which reference has already been made. In relation to part of the very substantial amount of gold which was dealt with in those different ways false invoices were created. An account was rendered to the Revenue by the use of false invoices relating to the buying of gold on which it was said that value added tax had been paid. The amount of that was set off against value added tax on true invoices given by bullion dealers in Hatton Garden. That set-off falsely revealed that the companies owed the Revenue a very trifling sum of money.

In relation to another and quite substantial part of value added tax kept away from the Revenue the intention was that one or more of the appellants, and others, would abscond with the money, no doubt leaving this country to spend the rest of their lives in a sunnier clime.

The respective roles played by the appellants and others were canvassed at length before the jury. There can be no doubt whatever that it was for a time a very successful enterprise. It was enabled to be effective because the companies created for the purpose were properly registered for the purposes of value added tax, and had therefore numbers on that register. The third company was however brought into life principally by Rees and Harding, who, using false names, managed to register that company for the purposes of value added tax and improperly thereby to obtain a number on the register, which was thereafter used to further the success of the unlawful enterprise. That was how those three men busied themselves for a number of months in 1982 and early in 1983.

Turning now to the appellant Evans, on 14 January 1984 in the Central Criminal Court, after a retrial which lasted three months, he was convicted and sentenced by Judge Lowry to 3fD years' imprisonment for conspiracy to defraud. He appeals against conviction by leave of Beldam J. On the indictment he had co-accused, seven men and a limited company. He alone was convicted. There was a failure to agree in respect of one co-defendant, Wilson, and verdicts of not guilty in respect of the others including the limited company.

The facts as far as Evans is concerned were these. Four of the men who were found not guilty were directors of a company, Illuminate Ltd, which was formed as a jewellery business, with premises in Hatton Garden. A man called Rajnikant Unadkat ('Raj' for short) and his brother traded as jewellery importers and engaged in buying and selling gold.

On 2 November 1981 a company named D Roberts Ltd, with an office in Shoreditch High Street, was registered for value added tax. On 4 and 5 November David Roberts, its so-called director, opened a number of bank accounts in the company's name. Between early November 1981 and early January 1982 nearly 60,000 gold coins were bought by or on behalf of David Roberts at a cost of £17m. No value added tax was paid on those coins. They were delivered to the premises of the company, Illuminate, where they were melted into bars and sold on the open market by Raj, who charged and received value added tax at 15%. The value of the bars was less than the equivalent weight of the coins. The profit which was pocketed by those unlawfully dealing in this way was made by not handing over the value added tax charged on the sale to the Customs and Excise. The loss to the commissioners through the dealings of these men was about £2fDm.

This fraud was concealed for some time by the production of false invoices. Raj produced invoices to show that he had purchased gold at a slightly lower rate from Illuminate. The rate of profit was running at something like 8% of the value added tax imposed on sale and purchase. The investigation into this fraud was hindered for a considerable time because no one was able to find Roberts. He it was, whoever he was, who had registered the business of the company, D Roberts Ltd. He it was who arranged for payment of the coins and had transactions, at any rate on paper, with Raj.

Eventually Roberts was unmasked. A man was arrested on 30 June 1982. His name was not Roberts at all: it was Evans. He had been wearing a wig, a commonplace device to try to hide one's identity. It was effective for some while but eventually it was taken off in the manner which has been very briefly outlined. He too therefore stood his trial and was convicted as already mentioned.

This court heard the appeals against conviction simultaneously, at the invitation of counsel for the appellants and with the consent of counsel for the Crown We acceded to the invitation because the main ground of appeal of all four appellants is identical in one respect. Much time has been saved by avoiding duplication. That ground of appeal is that the conspiracies to defraud contrary to common law were all wrongly charged, that the statement of offence in each

material count should have alleged a conspiracy contrary to s 1(1) of the Criminal Law Act 1977 (see R v Ayres [1984] 1 All ER 619, [1984] AC 447). Consequently, subject to the exercise by this court of its power to apply the proviso to s 2(1) of the Criminal Appeal Act 1968, all convictions must, so it is said, be quashed.

When these appellants were convicted R v Ayres had not been heard in the House of Lords. There existed at that time an unresolved controversy as to the precise effects of the provisions of ss 1(1) and 5 of the 1977 Act. The terms of s 1(1) are:

'Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions, he is guilty of conspiracy to commit the offence or offences in question.'

Section 5, so far as material, provides:

'(1) Subject to the following provisions of this section, the offence of conspiracy at common law is hereby abolished.
(2) Subsection (1) above shall not affect the offence of conspiracy at common law so far as it relates to conspiracy to defraud, and section 1 above shall not apply in any case where the agreement in question amounts to a conspiracy to defraud at common law . . .'

R v Walters (1979) 69 Cr App R 115, approving as it did a ruling in R v Quinn [1978] Crim LR 750, and R v Duncalf [1979] 2 All ER 1116, [1979] 1 WLR 918 produced in this court solutions to the problem which seemingly could not be reconciled. Consequently some judges adopted what might be called the Walters solution and others that of Duncalf. Despite submissions in the joint trials of Tonner, Rees and Harding and in the trial of Evans, Judge Lowry declined to follow R v Duncalf. Accordingly he permitted the Crown in both trials to proceed with charges of conspiracy to defraud contrary to common law.

In R v Ayres [1984] 1 All ER 619, [1984] AC 447, the defendant had been charged on an indictment with the common law offence of conspiracy to defraud, the particulars of the offence being that he had conspired with his co-defendant and other persons to obtain money from an insurance company by falsely claiming that a lorry and its contents had been stolen while in transit. He was convicted and he appealed on the ground, inter alia, that he had been improperly charged with conspiracy to defraud at common law and that he should have been charged with conspiracy to obtain property by deception contrary to s 1(1) of the 1977 Act. The House of Lords held, dismissing the appeal ([1984] AC 447 at 447--448):

'(1) that upon the true construction of the Act of 1977 common law conspiracy to defraud and statutory conspiracy contrary to section 1 were mutually exclusive offences that "conspiracy to defraud" within the meaning of section 5(2) was limited to those exceptional fraudulent agreements which, if carried into effect, would not necessarily result in the commission of any substantive criminal offence by any of the conspirators and that whenever the evidence supported the commission of a substantive criminal offence if the agreement constituting the conspiracy had been performed, the only proper charge was conspiracy contrary to section 1 that since the evidence against the defendant supported an attempt to obtain property by deception if the conspiracy had been performed, the charge of conspiracy to defraud was improper and that was a material irregularity in the course of the trial . . . Reg. v. Duncalf ([1979] 2 All ER 1116, [1979] 1 WLR 918), approved . . . But (2) dismissing the appeal, that in all the circumstances of the case there had been no actual miscarriage of justice because the particulars of offence in the indictment and the judge's directions to the jury made it plain that the crime alleged against the defendant was conspiracy to obtain money by deception, and accordingly, the conviction would be upheld under the proviso to section 2(1) of the Criminal Appeal Act 1968 . . .'

I shall return to the speech of Lord Bridge in R v Ayres a little later.

Counsel for the appellants submit that in both their cases there is no room for doubt whether common law conspiracy or statutory conspiracy should be charged. The particulars in each of the material counts make it abundantly plain that either the alleged unlawful agreements were to commit substantive offences or, if not, as they contend cannot possibly be the position, they were designed to set in being the unlawful process of defrauding the Revenue, that is to say the public, in which event they would have acted contrary to common law. All the conduct complained of, they submit, must have been within the contemplation of Parliament when it enacted the provisions of s 38(1) of the Finance Act 1972 or those of s 170(1) of the Customs and Excise Management Act 1979. Section 38(1) provides:

'If any person is knowingly concerned in, or in the taking of steps with a view to, the fraudulent evasion of tax by him or any other person, he shall be liable to a penalty of £1,000, or three times the amount of the tax, whichever is the greater, or to imprisonment for a term not exceeding two years, or to both.'

The maximum penalties for acting contrary to not only s 38(1) but also s 170(1), which we see no need to quote, and of course for acting contrary to s 1(1) of the 1977 Act by conspiring to do so, which are identical, are almost trifling compared with the maximum penalties which can be and were imposed in these cases for the common law conspiracy.

The Crown, not surprisingly, having regard to the scale of the frauds here, had this factor very much in mind when laying the charges at common law. But both counsel for the appellants argue that Parliament cannot possibly have overlooked the consequences of enacting ss 1(1) and 5 of the 1977 Act. Moreover, in hearing the appeal in R v Ayres the House of Lords must have had them in contemplation. A copy of the indictment in Evans's case was produced to their Lordships during the hearing of the appeal in R v Ayres.

Regardless of that, both counsel for the appellants argue that the clear terms of the two sections cannot be expanded into an interpretation that they cannot sensibly bear merely because the conduct complained of was on a uniquely serious scale. And finally they maintain that, if the unlawful conduct agreed on contains a mixture of that which amounts to a statutory offence and that which does not, then the conspiracy is caught by s 1(1) of the 1977 Act.

During the trial of Tonner, Rees and Harding counsel for the Crown revealed to the judge why he had drafted the material counts in the indictment as he did. We have a transcript of what passed between counsel and the judge in relation to this matter. Counsel is recorded as having explained to the judge his reasons for deliberately refraining from charging the three appellants and others with the common law offence of conspiracy to cheat the Revenue. Counsel for the appellants Tonner, Rees and Harding pricked up his ears at that and said that if counsel for the Crown had indicted his clients in that way he would have addressed legal argument on it. At the conclusion of the argument the judge concluded that it was right for the Crown to proceed with the trial against the three appellants on the indictment as presented.

Counsel for the Crown, whose submissions in this court have been supported by counsel for the Crown in Evans's case, opened his argument by posing the rhetorical question: what does a lacuna in this context mean? He submitted that s 5 of the 1977 Act was designed to provide the prosecuting authority with the means of charging a defendant with the common law offence of conspiracy in cases where s 1(1) of the 1977 Act could not be applied. He contended that it covers, obviously, unlawful conduct agreed to be performed which does not constitute an offence within the meaning of s 1 of the 1977 Act, where, in sub-s (4), the offence is defined thus:

'In this Part of this Act "offence" means an offence triable in England and Wales, except that it includes murder . . .'

There is a lacuna also, he submits, in two other circumstances not considered by the House of Lords in R v Ayres: firstly, where the agreement is to perform a combination of conduct which constitutes an offence or offences within the meaning of s 1(1) and that which does not. Here some of the conduct contemplated was clearly contrary to s 38(1) of the Finance Act 1972 and possibly to s 170(1) of the Customs and Excise Management Act 1979. But there was much else to be done. Some of it admittedly amounted to cheating the public revenue, which by s 32(1) of the Theft Act 1968 is retained as an offence.

Secondly, he says, what is agreed on is so diverse and complicated as to warrant alleging against a defendant or defendants one all-embracing conspiracy charge which a jury could more easily understand than were it to be faced with a series of conspiracies in different counts all arising out of the same circumstances. Furthermore, he continued, the seriousness of the conduct agreed on, measured against the punishment available to penalise it, is a legitimate consideration.

If counsel for the Crown is right it must follow, in our judgment, that the decision in v Ayres left a considerable area of uncertainty as to what constitutes a lacuna, and consequently substantially failed to achieve its purpose, which must have been to remove the doubts which existed about the effects of ss 1(1) and 5 of the 1977 Act.

Regrettable though it may be that serious criminal conduct may appear to be inadequately punished consequent on the decision in R v Ayres, we do not accept that it left in its wake a lacuna of the nature contended for by counsel for the Crown. We would cite Lord Bridge's conclusion, with which all of their Lordships agreed ([1984] 1 All ER 619 at 625, [1984] AC 447 at 459):

'For these reasons, and for those expressed in the extract quoted above from the judgment of the count in R v Duncalf [1979] 2 All ER 1116 at 1120--1121, [1979] 1 WLR 918 at 922--923, which which I respectfully agree, I conclude that the phrase "conspiracy to defraud" in s 5(2) of the 1977 Act must be construed as limited to an agreement which, if carried into effect, would not necessarily involve the commission of any substantive criminal offence by any of the conspirators. I would accordingly answer the certified question in the affirmative.'

That, effectively and precisely, we think, draws the line between what can and what cannot be regarded as conspiracy to defraud at common law. It is now, we think, beyond doubt that, if a conspiracy involves the commission

of any substantive offence, it can be charged only under s 1(1) of the 1977 Act. We therefore find that these appellants were wrongly charged.

This leads us directly to the application of the proviso to s 2(1) of the Criminal Appeal Act 1968, on which we have heard argument, a great deal of which has been directed to the definition of cheating the Revenue contrary to common law. Counsel for the appellants Tonner, Rees and Harding, and counsel for the appellant Evans too, submit that only positive acts will suffice for this purpose, that if there is one act among a number of positive acts which is passive (in other words, a failure to do this or that) a cheat is not established. In this context we were referred to a number of authorities, including R v Hudson [1956] 1 All ER 814, [1956] 2 QB 252, and to some statutory provisions and old textbooks, which it is submitted establish that proposition. We are not persuaded that any one of them has that effect.

We do not however have to go so far as to decide that point, nor do we have positively to conclude, as we would if we had had to do so, that here were committed barefaced cheats on the Revenue on a substantial scale. This is because we cannot accede to the joint invitation of counsel for the Crown and counsel for the Crown in Evans's case to apply the proviso as was done in R v Ayres. In relation to this matter Lord Bridge proposed a test which we adopt. He said ([1984] 1 All ER 619 at 626, [1984] AC 447 at 460--461):

'If the statement and particulars of the offence in an indictment disclose no criminal offence whatever or charge some offence which has been abolished, in which case the indictment could fairly be described as a nullity, it is obvious that a conviction under that indictment cannot stand. But, if the statement and particulars of offence can be seem fairly to relate to and to be intended to charge a known and subsisting criminal offence but plead it in terms which are inaccurate, incomplete or otherwise imperfect, then the question whether a conviction on that indictment can properly be affirmed under the proviso must depend on whether, in all the circumstances, it can be said with confidence that the particular error in the pleading cannot in any way have prejudiced or embarrassed the defendant.'

Counsel for the Crown and counsel for the Crown in Evans's case submit that there would be no miscarriage of justice here if we were to apply the proviso on the basis that the misdescribed statement of offence were to read, 'Cheating the Revenue contrary to common law', that the particulars of the offence as set out in the indictment are apposite to cover the charge, and that the evidence amply established it.

If we felt able to accept those submissions, the power to punish would be unaffected. In the sense that the punishment should fit the crime, this is probably what ought to happen. But we are with regret driven to find that there would truly be a miscarriage of justice if we did so. The proviso was not intended to be used in circumstances such as these, where (1) in the case of Tonner, Rees and Harding, the Crown could have charged but refrained from charging these appellants with cheating the Revenue. We have no criticism to make of counsel for the Crown in this respect he had a difficult decision to make at the time of drafting the indictment (2) there would have been legal argument at the trial on the definition of 'cheating'. This did not take place, as has already been made plain. If it had, the appellants may have benefited from it (3) the jury were never directed on the issues arising from the offence of cheating (4) issues involving the admissibility of evidence may have arisen on a charge of cheating which did not arise in either trial (5) in the trial of Evans the offence of cheating was never envisaged. We accept that it is probably wrong in principle to apply the proviso in that circumstance (6) it is not known what evidence either jury accepted. In the trial of Evans there were wholesale acquittals and (7) no appellant had the opportunity to meet the allegations arising from the offence of cheating.

We turn now to the other ground of appeal which is relied on by Evans alone. It has been argued before the court by his counsel, supported by Mr Nicholas Brandt, counsel for an appellant called Rhiney whose appeal is to be heard hereafter. The decision on this particular ground of appeal will govern Rhiney's appeal against conviction, since the circumstances on which it was founded and the law on which it was based are identical. Thus it was that we allowed counsel for Rhiney to make his submissions in support of counsel for the appellant Evans.

The facts which need to be stated as a preliminary to exploring what is undoubtedly an important matter for the appellant Evans, and of course for Rhiney, are these. He was first of all arraigned at the Crown Court at Southwark on 11 April 1983. After some while, and when the prosecution had concluded its case, there were submissions to the judge conducting the trial, as a result of which the jury were discharged from giving a verdict. That was on 22 June 1983. On 19 October 1983 there was a retrial of Evans. That concluded in the manner I have already stated. Between arraignment on 11 April and the retrial commencing on 19 October, s 72 of the Criminal Justice Act 1982 came into force on 24 May. That section provides:

'(1) Subject to subsections (2) and (3) below, in any criminal proceedings the accused shall not be entitled to make a statement without being sworn, and accordingly, if he gives evidence, he shall do so on oath and be liable to cross-examination but this section shall not affect the right of the accused, if not represented by counsel or a solicitor, to

address the court or jury otherwise than on oath on any matter on which, if he were so represented, counsel or a solicitor could address the court or jury on his behalf.

(2) Nothing in subsection (1) above shall prevent the accused making a statement without being sworn--(a) if it is one which he is required by law to make personally or (b) if he makes it by way of mitigation before the court passes sentence upon him.

(3) Nothing in this section applies--(a) to a trial or (b) to proceedings before a magistrates' court acting as examining justices, which began before the commencement of this section.'

Judge Lowry was addressed at the commencement of the trial of Evans in October 1983 on the effect of s 72. The contention of counsel for the appellant was and remains that the trial of Evans had commenced when he was arraigned as long ago as April 1983, and that accordingly, having regard to s 72(3) of the 1982 Act, it was self-evident that that section did not apply, that the trial was, as it were, in midstream. The judge, who took considerable care to listen to those submissions directed to the question when a trial by jury can properly be said to commence, came to the conclusion that it commences at the time when the jury are sworn and the defendant is put in the charge of that jury. It did not begin, and never has begun, he said, with the arraignment of a defendant. Accordingly, the trial proceeded and Evans was denied the right which he claimed to make a statement from the dock. In the event, he did not give evidence and, having been forbidden to do so, made no statement from the dock.

The point of counsel for the appellant Evans, made here with commendable brevity and clarity, rests on a number of provisions in various statutes and certain decided cases. Counsel for Rhiney adopted the argument of counsel for the appellant Evans and supplemented it by citing a Canadian case to which we will make reference in due course. Beginning, then, with the argument of counsel for the appellant Evans and referring to some of the statutory provisions to which he has drawn our attention, we look at the Criminal Evidence Act 1898. That Act for the first time gave an accused the right to give evidence on his own behalf. It further provided that the right of an accused to make a statement from the dock was not to be affected. So until 1982 there never had been any doubt that a defendant had the right to make a statement from the dock. The exercise of that right, scarcely used 20 or 30 years ago, had become very fashionable and this doubtless led Parliament to enact s 72 of the 1982 Act. So much, then, for the origins of this state of affairs.

We have been referred to the Courts Act 1971, s 7(1) of which provides for committal for trial on indictment. Counsel for the appellant Evans submits that the words therein, 'committing a person for trial', can only mean that, from the time a person is committed for trial, nowadays to the Crown Court, that trial is in being. We do not find that in the least convincing. We go further into the section and look at sub-s (4)(i), which reads:

'. . . For the purposes of this subsection--(i) "the prescribed period" means such period for the respective purposes of paragraphs (a) and (b) of this subsection as may be prescribed by Crown Court rules, and the rules may make different provision for different places of trial, or for other different circumstances . . .'

What this part of s 7 intended to provide was a time limit within which a defendant was to be brought to trial once he had been committed to the Crown Court. It cannot, so it seems to us, be said that by enacting s 7 Parliament intended to lay down a rule that a trial begins, for example, on arraignment, because it went on to state in sub-s (4)(ii) that: 'the trial shall be deemed to begin when the defendant is arraigned'. If there had been any doubt when a trial begins it would not have been necessary for Parliament to state in that subsection that a trial begins when the defendant is arraigned. It is quite clear that the intention was to ensure that Crown Court officials, and judges too, should have a clear yardstick which would govern them in determining whether a person had been brought to trial within the prescribed period it had no other function. So it seems to us that the provisions of s 7 cannot possibly be of assistance in deciding when, legally speaking, a trial by jury can properly be said to begin.

We were referred also to certain provisions in s 4(4)(a) of the Criminal Procedure (Insanity) Act 1964. This clearly was a special provision to determine the circumstances in which a person should be found unfit to plead. It is a procedure which is well known to our courts. It takes place inevitably before arraignment, because the whole purpose of endeavouring to discover whether a person is fit to plead is to decide whether or not the charge should be put to him and that he should be required to answer that charge.

We were referred to s 12 of the Juries Act 1974, where the expression 'In proceedings for the trial . . .' is used. The argument is that that expression can only mean that it was envisaged by the legislature that a trial was in being in the circumstances contemplated in s 12, which deals with challenges to jurors and so on. We do not take that view of it we cannot see how it could possibly mean that.

That leads us to look at R v Vickers [1975] 2 All ER 945, [1975] 1 WLR 811. In that case there had been a ruling on a question of law before the commencement of the trial. I use the words 'the commencement of the trial' in the loosest

possible sense for the moment. That was sought to be challenged in the Court of Appeal. In the course of the judgment Scarman LJ said ([1975] 2 All ER 945 at 948, [1975] 1 WLR 811 at 814):

'After a short adjournment, the charge was then put to the appellant, who pleaded guilty to the conspiracy. We think it clear that the proceedings in which the ruling was given were not part of the trial. Arraignment is the process of calling an accused forward to answer an indictment. It is only after arraignment, which concludes with the plea of the accused to the indictment, that it is known whether there will be a trial and, if so, what manner of trial. Hale (2 Hale PC 219), describing arraignment, says that, if the prisoner pleads not guilty--"the clerk joins issue with him . . . and enters the plea: then he demands how he will be tried, the common answer is 'by God and the country' and thereupon the clerk enters 'po. se.' [Ponit se in patriam]." In Hale's time trial by compurgation or battle were possible alternatives to trial by jury. Not so today but even today there is no trial on a plea of guilty for "an express confession . . . is the highest conviction that can be": Hawkins, Pleas of the Crown (ch 31, s 1). Thus it still remains true that there is no trial until it is known whether one is necessary on a plea of guilty, no trial is needed for the entering of the plea is the conviction.'

It might be said that for the purpose of the determination of the issue in that appeal what Scarman LJ there said was obiter dicta. But obiter or not we find it to be a very comprehensive and accurate statement of the law as to the commencement of trial.

We have been referred to and have very carefully examined the decisions in a number of other cases, namely, R v Paling (1978) 67 Cr App R 299, R v Ellis (1973) 57 Cr App R 571, R v Williams (Roy) [1977] 1 All ER 874, [1978] QB 373. It is to R v Williams (Roy) that we turn to look in a little detail at the judgment of Shaw LJ. The question when a trial can truly be said to begin having been canvassed, Shaw LJ observed ([1977] 1 All ER 874 at 878, [1978] QB 373 at 381):

'He submitted that there was no trial at all, for there was no proper beginning to a trial. This proposition in an abstruse and abstract sense has an appearance of validity. The fact is however that the proceedings which began on 25th May had all the elements of a duly constituted trial by jury and followed in all particulars the course of such a trial. If on some earlier occasion the appellant had been arraigned, no question could have arisen as to the regularity of the proceedings on 25th May. There was a mutual assumption between the Crown and the appellant that the prosecution were put to proof of their accusation so that a trial of the issues was necessary.'

It should be interpolated here that the charge had never been put there had been no arraignment. Shaw LJ continued ([1977] 1 All ER 874 at 879, [1978] QB 373 at 381):

'Counsel for the Crown has conducted extensive research into the literature relating to the function and significance of arraignment in a criminal trial. The court is much indebted to him for the very helpful results of his labours. They support the view which this court has formed. Counsel for the Crown referred to Roscoe's Criminal Evidence (16th edn, 1952) p 242, where arraignment is dealt with as coming within the proceedings "before trial". The author states that "A person indicted for felony must in all cases appear in person and be arraigned . . .". . .'

Later Shaw LJ made it plain that the court was accepting the proposition that the trial began when the jury were seised of the issue.

We were referred to a Canadian case, Catherwood v Thompson [1958] OR 326. It arose from a civil action in the county court, and the Court of Appeal held (at 331--332):

'When a trial may be said actually to have commenced is often a difficult question but, generally speaking, this stage is reached when all preliminary questions have been determined and the jury, or a judge in a non-jury trial, enter upon the hearing and examination of the facts for the purpose of determining the questions in controversy in the litigation.'

Counsel for Rhiney has made an exploration (it would be a disservice to him to describe it in any other way) into the judgments of the Supreme Court of Canada in v R (1890) 18 SCR 407, in an appeal from the Court of Queen's Bench for Lower Canada (Appeal Side). That case concerned the right of the Crown to stand aside jurors when the panel had already been gone through. The issue before the Court of Appeal was whether or no that matter could be the subject of appeal. It could only be the subject of appeal, so it was said, if the trial had not commenced. That court, constituted of six judges, and presided over by Ritchie CJ, reached the conclusion, as to three of them, that the trial started when the jury were seised of the matter, and, as to the other three, to the contrary, that the trial started probably at about the time of arraignment.

Counsel for Rhiney seeks to persuade us, by an examination of the judgment of Strong J in that case, that, although that judge came down on the side of Ritchie CJ and another judge in saying that the trial started at the time when the

defendant was put in the charge of the jury, he really did so under the duress of what he called authority binding on him. The result, therefore, said counsel for Rhiney very engagingly, was not 3: 3 but 4: 2 in his favour. Examining law reports in that way is a legitimate forensic exercise and, as we found, a welcome diversion. But the plain fact of the matter is that Strong J came to the conclusion that he was bound by authority. Accordingly, as I have said, the Canadian court was in an inconclusive state as a result of the decision of those six distinguished judges.

The judgment of Ritchie CJ is, we think, worthy of very careful study. It is instructive in that the Chief Justice examined a large number of authorities, most of them English. He relied quite heavily on the work of Chitty on Criminal Law (2nd edn, 1826) in reaching this very clearly stated final conclusion (18 SCR 407 at 415):

> 'Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the jurymen's oath seem to show this. And as is to be inferred as we have seen even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial. How can the prisoner be tried until there is a court competent to try him? And how can there be a court until there is a judge on the bench and a jury in the box duly sworn? Until there is a court thus constituted there can be no trial, because there is no tribunal competent to try him. But when there is a court duly constituted the prisoner being present and given in charge to the jury his trial in my opinion commences, and not before.'

That expresses more aptly and clearly than we think we could what we deem to be the true position. We go further and say that our experience as judges in the criminal courts leads us inevitably to the conclusion, unassisted by the authorities to which we have referred in the course of this judgment, that it would be wholly insensible to speak of the commencement of a trial as being other than when the jury have been sworn and take the prisoner into their charge, to try the issues and, having heard the evidence, to say whether he is guilty or not of the charge against him, always remembering that it is inevitably a trial by jury, not by a judge. A trial can take place only if the defendant himself demands it by pleading not guilty. If he pleads guilty there is no issue to be tried.

Counsel for the appellant Evans at one stage submitted that there is an issue to be tried on a plea of guilty when there is a matter to be resolved which may affect sentence, a question of fact relating to a state of affairs, for example. It is true of course that a judge sometimes goes to the extent of calling evidence before him on a plea of guilty, to be sure that he has the essential facts established before he passes sentence. To that extent it may be said that there is an issue to be resolved. But it is not the kind of issue which is in contemplation when considering trial by jury it is a wholly different matter.

For those reasons we are firmly of the opinion that, as was stated so eloquently by Ritchie CJ, a trial starts at the time he adumbrated.

Evans did not give evidence in his trial. Before the trial started he knew the legal position. We are sure that he had been advised on the law as it stood. He must have heard the legal argument which took place before the judge about the time of the commencement of the trial. In Rhiney's case it needs to be said that Rhiney not only gave evidence himself but called various witnesses on his plea of alibi. We fail to see what hardship there was to either of these two men as a result of the enactment of s 72 of the 1982 Act.

That, however, is not a matter that can affect our judgment. We have to interpret the effect of the plain provisions of s 72. This we have done, with the result that I have already stated.

As that ground of appeal fails, we turn to look at the effect of the other main ground of appeal. It must inevitably lead to the quashing of the convictions of Tonner, Rees, Harding and Evans on the charge of conspiracy at common law. This court has however a power to substitute of its own accord a conviction of one or more of these appellants of another offence if it deems it right and just so to do. Counsel for the appellants Tonner, Rees and Harding and counsel for the appellant Evans are aware of the intention of the court in this respect, because we invited argument by them on it. Both counsel made it absolutely clear that they could not resist, in the whole of the circumstances, the use by the court of the provisions of s 3 of the Criminal Appeal Act 1968. For present purpose those provisions are contained in sub-s (1):

> 'This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.'

The other offence, as is acknowledged by both counsel for the appellants, is that of acting contrary to s 38(1) of the Finance Act 1972. We quash the convictions, as we have said, and substitute for them in every instance in respect of every appellant a verdict of guilty of conspiring to act contrary to the provisions of s 38(1) of the 1972 Act, and such convictions will therefore be recorded.

9466

We turn therefore to the only remaining matter in these appeals. In doing so we are of course aware that we are circumscribed in our powers by the provisions of s 1(1) of the Criminal Justice Act 1977, and we bear them carefully in mind. The maximum sentence under s 38(1) of the Finance Act 1972 is two years' imprisonment, but the fines which can be levied are very heavy, as is manifest from the fact that the court has power to impose a fine three times the amount of the value of the tax kept away from the Revenue.

Turning to the individuals concerned here, we look first at Tonner. He is 51 years of age, and he has a criminal record. He has been to borstal for office-breaking and larceny. That was a long time ago, it is true. He has further been convicted of receiving stolen jewellery, and in 1980 of conspiracy to utter counterfeit gold coins. In 1981 he was first convicted of dishonestly handling stolen jewellery. That conviction was the result of information having been passed to police officers by what is nowadays called a 'super-grass'. The conduct which brought about that conviction was committed as long ago as 1974. That was said to be why, in passing a sentence of 18 months' imprisonment, the court suspended it for two years. Doubtless it was with that fact in mind that Judge Lowry in activating that sentence reduced it to six months. We think it is an important feature of Tonner's conduct that it was not very long after the imposition of that suspended sentence that he began the activities which have been of so much concern to this court in these appeals. Clearly he paid very little heed to the fact that he was subject to a suspended sentence.

Counsel has urged on us that in those circumstances we should impose on Tonner concurrent sentences regardless of the heavy sentences imposed by the judge below. It is, he submitted, wrong in principle to make them consecutive. In that regard he has referred us to R v Lovelock [1956] 3 All ER 223, [1956] 1 WLR 1217. We think that that case is opposed to the principle which counsel would have us believe exists. He has said that it exists in his own head. It may be none the worse for that but we should prefer other assistance before coming to the belief that it really does exist. We are sure that he will not regard that comment as discourteous. We see no reason, having regard to the gravity of the matter, why consecutive sentences should not be passed in this case. This was indeed a very serious affair.

We fully note the terms of the sentences which were imposed by the judge and we bear in mind of course the submissions made to us of Tonner's involvement in the second count. For his part in the conspiracy as found by this court we think there should be a sentence of two years' imprisonment on count 1 and of two years' imprisonment on count 2, those sentences to run consecutively, and moreover also to run consecutively to the six months' imprisonment which was activated by Judge Lowry, making overall a term of 4FD years' imprisonment.

Finally, as the costs are not challenged, we look at the fines. Counsel very frankly has conceded that he cannot launch an attack on the fines imposed on the first count. He has therefore confined his attack to the fine on the second count, which he submits is grossly excessive, having regard to a number of factors, notable amongst which is the role played by his client in that count.

We bear those matters in mind, but cannot accept that Tonner was not at the centre of the web and not heavily engaged in what Rees and Harding were doing, as a result of the conviction of the company. We see no reason whatever to reduce the fine of £100,000. This appeal therefore in respect of that must fail.

Accordingly, in relation to the offences for which we deal with Tonner, we fine him £300,000 on the first count and £100,000 on the second count, and order him to pay £20,000 towards the costs of the prosecution and £10,000 towards legal aid costs. So much, then, for Tonner.

Rees is 43 and Harding 45 years of age. Both have criminal records, and they are a pair of scoundrels. They did not receive a day too long. In fact it could be said that the sentences imposed on them were lenient. We do not regard either of them as deserving of the slightest sympathy or consideration from the point of view of leniency. They it was who deceived the registrar into accepting the false names they used for the purposes of value added tax, and they it was who sold the gold on to buyers in Hatton Garden.

We should not, we think, be doing our duty unless we were to impose on Rees and Harding the maximum sentence it is in our power to pass, that is two years' imprisonment.

We regard Evens as a man of hitherto good character. He has some spent convictions, of which we take no notice. He is now 42 years of age. He played for very high stakes indeed and was quite ingenious. As we have already said, it took a considerable time to unclothe Mr Roberts of his wig and to reveal Mr Evans. But we cannot accede to his counsel's invitation to this court, and Evans will also go to prison for two years.

For the reasons we have given we allow the appeals to the extent of quashing the convictions for conspiracy to defraud at common law and substituting convictions as already stated.

DISPOSITION:

Appeals allowed to extent of quashing convictions for common law conspiracy to defraud and substituting therefor convictions for conspiracy to act contrary to s 38(1) of Finance Act 1972. Appeals against sentence allowed in part.

SOLICITORS:

Solicitor for the Customs and Excise.

The Queen v. Allen and Anor, 1994 Vic Lexis 1246 Supreme Court of Victoria (Court of Criminal Appeal)

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VICTORIAN UNREPORTED JUDGMENTS

THE QUEEN v ALLEN and ANOR

284 of 1993

SUPREME COURT OF VICTORIA
COURT OF CRIMINAL APPEAL

1994 VIC LEXIS 1246; BC9401336

24-25 November 1994, heard

20 December 1994, delivered

CATCHWORDS: [*1] Criminal law - Crimes Act s339(3) - Application of principles Jones v Dunkel - Blackmail - Prohibited comments by prosecutor and judge concerning uncontradicted evidence - Presumption that jury knows of an accused's right to give evidence - Application of proviso to s568 Crimes Act - Cumulation of sentences re crime committed by serving prisoners.

JUDGES: SOUTHWELL (1), NATHAN (2) AND MCDONALD (1), JJ

JUDGMENTS: SOUTHWELL, J, McDONALD, J: We have had the advantage of reading the draft reasons for judgment of Nathan, J The relevant facts and circumstances giving rise to these applications are there set out.

On the hearing of the applications for leave to appeal against conviction the ground relied on and argued before the Court on behalf of each applicant was that the prosecutor and the trial Judge each erred in making comment to the jury as to the failure of the applicants to give evidence and by doing so they contravened the provisions of s399(3) of the Crimes Act 1958. That section provides "399(3) The failure of any person charged with an offence to give sworn evidence shall not be made the subject of comment to the jury by either counsel for the prosecution, or by the presiding judge."

Specifically [*2] it was contended by counsel for each of the applicants that the provisions of the section were contravened by the learned trial Judge in his directions to the jury which were given in consequence of counsel for the prosecution and defence each contending that the other side failed to call a particular witness or an identified group of witnesses. Further it was contended that in other comments made by the prosecutor and the trial Judge to the effect that the evidence of Vabaza was uncontradicted constituted a contravention of the relevant section.

As part of his directions to the jury the trial Judge gave what may be referred to as a Jones v Dunkel [(1959) 101 CLR 298] direction. We agree with the conclusion of Nathan, J that the Jones v Dunkel direction given by the trial Judge did not amount to a comment which was prohibited pursuant to the said section. The trial Judge in the course of directing the jury reminded them that counsel on each side had made comment on the failure of the other side to call evidence. It appears that the prosecutor was critical of the defence for failing to call Hans Kostiman and the other players in the alleged card game [*3] as identified by Walsh in his evidence. It further appears that the defence made comment as to the failure of the prosecution to call persons who were in the queue at the phones when Vabaza made his first phone call to Pietsch, other inmates and evidence relating to a bank account of Vabaza with respect to which he had been cross-examined. The trial Judge told the jury that because of those criticisms he was "require[d]" to tell them as to the use they could make, if they wished, of a failure of "a party to call a particular witness".

It is clear on authority that the rule in Jones v Dunkel applies in criminal cases - *R v Booth [1983] 1 VR 39,* R v Murphy (unreported CCA - 7 April 1992). In the circumstances of this case where each side had criticised the other for the failure to call a witness it was appropriate and necessary for the trial Judge to give directions to the jury as to the use they could make of the failure of a party to call as a witness a person who ought reasonably to be in a position to give evidence of a fact in issue in circumstances where no or no acceptable explanation for such failure had been the subject of evidence. In directing [*4] the jury the trial Judge said "Where an issue of fact is raised between parties to litigation, that is where one party seeks to establish a fact, the existence or truth of which is contested, if it appears on the material that there is A PERSON who ought reasonably to be in a position to give evidence of that fact, that is the first point that you need to consider in the particular case where the criticism is made, does it appear to you that there was a person, or is a person, who ought reasonably to be in a position to give evidence of that fact, that if there is such A PERSON and THE PARTY SEEKING TO ESTABLISH AND RELY on THAT FACT fails to call THAT PERSON AS A WITNESS without having given an explanation or any acceptable explanation for failing to do so, then that failure can be used by the jury in resolving the disputed question of fact, but only in a limited way." His Honour further proceeded by saying "The failure to call such a person as a witness does not of itself provide evidence of the fact which is in issue and cannot be used as such."

After explaining the last matter to the jury the trial Judge proceeded by saying "It is open to the jury if it is satisfied that [*5] it is the only reasonable inference to be drawn, to infer from the failure of THE PARTY to call THAT PERSON, without any [or] acceptable explanation that the evidence of that person if called would not have materially assisted THAT PARTY'S case in so far as it relates to the question of disputed fact."

Importantly and as was necessary to complete his directions on this matter the trial Judge said further ".. the jury is entitled to proceed on the basis that evidence relied on by the OPPOSITE PARTY as establishing what it contends for, concerning the disputed question of fact, may be more readily and confidently accepted and acted upon, because it has not been CONTRADICTED BY A PERSON who reasonably could have been in a position to do so had he been called and if it was untrue or incorrect or inaccurate. Secondly that any inference of fact which the OPPOSITE PARTY urges the jury to draw from the evidence which has been called may be more readily accepted and confidently drawn because the evidence or inference of fact sought to be so drawn could have been contradicted by A PERSON who could reasonably have contradicted the same if they were untrue or incorrect or inaccurate." (the [*6] emphasis are ours)

It was submitted that while such a direction may have been appropriate and able to be given when an accused gave sworn evidence or was able to and made either an unsworn statement or gave unsworn evidence, such a direction ought not to be given where on a trial an accused stands mute and does not exercise his or her only other option to give evidence on oath. This trial was conducted subsequent to the enactment of the Evidence (Unsworn Evidence) Act 1993 which by s3 abolished an accused's right to make an unsworn statement or to give unsworn evidence. In *R v Booth [1983] 1 VR 39* a direction of the nature now under consideration was given where an accused gave evidence on oath but counsel for the prosecution in addressing the jury commented on the failure of the defence to call other witnesses. In R v Buckland [1977] 2 NSWLR 452 a direction was given by the trial Judge in answer to a question asked by the jury relating to identified persons not being called as witnesses. In that case the accused had made an unsworn dock statement - see also R v Broadhurst (1986) 25 A Crim R 349, R v Browne (1987) 30 A Crim R 278. We are of the opinion [*7] that where circumstances make it appropriate for the trial Judge to give a Jones v Dunkel direction, the fact that the accused stood mute, electing not to give sworn evidence does not affect the necessity for the direction to be given or prevent such direction being given. If such direction was not given then the jury when applying themselves to the evidence and considering the question of the relevance of the fact that a person has not been called by the prosecution as a witness or by an accused in his or her defence, or when considering the addresses of counsel relating to such a matter, would be left unassisted by the trial Judge. The jury would be left to speculate as to how they should treat the matter. The jury may, unassisted, draw inferences and deal with the matter in a manner which is not permitted. This could lead to injustice to the prosecution and/or to the accused It may result in the trial being unfair. In circumstances such as in this case, where the applicants stood mute it was appropriate and necessary for the trial judge to deal with the submissions made by counsel for the prosecution and for the defence relevant to the failure of the other side to call identified [*8] witnesses and accordingly to give a Jones v Dunkel direction. Where it is necessary and appropriate for such direction to be given it should be borne in mind that such a direction is subject to the provisions of s399(3) of the Crimes Act and other statutory provisions - R v Buckland, Street, CJ at 459; R v Browne at 295. In some criminal trials such a direction may be precluded by s399(3) or by s400(5) of the Crimes Act cf R v Demirock (1977) 137 CLR 20.

This was not such a case. In the circumstances of this case the direction, given by the trial Judge, was appropriate and necessary for him to give.

In determining whether the form of the direction given breached s399(3) of the Crimes Act the words of Isaacs, J in Bataillard v R (1907) 4 CLR 1282 at 1291 should be kept clearly in mind. His Honour said when considering s407 of the Crimes Act 1900 (NSW), which made it unlawful for comment to be made at the trial of the fact that an accused "refrained from giving" evidence on oath on his own behalf "If, however, reference, direct or indirect, and either by express words or the most subtle illusion, and however much wrapped up, [*9] is made to the fact that the prisoner had the power or right to give evidence on oath, and yet failed to give, or in other words 'refrained from giving', evidence on oath there would be a contravention of the subsection now under consideration. The question whether the law has been so contravened must depend in each case on the words used and the circumstances in which they are used." It is also necessary to consider this question having regard to the fact that it must be accepted that a jury will be aware of the right of an accused to give evidence in his or her defence - Bridge v R (1964) 118 CLR 600, at 605, Bataillard v R at 1288, R v Aiton (1993) 68 A Crim R 578 at 587.

In this case the trial Judge introduced that part of his direction now under consideration by reference to the arguments put by counsel on each side as to the fact that the other side did not call as witnesses identified persons. A fair reading of the directions given by the trial Judge neither directly or indirectly or by a subtle allusion constituted a comment as is proscribed by s399(3) of the Crimes Act.

We turn now to the question whether other comments made by counsel for [*10] the prosecution and repeated by the Judge breached the provisions of s399(3).

We are of the respectful opinion that this Court should still regard the above quoted statement of Isaacs, J as correct in law. It was so regarded by King, C.J. with whom Bollen, J agreed in Siebel and Waterman (1992) 59 ACrimR 105 at 107, a case in which the two appellants had at trial stood mute. The SA Evidence Act 1929, by s18(1)(II) forbade the prosecutor from commenting on the failure of an accused to give evidence. In the course of his address to the jury, the prosecutor specifically referred to the fact that "neither accused ... has given evidence". He said the Crown witnesses were not contradicted; he referred to "a failure on the part of the accused to contradict or explain that evidence." Not at all surprisingly, those comments were held to have breached the statute. King, CJ said at 108: "An accused person can only contradict, in a practical sense, evidence of events in which he is personally involved by giving evidence and he can only put forward a version of events by giving evidence. It follows, as it seems to me, that any words which refer to the fact that an accused person has not given [*11] evidence or has not contradicted prosecution evidence or has not put forward an alternative version of events, is necessarily comment upon the failure of the accused person to give evidence."

We respectfully agree. However, the Chief Justice went on to say at 109: "It is lawful, in my opinion, for counsel for the prosecution to make the point to the jury that the only version of the facts before them is that proved by the prosecution witnesses and, if counsel for the defence has engaged in speculation as to alternative scenarios, that there is no evidence to support such alternative scenarios. Any comment, however, that the accused person has failed to contradict prosecution witnesses or to provide an alternative version of events, or that he has not given evidence, must, in my opinion, amount to a prohibited comment."

In the case there under consideration, assaults were said by the Crown to have been committed in the course of a melee involving a number of persons. The report of the case does not make clear whether some eye-witnesses were not called, or whether all those called gave similar versions. It may be that in that case a comment by counsel for the prosecution that [*12] "the only version of the facts before them is that proved by the prosecution witnesses", would have been regarded as doing no more than draw the jury's attention to the fact that there were witnesses (other than the accused) who were not called to give evidence. However, in the present case the alleged blackmail was contained in two conversations between the applicants and Vabaza. The evidence showed that no other person was in earshot. In other words the only persons who could have given a version of events contradicting that of Vabaza were the applicants. It is against this background that the impugned comments must be judged. We shall set out those comments.

1. (By the prosecutor): "That's the account given to you by Mr Vabaza of his dealings with Mr Jackson and Mr Allen and there is no direct evidence contradicting his account of his dealings between Allen and Jackson." 2. (By the judge):

"[The prosecutor] said that is Vabaza's evidence of the events and he put it to you that there is simply no evidence contradicting that recitation of those events on those two days." 3. (By the prosecutor): "Mr Vabaza's account of what took place is the only version of the facts in relation [*13] to the dealings between Vabaza, Allen and Jackson, and in that regard his evidence, for the reasons that I outlined, remains undisputed. His evidence, I suggest to you, is undisputed." 4. (By the judge - referring to the prosecutor's address): Further Vabaza's evidence is the only evidence concerning what took place between Allen, Jackson and Vabaza. Therefore, he put it to you, it is simply uncontroverted." Again, it should be borne in mind that the Court must assume that the jury know that an accused is permitted to give sworn evidence in his defence. Even without authority to guide one, it would be absurd in this day and age to doubt that at least some jurors are aware of the right of an accused to give sworn evidence.

In R v Barron [1975] VR 496 it was said by Winneke, CJ and Menhennitt, J, at 502: "The authorities show that a prohibited comment really contains two elements, viz a reference to the fact that the accused could have given evidence on oath and a reference to the fact that he has not done so. Bataillard v R (1907), 4 CLR 1282 per Griffith, CJ at 1288, Isaacs, (1912), 12 SR (NSW) 111; Jackson v R (1918), 25 CLR 113; [*14] Bridge v R (1964), 118 CLR 600 per Barwick, CJ at 606 (in which Owen, J agreed) and per Windeyer, J at 616-617. Of course, a reference to the first fact will almost always imply the second, but a reference to the second alone does not necessarily imply the first. Here the most that could be said of the remark complained of is that it was a reference to the fact that the accused had given no account of the events by any of the means open to him. It could not be taken to be a reference to his right to give evidence on oath. Counsel for the applicant placed much reliance upon the words, as you sometimes have', but even those words are not capable of being construed as a reference to the accused's right to give evidence on oath as opposed to making an unsworn statement from the dock. Accordingly, for these reasons also, we are satisfied that the remark did not amount to a prohibited comment."

At that time, of course, an accused could give sworn evidence, or make an unsworn statement. As it seems to us, if it be acknowledged that the jury knows of the right of an accused to give sworn evidence, a comment nowadays that the accused has not given a version [*15] of the facts, serves as a prohibited reminder that the accused has not availed himself of the opportunity given by the law to give sworn evidence.

In the present case, neither the prosecutor nor the judge in terms said that the applicants had not given sworn evidence, or their own version of the facts. However, that is not the end of the matter. The passage cited above from the reasons of Isaacs, J in Bataillard (see also per Barwick, CJ in Bridge, at 605, referring to "indirect" comment) shows that the comment to be prohibited need not be "direct", or by "express words"; even a "subtle allusion" may suffice.

In our opinion, where, as in this case, it is demonstrated that only the applicants could have given a "version of the facts", a version "contradicting" that proffered by the Crown, a comment of the nature of any of those set out above is a prohibited comment. Each of the comments serves as a reminder to the jury that the only witnesses who could have contradicted Vabaza, namely, the applicants, have not done so.

Accordingly, it must be held that Ground 2 in Allen's application and Ground 3, in Jackson's application have been made out.

For the Crown it was submitted [*16] that should the Court so decide, then the proviso to s568(1) should be applied. For the applicants, it was submitted that the making of such prohibited comments constituted a fundamental error, and necessarily involved a miscarriage of justice. It is clear that the majority of the Court in Barron did not regard the making of such a prohibited comment as necessarily involving a miscarriage of justice. After referring to the test being whether "the applicant has thereby lost a chance which was fairly open to him of being acquitted: Mraz v R (1955) 93 CLR 493 per Fullagar, J at 514", their Honours went on to state: "Again, if the Crown Prosecutor had made a comment prohibited by s399, having regard to the consideration that it is now well known in the community that an accused person can give evidence on his own behalf on his trial, even if the Crown Prosecutor had drawn attention to the fact that the accused had not done so, it could not in the circumstances have made any difference to the outcome of the trial."

In Glennon v The Queen (1994) 179 CLR 1, the High Court has again confirmed that Mraz poses an appropriate test, unless [*17] there is a fundamental error of the type considered in Wilde v The Queen (1988) 164 CLR 365.

In our opinion, it is fanciful to think that there might have been an acquittal if the prohibited comments had not been made. There was a strong Crown case, where no sensible motive had been put forward for Vabaza to have concocted his version, a version which found strong support in the evidence of Williams and Pietsch. An indirect comment serving as a reminder of two matters of which the jury were already aware - that the applicants could have given evidence, and did not do so - cannot here be held to have deprived the applicants of "a chance of acquittal which was fairly open to them".

Accordingly, the applications for leave to appeal against conviction should be dismissed. Before leaving the case, we would make some observations concerning s399(3). We are of the view that the prohibition it contains might now be regarded first, as an absurd fetter upon the right to inform or remind the jury of what the law is - that an accused person has the right to give sworn evidence, and secondly, as an unwarranted restraint upon the judge and prosecutor to make fair [*18] comment to the jury.

In this regard, the judgments in R v Greciun-King [1981] 2 NSWLR 469, well repay study. In that case the jury had asked of the judge whether the accused, who had made an unsworn statement was on oath, and if not, whether he "was precluded from taking the oath by reason of his unwillingness to enter the witness box". The judge answered by telling the jury of the three courses open to the accused, adding that "no adverse conclusion should be drawn against him from the fact that he decided to make a statement rather than give evidence." It was held that this answer constituted a prohibited comment. At 471-472, Street, CJ (who felt unable in that case to apply the proviso under the section equivalent to s568(1)) said: "I should add in conclusion that this case exemplifies the practical difficulties that are presented by the prohibition in s407(2). The question of whether or not comment should be permitted upon the failure of an accused to give evidence - indeed the wider question of whether or not the unsworn statement should continue to be an available option - has been much agitated in recent years. Unless and until Parliament amends the statute a trial judge [*19] is forbidden to tell a jury what the law really is even when, as here, he is asked a specific question by the jury. This has been suggested to be tantamount to requiring juries to determine cases with a partial blindfold upon the true state of the law. There is much to be said in favour of bringing the administration of justice out into the open. Those concerned in the conduct of criminal trials - certainly the judges, if not, indeed both judge and counsel - should be freed from this artificial fetter which can only serve to mislead the jury as to what the true state of the law is. His Honour, in straightforward and wholly correct terms, answered the specific question the juror had asked: he told the jury exactly what the law was. Understandably he found it distasteful, to the point of being unacceptable, to equivocate with or mislead the jury as to the true state of the law. It is an absurd paradox that, by having accurately stated the accused's rights as enacted in the Crimes Act, the judge has caused the trial to miscarry. Statutory secrets enforced on the courts and on juries such as s407(2) do less than justice to the commonsense and fairness of juries. That, however, is what [*20] the legislation requires and this Court, accordingly, has no option but to give effect to the law as it presently stands. This particular law might be recognized as reminiscent of the oppressive rule in the pre-Christian Roman Republic. The plebs were kept in a state of subjugation by not allowing them to know what the law was. This knowledge was the exclusive and jealously guarded prerogative of the college of pontiffs. The ascendancy of the pontiffs came to an end in BC 304 when, according to the story, one Gnaeus Flavius, secretary of Appius Claudius (censor in 312), stole his master's manuscript and made public the forms of action appropriate to each state of circumstances, a secret up till then jealously guarded by the priesthood. Perhaps his master was privy to the 'theft'. This completed the process begun by the Twelve Tables. The law and above all its use in practice was no longer hidden in the bosom of the priests. From having been religious, it became secular, and public property." (Lee's Elements of Roman Law (1944) at 8,9.) In a free and democratic society the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament and [*21] in judgments, must be publici juris - available to all to be studied, to be used and to be quoted as a matter of public entitlement." Lee, J, in agreeing with the Chief Justice, said at 473: "It is difficult to perceive a sound reason based upon considerations of justice for withholding from a jury that an accused person has a right to give evidence on oath but the present case illustrates that on an important matter a jury must, if the law is to be applied correctly, be kept in a state of deception. ... Justice with blinkers on can hardly be called justice. Procedures applying in regard to the conduct of a criminal trial should be capable of explanation by the judge to the jury without resort to concealment of the truth of the situation."

As to the applications concerning sentence, we agree with Nathan, J. that they should be dismissed, for the reasons given by him.

NATHAN, J: The applicants were presented together before the County Court charged with blackmail contrary to the Crimes Act 1958 s87(3). Both were found guilty by the jury. Allen was sentenced to imprisonment for 4 1/2 years with

a 3 per cent year minimum to be served cumulatively upon the sentence he is presently [*22] serving. Jackson was sentenced to imprisonment for 3 1/2 years with a minimum term of 2 1/2 years which was directed to be served cumulatively upon the sentence he, too, is presently serving. The maximum penalty for this offence is 12 1/2 years' imprisonment. Both applicants seek leave to appeal against conviction and sentence. Both appeals against conviction are based upon the ground that the prosecutor and then the trial judge erred in making what was said to be a comment relating to the failure of the applicants to give evidence. It was argued that this contravened the Crimes Act 1958 s399(3). As this was the only ground argued before me regarding the convictions, it is relevant to rehearse that section again: "399(3) The failure of any person charged with an offence to give sworn evidence shall not be made the subject of comment to the jury by either counsel for the prosecution, or by the presiding judge."

The issue arises in the following way. On 28 June 1992 a prisoner on remand upon a rape charge, by the name of Godfrey Vabaza, a refugee from Africa, was given access to the activities yard of the metropolitan reception prison at Coburg. Both of the applicants were seasoned [*23] criminals and well familiar with prison routine in the activities yard and after lunch both approached Vabaza and asked him how much money he had in the bank. Vabaza replied that he had very little and Allen then referred to what had happened "on the outside" to some people who had allegedly harassed his female friend. This exchange was said at the trial to be part of the threats and menaces directed towards Vabaza who was in a vulnerable position because of his minority status and the unpopularity within the prison population of the crime for which he had been remanded. In any event, the demands became even more menacing. Allen told Vabaza that he had to deposit money into the Totalizator Agency Board betting accounts. Jackson then told Vabaza that he would kill him if he did not pay $ 200 into each of two nominated accounts. Jackson and Allen both told Vabaza he should telephone a friend of his on "the outside" and arrange for the deposits to be made, in which event his life would be saved. In the activities yard, there is access to public phones, but because the facilities are much in demand apparently a queue forms to use them. Allen provided Vabaza with the thirty cents to [*24] make the phone call and Jackson gave him a piece of paper on which was written the two TAB account numbers into which the money was to be paid. The phones are located near a supervising prison officer's desk and a prison officer, one Williams, was on duty in the area and saw Allen and Jackson speaking to Vabaza in the area close to the phones. He saw Vabaza make a phone call while Jackson remained close by but Allen walked away. Apparently it was customary to give a person making a phone call some privacy and the other prisoners generally held back from the actual handpiece. Williams asked Jackson to move away. Jackson said that he wanted to use the phone and then directed a racially bigoted comment at Vabaza. He saw Allen return to the general area and heard him say, in conversation to Jackson "Make sure he gets the right account". Allen then left but Jackson remained close to Vabaza.

In fact, Vabaza had telephoned the Rev Pietsch, the Minister in charge of a city church to whom he was known and who had helped him on previous occasions. Pietsch gave evidence of receiving a phone call from Vabaza during which he was asked to deposit moneys into two nominated TAB accounts. While [*25] giving the numbers of the accounts Pietsch said he heard Vabaza saying "Don't do it Mike". This latter comment was repeated a number of times and Pietsch gained the impression that somebody was close to Vabaza and that he did not want the money put into the accounts.

That evening Vabaza wrote a letter to the Governor of the prison. In the letter Vabaza made complaint as to what had occurred. He sought protection.

On the following day Vabaza saw Allen again. Allen reiterated his demand that money be paid into the TAB accounts on that day. Later, on the same day he was approached after lunch by Jackson. Jackson said that Allen had told him the money had not been deposited. Again Vabaza was abused. Vabaza did say that he had asked his friend to deposit the money. Jackson made Vabaza ring Pietsch again but he was unable to contact him. Vabaza said that further death threats were made to him on this occasion, and was also subjected to being head-butted and bruised but this event did not become the subject of a separate charge. Later in the afternoon Vabaza spoke with Williams and told him of the threats. The letter written by Vabaza to the Governor was located and handed onto him. [*26] Thereafter Vabaza was moved into a protection yard separate from the area of the prison frequented by Allen and Jackson. Although the applicants did not give evidence and stood mute they did call two serving prisoners to give evidence on their behalf. The first was a former prisoner called Koman who had been Vabaza's cell mate. He denied treating Vabaza for bruises suffered in the alleged assault on 29 June. I can observe that this evidence was not of great materiality. However, the other prisoner called was one Walsh. He gave evidence that Vabaza had joined in a card game known as manila. This is a type of poker played with the participation of a banker. Walsh gave evidence that the card game was financed by chips

which represented money and that settlement of accounts was effected through deposits paid by outside persons into nominated TAB accounts. Walsh's evidence was that the card game was for high stakes and required any person being introduced into it to be either accepted as creditworthy, or else have his gambling stake guaranteed. In this case Walsh said that Vabaza had been introduced into the game by a man called Hans Kosterman and had been given chips by him. He said [*27] that Vabaza won early in the game but thereafter lost heavily. The man holding the bank but who also played, and to whom Vabaza allegedly became indebted for many hundreds of dollars, was Jackson. Vabaza, when cross-examined, denied being involved in any card game or a card game in which he had lost money which was covered by Allen as the "banker", as was put to him.

The defence case, revealed to the jury by cross-examination of the Crown's witnesses, was that Vabaza had become indebted to Allen as a result of losing heavily during the card games, and that the phone calls made by Vabaza related to payment of these debts in respect of which it was said Vabaza had welshed. Accordingly, so the defence contended, Vabaza had a motive to fabricate the blackmail story because he wanted to be removed from the area of the prison frequented by the applicants so that he could be free of any pressure to repay his debts. It is apparent the jury rejected this fantasy. Prior to addressing the jury, the prosecutor Mr Maguire, sought from the trial judge a ruling that he was entitled to assert that the Crown's case was uncontradicted, but nevertheless by doing so, he would not infringe s399. [*28] The learned trial judge ruled that it would be open to the prosecutor to contend that Walsh's evidence ought not be accepted and then it would be the case that Vabaza's evidence stood uncontradicted. He said: "a comment confined to the fact that the Crown case stands uncontradicted, whether unqualified or in the event of certain evidence being rejected does not in fact offend against s399(3)."

In the event, references were made by the prosecutor and the trial judge to uncontradicted evidence to which I shall turn in a moment.

The comment that the substance of the Crown's case was uncontradicted involved discussion and submissions relating to the rule in Jones v Dunkel (1959) 101 CLR 298. I do not purport to recite the principles of the rule exhaustively but, so that the submissions of both applicants and the respondents to these applications can be readily understood, I epitomize the rule as it applies to this case. The trial judge should give directions to the jury that the unexplained failure of the applicants and the Crown to call witnesses, whom it could reasonably be expected they would call, could be used to draw an inference that the uncalled [*29] evidence would not have assisted either the applicants' or the Crown cases. But the failure to call evidence to deny a fact which it was in the power of either the applicants or the Crown to have denied entitles the jury more confidently to draw an inference favourable to the other party when a person presumably able to put the true complexion on the facts relied upon as the ground for the inference has not been called as a witness; or to put it another way, that failure "gives colour to the evidence" against the non-calling party (per Alderson, B in *Boyle v Wiseman (1885) 10 Exch 647 at 651).* The inferences which could be drawn and the use to which they could be put were properly explained by the trial judge and no objection was taken as to the terms used by the trial judge here. They are set out hereafter. That the rule applies to criminal proceedings is now clear beyond peradventure (*R v Booth [1983] 1 VR 39).* Mr Holdenson and Mr Tehan for the applicants both contended that the import of the trial judge's directions amounted to a comment that neither applicant had given evidence. Hence, so it was argued, s399(3) must have been [*30] offended. They contended that where an accused stood mute, either no Jones v Dunkel directions should be given, or else be made with especial care and specificity neither of which were said to have been observed in this case. In giving the Jones v Dunkel direction the judge referred to the Crown's assertion that the defence could have called Kosterman or any of the other alleged card players. Similarly, he rehearsed the prosecutor's remarks during his final address that the defence could have called evidence of Jackson's gambling debts being settled by payments into nominated TAB accounts.

The defence on the other hand contended the Crown could have called evidence relating to Vabaza's bank account as well as other prisoners in the phone queue. The defence asserted the judge should have identified specifically the witnesses in respect of whom the Jones v Dunkel direction applied. It was said that his failure to do so resulted in the direction being so wide, that by virtue of not being confined to witnesses, the accused became by necessary inference part of the category of uncalled witnesses. In effect, a comment that the applicants had not given evidence, in clear contravention [*31] of the prohibition expressed in s399.

I turn now to the actual comments of the prosecutor and learned trial judge.

9276

PROSECUTOR'S COMMENTS IN ADDRESS Very shortly after commencing his address to the jury the prosecutor said: "The only evidence of the dealings between Vabaza, Allen and Jackson on 28 and 29 June apart from the evidence of Pietsch and Williams is the evidence of Vabaza. The only evidence that there was a card game, ladies and gentlemen, is from the witness Walsh."

In referring to the duties of counsel, the prosecutor said: "One of the important matters that defence counsel should put is the evidence of the defence case ... not only has Mr Kosterman not been called ladies and gentlemen, there's never even been any reference to him in the course of cross-examination of Mr Vabaza and there has been no explanation put before you as to why it was that Mr Kosterman was never called as part of the defence case. Mr Walsh was telling lies about paying moneys into TAB accounts and having dealings through TAB accounts whilst he was in gaol but the challenge was never taken up. Mr and Mrs Fritta whom you might think were certainly in the camp of being the father and mother [*32] of Mr Walsh were never called." Then later on: "The only version of the facts of the dealings between Vabaza, Allen and Jackson prior to the telephone call is the evidence of Vabaza."

He said to the jury that: "You are entitled to look at all the evidence the evidence that has been called, THE EVIDENCE THAT HAS NOT BEEN CALLED in order to decide ultimately whether the jury, that is you, are satisfied beyond reasonable doubt as to the elements of the offence. As part of that task you are entitled to consider the evidence called by the defence obviously AND OTHER EVIDENCE WHICH MIGHT NOT HAVE BEEN CALLED, which you would have expected to have been called." (My emphasis.)

That recitation with the preliminary remarks brings me to the comment of the prosecutor which was directly impugned by counsel for both applicants. It is this: "Ladies and gentlemen, that is the account given to you by Mr Vabaza of his dealings with Mr Jackson and Mr Allen, AND THERE IS NO DIRECT EVIDENCE CONTRADICTING HIS ACCOUNT OF HIS DEALINGS BETWEEN ALLEN AND JACKSON." (My emphasis.)

And then very much later in his address the following comment was also directly impugned. "Mr Vabaza's account of what [*33] took place is the only version of the facts in relation to the dealings between Vabaza, Allen and Jackson, and in that regard his evidence, for the reasons that I have outlined, remains undisputed. His evidence, I suggest to you, is undisputed."

JUDGE'S CHARGE, RE JONES V DUNKEL AND S399 Because the Jones v Dunkel direction given by the trial judge is under attack, more for that which was not said than that which was, it is necessary to give ample rehearsal of it. The trial judge referred to the prosecutor's criticism of the defence in failing to call Mr Kosterman and their failure to call the other participants in the alleged card game. He referred to the defence submission that as there were prisoners in the phone queue, and a number of other inmates in the gaol, the Crown should have called them together with evidence of Vabaza's bank account and whether a search of his cell had discovered the note upon which the phone numbers had been written. His Honour then went on to say this: "Where an issue of fact is raised between parties to litigation, that is where one party seeks to establish a fact, the existence or truth of which is contested, if it appears on the material that [*34] there is a person who ought reasonably to be in a position to give evidence of that fact that is the first point that you need to consider in the particular case where the criticism is made, does it appear to you that there was a person or is a person, who ought reasonably to be in a position to give evidence of that fact, THAT IF THERE IS SUCH A PERSON and the parties seeking to establish and rely on that fact FAILS TO CALL THAT PERSON AS A WITNESS without having given an explanation or any acceptable explanation for failing to do so then that failure can be used by the jury in resolving the disputed question of fact but only in a limited way." (My emphasis.) It was contended by counsel for the applicants that the trial judge's reference to "a person" in the passage quoted above failed to tie the direction to the nominated individuals or identify them in such a way as the jury could usefully use the direction. In my view this contention has no merit. A full examination of the charge to which I shall come reveals the learned trial judge did nominate to the jury, the persons whom they might have considered could reasonably have been called by either the Crown or the defence. A similar [*35] criticism was made to the latter portion of the judge's Jones v Dunkel direction where he said (as edited): "The jury is entitled to proceed on the basis that evidence relied upon by the opposite party as establishing what it contends for - may be more readily and confidently accepted - because it has NOT BEEN CONTRADICTED BY A PERSON who reasonably could have been in a position to do so." (My emphasis.)

In my view the judge adhered strictly and correctly to the proprieties of the Jones v Dunkel direction. I can find no merit in the suggestion that it was not meaningful in the circumstances of this case. Especially so when the following further passages are borne in mind.

The trial judge said in relation to the alleged card game wherein it was said Kosterman vouched for Vabaza to the value of one or two thousand dollars: "Mr Maguire put it to you if this was true you would expect that it would have been put to Vabaza that Kosterman vouched for him to enter the game. He said not only has Kosterman not been called as a witness by the defence but there was no reference to him when the defence counsel were cross-examining Vabaza. He put it to you that there was no explanation why [*36] Kosterman was not called as part of the defence case. He said that was not an attack on counsel for the accused but rather he put it to you that the defence story concerning the card game had been put to Vabaza in the widest way and the accused had been making it all up as they had gone along. He said that the same comment as to the failure to call the card players also applies and they were the individuals mentioned by Mr Walsh who, he said, were in the game. Mr Maguire put it to you that those individuals should have been identified to Vabaza when he was being cross-examined and likewise that they should have been called as witnesses if, in truth, a card game had occurred and they had been involved in it ... he suggested (as to the payment in Fritta's phone account) that was a challenge that was laid down to the defence but never taken up. Mr and Mrs Fritta parents of Walsh and therefore in the camp of the accused he suggests were never called."

Then referring to the obligation of the Crown the trial judge made the following two comments which are the focus of a special attack by the applicants. They are: "He said that you as a jury were entitled to ana indeed you are obliged [*37] to, to look at all the evidence. That which has been called, he suggested and that which has not been called. He said that you look at all the evidence the Crown and the defence evidence and the evidence which might have been called and was not." And later: "He said that is Vabaza's evidence of the events and he put it to you that there is simply no evidence contradicting that recitation of those events on those two days."

In similar vein and finally: "He put it to you that Vabaza's evidence stands alone. That no attempt was made to obtain confirmatory evidence from prisoners in the queue for the phones. That no attempt had been made to obtain the slip with the account numbers on them from Jackson's cell. ... Next that no evidence was called by the Crown that no card game was conducted on that Sunday."

I return now to the grounds of appeal. Mr Holdenson for the applicant Allen submitted that the Jones v Dunkel direction, which was given in accordance with the authorities, was now only appropriate in cases where an accused had given evidence and was not a proper one in a case where the accused stood mute.

In the following cases the accused had either given sworn evidence [*38] or made an unsworn statement as was then possible. R v Buckland (1977) 2 NSWLR 452, was an unlawful carnal knowledge case, in which the jury asked direct questions why the alleged victim and a married couple who might have been expected to have given evidence in her support were not called. The trial judge gave directions which were equivocal in the circumstances and held to be in error. Those directions assumed the absent witnesses would have been able to give admissible evidence, and were based upon the supposition that it was the accused who should have called them. Error was also found because the Jones v Dunkel direction given, was such that whilst it would have been permissible to have invited the jury to infer, from the fact that the witnesses were not called, that nothing which they could have said would have assisted the accused, it was not permissible to invite the inference that their evidence would not have been favourable to the accused, or that their evidence would positively have been unfavourable to him. Similarly, in *R v Booth (1983) 1 VR 39* where an accused gave sworn evidence the Jones v Dunkel direction was held to be applicable. In R [*39] v Broadhurst (1986) 25 A Crim R 349 and R v Brown (1987) 30 A Crim R 278 both accused had made unsworn statements in circumstances which made a Jones v Dunkel direction applicable. In my view there is no warrant for the conclusion that a Jones and Dunkel direction to the jury should not be given where an accused stands mute. There is no logical reason why a jury should not be assisted by judicial directions of what use may be made of the failure to call witnesses, from whom it could reasonably have been expected to hear. Rather it is proper for a jury to be judicially directed as to how it may use the unexplained failure to call expected witnesses. Otherwise, room is created for speculation, or worse, the drawing of impermissible inferences. As I shall go on to illustrate, the right of an accused person to remain silent and not have that fact drawn to the jury's attention is one principle of the criminal law. The proper conduct of a trial and the way in which inferences may be drawn due to an unexplained failure to call witnesses is yet another. The two principles are not mutually inconsistent, the former does not abrogate the latter.

9479

Counsel for both applicants advanced an alternative [*40] argument which was that if a Jones and Dunkel direction was permissible, then in view of s399 it had to be circumscribed so as not to allude to them as being persons in respect of whom the unexplained failure to call evidence applied. The directions should have specified the uncalled witnesses in such a way as not to have identified the applicants as being within that class. A reading of the charge rehearsed above indicates the trial judge did specify those witnesses whom the defence said the Crown could have been expected to call and unexplainedly did not, and likewise those witnesses whom the Crown said could have been called by the applicants. Into this latter class, the Crown's failure to have searched Vabaza's cell or produce the piece of paper on which the telephone numbers had been written, should have been put. The failure to call a piece of physical evidence falls into the same class as the failure to call a person and there is no need for me to consider that issue further. I shall return to this argument. Mr Holdenson proceeded to a further alternative argument which can be summarised thus. As the jurors must have been presumed to have known the applicants had R right [*41] to give evidence, reference by the judge to those persons who had not done, even if given in compliance with the rules in Jones and Dunkel, necessarily carried reference of the fact that the applicants had not given evidence. This was said to be in the nature of a comment which infringed s399. It was contended by both counsel for the applicants that the references to uncontradicted evidence given by the prosecutor in his address and referred to by the learned trial judge in the charge, to which I have given emphasis in my quotations of them, must have left the jury with the clear knowledge that both applicants could have given evidence and had not, and that the prosecutor and judge had referred that fact to them.

As these propositions rest upon the assumption that modern day juries must be presumed to know of the right of an accused to give evidence, an examination of that proposition is warranted. In Victoria and New South Wales, neither the judge nor the prosecutor may comment upon the accused's choice to remain silent. In the other states the judge may but the prosecutor may not comment on that fact to the jury. However, the right of an accused person to give evidence is not [*42] an ancient one. It was introduced into the colonies of Victoria and New South Wales in 1891 although earlier in South Australia in 1882. In 1898 the predecessors of s399 were enacted in both New South Wales and Victoria. Both appear to have followed the decision in Kops v R (1894) AC 650 which was an appeal from the New South Wales Colonial Court of Appeal. The right of an accused person to remain silent at trial has its origins in the privilege against self-incrimination and is both venerable and ancient. It is the outcome of the constitutional struggles of the seventeenth century. Those unfortunate to proceed before the Star Chamber such as John Millburn invoke the common law right to remain silent and in 1641 Parliament abolished those courts. Following the Restoration the courts extended the privilege of not answering incriminating questions. In Gilber's Law of Evidence published in 1754. It is stated "Our law in this differs from the civil law, that it will not force any man to accuse himself; and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation."

This principle has found latter day expression in Sorby v The Commonwealth (1983) 152 CLR 281 [*43] which regarded the privilege against self-incrimination, not merely a rule of evidence, but as a fundamental principle of the common law. S399 is clear and explicit. It prohibits comment, albeit oblique, concerning the right of an accused to remain silent. As such, it is a right which the courts have been at pains to protect, although for reasons which I go on to state it is now wholly superfluous. In Bataillard v R (1907) 4 CLR 1282 a passage in the judgment of Isaacs, J has been relied upon many times since, as properly stating the law viz at 1291: "If however, reference. direct or indirect, and by express words or the most subtle illusion, and however much wrapped up, is made to the fact that the prisoner had the power to give evidence on oath, and yet failed to give, or in other words 'refrained from giving' evidence on oath, there would be a contravention of the subsection now under consideration."

The subsection under consideration was the 1898 New South Wales colonial equivalent of s399(3). It appears to me to be now incongruous that a judge is prohibited from telling a jury that which they are presumed to know. However, it remains a section [*44] with which prosecutors and trial judges must comply. I turn now to some judicial considerations of the paradox.

R v Moir (1912) 12 SR (NSW) 111 concerned some very robust comments by a prosecutor who referred to the unexplained silence of a murderer. Of the prohibition Cullen, CJ said: "It is clearly one thing to forbid comment on the fact that the prisoner omitted to give evidence on oath, and another to forbid comment on his failure to explain the charge against him."

I observe that this case appears to run counter to later Australian authority and has not received much subsequent judicial consideration. Forty-five years later the same court, ie the NSW Court of Criminal Appeal, adopted a more rigorous approach. In R v Thomas (1957) SR (NSW) 293 Herron, J said at 296: "With regard to the question of comment under the prohibition ... I merely wish to state what I consider to be the precise rule in this matter, and that is while a comment that the statement made under s403 is not on oath may be proper (BATAILLARD) any comment by the judge WHICH IN SUBSTANCE INFORMS THE JURY that the accused could have gone into the witness box and been sworn is forbidden." (My emphasis.) In [*45] Bridge v R (1964) 118 CLR 600 a trial judge's comment that under the circumstances, "they (the accused) could not be asked a single question, they could not be cross-examined and they could not be asked any questions by the judge or anybody else after they had made the statements to you" amounted to an infringement of the New South Wales statutory prohibition when the judge was referring to unsworn statements made by the accused. In R v Barron (1975) VR 596 a prosecutor in his final address had said "You haven't got a description of events from the accused as you sometimes have". All members of the Court of Criminal Appeal, Young, CJ, Menhennitt and Norris, JJ considered that s399 had not been infringed because the prohibition referred to: (a) a reference to the right of the accused to give evidence on oath and (b) that he had not done so. In Barron the comment should be taken to have referred only to the right to have given evidence and not the failure to have invoked that right. This twofold approach to the nature of the prohibited comment has remained the law in this state ever since.

In R v George and Price (1981) 4 A Crim Rep a case similar to the [*46] one before me in that both appellants were prisoners in custody at the time of allegedly committing an offence, the prosecutor in his final address told the jury: "Now it is very significant and you may well think this is absolutely incredible that both these men have seen fit to stay dumb and mute." Street, CJ with whom Begg, J agreed said: "The mere circumstance that a general comment to this effect would include the particular failure to give evidence does not bring the comment within thee prohibition, as that prohibition has been construed by the cases. The prohibition is I repeat, against a comment which is specifically directed to the right of an accused person to give evidence and his failure to avail himself of that right."

In R v Greciun-King (1981) 2 NSWLR 469 the test in R v Barron was specifically adopted and applied. In that case the jury had asked why the accused had given an unsworn statement. The trial judge, although replying accurately, told them that the accused had a right to give evidence on oath. Of that reply Street, CJ said: "The direction that his Honour gave in the present case clearly and explicitly informed the jury that the appellant had the right [*47] to give evidence from the witness box 'like any other witness' that is to say, to give evidence on oath. That reference was made in the context of the jury's question in which the second element referred to by Young, CJ and Menhennitt, J (a reference to Barron) was a significant underlying factor, namely that the appellant had not given evidence on oath. The conclusion is inescapable that, in thus directing the jury, his Honour transgressed the long established boundary line and it follows that the appellant's challenge is made good."

However, of the statutory prohibition the Chief Justice went on to say: "Statutory secrets enforced on the courts and on juries such as s407(2) (ie s399(3)) do less than justice to the commonsense and fairness of juries. That, however, is what the legislation requires and this Court, accordingly, has no option but to give effect to the law as it presently stands. This particular law may be recognised as reminiscent of the oppressive rule of the pre-Christian Roman republic. The plebs were kept in a state of subjugation by not allowing them to know what the law was. This knowledge was the exclusive and jealously guarded prerogative of the college of [*48] pontiffs." After reciting these elements of Roman law he went on to add: "In a free and democratic society the law and all its documentation, both statutory and interpretive, that is to say both in Acts of Parliament, and judgments must be publici juris - available to all to be studied, to be used and to be quoted as a matter of public entitlement."

In the same year R v Sadaraka (1981) 2 NSWLR 459 the Chief Justice adhered to the principle that an accused may remain silent and that fact should not be permitted by the jury to be used to draw an inference adverse to the accused. "The law requires that a jury should not be left under an impression that an unfavourable inference could be drawn from silence." In South Australia much more recent consideration has been given to the prohibition, Siebel and Waterman (1992) 59 A Crim R 105. There the prosecutor told the jury explicitly that neither accused had given evidence, and that the Crown case was uncontradicted. Of these remarks King, CJ observed (at 109): "It is lawful, in my opinion, for counsel for the prosecution to make the point to the jury that the only version of the facts before them is that proved by the prosecution witnesses [*49] and, if counsel for the defence has engaged in speculation as to alternative scenarios, that there is no evidence to support such alternative scenarios. Any comment, however, that the accused person has

failed to contradict prosecution witnesses or to provide an alternative version of events, or that he has not given evidence, must, in my opinion, amount to a prohibited comment."

All cases go to support the proposition that the law will sustain the right of an accused to remain silent, that right must be respected by prosecutors and judges by refraining from making any comment which goes to the fact that the accused has a right to give evidence on oath and has not done so.

In the United States the position is, to my mind, more sensible. In *Carter v Kentucky 450 US 288* the Supreme Court held that a general instruction should be given to a jury to the effect that an accused person is not compelled to testify and the fact that he or she does not do so cannot be used as an inference of guilt and should not be used to prejudice the accused person in any way. I make the observation that so much accords with fairness and what is said by the applicants in [*50] this case, to be obvious, namely that a jury must be presumed to know that an accused person can give evidence. In the United Kingdom the position is the same as in Victoria. A criminal law revision committee recommended that the law be aligned with American practice. The suggestions have not been taken up in England but have been adopted in the North of Ireland.

That a jury must be assumed to know that an accused has the right to give evidence must now be clear again beyond per adventure. The courts have now acknowledged this fact. In Bataillard v R at 1288 Griffiths, CJ said: "But when the law has been in force for many years and the trial takes place, as this did, in a court which is in almost perpetual session, and where the spectacle of an accused person giving evidence on oath on his own behalf is familiar - "

I make reference to this truncated quotation, because Bataillard was decided less than fifteen years after the introduction of the right of an accused to give evidence and less than a decade from the time it became statutorily prohibited to comment upon the failure of an accused to give evidence. In Bridge v R (1964) 118 CLR all judges commented upon the familiarity [*51] of juries with the right of an accused to give evidence and by way of example I refer to Barwick, CJ 603 viz: "Nowadays even more so than at the time when Bataillard was decided it would be quite unreal to imagine that a jury, particularly a jury doing duty in such a court as the Court of Quarter Sessions at Sydney, is unaware of the fact that an accused can give evidence on his own behalf; or, put at its very lowest, it would be unsafe to act in the administration of the criminal law on the assumption that none of a panel of twelve such jurymen would be aware of the accused's competence in this respect or that if any of them did know he would be unlikely to communicate his knowledge to his fellow jurors." In the Court of Criminal Appeal of this State a similar view was expressed; see R v Aiton (1993) 68 A Crim R 578 at 587 where the Court Phillips, CJ, Crockett and Vincent, JJ said: "At this stage of our legal and social history it is unrealistic to suggest that they (the jury) may not be aware of the right of an accused person to give evidence in his or her own defence."

There would seem to be little warrant for s399(3) remaining in place. It is incongruous at the least that [*52] the legislature should prohibit a judge or prosecutor from telling a jury that which they must be assumed to know. It distorts the ability of a trial judge to properly and fairly address a jury by drawing to their attention in a logical and coherent way all the matters relevant for their attention. As the Jones and Dunkel direction, should as a matter of fairness, be given, it becomes a tortuous and convoluted task to direct the jury about the unexplained failure to call witnesses, and yet not refer, even by implication to the accused. In effect, the section now obliges a trial judge and prosecutor to edit the truth, a truth which the jury are assumed to know. By doing so unanswered questions are likely to arise in a jury's mind leading them into paths of speculation or the drawing of false inferences. This can be neither fair to the accused or the community. I turn now to the more vexed question of whether the prosecutor's remarks and the judge's comments in address can be seen to cross the boundary and into the territory prohibited by s399(3). I think, unfortunately, that they do. The prohibition is absolute and has been characterised by the highest authority (Bataillard) as going [*53] to any reference, inter alia, indirect or by the most subtle illusion (see also Professor CR Williams, "Silence in Australia: Probative Forces and Rights in the Law of Evidence" 1994 Oct LQR). The impugned comments made by both the prosecutor and judge, referring as they do to the uncontradicted evidence of Vabaza et al, must, in my view, inform the jury that the applicants had not given evidence, a right which the jury must be presumed to know they could have invoked. It must mean that the comments necessarily infer, at least indirectly and by none too subtle illusion, that the applicants had not given evidence. It is not desirable to set out a formula or form of words a trial judge might use to avoid this problem. Circumstances are infinite and all of them can never be foreseen. However reference to "the evidence called" or "sworn testimony was given by" may be useful in properly reflecting the facts of the case without infringing s399(3). The applicants must succeed on this part.

9481

It remains to consider whether the provision to the Crimes Act s568(1) should be applied. In my view it should. The affording comments were, as I have said, about a matter the jury must be presumed [*54] to have known, they could not have harmed the applicants or deprived them of a chance of acquittal. The comments were utterly marginal in the context of this trial. Considered as a whole the case is pre-eminently one for the application of the provision. I turn now to the appeals against sentence. The applicant Allen has appealed against the sentence, particularly so far as it relates to the cumulation of 3 years 6 months upon the sentences he is currently serving. There are three grounds. The first has four parts, namely, that the trial judge gave little or no weight to the prospects for rehabilitation, that he erred in characterising this case as a serious example of blackmail, and similarly erred in characterising the victim as a vulnerable person, which factor aggravated the blackmail and finally, that the judge erred in concluding there were no mitigating factors present. The second ground of appeal is that the failure to make an effective order as to concurrency, thereby imposed a crushing sentence which affords the principle of totality. The third ground is that the sentence is manifestly excessive.

There is no merit in any of the grounds. The applicant has an extensive [*55] criminal repertoire involving 33 previous convictions from 15 court appearances between March 1970 and December 1988. The offences range from street crimes, through to rape and to crimes of violence. In fact, he has spent less than three years out of prison in the last 20, and in the last decade he has been at large for only eight months. He is presently serving a sentence of 13 years with a minimum term of 11 years imposed by the Supreme Court after an appeal for drug trafficking and conspiring to commit armed robbery. He would appear to be eligible for release in 1997. The result of cumulation of this sentence will mean he will become eligible for parole on 11 February 2001. He is aged 40 and unmarried but has two children and three grandchildren to whom, it is said by a consultant psychologist, he is emotionally attached. I return to the grounds of appeal and deal with them seriatim. As to the prospects of rehabilitation it seems almost absurd to argue that any weight at all should be given to this consideration where a person commits a further very serious crime while undergoing a lengthy sentence, which itself must have taken the prospects of rehabilitation into account. Although [*56] no person should ever be considered to be beyond redemption, there are cases where any foreseeable prospects can be characterised as remote if not forlorn. This is one of them. The applicant received lenient non-custodial sentences when he first commenced his criminal career, but the crimes and the sentences imposed increased in severity as the years passed. Nothing has rehabilitated him in the last two decades. Despite this, the learned trial judge did consider the evidence of the psychologist who gave the customary evidence about rehabilitation and the present resolve of the applicant to change his ways. The judge did not ignore the prospect of change but found "there is no basis for the conclusion that you have found any resolve to rehabilitate yourself".

I do not think it can be said the judge was wrong, on the contrary, the evidence established he was correct. There is a distinction between the subjective intent to rehabilitate and the objective likelihood of it occurring. There is no basis for impugning the judge's discretion on this ground as he took both aspects of rehabilitation into account. The second and third limbs of the first ground are that the judge erred in characterising [*57] the offence as a serious example of blackmail and Vabaza as a vulnerable person. There is no basis for these contentions. The trial judge said and was correct when he did so: "As a matter of public policy, the court must act in a manner calculated to protect rather than abandon individuals who are the responsibility of the State, whilst deprived of this liberty." A prisoner on remand, who at that stage must be presumed to be an innocent person must be protected from thuggery and extortion just as much, if not more so, than an ordinary citizen. That aspect of general deterrence is very significant in this case. Acting in concert with Jackson, the applicant used his reputation to support demands accompanied by the ultimate threat to kill. A threat which Vabaza thought, in my view quite justifiably, could be put into effect. In my view Vabaza was vulnerable, he stood out in the prison population by virtue of his race and the crime for which he was charged. It would have been obvious Vabaza would be unlikely to have a support system capable of helping him withstand being blackmailed. The judge's characterisation of both crime and victim was correct. The fourth limb of this ground was [*58] to object to the judge's finding there were no mitigating factors. In fact, none were advanced to us, my examination of the circumstances fail to reveal any. There was a trial so the court cannot expect remorse or contrition, nothing other than a vague expression to be re-united with his children could be put on behalf of the applicant. This was taken into account. Therefore, the argument on this limb must also fail.

The second ground was that the effect of making 3 1/2 years cumulative upon the sentence now being served crushed the applicant. I do not think so. Mr Holdenson conceded Allen was now "institutionalised" and therefore amenable to prison routine. It follows from this that he is less likely than most prisoners to be utterly demoralised by a prison term.

To be weighed against this subjective matter is the fact that prisoners in gaol must be deterred from the commission of further offences and making gaols places of incarceration not peril. With these factors in mind I cannot find the sentence, or its accumulative effect, crushing. Mr Holdenson was so bold as to suggest that the entire sentence should be served concurrently with those already being served. In effect, [*59] imposing no penalty whatsoever. Of course, this submission must be rejected.

The third ground of appeal is that the sentence is manifestly excessive. For the reasons already given the ground must fail.

Mr Tehan for the applicant Jackson appealed against sentence on two grounds, the first that the judge erred in failing to make any part of the minimum term concurrent with the applicant's current sentence, and the other was that it was manifestly excessive. Both grounds should fail. Jackson is also a well versed criminal. Although aged only 28, he admitted 75 previous convictions from 17 court appearances between April 1983 and June 1992. He will commence to serve the 2 1/2 year term on 28 February 1995. The trial judge commented that both applicants "were both substantially implicated in the commission of this offence". He differentiated Jackson from Allen on the basis of age, antecedent criminal history and some familial mitigating features. In my view, he was right to do so and the lesser sentence reflects these matters. For the reasons already given in respect of Allen, I cannot see this sentence as manifestly excessive. As a principal offender a further custodial sentence [*60] over and above that which the applicant was already serving was, in my view, demanded. The length of that term was not excessive. It follows that both applicants' appeals against convictions and sentences should be dismissed.

ORDER:

Applications for leave to appeal against convictions dismissed.

Counsel for the Crown: Mr C Hillman
Instructed by: Mr JM Buckley , Solicitor for DPP
Counsel for Applicant Allen: Mr DP Holdenson
Instructed by: Slater and Gordon
Counsel for the Applicant Jackson: Mr PF Tehan
Instructed by: Michael Rafter and Assoc