

of July, 1893, upholding a conviction of the petitioner on the 20th of March of that year under sect. 182 of the Criminal Law Amendment Act, 1883 (46 Vict. No. 17), at Quarter Sessions at Cowra.

The petition alleged that the chairman commented to the jury on the petitioner not having given evidence which he was competent but not compellable to do under sect. 6 of 55 Vict. No. 5, and told the jury that "they might draw an inference adverse to me from my having omitted to deny on oath certain statements by the witnesses, and to explain certain matters which when unexplained were suspicious against me;" that a special case was reserved whether the chairman was right in so commenting; that there was a difference of practice on this subject between the judges of the Supreme Court, and also between chairmen of quarter sessions; that on that account, and also because the question affected the administration of justice in every case, the special case had been argued and decided by a Full Court consisting of all seven judges.

Shearman, for the petitioner, contended that this was an exceptional case in which leave should be granted. The question had been treated by the Court below as one of great and general importance; its difficulty was apparent from the judgments of Innes and Stephen, JJ., who dissented from those of the majority. The comment complained of was not a general one, but in respect of particular facts proved by the prosecution, and unexplained by the prisoner. The dissentient judges were right in saying that while the Act made a prisoner competent but not compellable, liability to judicial comment of this kind amounted to an indirect compulsion. The constitutional right to claim an acquittal in the absence of direct proof of guilt was not taken away by the statute; but the comments complained of rendered *prima facie* evidence sufficient unless rebutted by the prisoner.

[LORD MORRIS:—It is a matter of every-day comment that witnesses have not been called to disprove facts; and before this Act comment might have been made that no explanation had been suggested.]

J. C.

1894

KOPS

v.

THE QUEEN.

Ex parte
KOPS.

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In the analogous Acts (South Australian Act, 45 & 46 Vict. No. 245, s. 1, and New Zealand Act of 1889, No. 16, s. 4) a proviso is introduced that no presumption of guilt shall arise from a prisoner refusing to give evidence. This Act does not contain that proviso, and should be construed favourably to the prisoner.

[THE LORD CHANCELLOR:—"Competent and compellable" occur in sect. 2 of Lord Denman's Act (14 & 15 Vict. c. 99). "Compellable" there means compellable by process of law. So here.]

The question affects the conduct of every criminal trial in the Colony, and raises a question of principle on which the Full Court differed.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR:—

This is a petition for special leave to appeal in a criminal matter. In the case of *Ex parte Deeming* (1), which was a petition for a similar indulgence, the then Lord Chancellor, delivering the opinion of the Board, quoted from the judgment in *Dillett's Case* (2) the following passage, of which their Lordships entirely approve: "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shewn that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

The point on which special leave to appeal is sought in the present case is whether upon the trial of a prisoner since the passing of the New South Wales Criminal Law and Evidence Amendment Act (55 Vict. No. 5) it is legitimate for the judge, in commenting upon the facts proved, to refer to the capacity of the prisoner to give evidence on his own behalf, and so explain matters which would be naturally within his own knowledge, and of which an explanation would be important in view of the evidence already given. The argument would have to go, and

(1) [1892] A. C. 422.

(2) 12 App. Cas. 467.

did go, to this length—either that in no case is a judge entitled to comment upon the prisoner having refrained from giving evidence, or that in this particular case there were circumstances rendering such a comment illegitimate in point of law.

The majority of the learned judges of the Full Court have held that the comments made by the learned judge at the trial in this case were made according to law, and that there was no reason to interfere with the verdict which followed.

Their Lordships see no reason to doubt the correctness of the conclusion at which the majority of the Court arrived. The learned judges did not lay down—it was not within the scope of the case necessary to lay down—any general rule as to such comments. There may no doubt be cases in which it would not be expedient, or calculated to further the ends of justice, which undoubtedly regards the interests of the prisoner as much as the interests of the Crown, to call attention to the fact that the prisoner has not tendered himself as a witness, it being open to him either to tender himself, or not, as he pleases. But on the other hand there are cases in which it appears to their Lordships that such comments may be both legitimate and necessary.

It has been argued on behalf of the petitioner that the words “not compellable” are used in the Act, and that these words indicate an intention that no such comments as those made by the learned judge who tried this case should be made to the jury; and this appears to have been the view of the minority of the learned judges in the Court below.

In their Lordships’ opinion—having in view the fact that in the English Act to amend the law of evidence (14 & 15 Vict. c. 99), which enabled parties to tender themselves as witnesses, or be called as witnesses in civil actions, the provision was that parties should be both “competent and compellable” to give evidence—when subsequent legislation introduced in part the same capacity as regards criminal cases, rendering the accused competent but not compellable to give evidence, the word “compellable,” which in the earlier statute obviously meant “compellable by process of law,” must in the subsequent legislation have the same meaning, and not any more extended meaning, such as that which has been contended for here.

J. C.

1894

KOPS

v.

THE QUEEN.

*Ex parte*

KOPS.

J. C.      Consequently the argument founded upon the use of the words  
 1894      "not compellable" cannot prevail.  
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 KOPS Their Lordships will therefore humbly advise Her Majesty
 v. that this petition must be dismissed.
 THE QUEEN.
 Ex parte
 KOPS.

Solicitors for the petitioner: *Shearman & Rayner.*

[PRIVY COUNCIL.]

J. C.* HIRSCH AND OTHERS DEFENDANTS ;
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 AND  
 July 3, 4, 5, 28. SIMS AND ANOTHER . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF  
 GOOD HOPE.

*Law of the Cape of Good Hope—Powers of Directors—Issue of Shares at a  
 Discount—Damages.*

*Held*, in this case, that it was not competent for directors to issue shares at a discount, so as to make the holder liable for less than their full amount.

Where directors bonâ fide agreed, in consideration of a stipulated service, to allot shares at a discount and the allottee subsequently received certificates of fully paid-up shares, paid to the company the par value less 10 per cent. discount, and subsequently sold the same to bonâ fide purchasers at a profit:—

*Held*, that the directors were answerable to the company for the discount allowed ;

But *held*, that they were not liable beyond the discount, there being no proof of fraud against the company, or of further resulting damage to it from the transaction.

*Semble*, such further resulting damage could not have exceeded the difference between the price paid by the allottee and the presumable value of the shares at the date of the agreement if it and the transactions founded thereon had never taken place.

APPEAL from a decree of the Supreme Court (March 2, 1893) varying a judgment of the High Court of Griqualand (Dec. 15, 1893).

The facts of the case and the proceedings in the suit are stated in the judgment of their Lordships.

\* *Present*:—THE EARL OF SELBORNE, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCH.