

Kenneth Merrall Fox - - - - - - - *Appellant*

v.

The General Medical Council - - - - - - - *Respondents*

FROM

**THE DISCIPLINARY COMMITTEE OF THE GENERAL MEDICAL
COUNCIL**

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
26TH JULY, 1960

Present at the Hearing

LORD RADCLIFFE

LORD TUCKER

LORD COHEN

[*Delivered by* LORD RADCLIFFE]

This is an appeal against a decision of the General Medical Council, acting by its Disciplinary Committee, that the appellant, Dr. Kenneth Merrall Fox, had been guilty of infamous conduct in a professional respect and that his name should be erased from the Register of Medical Practitioners. The decision of the Council was arrived at on 27th November, 1959, after a three-day hearing. The charge preferred against the appellant was that for a period of some three years ending in April, 1959, he had improperly associated with a patient of his, the late Mrs. Kathleen Margery Thomas, and committed adultery with her on numerous occasions. The course of proceedings before the Committee and on the appeal before this Board made it plain that the charges of improper association and of adultery were to be considered as interdependent and that the decision to remove the appellant's name from the register must stand or fall according to the view taken of the relevance and cogency of the evidence on the adultery charge.

It is necessary at the outset to say something as to the nature of an appeal to the Board in a matter of this kind, because upon that depends to some extent the Board's approach to questions that relate to the evidence taken at the hearing and the treatment of it before the Committee during the course of the hearing. The appeal in this case lies as of right and by statute—see section 36 of the Medical Act, 1956. The terms of the statute that confers the right do not limit or qualify the appeal in any way, so that an appellant is entitled to claim that it is in a general sense nothing less than a rehearing of his case and a review of the decision.

Nevertheless an appellate court works under certain limitations which are inherent in any appeal that does not take the form, as this does not, of starting the case all over again and hearing the witnesses afresh. In the High Court, where appeals to the Court of Appeal are by function by way of rehearing, there are well-recognised principles which give some measure of precedence to the decisions of the tribunal that has

seen and heard the witnesses over what might otherwise be the view of the facts preferred by the appellate court which has only the record of the evidence to study. Moreover, if the trial at first instance has been by judge and jury, only misdirection by the judge or such special cases as a perverse verdict or a verdict wholly contrary to the weight of the evidence are allowed to justify a reversal of the finding of the jury.

It does not seem to their Lordships that it is possible to find an exact analogy between the position of the Board on an appeal under the Medical Act and the position of an appellate court dealing with an appeal either from a judge sitting with a jury or from a judge sitting alone to decide both law and fact. With the former there is no useful analogy. The decision arrived at in a hearing before the Medical Council is indeed that of a body of persons, but there is no distinction between their responsibility for deciding on the law and their responsibility for deciding on the facts. There is no judge to conduct the proceedings, to direct the jury on matters of law or to sum up for them on issues of fact. Although the Disciplinary Committee has the assistance of a Legal Assessor at its hearing, as required by the Act, it is the President of the Court and not he who is in charge of the proceedings and his duties are confined to advising on questions of law referred to him and to interventions for the purpose either of informing the Committee of any irregularity in the conduct of their proceedings which comes to his knowledge or of advising them when it appears to him that but for such advice there is a possibility of a mistake of law being made.

There is no doubt a much closer and more useful analogy between the Board's position and that of a Court of Appeal hearing an appeal from a judge sitting alone without a jury and for many purposes this analogy will suffice. But even here there is a distinction which may be important in some instances. A judge delivers a reasoned judgment; he puts on record his findings where there is material conflict of evidence and the conclusions that he has formed as to the credibility or reliability of the witnesses he has heard; he indicates his views on the law and the bearing of those views on the conclusion that he comes to. It is with this judgment before it that the appellate court proceeds to its hearing of the appeal. But in the case of hearings before the Medical Council no judgment is, of course, delivered. There is only a finding such as we have here that "the Committee have determined that the facts alleged . . . in the Charge have been proved to their satisfaction". It is not possible to tell except by inference what has been the weight given by the Committee to various items or aspects of the evidence or what considerations of fact or law have proved the determining ones that have led the members to arrive at the decision finally come to. Such considerations, which are unavoidable in appeals of this kind, do sometimes require that the Board should take a comprehensive view of the evidence as a whole and endeavour to form its own conclusion as to whether a proper inquiry was held and a proper finding made upon it having regard to the rules of evidence under which the Committee's proceedings are regulated.

The validity of any determination by the Committee is, certainly, dependent upon the performance of its statutory duty to hold a "due inquiry" into the matter, and the Board will need to be satisfied as to this if it is challenged on an appeal. But to say that there must be due inquiry does not greatly elucidate the question unless there is some exhaustive definition of the conditions which such an inquiry postulates. It has been said in an earlier case (see *General Medical Council v. Spackman* [1943] A.C. 627) that there can have been no due inquiry if the rules of natural justice have not been observed, and this is true. At the same time it must be remembered that before there was a statutory right of appeal to the Board under the Medical Act the only way of attacking a decision of the Council was by way of certiorari proceedings or, at any rate, one of the other prerogative writs. Such proceedings are not truly by way of appeal. The Court in granting or refusing the

writ does not investigate the merits of the decision: its only concern is to satisfy itself that certain essential rules of procedure, which are treated by it as constituting the requirements of natural justice, have been duly observed. Their Lordships think therefore that it would be an undue limitation of their duty and powers in dealing with the statutory appeal to require no more for the upholding of a determination than observance of what are known as the rules of natural justice.

There are now detailed rules governing many aspects of the proceedings of the Disciplinary Committee—see the General Medical Council Disciplinary Committee (Procedure) Rules Order in Council, 1958. An important provision of these Rules is that which deals with the reception of evidence, see rule 43 (2):—“The Committee may receive as evidence any such oral, documentary or other matter as, after consultation with the Legal Assessor, they may think fit; Provided that where any matter is tendered as evidence which would not be admissible as such if the proceedings were criminal proceedings in England, they shall not receive it unless, after consultation with the Legal Assessor, they are satisfied that their duty of making due inquiry into the case before them makes its reception desirable”. There is also a separate set of rules laying down the functions and duties of the Legal Assessor—see the Medical Disciplinary Committee (Legal Assessor) Rules, 1951. The Board is bound to consider complaints made on any appeal to it against the background of these special regulatory provisions. It may be that in some cases an appellant will be able to show in positive terms that there has been a departure from what the rules required. In any such case the departure will be a matter for comment and, in the absence of any actual indication of the significance or bearing that it had upon the ultimate decision, their Lordships cannot well escape the responsibility of assessing for themselves what that significance or bearing should be taken to be. It is sufficient at this stage to guard themselves from the assumption that merely because something inconsistent with the Rules can be shown to have taken place there can have been no “due inquiry” and the decision appealed from must necessarily be reversed.

With these considerations in mind their Lordships turn to the circumstances of the present appeal. The relevant facts that appeared at the inquiry were few and there is in effect no dispute about them. The appellant carried on a medical practice in the Reading area, having surgeries at Earley, Woodley and Winnersh. In 1956 he was a married man, with two children, a girl aged 14 and a boy aged 9. Among his patients were a Mr. Leslie Thomas, his wife Kathleen Margery Thomas and their three small children. A fourth child, Anne, was born in July, 1957. The home of the Thomas family was at 508 Wokingham Road, Earley.

The appellant became a friend of both Mr. and Mrs. Thomas and was a frequent visitor to their house. About February, 1958, he and his wife agreed to separate and in June of that year she went to live in the North of England, their intention being that the two children's school holidays should be divided between them. In January, 1959, however, the appellant's wife died. Before her departure the appellant and the Thomases had arranged that when she went he should take up residence with them as a paying guest at 508 Wokingham Road. In fact from the month of March, 1958, Mrs. Thomas had been providing the appellant with lunch on working days at her home and his motor-car was frequently to be seen parked on the grass verge or on the road opposite the house. According to the appellant this was a business arrangement for which she was paid: but Mr. Thomas in his evidence said that he did not know that these lunches took place. The appellant has one of his surgeries in the vicinity as well as patients in the neighbourhood.

From June, 1958, to March, 1959, the appellant lived as a paying guest in the Thomas household. In March he and they moved into a pair of semi-detached houses, 51 and 49 Avalon Road, Earley. They had come to an agreement the general effect of which was that Mrs. Thomas

was to supervise the running of No. 51, the appellant's house, provide him with lunch, do his washing and laundry, and help in looking after his children when they were with him: he, on the other hand, was to pay the rates of No. 49, the Thomas house, allow a bedroom in his house to be used, if needed, by one of the Thomas children, and, for this purpose, to open a communicating door between the upper floors of the two houses.

Mr. Thomas was a government inspector of armaments and his work involved very long hours. He seems to have been away at work from 7.30 a.m. until 8.0 p.m. on five days each week and from 7.30 a.m. until 4.0 p.m. on the other two days. With his knowledge and without any objection from him the appellant took Mrs. Thomas out on numerous occasions, sometimes to a country club of which he was a member, other times to the theatre. Occasionally Mr. Thomas himself accompanied them on outings.

On the evening of the 16th April, 1959, Mrs. Thomas left her home, took a bedroom at a hotel in Reading and the next morning was found there dead in bed, having taken an overdose of seconal tablets. She left behind on a sideboard in the room two letters, one addressed to a woman friend at Earley, Mrs. Monck-Mason. There was argument at the inquiry whether the contents of these letters should be placed before the Committee and in the end the Legal Assessor advised that they should not be admitted. Her departure from home had been preceded by more than one interview with the appellant, and their Lordships will refer to the circumstances of one of these, on the 14th April, when they come to deal with the legal submission that was made on the appellant's behalf as to the admission of evidence in connection with it.

Taking the recited facts by themselves it is plain that they amount to no evidence of adulterous intercourse. They show an intimate association between the appellant and Mrs. Thomas, an association, it may be said, of a somewhat unusual character. They show too that there were numerous occasions of opportunity for adultery, if adultery took place. But any interpretation of these facts that supported the charge brought against the appellant must have depended entirely upon certain things said or admitted by him in the course of several conversations which he had with Mrs. Monck-Mason during the months that followed Mrs. Thomas's death. Here again, with the exception of two points, neither of which appears to their Lordships to be of any crucial importance, there is no conflict of evidence between the appellant and Mrs. Monck-Mason as to what was actually said. The conflict arises in the significance to be attached to certain remarks, in the bearing which they are thought to have upon what had gone before and in the relative plausibility of the explanations offered by the appellant as to his meaning or purpose in saying them. Having no guidance as to the view formed by members of the Tribunal on these matters, their Lordships can only proceed by setting out the essential passages of each conversations and assessing their weight as evidence before a tribunal of fact.

The first conversation took place on the telephone on the Sunday morning following Mrs. Thomas's death. It was initiated by the appellant with the words "Is that you, Margaret?" and he then asked if Mrs. Monck-Mason could spare him five minutes of her time. "It's about this business of Kath", he said, "so much depends on you whether I support Les and the children. It depends on my being able to stay here in practice". The subject of the call was evidently the letter which Mrs. Thomas had left addressed to Mrs. Monck-Mason. The police had in fact detained the letter and she told him that she knew nothing about the contents. The appellant said that he hoped that very little had been said in them. The only other remark of consequence seems to have been that Mrs. Monck-Mason said that she had loved Mrs. Thomas very much, to which the appellant replied "Nobody loved her better than I did" and added "We must be very discreet over this".

The appellant's explanation of these remarks made by him was to the effect that on the 14th April, two days before Mrs. Thomas's death, there had been an emotional scene between them during the course of his luncheon interval. She had burst into tears and declared that she was in love with him, had been for a long time, could no longer go on living with her husband and was going away. He was appalled, he said, "absolutely and utterly appalled" and, when he realised his predicament, extremely angry. He had told her that all contact between himself and her family—domestic, social and professional—must cease at once and that her husband must be informed. He realised that she had placed him in the gravest professional danger. He had, finally, made it clear that he did not reciprocate her feelings, that it was ridiculous and that "her stupid emotionalism had completely wrecked everything". She was "terribly distressed".

It was with this interview in mind that he had spoken to Mrs. Monck-Mason on the Sunday morning. He was worried that the letter addressed to her might have contained references to it and his words about hoping that there was very little in it and being discreet were directed to this. His account of his relationship with Mrs. Thomas was that he had the highest possible regard and esteem and affection for her, she had shown him and his children "absolutely unlimited kindness", but he was not in love with her in any physical and sexual sense of the word at any time.

The second conversation took place on the evening of the next day, Monday, the 20th April. Mrs. Monck-Mason at the request of the police rang up the appellant and the police took a shorthand record of all that passed. The transcript of this was put in evidence at the inquiry. There were a number of things said by the appellant in the course of the conversation that testified to his anxiety both about what the dead woman's letter might contain and about what Mrs. Monck-Mason herself might be disposed to say about his relations with Mrs. Thomas. The purport of it was that if she were to "go saying a lot of things which you think" or "if you say you think Kath was having an affair" there would be bitterness, unpleasantness and hostility generally and that would prevent him doing anything for the Thomas children. The closing passages included the following remarks by him "Frankly speaking, I did nothing . . . if you follow me, which would show any change from my side in the position between the two of us . . . I am speaking to you terribly frankly, but a year ago or a bit less, we were a bit bothered that my wife might be considering divorce proceedings and the position was Kath was implicated. However, that has all long since gone, and I am a perfectly free agent, but that did not change my feelings, but I think she knew. If she was afraid of losing me, it was a completely unfounded fear, but I can't express these feelings in court".

The appellant suggested that the words "the position was Kath was implicated" had not been used by him, but that what he had said was "the position with Kath was complicated". The shorthand writer who made the transcript was asked about this in cross-examination but would not accept the emendation. It is noticeable that Mrs. Monck-Mason's own recollection of this passage, which was merely of the substance of what was said, was to the effect that a year ago he and Kath had had a very worrying time, because after his wife had left she was going to take out divorce proceedings citing Kath as co-respondent.

In June, 1959, the Monck-Masons bought and moved into Mr. Thomas's house, No. 49 Avalon Road. They thus became next-door neighbours to the appellant. This led to more than one exchange between him and Mrs. Monck-Mason, generally over the intervening garden fence. They seem to have spoken from time to time about his feelings towards Mrs. Thomas: "He told me", Mrs. Monck-Mason said, "he did not need anybody else so long as he had Kath". The appellant in his evidence said that this referred merely to his domestic arrangements.

Some time during the month of July, while the child Anne Thomas was staying with the Monck-Masons, there occurred what is certainly

the most critical of this series of exchanges. The appellant invited Mrs. Monck-Mason into his house with the words "Come in and talk to me a moment". She and the child went in, he took the little girl on his knee and she then said to him "Anne is your child, is not she?" According to her evidence in chief he answered "Yes. How long have you known it?". Her evidence continues "I said, 'Well, since she was about five months old but definitely since I was in Somerset'. He said that it had been on the tip of his tongue to tell me several times but he had not done so in case it changed my feelings towards her—meaning that I then would not perhaps want to adopt her". They spoke further of Kathleen Thomas. The appellant "told me I could talk quite freely with him if there was anything I wanted to say or anything I wanted to know, to ask him. He told me that she was a girl who needed a lot of physical attention . . . and he had warned her that when they moved into their new house he would be busy and might not be able to give her the same amount of time".

It is essential to any final judgment on the case to see how far these words are denied, qualified or explained. First, Mrs. Monck-Mason accepted under cross-examination that she was not certain that the appellant's reply to her question "Anne is your child, isn't she?" had included the opening word "Yes". She thought it had. It does not appear to their Lordships to make any difference to the significance of the reply whether it did or did not. Secondly, the appellant firmly denied that he had used the words about Mrs. Thomas needing a lot of physical attention. This raises a direct conflict between two witnesses and a tribunal that chose to accept Mrs. Monck-Mason's account could not be found fault with, since she seems to have been a generally credible witness. Thirdly, apart from these two points, the appellant did not deny that what she had testified to had passed between him and her on that occasion. He offered an explanation of the words he had used. His purpose, he said, was to extract information from her, to "pick her brains", having regard to the fact that proceedings before the General Medical Council were then pending or, as is more probable having regard to dates, he then feared they would be. He was therefore non-committal and denied nothing. He said that his words to the effect that it had been on the tip of his tongue to tell her several times referred merely to the interview between Mrs. Thomas and himself on the 14th April—but the explanation, in itself implausible, is in effect unacceptable having regard to the admitted sequence in which the words occurred.

For completeness one more conversation testified to by Mrs. Monck-Mason should be mentioned. It occurred some little while after the one just related. She had mentioned to the appellant that the police had asked her a lot of questions about the child Anne at the time of their enquiries, including the question whether she thought her the appellant's child. To his query "Well, what did you say?" she replied "Yes. I did tell them" and he then went rather white and said "This will mean complete destruction for all".

Their Lordships feel no doubt as to what all this evidence must have amounted to in the eyes of the tribunal. Much of what passed in these conversations is consistent with either view of the appellant's relations with Mrs. Thomas but not all of it tallies with his version. Nevertheless there are certain critical points. However much the Committee may have accepted the appellant's account of the actual words that passed at the interview of the 14th April, they must have rejected the implication which he invited them to draw, that Mrs. Thomas's declaration of love came to him as a complete surprise and that there had not previously been any sexual relationship between them. In finding the charge of adultery proved against him they must have accepted the account of the July interview with Mrs. Monck-Mason which emerges from the combined effect of his and her evidence whether or not they also accepted that the disputed words were spoken and they cannot have given credence to the virtually impossible account of his purpose and meaning which he offered in his evidence. On this basis they had before them a clear

admission by the appellant that he regarded Mrs. Thomas's last child as his own and that therefore adultery had taken place between them. Such an admission is not in any way contradicted by the purport of the other conversations and is in fact a great deal more consistent with some parts of what the appellant said and did than his own interpretation of his words and conduct. The tribunal was therefore fully entitled to make the finding that it did on the evidence before it and it would be impossible for an appellate court to reverse the finding on any contrary view of the facts. It follows that the appeal must fail unless there was some defect in the conduct of the inquiry, by way of admission or rejection of evidence or otherwise, that may fairly be thought to have been of sufficient significance to the result to invalidate the Committee's decision. It is to this that their Lordships now turn.

Four points were raised on behalf of the appellant which were said to involve breaches of the Disciplinary Committee rules of procedure or otherwise to amount to misconduct of the proceedings. The first two require only brief notice since their Lordships cannot attach any weight to them. First, it was said that, whereas Rule 18 (a) requires that in a case such as the present the respondents' solicitor shall "present the facts on which the complaint or information is based", a breach of this rule was committed in that the solicitor did not in his opening give any account of the substance of the telephone conversation that took place on the 20th April. What he actually said, after referring to the fact and date of this conversation, was "I will not refer in detail to the telephone conversation on 20th April, as you will hear about this particular conversation when the evidence is called before you". It is generally regarded as a matter within the advocate's discretion how far he opens in detail upon words or conversations that are subsequently to be proved through witnesses. In this case, after Mrs. Monck-Mason had given in chief her recollection of what was said on the 20th April (the shorthand transcript was to be proved later by a police witness), her cross-examination was deferred until after the luncheon adjournment at the request of the appellant's solicitor. In the interval he was supplied with a copy of the transcript for his personal use and presumably could obtain any necessary instructions. It was an order of proceedings which the appellant's solicitor described as "admirable" in reply to the President and their Lordships can see nothing to object to in what was done.

The second point made was that, though the letters left by Mrs. Thomas had been excluded on the advice of the Legal Assessor, material obtained from them was used in the cross-examination of the appellant. Even if it was, there is nothing necessarily improper in that. An advocate is entitled to use his discretion as to whether to put questions in the course of cross-examination which are based on material which he is not in a position to prove directly. The penalty is that, if he gets a denial or some answer that does not suit him, the answer stands against him for what it is worth. The whole episode apparently—their Lordships do not know the contents of the letters—comes down to one question—"Q. Did you seduce her in the surgery very soon after that (a visit of Mrs. Thomas in 1956)? A. I did not". As the Legal Assessor immediately intervened with the words "I don't think we can have this", the matter was not pursued further. There is nothing in the point.

Next, the objection was made that on the "direction" or advice of the Legal Assessor inadmissible evidence had been admitted on the issue of adultery. To appreciate what weight there is in this, it is necessary to set out something of the context in which the point arose. What happened was this. In the course of the cross-examination of Mrs. Monck-Mason by the appellant's solicitor she gave an answer to one of his questions which introduced a story about something which Mrs. Thomas had said or implied to her connecting the appellant with the paternity of Anne Thomas while the Thomases and Monck-Masons were on holiday together in Somerset in the year 1958. The answer did not strictly arise out of the question put to her. It might have been objected to on the spot as not being "responsive" and the tribunal invited to ignore it.

In any event a report of some statement made by Mrs. Thomas would not have constituted any evidence against the appellant on the issue of adultery. No objection was taken: the appellant's solicitor, probably exercising a wise discretion, paid no attention to the matter and returned to another point. He did however make an allusion to Mrs. Monck-Mason's answer in the course of his closing address to the Committee. There was no need for him to do this unless he chose to. The respondents' solicitor had never made any reference to it or at any time suggested that it could be evidence against the appellant nor had he examined or re-examined Mrs. Monck-Mason on it. What the appellant's solicitor said in his address was "If you are going to be asked to believe that Dr. Fox was the father of Anne you cannot forget that the story which, according to Mrs. Monck-Mason, Mrs. Thomas told her, in this rather roundabout way, is one which is not borne out by other facts". At this point the Legal Assessor intervened to say: "Here I should intervene. There can be no question of this tribunal making a finding about whether Dr. Fox was the father of Anne. All that is put here is that this tribunal is asked on the evidence to believe that Mrs. Thomas thought that Dr. Fox was the father of Anne because, according to Mrs. Monck-Mason, she said so; in other words Dr. Fox might or might not have been the father of Anne".

No one can say that the long closing sentence of this passage is clearly or happily expressed and their Lordships have never been able to understand with any certainty what it is intended to convey. Probably it conveyed no clearer meaning to the members of the Committee themselves than it did to the appellant's solicitor who merely observed "I am not sure that I followed that, but I leave it there". The thing that matters for the present purpose is that no intelligent man, listening to what was said, could possibly have supposed that he was getting legal advice from the Assessor to the effect that he could properly count Mrs. Thomas's alleged belief as proving anything against the appellant on the issue charged against him. If the words did not convey that meaning, it is not of material importance to decide what, if any, other meaning they conveyed. The objection taken therefore fails, the truth being that the presence of this inadmissible piece of evidence in the case at all and any weight that may conceivably have been given to it must be ascribed to the conduct of the case on behalf of the appellant and it would be altogether anomalous if he were now to profit by it.

The remaining objection taken relates to what was said to be the wrongful refusal to admit a piece of relevant evidence for the appellant. It will shorten the discussion of this point if it is assumed (1) that the appellant in his evidence testified that on the day after Mrs. Thomas's outburst to him on the 14th April he went to see an old friend, a Mr. Frampton, to discuss his position and to take advice, (2) that his solicitor later tendered Mr. Frampton as a witness to speak of what the appellant had said to him at their meeting and (3) that, on the advice of the Legal Assessor, Mr. Frampton's evidence was not allowed to be given. These assumptions are favourable to the appellant for Mr. Frampton's evidence was not tendered in a proper or satisfactory way and it is doubtful whether the legal point that was taken before the Board was ever clearly presented to the Committee.

It was however sufficiently apparent that the appellant's solicitor wished to call Mr. Frampton to confirm that on the 15th April the appellant had told him the same general story about his relations with Mrs. Thomas, in particular that her outburst of the previous day was not induced by any improper conduct of his, that constituted his defence to the charge before the Committee. The purpose of such evidence of a witness's previous statements is and can only be to support his credit, when his veracity has been impugned, by showing a consistency in his account which adds some probative value to his evidence in the box. Generally speaking, as is well known, such confirmatory evidence is not admissible,

the reason presumably being that all trials, civil and criminal, must be conducted with an effort to concentrate evidence upon what is capable of being cogent and, as was remarked by Humphreys, J. in *R. v. Roberts* 28 Cr. App. R. 102, it does not help to support the evidence of a witness who is the accused person to know that he has frequently told other persons before the trial what his defence was. Evidence to that effect is therefore in a proper sense immaterial.

There are however certain special exceptions, or at any rate one head of exception, from this general rule. If in cross-examination a witness's account of some incident or set of facts is challenged as being a recent invention, thus presenting a clear issue as to whether at some previous time he said or thought what he has been saying at the trial, he may support himself by evidence of earlier statements by him to the same effect. Plainly the rule that sets up the exception cannot be formulated with any great precision, since its application will depend on the nature of the challenge offered by the course of cross-examination and the relative cogency of the evidence tendered to repel it. Its application must be, within limits, a matter of discretion and its range can only be measured by the reported instances, not in themselves many, in which it has been successfully invoked.

Thus in *Reg. v. Coll* 24 L.R. Irish 522 (C.C.R.) a police witness who identified an accused in his trial evidence as being present at and party to the crime charged, being cross-examined on an earlier information sworn by him that did not mention the name of that accused, was allowed to give evidence to the effect that he had mentioned the name in an information of still earlier date. The admission of his evidence seems to have been treated by the Court as coming within the "recent invention" exception. That apart, it seems to have been little more than a permissible exercise of the right of re-examination to ask him in effect whether or not the second of the two informations may not have been due to inadvertence and thus to displace the inference which the cross-examination had sought to draw from its contents.

R. v. Benjamin 8 Cr. App. R. 146 is often referred to in this connection. A police witness, whose account of what he saw in certain premises was challenged in cross-examination, was allowed to refer to a contemporary entry in his official note-book showing that he had immediately made a report to the same effect to his superior in the police force.

Perhaps the best example of the way in which the exception can be properly invoked and applied is offered by the case of *Flanagan v. Fahy* 1918 L.R. Ir. 2 K.B. 361. There a witness who had testified to the forging of a will was cross-examined to the effect that he had invented his story because of enmity between him and the accused, the beneficiaries under the propounded will. He was allowed to call confirmatory evidence to show that before the cause of this enmity had arisen he had told a third party the story he was now telling. In that situation the issue raised by the cross-examination was clearly defined: a recent invention due to a specified cause, and if the witness could show that his account had been the same before the cause existed he was certainly adding a relevant fact in support of his credibility.

Did Mr. Frampton's evidence, as tendered, come within the exception? In their Lordships' opinion it did not. It is impossible to say that its exclusion was wrongful in the legal sense. The cross-examination of the appellant on behalf of the respondents had not in fact challenged his account of what had passed between him and Mrs. Thomas on the 14th April. It did not need to, since nearly everything that, according to him, was said could have been said consistently with either view of the case. What was, no doubt, challenged was his whole story that there had been no adulterous relation between them and that her outburst of the 14th April had come as a complete surprise to him. According to him he was "appalled" by the predicament in which this placed him; he had become "more and more worried by the turn of events". In that state he went to seek advice from an old friend. Could it have made

any contribution to the Committee's judgment on the veracity of his whole account for them to know that in such a situation he had told the old friend substantially the same story as to his innocence of the matters charged as he was now telling at the hearing? Their Lordships do not think that it could. In their view the challenge to the appellant's evidence that was raised by the cross-examination was not of the order that could be affected by proof of statements made by him of that kind at that date. No tribunal that was not otherwise prepared to accept the appellant's general story could have been led to do so by hearing what he had told Mr. Frampton on the 15th April. So regarded, the evidence rejected is no more than the previous assertion of the defence story told at the trial which Humphreys, J. pointed out in *R. v. Roberts supra* is clearly inadmissible.

As already announced, their Lordships have humbly advised Her Majesty that the appeal ought to be dismissed. The respondents have asked for their costs of the appeal and their Lordships know of no ground upon which they can refuse the application.



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