

1902 court judge, there is the ordinary right of appeal, under s. 120
 KNIVETON of the County Courts Act, 1888, to this Court.

v.
 NORTHERN
 EMPLOYERS'
 MUTUAL
 INDEMNITY
 COMPANY.

DARLING and CHANNELL JJ. concurred.

Objection overruled. Appeal allowed.

Solicitors for appellants: *Rowcliffes, for Peace & Ellis, Wigan.*

Solicitors for respondent: *Chester & Co., for Fielding & Fernihough, Bolton.*

J. F. C.

1902
 April 26.

[CROWN CASE RESERVED.]

THE KING v. HADWEN AND INGHAM.

Criminal Law—Evidence—Prisoners jointly indicted—Evidence by one Prisoner incriminating another—Right of the latter to cross-examine—Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f), (iii.)

Where one of two prisoners, jointly indicted, gives evidence under s. 1 of the Criminal Evidence Act, 1898, and in doing so incriminates the other prisoner, the latter is entitled to cross-examine the former.

CASE stated by Ridley J.

The two prisoners were jointly indicted at the assizes held for the West Riding of the county of York at Leeds, and tried on March 14 and 15, 1902, upon an indictment whereby they were jointly charged in thirty counts with the following: (a) Offences under the Debtors Act, 1869, s. 11, sub-s. 10, in making and being privy to the making of certain false entries in a document relating to their affairs, namely, a certain balance-sheet, within four months before the presentation of a bankruptcy petition by them, with intent to conceal the state of their affairs; (b) offences under s. 13 of the same Act by obtaining credit under false pretences in incurring a debt to the Halifax and Huddersfield Union Banking Company; (c) conspiring together to cheat and defraud the said banking company.

The prisoners had for many years before their said trial

carried on business in co-partnership as silk spinners, under the style of Hadwen & Sons, at Triangle, near Halifax, and the banking account of the firm was kept with the said Halifax and Huddersfield Union Banking Company.

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Each prisoner pleaded "Not guilty" to the whole of the indictments, and was separately defended by counsel.

Upon the close of the case for the Crown, each prisoner elected to give evidence upon oath; and each prisoner then gave evidence exculpating himself, and also gave evidence against the other prisoner who was charged with the same offences.

Counsel on behalf of each prisoner then claimed the right to cross-examine the other prisoner upon the evidence given by him against his co-prisoner.

The objection was taken that such cross-examination was not permissible, and the learned judge upheld that contention, and excluded all cross-examination of one prisoner on behalf of the other prisoner, but agreed to state a case for the opinion of this Court.

The jury found both prisoners guilty upon all the counts.

The prisoners were released on bail, and this case was stated for the consideration of the Court.

The question for the opinion of the Court was whether under the above circumstances counsel for one prisoner was (as he claimed), or was not, entitled to cross-examine the other prisoner upon the evidence given by the latter upon oath against him.

If the learned judge was right in excluding such cross-examination the conviction was to be affirmed; otherwise it was to be quashed.

Tindal Atkinson, K.C. (Vaugh with him), for the prisoner Hadwen; Scott Fox, K.C. (R. A. Shepherd with him), for the prisoner Ingham. The ruling of the learned judge was wrong. Before the passing of the Criminal Evidence Act, 1898, a statement not on oath by one prisoner was not evidence against another prisoner, because it could not be cross-examined to; but if witnesses called by one prisoner gave evidence tending to incriminate another prisoner, they could be cross-examined

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by that other: *Reg. v. Woods* (1); *Reg. v. Burditt* (2); and in civil cases one co-defendant can cross-examine another co-defendant: *Allen v. Allen* (3); *Lord v. Colwin*. (4) By the Criminal Evidence Act, 1898, a prisoner who elects to give evidence is, subject to the qualifications contained in the Act, in the same position as any other witness for the defence, and, therefore, he *prima facie* is liable to be cross-examined by a fellow-prisoner in circumstances similar to those in which other witnesses called for the defence of one prisoner can be so cross-examined. The Act clearly contemplates that he may be cross-examined, because it provides by s. 1 (f) that he shall not be cross-examined as to bad character except in certain events, one of which is, if he has given evidence against any other person charged with the same offence. The most obvious case to which those words apply is a case like the present, where one prisoner endeavours to exculpate himself by throwing the blame upon another prisoner. To hold that in circumstances like these one prisoner is not entitled to cross-examine another would work great hardship, and would be calculated to defeat the ends of justice. [*Reg. v. Martin* (5) was also cited.]

Harold Thomas (Milvain, K.C., with him), for the prosecution. The contention that one prisoner may be cross-examined by another involves the assumption that he is a witness for the prosecution. That contention is contrary to the policy of the Act, which expressly provides that a prisoner shall be a competent witness for the defence. In *Reg. v. Woods* (1) and *Reg. v. Burditt* (2) the Court treated the witnesses called by the one prisoner as, in effect, giving evidence for the prosecution, and it was on that ground that cross-examination by the other prisoner was permitted; but the evidence of a prisoner cannot be so regarded, as it is only as a witness for the defence that a prisoner is under the Act competent to give evidence. A prisoner can, therefore, only be cross-examined by counsel for the prosecution. In the case of prisoners jointly indicted the proper course is for one prisoner to examine the

(1) (1853) 6 Cox C. C. 224.

(3) [1894] P. 248.

(2) (1855) 6 Cox C. C. 458.

(4) (1855) 3 Drew. 222.

(5) (1889) 17 Cox C. C. 36.

other, and, if he becomes hostile, then to apply for leave to cross-examine on the ground of hostility. But one prisoner is not entitled as of right to cross-examine another.

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LORD ALVERSTONE C.J. The question for decision in this case is, whether, where two prisoners are jointly indicted and are separately defended, and one prisoner elects to be sworn and to give evidence on his own behalf, and in the course of his evidence he gives evidence inculcating the other prisoner, counsel for the latter can cross-examine him, or whether he can only be cross-examined by counsel for the prosecution. Before considering how far the question is governed by authority, it is important to point out that, if the law does not prohibit it, it is obviously in the interests of justice that the cross-examination of one prisoner by counsel for the other prisoner should be allowed, because, where the evidence is very strong against both prisoners, counsel for the prosecution might not think it his duty to cross-examine the prisoner so strictly as counsel for the other prisoner would. Further, inasmuch as a prisoner in giving evidence may raise some new point inculcating the other prisoner as to which counsel for the prosecution has had no notice and has no instructions, counsel for the other prisoner would probably be able to cross-examine more effectively than counsel for the prosecution could do. There may also be cases in which the judge's direction to the jury that evidence given by one prisoner is not evidence against the other would not, in the absence of cross-examination, be an effective protection to the other prisoner. Therefore it is in the interests of justice that every opportunity of testing by cross-examination a prisoner's evidence against the other prisoner should be given.

Before coming to the Act of 1898 I think it will be convenient to consider how the law stood before that Act was passed. In *Reg. v. Woods* (1) two prisoners were indicted for manslaughter, and the counsel for one of them having addressed the jury, counsel for the second prisoner did the same and then called witnesses for the defence, whose evidence tended

(1) 6 Cox C. C. 224.

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to shew negligence on the part of the first prisoner, and it was held that the counsel for the first prisoner had the right to cross-examine the witnesses called by the second prisoner, and then to address the jury a second time, confining his speech to comments on the evidence which the second prisoner had adduced against the prisoner for whom he appeared; and in *Reg. v. Burditt* (1) it was expressly decided that, where two prisoners were jointly indicted, and one of them called a witness who gave evidence criminatory of the other, the latter had the right by himself or his counsel to cross-examine the witness and to address the jury in reply upon the evidence given. The reasoning of Jervis C.J. in the latter case affords considerable assistance in coming to a conclusion in this case. The learned judge said: "The prisoner should certainly have been allowed to cross-examine and reply, because the witness called by Burditt gave evidence to criminate him, and that evidence became tacked, as it were, to the case for the prosecution." It seems to me that the learned judge recognised the fact that in criminal proceedings it is very difficult to make certain that the jury will keep distinct the evidence which has been given on behalf of the different prisoners, and, therefore, he says that the evidence in the case in question became tacked, as it were, to the case for the prosecution. He goes on to say: "We must not, however, be understood as deciding that when one prisoner calls a witness who does not criminate his fellow-prisoner, the latter would, in that case, have a right to cross-examine and reply."

Therefore, previously to the Act of 1898, the right of one prisoner to cross-examine the witnesses called by another prisoner and to address the jury on that evidence depended on whether or not the witnesses for the one had given evidence tending to incriminate the other. That being the existing state of the law, the Criminal Evidence Act, 1898, was passed, the object of which was to enable prisoners to be called as witnesses on their own behalf; but it was not intended that they should be called against their own wish, and, therefore, s. 1 provides that "Every person charged with an offence . . .

(1) 6 Cox C. C. 458.

shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows—
 (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application.” I think that it occurred to the Legislature that cases might arise, where prisoners were jointly indicted, in which one prisoner might give evidence attacking the other prisoner, because clause (f) of s. 1, after limiting the right to cross-examine a prisoner, by providing that he shall not be asked questions tending to shew that he has committed other offences or is of bad character, goes on to remove that restriction in certain cases, one of which is, where the prisoner “has given evidence against any other person charged with the same offence.” I think that the most ordinary case of that would be where there are two or more prisoners jointly indicted. I agree that the words also apply to a different case, namely, where the same offence has been the subject of other proceedings. But if it had been intended to exclude the case of one of two prisoners jointly indicted endeavouring by his evidence to impute guilt to his fellow-prisoner, I think that that would have been done in express terms. Speaking for myself, I think that the ordinary case of two or more persons being jointly indicted for the same offence is exactly the case where general cross-examination ought to be allowed.

But then it is said that, if in a case such as this there is to be unrestricted cross-examination of the prisoner, it must be by counsel for the prosecution, and not by counsel for the other prisoner. On this point the reasoning of Jervis C.J. in *Reg. v. Burditt* (1) helps us in our decision, because his reason for allowing cross-examination by the prisoner's counsel was that evidence had been given of which the prosecution could avail themselves, and, therefore, although originally given in defence of one prisoner, it became in fact evidence for the prosecution against the other.

I come to the conclusion, therefore, both on principle and on the analogy of the decisions before the Act, that a prisoner

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who has given evidence incriminating his fellow-prisoner has, in the words of the Act, given evidence against another person charged with the same offence, and that in these circumstances cross-examination on behalf of the other prisoner ought to be allowed.

LAWRANCE J. I am of the same opinion.

WRIGHT J. The only question is whether the evidence of one co-defendant given in self-defence is evidence which is legally admissible to inculcate the other defendant, because, if it is, it necessarily follows that the latter should be allowed to cross-examine. I can find nothing in the Act except s. 1 (f), (iii.), which tends to abrogate the ordinary common law rule—see *Reg. v. Payne* (1) ; *Allen v. Allen* (2)—that the evidence of one defendant cannot on a criminal trial be received as evidence either for or against another defendant, the reason being that otherwise there would be a great danger that one defendant would be tempted to exculpate himself at the expense of his co-defendant. I have had some doubt whether clause (f), (iii.), does get over the difficulty, but I think that it can be construed as dealing with evidence given by one prisoner, not only in his own defence, but also with the object of making a case against the other prisoner. If that is so, and I am not disposed to decide otherwise, it follows that there may be cross-examination of the one prisoner by the other.

BRUCE J. I agree with the Lord Chief Justice for the reasons which he has given.

KENNEDY J. I agree with the judgment of my Lord.

Convictions quashed.

Solicitor for prosecution : *Solicitor to the Treasury.*

Solicitors for prisoner Hadwen : *Van Sandau & Co., for Mills & Co., Huddersfield.*

Solicitors for prisoner Ingham : *Helliwell, Harby & Co., for Jubb, Booth & Helliwell, Halifax.*

(1) (1872) L. R. 1 C. C. 349.

(2) [1894] P. 248, at p. 253.