

(*New Zealand Law Reports*, 1920, page 21.)

[IN THE COURT OF APPEAL.]

REX *v.* PERRY AND PLEDGER.

C.A.

1919.

September 29; *Criminal Law—Indecent Assault—Defence of Belief that Girl over 16—No Direct*
October 20. *Evidence as to Belief of Accused—Necessity for Legal Evidence—Unsworn*
Statement by Accused—Whether to be taken into Consideration—Duty of
Judge in directing Jury—Crimes Act, 1908, ss. 208 (2), 424 (2).

EDWARDS, J.
CHAPMAN, J.
SIM, J.
HOSKING, J.

On a trial for indecent assault upon a girl under the age of 16 years neither of the accused gave evidence, and there was no evidence as to what they knew or believed as to the girl's age. The presiding Judge directed the jury that they might infer the belief of the accused as to the girl's age from their conduct and the other circumstances of the case.

Held, That this direction was right.

The onus of establishing the defence allowed in such cases by the proviso to s. 208 (2) of the Crimes Act, 1908 — viz., that the accused had reasonable cause to believe that the girl was of or over the age of 16 years—is on the prisoner.

R. v. Banks(1) followed.

Both the belief of the accused as to the age of the girl in such cases and reasonable cause for such belief must be established by some legal evidence, and the appearance of the girl is such evidence.

Though no provision is made by the Crimes Act on the subject, unless involved in s. 424 (2), an accused person has always been allowed to make an unsworn statement as part of his defence, the only question being at what stage of the proceedings it should be made, and some weight may be given by the jury to such a statement, but the Judge should direct them that it is not legal evidence.

R. v. Baucke(2) considered and, *semble*, approved.

(1) [1916] 2 K.B. 621.

(2) 9 G.L.R. 317.

CASE stated for the Court of Appeal by Sim, J.

On a trial for indecent assault on a girl under the age of 16 years counsel for the accused called no evidence, and admitted that a case of indecent assault had been proved, but invited the jury to find that the accused believed on reasonable grounds that the girl was over the age of 16 years. There was no direct evidence as to what the accused knew or believed about the girl's age. Counsel for the Crown submitted that, as there was no evidence on the point, the jury ought to be directed that

the defence was not open to consideration. The Judge ruled provisionally that the jury might infer the belief of the accused with regard to the girl's age from their conduct and the other circumstances of the case, and that they ought to convict the accused unless they were satisfied that the accused believed the girl to be at least 16 years of age and had reasonable grounds for such belief. The jury returned a verdict of "Not guilty," and the question of the correctness of the direction to the jury was reserved for the Court of Appeal.

C.A.
1919.
—
REX
v.
PERRY AND
PLEDGER.
—

The Solicitor-General (Sir John Salmond, K.C.), for the Crown:—

The case is without authority and raises an important point of criminal practice. The burden of proof in respect of the proviso to s. 208 is on the accused and not on the Crown: *R. v. James*(1). I submit that the ordinary rule then applies, and there was nothing to go to the jury unless there was reasonable evidence in favour of the accused on that point. This rule applies to both civil and criminal cases. As to the rule in civil cases see *Metropolitan Railway Co. v. Jackson*(2). It is familiar practice to direct an acquittal if there is not sufficient evidence against the accused: *R. v. Robinson*(3). The same applies if the onus is on the accused, and in such a case the accused cannot discharge that onus by an unsworn statement.

[HOSKING, J.—By "reasonable evidence" you exclude a statement of the prisoner made not on oath?]

If a prisoner's statement is evidence what was the object of the Prisoners' Evidence Act? It would be the duty of the Judge to direct the jury that, as there was no evidence before them as to belief as to age, it was their duty to convict. I do not suggest that the prisoner had to go into the box if there was sufficient other evidence on the point, and I do not object to the provisional ruling of the learned Judge; but in the present case there was no evidence at all to support the alleged belief.

[HOSKING, J.—The prisoner's statement goes to the jury in all criminal cases.]

But not as evidence; only as argument, like an address by counsel.

The accused was not represented by counsel.

Cur. adv. vult.

(1) [1902] 1 K.B. 540.

(3) 10 Cox C.C. 107.

(2) 3 A.C. 193.

C.A. Oct. 20.—HOSKING, J., delivered the judgment of the Court :—
1919. There can be no doubt that the proviso to s. 208 (2) of the
REX Crimes Act, 1908, throws on the accused the burden of establish-
v. ing the defence which the proviso allows—that is, the burden of
PERRY AND making it appear to the jury that the accused had reasonable
PLEDGER. cause to believe that the girl was of or over the age of 16 years.
EDWARDS, J. This implies that the accused must also make it appear to the
CHAPMAN, J. jury that he did in fact believe upon reasonable cause that the
SIM, J. girl was of or over the age mentioned. Such has always been
HOSKING, J. the construction placed by our Courts on this proviso, and it
— has recently been confirmed by the decision of the Court of
Criminal Appeal in England in *R. v. Banks*(1). The Solicitor-
General argues that the accused must make the cause and
this fact of belief apparent to the jury by means of evidence
on oath, so that, if there be no evidence on oath given by
the Crown from which the cause and fact of belief can
reasonably be inferred, and no evidence on oath given by the
accused from which that inference can reasonably be drawn,
the Judge must direct the jury that they cannot entertain
a defence founded on the existence of such cause and belief.
He further, as we understood, denied that any consideration
should be given to a prisoner's unsworn statement made as part
of his defence. We are unable to agree with these propositions
in their unqualified form. In the first place one of the material
pieces of evidence for making the matters in question apparent
to the jury is the personal appearance of the girl herself. If
in the eyes of the jury she might well be taken by an ordinary
person to be of the age of 16 that would be evidence—we do
not say proof—of a reasonable cause for the belief that she was
of that age. If they found on this ground that a reasonable
cause for belief did exist, then such a finding would have a con-
siderable bearing in their appraisalment of the materials presented
to them in support of the existence of the belief in fact. Evidence
thus presented directly to the senses of the jury is legal evidence
quite as much as evidence on oath.

In the next place our practice in criminal trials, whether the
accused is defended by counsel or not, is to permit him as part
of his defence to make a statement not on oath if he does not
elect to be sworn as a witness. This right or privilege is not
provided for by our Code unless it is involved in s. 424 (2), which
enacts that “upon the trial of any accused person, whether he

(1) [1916] 2 K.B. 621.

"is defended by counsel or not, he shall be allowed, if he thinks
 "fit, to open his case, and after the conclusion of such opening
 "shall be entitled to examine such witnesses as he thinks fit,
 "and when all the evidence is concluded to sum up the evidence."

C.A.

1919.

REX

v.

PERRY AND
PLEDGER.

But, notwithstanding any silence of the Code on the subject, the right or privilege referred to has always been allowed. The only question at times has been at what juncture of the proceedings the statement should be made—namely, whether before or after the accused's counsel has addressed the jury. In *R. v. Baucke*(1) Cooper, J., after examining the English authorities, directed that the statement should follow the address, with a right of reply for the Crown if the accused introduced new matter into his statement. The right or privilege of making a statement is expressly recognized by the rules passed on the 3rd November, 1909. The 5th of these provides that, where a prisoner in addressing the jury makes statements of fact, the prosecutor shall, with the leave of the Judge, have the same right to call evidence to contradict such statements as if they were made on oath.

EDWARDS, J.
CHAPMAN, J.
SIM, J.
HOSKING, J.

Our practice of allowing the accused to make an unsworn statement as a part of his defence follows that allowed in England. In *R. v. Doherty*(2) Stephen, J., gives the history of this practice, stating that "down to the year 1837 prisoners
 "were not allowed in cases of felony to be defended by counsel,
 "although they might have counsel to cross-examine witnesses.
 "The effect of that, of course, was that the prisoner was obliged
 "in the nature of the case to speak for himself. The Prisoners'
 "Counsel Act was passed in 1837, and this declared that a
 "prisoner had a right to make a full defence by counsel, and
 "accordingly that has since been done." [Note that the year mentioned should be 1836, not 1837.] Then he goes on to say that some Judges had considered this Act took away from the prisoner the right to make a statement on his own behalf. He held it did not. It appears from *R. v. Mulhouse*(3) that a resolution of a majority of the Judges held that it was undoubtedly competent for a prisoner to make a statement of facts to the jury, and that the proper time is after his counsel has addressed the jury. In *R. v. Pope*(4) Phillimore, J., held that the passing of the Criminal Evidence Act, 1898, in England, enabling an accused person to give evidence on oath, did not take away

(1) 9 G.L.R. 317.

(3) 15 Cox C.C. 622.

(2) 16 Cox C.C. 306, 309.

(4) 18 T.L.R. 717.

C.A. the right. See also *R. v. Sheriff*(1), before Darling, J., where
 1919. the right was recognized. Our legislation to the same effect
 REX has not been treated as altering our practice.

v.
 PERRY AND
 PLEDGER.

EDWARDS, J.
 CHAPMAN, J.
 SIM, J.
 HOSKING, J.

The statement thus permitted to be made must have some place in the body of material on which the jury are asked to decide whether the accused is guilty or not guilty—else why allow it at all? In cases where a statement is made the usual practice is for the presiding Judge to point out to the jury that the statement is not legal evidence because it has not been made on oath or subjected to the test of cross-examination, but that, having regard to the other materials before them, they may give it such weight as in the circumstances they consider it deserves; and, of course, the Judge makes such other observations as may be proper in enabling the jury to estimate the weight. This is in accordance with the observations of Cave, J., in *R. v. Shimmis*(2). In *Peacock v. R.*(3), an appeal from the Supreme Court of Victoria, the High Court of Australia had occasion to consider the value to be given to a statement made by the accused on his trial. From the report(4) it appears that by the Victorian Evidence Act, 1890, s. 52. an accused person may make a statement of facts without oath in lieu of or in addition to any evidence on his behalf. A later Act provides that the person accused shall be entitled to give evidence. A direction by the trial Judge that where the statement was in conflict with the sworn evidence the jury should disregard it was held to be erroneous; and Griffith, C.J., stated that the jury should be directed to take the statement as *prima facie* a possible version of the facts, giving such weight as it appears to be entitled to in comparison with the facts established by evidence.

Subject to the qualifications we have discussed arising from the inference to be drawn from the personal appearance of the girl, and to the weight the jury may attach to the statement of the accused where one is made, we agree that reasonable cause for the accused's belief and the fact of his belief must be supported by some reasonable legal evidence, and that failing such reasonable legal evidence the Judge should tell the jury that the defence ought not to be considered by them. But if in such a case the verdict returned is "Not guilty" a difficulty exists in the way of awarding a new trial upon the ground that no such evidence was before the jury, for the jury may not have been satisfied that the offence itself was proved.

(1) 20 Cox C.C. 334.

(2) 15 Cox C.C. 122.

(3) 13 C.L.R. 619.

(4) *Ibid.* 639.

The question submitted for the consideration of the Court in the present case is whether the direction to the jury was right. That direction was that the jury might infer the belief of the prisoners with regard to the girl's age from their conduct and the other circumstances of the case. By this we understand that there were certain materials available from the appearance of the girl, the conduct of the accused, and the other circumstances of the case as disclosed by the evidence for the Crown from which an inference might reasonably be drawn by the jury that the accused did believe the girl to be of or over the age of 16, and had reasonable cause for that belief. The whole of the evidence is not before us, but the learned Judge who tried the case, and who is a member of this Division of the Court, is satisfied that there were sufficient materials for submitting the question to the jury. We therefore consider his direction was right, although no evidence on oath was given by or on behalf of the accused as part of their defence.

Direction approved.

Solicitors for Crown: *Crown Law Office* (Wellington).

C.A.
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REX
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