

*Reasons for the Report of the Lords of the
Judicial Committee of the Privy Council on
the Appeal of John Makin and Sarah Makin
his wife v. The Attorney-General for New
South Wales, from the Supreme Court of New
South Wales; delivered 12th December 1893.*

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD HALSBURY.

LORD ASHBOURNE.

LORD MACNAGHTEN.

LORD MORRIS.

LORD SHAND.

[*Delivered by the Lord Chancellor.*]

The Appellants in this case were tried and found guilty at the Sydney Gaol Delivery held at Darlinghurst of the murder of the infant child of one Amber Murray. The learned Judge before whom the case was tried deferred passing sentence until after the argument of the Special Case which he stated for the opinion of the Supreme Court of New South Wales.

The points reserved by the learned Judge were :—first, that his Honour was wrong in admitting evidence of the finding of other bodies than the body of the child alleged to be Horace Amber Murray : secondly, that his Honour was wrong in admitting the evidence of Florence Risby, Mary Stacey, Agnes Todd, Agnes Ward and Mrs. Sutherland : thirdly,

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that there was no evidence to prove the identity of the body marked D with that of Horace Amber Murray: fourthly, that there was no evidence of the death or cause of death of Horace Amber Murray, or that he was murdered.

The questions for the Court were, whether the evidence objected to was admissible, and if not, were the prisoners rightly convicted? and even if inadmissible, was there evidence sufficient to sustain the conviction? On the argument of the Special Case the third point was abandoned by the learned Counsel for the prisoners. On the other points the judgment was in favour of the Crown.

Special leave was granted to appeal to this Board from the judgment of the Supreme Court of New South Wales, some of the questions raised being of grave and general importance.

At the close of the argument before their Lordships they intimated that they would advise Her Majesty that the Appeal should be dismissed, and that they would state their reasons for this advice on a future occasion.

There can be no doubt in their Lordships' opinion that there was ample evidence to go to the jury that the infant was murdered. Indeed that point was scarcely contested in the argument of the learned Counsel for the Appellants. The question which their Lordships had to determine was the admissibility of the evidence relating to the finding of other bodies and to the fact that other children had been entrusted to the Appellants.

In their Lordships' opinion the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has

been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other.

The principles which their Lordships have indicated appear to be on the whole consistent with the current of authority bearing on the point, though it cannot be denied that the decisions have not always been completely in accord.

The leading authority relied on by the Crown was the case of *The Queen v. Geering* (18 L. J. M. C. 215) where on the trial of a prisoner for the murder of her husband by administering arsenic evidence was tendered, with the view of showing that two sons of the prisoner who had formed part of the same family, and for whom as well as for her husband the prisoner had cooked their food, had died of poison, the symptoms in all these cases being the same. The evidence was admitted by Chief Baron Pollock, who tried the case: he held that it was admissible, inasmuch as its tendency was to prove that the death of the husband was occasioned by arsenic, and was relevant to the

question whether such taking was accidental or not. The Chief Baron refused to reserve the point for the consideration of the Judges, intimating that Baron Alderson and Mr. Justice Talfourd concurred with him in his opinion.

This authority has been followed in several subsequent cases. And in the case of *The Queen v. Dossett* (2 Carr. & Kir. 306) which was tried a few years previously, the same view was acted upon by Mr. Justice Maule on a trial for arson, where it appeared that a rick of wheat-straw was set on fire by the prisoner having fired a gun near to it. Evidence was admitted to show that the rick had been on fire the previous day and that the prisoner was then close to it with a gun in his hand. Mr. Justice Maule said—"Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully."

The only subsequent case to which their Lordships think it necessary to refer specifically is that of *The Queen v. Gray* (4 Foster & Finlason 1102) where on a trial for arson with intent to defraud an Insurance Company Mr. Justice Willes admitted evidence that the prisoner had made claims on two other Insurance Companies, in respect of fires which had occurred in two other houses which he had occupied previously and in succession, for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. The learned Judge after consulting Baron Martin refused to reserve the point for the consideration of the Court for Crown Cases Reserved. The fact that the learned Judge took this course after consulting Baron Martin is important, because a decision of that learned Judge

was mainly relied on in opposition to the authorities to which attention has been drawn.

The case referred to is that of *The Queen v. Winslow* (8 Cox 397), which it certainly seems difficult to reconcile with *The Queen v. Geering*; but, in view of the circumstance to which attention has been called, it cannot be regarded as certain that Baron Martin deliberately dissented from the view which was adopted in *The Queen v. Geering* and other cases.

The learned Counsel for the Appellants placed much reliance on the case of *The Queen v. Oddy* (2 Denison's Crown Cases Reserved, p. 265), the only one which has been considered by the Court for Crown Cases Reserved. It was there held that on the trial of an indictment containing counts for stealing, and for receiving the property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge, in respect of which alone it had been admitted by the Recorder. Lord Campbell said that in his opinion there was no more ground for admitting the evidence under the third count (for receiving) than under the first or second (for stealing). Under the two latter, it would have been evidence of the prisoner being a bad man, and likely to commit the offence there charged. So under the third count the evidence would only show the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue. Baron Alderson in his judgment said that the evidence merely went to show that the prisoner was *in possession* of other property which had been stolen in the previous December, and not that he had *received such property knowing it to be stolen*; that the mere possession of stolen property was evidence *primâ facie*, not of receiving, but of stealing, and to admit such evidence in the case before him

would be to allow a prosecutor, in order to make out that a prisoner had *received* property with a guilty knowledge which had been stolen in March, to shew that the prisoner had in the December previously *stolen* some other property from another place, and belonging to other persons. In other words, they were asked to say that in order to shew that the prisoner had committed one felony, the prosecutor might prove that he committed a totally different felony some time before.

Their Lordships do not think that the judgments in *The Queen v. Oddy* at all conflict with the judgment in *The Queen v. Geering* and the other cases referred to.

Their Lordships do not think it necessary to enter upon a detailed examination of the evidence in the present case. The prisoners had alleged that they had received only one child to nurse; that they had received 10s. a week whilst it was under their care, and that after a few weeks it was given back to the parents. When the infant with whose murder the Appellants were charged was received from the mother she stated that she had a child for them to adopt. Mrs. Makin said that she would take the child and Makin said that they would bring it up as their own and educate it, and that he would take it because Mrs. Makin had lost a child of her own two years old. Makin said that he did not want any clothing; they had plenty of their own. The mother said that she did not mind his getting 3*l.* premium so long as he took care of the child. The representation was that the prisoners were willing to take the child on payment of the small sum of 3*l.*, inasmuch as they desired to adopt it as their own.

Under these circumstances their Lordships cannot see that it was irrelevant to the issue to be tried by the jury that several other infants had been received from their mothers on like

representations, and upon payment of a sum inadequate for the support of the child for more than a very limited period, or that the bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners.

In addition to the question whether the evidence objected to in the present case was admissible the learned Judge (as has been stated) reserved for the opinion of the Supreme Court the further questions, whether if not admissible the prisoners were rightly convicted, and even if inadmissible, whether there was evidence sufficient to sustain the conviction.

These questions, and the point of law raised by them, were fully argued before their Lordships, and although their Lordships having arrived at the conclusion that the evidence was admissible it became unnecessary for the determination of the Appeal to decide them, their Lordships think it right to state the opinion which they formed upon the important question of law involved.

It was considered by the Supreme Court of New South Wales in the case of *The Queen v. M'Leod* (11 New South Wales L. R. 218) and led to a difference of opinion amongst the learned Judges. That case was brought by appeal to this Board with the view of obtaining its opinion upon the point. The case was, however, determined by their Lordships upon other grounds. The point of law involved is, whether where the Judge who tries a case reserves for the opinion of the Court the question whether evidence was improperly admitted, and the Court comes to the conclusion that it was not legally admissible, the Court can nevertheless affirm the judgment if it is of opinion that there was sufficient evidence to support the conviction, independently of the evidence improperly admitted, and that the accused was

guilty of the offence with which he was charged.

It was admitted that it would not be competent for the Court to take this course at Common Law, but it was contended that Section 423 of The Criminal Law Amendment Act of 1883 (46 Vict. No. 17) empowered, if even it did not compel the Court to do so. That Section is in these terms :—

“ The Judge by whom any such question is
 “ reserved shall as soon as practicable state a
 “ Case setting forth the same with the facts and
 “ circumstances out of which every such question
 “ arose and shall transmit such Case to the
 “ Judges of the Supreme Court who shall
 “ determine the questions and may affirm amend
 “ or reverse the judgment given or avoid or
 “ arrest the same or may order an entry to be
 “ made on the record that the person convicted
 “ ought not to have been convicted or may make
 “ such other order as justice requires Provided
 “ that no conviction or judgment thereon shall
 “ be reversed arrested or avoided on any Case so
 “ stated unless for some substantial wrong or
 “ other miscarriage of justice.”

Reliance was of course placed upon the language of the proviso. It was said that if without the inadmissible evidence there were evidence sufficient to sustain the verdict, and to show that the accused was guilty, there has been no substantial wrong or other miscarriage of justice. It is obvious that the construction contended for transfers from the jury to the Court the determination of the question whether the evidence, that is to say, what the law regards as evidence, established the guilt of the accused; the result is that in a case where the accused has the right to have his guilt or innocence tried by a jury the judgment passed upon him is made to depend not on the finding of the jury but on the decision

of the Court. The Judges are in truth substituted for the jury, the verdict becomes theirs and theirs alone, and is arrived at upon a perusal of the evidence without any opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords.

It is impossible to deny that such a change of the law would be a very serious one, and that the construction which their Lordships are invited to put upon the enactment would gravely affect the much cherished right of trial by jury in criminal cases. The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses. Yet the Court might under such circumstances be justified or even consider themselves bound to let the judgment and sentence stand.

These are startling consequences, which strongly tend in their Lordships' opinion to shew that the language used in the proviso was not intended to apply to circumstances such as those under consideration.

Their Lordships do not think it can properly be said that there has been no substantial wrong or miscarriage of justice, where on a point material to the guilt or innocence of the accused the jury have notwithstanding objection been invited by the Judge to consider in arriving at their verdict matters which ought not to have been submitted to them.

In their Lordships' opinion substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a

perusal of the evidence. It need scarcely be said that there is ample scope for the operation of the proviso without applying it in the manner contended for.

Their Lordships desire to guard themselves against being supposed to determine that the proviso may not be relied on in cases where it is impossible to suppose that the evidence improperly admitted can have had any influence on the verdict of the jury, as for example where some merely formal matter not bearing directly on the guilt or innocence of the accused has been proved by other than legal evidence.
