34/74

SUPREME COURT OF VICTORIA — FULL COURT

R v BOLAND

Adam, Little and McInerney JJ

18, 19, 22-26 April, 24 May 1974 — [1974] VicRp 100; [1974] VR 849

CRIMINAL LAW – ACCUSED CHARGED WITH KIDNAPPING – EVIDENCE GIVEN AT TRIAL – ADMISSIBILITY OF CONVERSATIONS WITH CO-WORKERS – COMPELLABILITY OF A CROWN WITNESS – CROSS-EXAMINATION OF ACCUSED – ADMISSIBILITY OF IDENTIFICATION PARADES – GRANTING OF LEAVE TO PERMIT THE CROWN TO CALL EVIDENCE TO REBUT IMPUTATIONS.

HELD: Appeal dismissed.

1. There were sufficiently strong similarities between the scheme outlined by the applicant in the conversations with Bristowe and Barrot and that actually carried out on 6 October 1972 to afford a basis for inferring that the man who outlined the nature of the kidnapping project in those conversations was one of the men involved in the kidnapping. Starting with the circumstances that kidnapping was a very special type of crime, and one rarely committed in this country, there was next the fact that the scheme outlined by the applicant envisaged a ransom of a million dollars, the very sum demanded in a ransom note left at the school by the kidnappers.

2. The cardinal feature in each case was that the victim or victims should be a person or persons of such importance in the eyes of the Government and the community that the kidnappers believed they could claim, with some prospect of success, the high price of one million dollars as ransom. Therefore what was proposed by the applicant in January or February 1972 had such marked similarity to the kidnapping committed on 6 October, that the evidence of the conversations with Bristowe and Barrot was admissible as tending to identify the applicant as a person involved in that crime.

3. Evidence admitted as probative of an issue adverse to the interests of the accused person is, to that extent, necessarily prejudicial to him. The evidence in question being probative was necessarily prejudicial but not that its prejudicial effect was out of proportion to its probative value. The trial Judge was therefore not in error in refusing to exclude the evidence.

4. The ultimate question in this case was what did the legislature intend—for the legislature is paramount. There was no sufficient ground, by reason of this canon of statutory construction, for qualifying the general language of s400(3) of the *Crimes Act* 1958, as amended by Act No. 8410, so as to exclude from its operation the case of a wife who had married the accused or the case of a kidnapping which had occurred before Act No. 8410 came into operation. The rule of construction in question was one for the protection of what may, for relevant purposes be described as "vested rights", the deprivation of which would smack of injustice. The rights envisaged were "substantive rights" as distinct from what may be loosely described as "rights" of a merely procedural or evidentiary nature. The law did not recognize "vested rights" against subsequent changes in the general law affecting procedure or evidence.

5. Accordingly, the accused's wife was compellable to give evidence.

6. In relation to the evidence given in respect of the identification parades, even if the evidence from the identification parade was obtained illegally that in itself did not render such evidence inadmissible. Further it was clearly open to the Judge in the exercise of his discretion to have allowed the jury to take into consideration as evidence at the trial this evidence which at the suggestion of applicant's counsel was heard not on a *voir dire* but in the presence of the jury.

ADAM J: [delivered the judgment of the Full Court (Adam, Little and McInerney JJ)]: This is an application, pursuant to a notice dated 21 December 1973 by Robert Clyde Boland for leave to appeal against convictions on 18 December 1973 on seven counts of kidnapping for which he was, on 21 December 1973, sentenced to 16 years' imprisonment on each count, the sentences to be served concurrently with each other, making a total effective sentence of 16 years, with a minimum term of 12 years.

The applicant originally gave notice of application for leave to appeal against sentence also but when the hearing commenced before us, counsel applied for and was granted leave to file late notice of abandonment of that application.

The presentment, laid under s63A of the *Crimes Act* 1958, as amended by Act No. 6731, arose out of the kidnapping, on 6 October 1972 at the February State School, some 22 miles from Bendigo, of the teacher in charge of that school, one Miss Mary Elizabeth Gibbs, and the six pupils in attendance on that day. Each count in the presentment charged one Edwin John Eastwood and the applicant Robert Clyde Boland with having at Faraday on 6 October 1972 taken away the person named in that particular count "with intent to demand from Her Majesty's Minister of Education in the said State [sc. Victoria] one Lindsay Hamilton Simpson Thompson or from some other person or persons payment of the sum $1,000,000 by way of ransom for the return or release of the said [person named in that particular count]".

The accused Eastwood and Boland were first presented before Gowans J and a jury at a trial which began on 1 March 1973. Both accused pleaded "not guilty" but after the trial had proceeded for some time Eastwood changed his plea to "guilty", and the jury having returned a verdict of guilty against him, he was sentenced on each count to 15 years' imprisonment, the seven sentences to be served concurrently. A minimum term of 10 years was fixed before he should be eligible for parole. The trial continued against the applicant alone. Eastwood was called as a witness for the prosecution, apparently in the expectation that he would give evidence that the applicant was the other man associated with him in the kidnapping. When called, however, Eastwood said that the applicant had not been associated with him in the kidnapping. The jury failed to agree and was discharged, and Gowans J remanded the applicant in custody for retrial. The second trial commenced before Dunn J and a jury on 19 June 1973. The applicant pleaded "not guilty" to all counts, and on 6 August 1973 the jury having been unable to agree was discharged and the applicant was remanded in custody for further retrial. The third trial commenced before Norris J on 1 October 1973 and after a trial lasting 54 days, the jury on 18 December 1973 returned a verdict of "guilty" on all counts.

According to the evidence in the Crown case, the facts concerning the kidnapping were as follows:—

At 1.35 p.m. on Friday, 6 October 1972, two men burst into the classroom of the Faraday State School and ordered the school teacher, 20-year-old Miss Mary Elizabeth Gibbs, and the six pupils—all girls—then at attendance at the school to enter a Kombi van inside the rear of which they were locked. The van was then driven away. Miss Gibbs later identified the man who drove the van as the applicant, while the other man, whom she identified as Eastwood, travelled in the rear of the van with her and the children. The van proceeded along the Calder Highway through Kyneton and then turned off on to a road leading to Lancefield. After passing through the town of Lancefield the van was driven on a rough unmade road into bush country where it was brought to a halt. Eastwood then drove off in a car which had been parked there, leaving Miss Gibbs and the children in the custody of the applicant. About 1.30 a.m. on 7 October Eastwood returned in his car and shortly afterwards the two men drove off, leaving Miss Gibbs and the children locked inside the van. About 7.30 a.m. Miss Gibbs succeeded in kicking out the metal panel in the upper part of the doors of the van, climbed out and then got the children out of the van. They walked in rough country until they met a party of "shooters" who drove them to the Lancefield Police Station where they arrived at about 8 a.m. Miss Gibbs and the children were then interviewed by the police and later they guided the police to where the van was parked.

At the van the police found and photographed a fingerprint on the driving-side door. On the evening of Sunday, 8 October, the fingerprint was identified as being that of the applicant, and this persuaded the police to act on information that Eastwood and the applicant were the men implicated in the kidnapping. Accordingly, in the early hours of Monday, 9 October 1972, two separate raids were made. At 4.15 a.m. at Edithvale a police party arrested the man Eastwood, while a quarter of an hour later, at Bendigo, another police party burst into the applicant's house in Queen's Street, Bendigo, and arrested the applicant. The applicant was brought to Melbourne in a police car. During the course of the journey to Melbourne, he denied all knowledge of the kidnapping and at Russell Street Police Station, during the course of long questioning by the police, he declined to answer any questions. Later in the afternoon of Monday, 9 October, he was

charged with the present offences, as also was Eastwood. On the morning of Tuesday, 10 October 1972, an identification parade was held in Police Headquarters at Russell Street, in the course of which Miss Gibbs identified Eastwood and the applicant as the two men who burst into the school at Faraday on Friday, 6 October.

At the same identification parade, a man named Vincent also identified the applicant as the man who had purchased at his business premises in Brunswick on 30 September 1972, the Kombi van used in the kidnapping, and a man named Ferris identified the applicant as the man whom he had seen driving that Kombi van on the Lancefield-Kyneton Road on the morning of Friday, 6 October 1972, the van being then driven in the direction of Kyneton from Lancefield.

At the trial counsel for the applicant formally admitted that on 6 October 1972, at the Faraday State School, Miss Gibbs and the six pupils named in counts 2 to 7 had been kidnapped by two men. No admissions were made as to the intent charged in the presentment.

The applicant's defence at the trial was an alibi. The question of identification was therefore crucial. The Crown case was that there was cogent evidence of identification of the applicant as one of the men involved in the kidnapping, and the Crown relied in particular on the evidence of the school teacher Miss Gibbs, who identified the applicant, and Eastwood as the two kidnappers. It also relied on the evidence of Vincent and Ferris to which reference has already been made. The Crown further relied on identification of the fingerprint found by the police on the driving-side door of the van as that of a fingerprint of the applicant.

In support of this evidence of identification the Crown relied on evidence by the witnesses Bristowe, Barrot and O'Halloran as to statements alleged to have been made by the applicant in conversations with these witnesses in the first half of 1972 in the course of which conversations the applicant discussed the possibility of making money by kidnapping. The Crown relied further on evidence of an association from June 1972 onwards between the applicant and the co-accused Eastwood. Finally, the Crown relied upon evidence of a statement made by the applicant to his wife during the course of the committal proceedings, which statement the jury was invited to regard as a direct admission by the applicant that he had been involved in the kidnapping.

As stated earlier, the applicant denied having taken any part in the kidnapping and set up a defence of an alibi both with respect to the day of the kidnapping and also with respect to the day on which the van had been bought.

As to the occasion when the van was bought, i.e. on 30 September 1972, the applicant gave evidence — and called his father and his mother to support him — that on that day he was not in Melbourne but was working on his father's property at Bendigo. As to the day of the kidnapping, the applicant said that he was in Melbourne with a woman named Susan Buchanan with whom, he alleged, he for some time had been having an affair. He said he had been unable to locate Susan Buchanan so as to call her at his trial. The Crown called evidence of extensive searches and inquiries made in and around Bendigo area in an unsuccessful endeavour to locate any such "Susan Buchanan", and the Crown suggested that there was no such person. As to the fingerprint alleged to have been found on the van, the applicant said that it was probably placed on the van by him on an occasion on Sunday, 1 October 1972, when Eastwood and a man named Fontaine called on him at Bendigo. As to this explanation, the Crown adduced expert evidence that any fingerprint placed on the van at the time alleged by the applicant could not, having regard to the weather prevailing between 1 and 6 October, have been as clear as the print discovered on the van on the morning of 7 October 1972.

In view of the grounds of appeal taken in the applicant's notice of application for leave to appeal, it is desirable to mention certain matters relating to the co-accused Eastwood and to the applicant's wife Mrs Lois Faye Boland.

At the committal proceedings in November 1972 the two accused, Eastwood and the applicant, pleaded "not guilty" and reserved their defence. During the course of the committal proceedings, Mrs Boland was called as a witness but she declined to give evidence.

At the first trial before Gowans J, as previously stated, Eastwood, after plea and sentence,

was called by the Crown but testified that the applicant was not implicated in the kidnapping and that the other man involved with him (Eastwood) in the kidnapping was one David O'Ryan. Mrs Boland was not called as a witness either for the Crown or for the defence.

At the time of the committal proceedings and also the first trial Mrs Boland was, by virtue of s400(1),as inserted in the *Crimes Act* 1958 by s9 of the *Crimes Act* 1967 (No. 7546), a competent but not compellable witness for the prosecution. On 9 May 1973 the provisions of the *Crimes (Amendment) Act* 1973 (No. 8410) came into force. The effect of this amendment was to add offences charged under s63A of the *Crimes Act* 1958 to the offences in relation to which the spouse of an accused person might be compelled to give evidence for the prosecution. The operation of s27 of the *Evidence Act* 1958 which provides, so far as relevant, that no wife shall be compellable to disclose any communication made to her by her husband during the marriage remained unaffected.

At the second trial of the applicant, commencing on 19 June 1973, Eastwood was not called by the Crown. The applicant's wife, Mrs Boland, was called by the Crown, and Dunn J ruled that she was compellable to give evidence. She accordingly gave evidence but claimed privilege as to matrimonial communications.

At the third trial again Eastwood was not called, but the Crown called Mrs Boland as a witness. She gave evidence against the applicant, including evidence voluntarily given of certain matrimonial communications. *[The Court then referred to the notice of application and certain amendments thereof and continued]:* ... We turn now to the grounds of appeal argued.

Ground 2 challenged the admissibility of conversations which the applicant was alleged to have had with, on the one hand, the witnesses Jack Kendall Bristowe and Louis Charles Barrot, and, on the other hand, with the witness Frank Simon O'Halloran. The conversations with Bristowe and Barrot took place in January or February 1972 at the premises of Boronia Fibrous Plaster Pty Ltd at Dorset Road, Ferntree Gully. The conversations with O'Halloran took place in Bendigo, at some date after Easter (2 April) 1972, probably in May 1972.

The witness Bristowe was the foreman at Boronia Fibrous Plaster Pty Ltd, during the period from about 18 or 19 January 1972 to about 15 February 1972 when the applicant and the witness Barrot were also employed there. Bristowe said that on one occasion—which could have been early in 1972, in January or February, during a morning tea break when Barrot and the applicant were talking in the mess room, there was some discussion—possibly prompted by something in the papers—as to how to make money to make things easier in life. He said that some suggestions were put forward and that the applicant said:

> "There's only one way to make money easily and quickly, [that] is to arrange a kidnapping of some important person such as the Prime Minister or other Government officers, hold them to ransom for one million dollars, make it a one operation, get the money and get out."

Bristowe said that the conversation up to that point was "more or less just tossing ideas about" but that when the applicant brought up the matter of kidnapping he was quite serious about it.

Bristowe said that the next time it was discussed was down in the cornice store, that Barrot and the applicant were working about seven to eight feet apart, and that he himself was working between them. He said that the applicant appeared to be doing all the talking, that the substance of the conversation was to put up a scheme to kidnap somebody to make money, that the applicant never at any time said how he was going to carry it out, but it was to be some important person, and the applicant seemed to be most serious about it.

The witness Barrot said that he remembered that the applicant started at the Boronia Fibrous Plaster Company after Christmas 1971. He said that he had conversations with the applicant about ways of making money, that the matter of kidnapping was mentioned only once and that was down in the cornice room. He said that Bristowe was present during part only of this conversation.

According to Barrot, the conversation in the cornice room turned to a discussion of what one would do if one had a large amount of money, and the applicant said: "Oh, there's an easy way of making money, to kidnap someone—kidnapping the Prime Minister or someone of high importance." Barrot said that he asked the applicant: "How would you do something like that and think you are going to get away with it?" The applicant "just said there would be an easy way of making money, kidnapping the Prime Minister or someone of high importance and getting away", that he (Barrot) then asked: "What would you want to do something like that when you've got a wife and four children?" to which the applicant replied: "To have an easy life." Barrot said that in answer to his question: "How much for?" the applicant said: "Oh, if I did do something, I'd probably do it for nothing under a million dollars." Barrot said that the applicant asked "Would you be interested?" but that he just laughed and said "Cut it out".

Barrot said that a couple of days later he said to the applicant: "What happens if you did do something like this and you get caught, now that you've told me?" to which the applicant replied: "I'll probably have to come and see you." To Barrot's next remark: "Oh yes, in what way?" the applicant replied "I'll probably come and have to shoot you", whereupon he (Barrot) said I'll be ready for you" and "just laughed".

The witness O'Halloran gave evidence that he had known the applicant for about 15 to 20 years, but became better acquainted with him when they were each following the occupation of sales representative though with different employers. He said that on an occasion after Easter 1972 when he was working in a car-yard at Bendigo operated by George R. Innes and Sons he had a conversation with the applicant, in the course of which it became apparent that each of them was earning less money then he had as a sales representative. According to O'Halloran, the applicant asked him: "Would you like to earn money?" O'Halloran replied: "Yes, for sure, what have you got in mind?" The applicant said: "It involves a large amount of money, more than you would ever get in a normal working life." O'Halloran asked: "How much?" The applicant would not tell him at first, but later said: "It involves a million dollars." O'Halloran said: "What is it, Clyde?" The applicant said "Kidnapping", to which O'Halloran replied: "Oh, yes, pull the other leg, Clyde" but the applicant said: "I'm serious. "O'Halloran said: "No, count me out, not interested" and the applicant then said: "You have not been used to a lot of money. With a million dollars involved you could live a good life, get out of the country, start a new life", to which O'Halloran replied: "No, still not interested, not that type of fellow." According to O'Halloran, the applicant said that it involved the Government, a number of people, a ransom, that it would be half for the applicant and half for O'Halloran, and that O'Halloran would have to live on his nerves for possibly two or three days. The applicant further said that if they were caught, they would be granted a government pardon. O'Halloran asked: "Why pick on me, Clyde?", to which the applicant replied: "I've known you throughout your rep. days, you're a good type of fellow, would be calm in a crisis, the right man for the job." O'Halloran said that he was still not interested. The applicant said: "Well, think it over" and said that he would ring O'Halloran later, and walked out of the car-yard.

About two or three days later, said O'Halloran, the applicant spoke to him at the car-yard of George Innes and Sons, and said to him: "Have you changed your mind?" and when O'Halloran replied: "I told you the first time I am not interested", the applicant said: "Okay, I will see a couple of guys in Melbourne."

Mr Beach intimated during argument that he did not contend that the learned trial Judge should not have admitted evidence of the conversations between the applicant and O'Halloran in which the applicant had sought to enlist O'Halloran's assistance in a kidnapping project. The admissibility of the conversation or conversations between the applicant and Bristowe and Barrot, and of the separate conversation between the applicant and Barrot must be considered against the background that the evidence of O'Halloran was admissible.

Mr Beach contended that the conversations with Bristowe and Barrot were merely idle chatter between workmen, not seriously intended. As to this, there was evidence from which it was open to the jury to conclude that although Bristowe and Barrot were joking, or at all events not talking seriously, the applicant was serious in expounding a scheme for making a million dollars by kidnapping. The admissibility of the evidence must therefore be tested on the basis that it was open to the Jury to conclude that the applicant's statements were seriously intended.

Mr Beach contended that the conversations were too remote in point of time from the actual kidnapping to have any relevance. But the interval of time which elapsed in this case cannot, in our view, provide, in itself, a bar to the admissibility of these conversations provided that some sufficient nexus can be found between the scheme then expounded and the kidnapping actually carried out tending to identify the applicant as the person involved in that crime.

There are, in our view, sufficiently strong similarities between the scheme outlined by the applicant in the conversations with Bristowe and Barrot and that actually carried out on 6 October 1972 to afford a basis for inferring that the man who outlined the nature of the kidnapping project in those conversations was one of the men involved in the kidnapping. Starting with the circumstances that kidnapping is a very special type of crime, and one rarely committed in this country, there is next the fact that the scheme outlined by the applicant envisaged a ransom of a million dollars, the very sum demanded in a ransom note left at the school by the kidnappers.

It was argued, however, that the difference between the victims proposed in the conversations and the victims actually kidnapped was so great to make it improper to infer any connexion between the man who outlined that scheme in early 1972 and the kidnapping actually effected on 6 October 1972. But when the scheme is analysed the distinction relied on is seen to be more apparent than real. The fact that a demand for such a large sum was contemplated by the applicant indicates that he had in mind a demand on some person or entity capable of making such a sum available and that the person to be kidnapped would be one for whom payment of such a sum as a ransom could be expected. According to Bristowe and Barrot, the applicant proposed that the person to be kidnapped should be the Prime Minister or some senior Government official, some person occupying a position or office of importance in the public eye. The persons actually kidnapped occupied no such position or office. They were, however, persons for whose safety a government, charged with the responsibility for primary education in this community, could be expected to be gravely concerned. The cardinal feature, in each case was that the victim or victims should be a person or persons of such importance in the eyes of the Government and the community that the kidnappers believed they could claim, with some prospect of success, the high price of one million dollars as ransom. We think therefore that what was proposed by the applicant in January or February 1972 had such marked similarity to the kidnapping committed on 6 October, that the evidence of the conversations with Bristowe and Barrot was admissible as tending to identify the applicant as a person involved in that crime.

Whether it would have been safe for the jury to have drawn this inference if there had been no other evidence than that of Bristowe, whose assistance in the project the applicant never sought, might perhaps have been open to some doubt. Barrot's evidence might be thought to carry greater weight than that of Bristowe, in that in Barrot's case there were the further features that the applicant sought to enlist his assistance and made what was capable of being regarded as a threat to shoot him if he disclosed this conversation to anyone. Nevertheless Bristowe's evidence gives support to the evidence of Barrot and the evidence of both gives support to—and is in turn supported by—the evidence of O'Halloran, which the applicant's counsel conceded to be relevant.

Subsequently to Barrot refusing to be involved, the applicant sought the assistance of O'Halloran, and when that was refused, the applicant stated that he would seek to enlist support from some men in Melbourne. Thereafter, in fact, the applicant in June 1972 commenced an association with Eastwood which continued into at least the beginning of October, and Eastwood was identified as one of the kidnappers. These circumstances made even stronger the case for the admissibility of the evidence of Bristowe and Barrot as relevant to the identification of the applicant as one of the kidnappers.

As an alternative to the argument that the conversations had no relevance, Mr Beach contended that if they had any probative value it was so slight in comparison with the prejudice which their admission in evidence would cause to the applicant that the learned trial Judge ought, in the exercise of his discretion, to have excluded them from evidence. This was an appeal to the principle that in a criminal trial "the trial judge always has an overriding duty in every case to secure a fair trial": see per Roskill J in *R v List* [1965] 3 All ER 710 at p712; (1966) 1 WLR 9. See also the remarks of Lord DuParcq in *Noor Mahomed v R* [1949] AC 182 at p192; [1949] 1 All ER 365 at p370; 65 TLR 134; 93 Sol Jo 180 and see also *Harris v DPP* [1952] AC 694 at p707; [1952] 1 All ER 1044 at p1048; 36 Cr App R 39; [1952] 1 TLR 1075; 116 JP 248 per Viscount Simon.

Evidence admitted as probative of an issue adverse to the interests of the accused person is, to that extent, necessarily prejudicial to him. The evidence in question being probative was necessarily prejudicial but we are quite unable to take the view that its prejudicial effect was out of proportion to its probative value. The learned trial Judge was therefore not in error in refusing to exclude the evidence.

Ground 3 was "That the learned trial Judge ought to have ruled that the spouse of the accused was not a compellable witness".

The learned trial Judge ruled that she was compellable and in consequence of such ruling, and only because of it, the applicant's wife, Mrs Lois Faye Boland, gave evidence for the prosecution.

This ruling was founded on the conclusion reached by the trial Judge that s400(3)(a) of the *Crimes Act* 1958, as amended by the *Crimes (Amendment) Act* 1973 (No. 8410), pursuant to which, for the first time, the wife of a man charged with the offence of kidnapping became compellable as a witness for the prosecution, applied notwithstanding that the marriage had taken place and the kidnapping had occurred before Act No. 8410 came into operation.

Mrs Boland married the applicant on 29 April 1959, and the kidnapping here in question occurred on 6 October 1972. On the face of it, the language of s400(3)(a), as so amended, is of general application and there is nothing in its language to exclude from its operation cases where the witness had married the accused or the kidnapping charged had occurred prior to 9 May 1973. But on behalf of the applicant Mr Beach submitted that upon the proper construction of s400(3), as amended by Act No. 8410, it did not apply where the marriage or the kidnapping had taken place before that Act came into force. The basis of this submission was that at the date of the marriage of Mrs Boland to the applicant and at the time of the kidnapping offence charged, Mrs Boland was not, under the law then in force, compellable to give evidence against her husband in respect of, *inter alia*, a charge of kidnapping, and that s400(3), as so amended, should not be construed as affecting her pre-existing legal position.

The canon of statutory construction relied upon by Mr Beach was thus expressed by Dixon J (as he then was), in *Kraljevich v Lake View and Star Ltd* [1945] HCA 29; (1945) 70 CLR 647 at p652; (1945) 19 ALJR 325:

> "The presumptive rule of construction is against reading a statute in such a way as to change accrued rights the title to which consists in transactions passed and closed or in facts or events that have already occurred. In other words, liabilities that are fixed, or rights that have been obtained, by the operation of the law upon facts or events for, or perhaps it should be said against, which the existing law provided are not to be disturbed by a general law governing future rights and liabilities unless [that] the law so intends appears with reasonable certainty."

This rule expresses no rigid or absolute rule but is "founded on the presumption of common sense that in a well ordered and civilised society the legislature would not intend what is unjust: see *Doro v Victorian Railways Commissioners* [1960] VicRp 12; [1960] VR 84 at p86.

The ultimate question here, of course, is what did the legislature intend—for the legislature is paramount. We are satisfied that there is no sufficient ground, by reason of this canon of statutory construction, for qualifying the general language of s400(3), as amended by Act No. 8410, so as to exclude from its operation the case of a wife who had married the accused or the case of a kidnapping which had occurred before Act No. 8410 came into operation. The rule of construction in question is one for the protection of what may, for relevant purposes be described as "vested rights", the deprivation of which would smack of injustice. The rights envisaged are "substantive rights" as distinct from what may be loosely described as "rights" of a merely procedural or evidentiary nature. The law does not recognize "vested rights" against subsequent changes in the general law affecting procedure or evidence: see per Mellish LJ in *Republic of Costa Rica v Erlanger* (1876) 3 Ch D 62 at p69. Hence the general statement that the canon of statutory construction against retrospectivity has no application to statutes merely of a procedural or evidentiary character. Thus the circumstance that at the time of her marriage to the applicant Mrs Boland had the privilege, denied to witnesses generally, of declining to give evidence against her husband on any kidnapping charge that might subsequently be levelled against him, and that on

6 October 1972, when the kidnapping took place, she had a similar privilege, did not confer upon her any such vested "right" against a subsequent change in the general law of evidence as would attract the canon of statutory construction against retrospectivity. This conclusion is confirmed when attention is paid to the basic reasoning for the rule of construction in question. Once the legislature had decided, as was evidenced by Act No. 8410, that a change in the general law was desirable to compel a wife in kidnapping cases to give evidence for the prosecution against her husband, what considerations of justice would warrant excluding from the scope of such legislation wives who had married before the legislation came into force or a kidnapping which had occurred before that time?

There is, we think, every reason for construing s400(3), as amended by Act No. 8410, according to the plain meaning of the language used—a construction which requires a court to treat a wife as a compellable witness for the prosecution in any kidnapping trial coming before the court after the Act came into force: see *Blyth v Blyth* [1965] P 411 at p425 per Willmer LJ and at p430 per Harman LJ; [1966] AC 643 at p656 per Lord Morris and at p675 per Lord Pearson; [1966] 1 All ER 524.

As an alternative submission, Mr Beach relied upon s7(2)(c) of the *Acts Interpretation Act* as preserving against the operation of Act No. 8410 the "right" or "privilege" to decline to give evidence against her husband in a kidnapping case which Mrs Boland had enjoyed both at the date of her marriage and at the date of the kidnapping. We do not consider that this provision of the *Acts Interpretation Act*, which adds little if anything to the common law canon of statutory construction, assists the applicant. For a "right" or "privilege" to be protected by s7(2) against subsequent legislation, it must be a "right" or "privilege" which has previously "accrued" or been "acquired". Even if such immunity as a wife had under the law existing prior to Act No. 8410 from being legally compellable to give evidence against her husband on a kidnapping charge amounted to a "right" or "privilege" within the meaning of the *Acts Interpretation Act* (as to which see *Clyne v McDonald* [1965] NSWR 161; *Boddington v Wisson* [1951] 1 KB 606; [1951] 1 All ER 166; *Mathieson v Burton* [1971] HCA 4; (1971) 124 CLR 1 at p13 per Windeyer J; [1971] ALR 533; *Yorkshire Dyeware and Chemical Co Ltd v Melbourne and Metropolitan Board of Works* [1968] VicRp 32; [1968] VR 277 at p282; (1967) 17 LGRA 36), we think it clear that in no sense had such "right" or "privilege" "accrued" or been "acquired" before Act No. 8410 came into force. For up to that time any such "right" or "privilege" as Mrs Boland had under the pre-existing law was no more than a "mere right...existing...in a class of the community to take advantage" of the law. Prior to 9 May 1973 there had been no "act done by her" towards availing herself of that "right" or "privilege". Accordingly, such "right" or "privilege" as she had under the pre-existing law was, at 9 May 1973, a "mere right" or "privilege" in the abstract which could not be regarded as a "right" or "privilege" which has "accrued" or been "acquired" within the meaning of the *Acts Interpretation Act*: see *Abbott v Minister for Lands* [1895] AC 425 at p431.

The learned trial Judge was therefore not in error in ruling that the applicant's wife was compellable to give evidence and, accordingly, ground 3 fails.

Grounds 4, 5 and 6 may conveniently be considered together, since they all raise the point that the learned trial Judge ought, at various stages of the evidence of the witness Lois Faye Boland, the wife of the applicant, to have discharged the jury without verdict. In ground 4 complaint is made of the failure to discharge the jury "after the witness Lois Faye Boland gave evidence of her state of mind at the second trial". Ground 5 deals with the position "after the witness Lois Faye Boland gave evidence of the fears she held of the accused" and ground 6 relates to the position after she had given evidence "of having seen the accused violent on previous occasions and of him possessing a predisposition of violence". It becomes necessary therefore to say something as to the evidence given by the applicant's wife at his second and third trials respectively. *[After referring to this matter, His Honour continued]* ... For these reasons we are of the view that the learned trial Judge did not exercise his discretion wrongly in refusing the application made to him on behalf of the applicant for the discharge of the jury in respect of the matters referred to in grounds 4, 5 and 6. These grounds therefore fail.

The next ground—ground 7—complains of the failure of the learned Judge to discharge the jury without a verdict after it became known that there had been some communications with a female juror by some person or persons unknown. *[After referring to this matter, His*

Honour continued] ... In the present case the learned trial Judge was of opinion that he should not discharge the jury. We can see nothing in the circumstances of this case and nothing in the statement of his reasons which would warrant us in concluding that his Honour had wrongly exercised his discretion or that his refusal to discharge the jury was wrong in law. In particular we are of opinion that his Honour was not in error in taking into account the length of the trial. Ground 7 therefore fails.

Ground 8 claims that the learned trial Judge at the end of the Crown case ought to have ruled that there was no evidence to support any offence under s63A of the *Crimes Act* 1958 and directed the jury to acquit the accused on all seven counts.

S63A, inserted into the *Crimes Act* in 1960 by Act No. 6731, provides:

> "Whosoever leads takes entices away or detains any person with intent to demand from that person or any other person any payment by way of ransom for the return or release of that person or with intent to gain for himself or any other person any advantage (however arising) from the detention of that person shall, whether or not any demand or threat is in fact made, be guilty of felony and liable to be imprisoned for a term of not more than 20 years."

Each count in the presentment charged the applicant with having taken away (the particular person referred to in that count) "with intent to demand from Her Majesty's Minister of Education of the said State one Lindsay Hamilton Simpson Thompson or from some other person or persons payment of the sum of $1,000,000 by way of ransom for the return or release of the said (person taken away)".

The argument here was that the evidence disclosed an intent to demand from the State of Victoria and not from Mr Lindsay Thompson, either personally or in any other capacity,or any other person, and that the State of Victoria was not a person within the meaning of s63A.

The learned trial Judge directed the jury in the following terms:

> "It is not necessary to prove that Thompson was to pay the money out of his own pocket. It would be sufficient if the intent was to demand the money from Thompson, wherever he was to get the money from. And it would be sufficient to prove an intent to demand a payment from some other person, because it is alleged 'with intent to demand from Mr Thompson or from some other person or persons'. It would be sufficient to prove an intent to demand a payment from some other person or persons than Thompson, and that other person could be constituted by the Government of Victoria, that is the individuals constituting that Government, whether or not the actual money was to come from their pockets or from elsewhere."

In our opinion that direction was plainly correct and as there was evidence on which the jury could have found that the intent was to demand money from either Mr Thompson or from the Ministers of the Cabinet, his Honour could not have ruled that there was no evidence to support any offence under s63A of the Crimes Act. Equally so, having regard to that evidence, he could not properly have directed the jury to acquit. In either case it is nothing to the point that the ransom moneys would be paid or that the kidnappers contemplated they would be paid out of public funds.

It is not necessary, accordingly, to consider whether the State of Victoria is a person within the meaning of s63A. Ground 8 therefore fails.

We pass now to ground 9 which may conveniently be dealt with along with ground 10. Those grounds are as follows:

> "9. That the learned trial Judge ought not to have permitted the accused to be cross-examined as to whether he had been implicated by Edwin John Eastwood in statements alleged to have been made by the said Eastwood to the Police."

> "10. That the learned trial Judge ought not to have permitted the accused to be cross-examined about statements alleged to have been made by Edwin John Eastwood to the Police."

As to these grounds it is necessary to remember that the applicant's wife had, in re-

examination, given evidence that during the committal proceedings she had asked the applicant who the person was sitting on his left and that the applicant had replied: "That's Ted Eastwood. He will be lucky to get to trial for dobbing me in." The applicant in his evidence denied that he had ever made that statement to his wife. There was thus a direct conflict between the evidence of the applicant and his wife on the matter. It was therefore permissible for counsel for the prosecution to test, in cross-examination, the applicant's denial that he had ever made the statement alleged by his wife. One way of testing it was to ask whether he had ever believed that Eastwood had implicated him or "dobbed him in". The applicant, in cross-examination, said he did not believe that Eastwood had "dobbed him in" and that he had never believed it. Later in his cross-examination he said that he believed Eastwood had made a "bodgie" statement to the police implicating him, that he believed that Eastwood had been forced to sign it, that it had been put before Eastwood with the applicant's name already in it, that he was sympathetic with Eastwood having signed that statement, and did not hold it against him. It seems to us that in the circumstances arising from the applicant's denial of his wife's evidence as to his statement to her during the committal proceedings, it was permissible for counsel for the prosecution to cross-examine him as to whether he had ever believed that Eastwood had "dobbed him in" and when he initially denied ever having had any such belief, it was permissible to test that denial by asking him whether he had, at the committal proceedings, heard Eastwood's record of interview read aloud in court.

Clearly in the absence of those circumstances the question whether Eastwood had implicated him with the police would have possessed no relevance at all. But in this case cross-examination on that matter was relevant both to the issue and to the credit of the applicant.

As drafted, ground 10 would appear to complain that the applicant had been cross-examined about statements alleged to have been made by Eastwood to the police, but it appeared from the argument submitted by Mr Beach that what was really complained about was that the applicant had been asked, in cross-examination, a number of questions as to whether Eastwood had said certain things to him or he had said certain things to Eastwood. The matters put to him being relevant to the fact in issue, no complaint could be or was made about the applicant having been cross-examined on these topics. What was, however, complained of was that the cross-examination must have conveyed to the jury the fact that Eastwood had told the police about the various conversations which were being put to the applicant in cross-examination. On an examination of the transcript the complaint is not borne out. There is no substance in this complaint, and any impropriety on the part of cross-examining counsel was expressly disclaimed.

Mr Beach coupled with grounds 9 and 10 a further ground No. 12, which complained that the learned trial Judge ought not to have permitted the accused to be cross-examined as to statements alleged to have been made to a person named George Waugh. Waugh was a person whom the applicant had met in the remand yard at Pentridge at some stage prior to the commencement of his second trial. Mr Beach complained that it was unfair for the Crown to put to the applicant, in cross-examination, statements which he was alleged to have made to Eastwood, on the one hand, and to Waugh, on the other, when the Crown was not prepared to call either of them to give evidence concerning these matters even though they were available to be called. The responsibility of counsel for the prosecution in relation to the calling of witnesses has been discussed in this Court on at least two occasions in recent years, namely in the cases of *R v Evans* [1964] VicRp 92; [1964] VR 717, and *R v Lucas* [1973] VicRp 68; [1973] VR 693, and was also discussed by Gowans J during the first trial of *Eastwood and Boland* (see [1973] VicRp 69; [1973] VR 709 at pp711-4). The fact that counsel, in the exercise of a proper judgment, decided not to call Eastwood or Waugh could not preclude him from seeking to elicit from the applicant admissions as to matters relevant to the issue, notwithstanding that counsel might have derived information as to those matters from those persons. The matters which counsel put in cross-examination were relevant both to the issues and to the credit of the applicant.

Other matters raised in connexion with ground 12 may conveniently be dealt with in association with grounds 14,15 and 16 which all relate to the same George Waugh, and which are as follows:—

> "14. That the learned trial Judge ought not to have admitted in evidence a letter written by the accused to a person George Waugh.
>
> "15. That the learned trial Judge ought not to have permitted the witness Reuben Boland to be cross-

examined as to his association with the person George Waugh.

"16. That the learned trial Judge ought not to have admitted in evidence correspondence between Ivy Boland and the person George Waugh."

Mr Beach complained that the cross-examination concerning the applicant's association with Waugh and as to a letter which he had written to Waugh was designed merely to discredit the applicant in the eyes of the jury by showing that he had associated with a person of criminal tendencies. Indeed he made this same complaint about the cross-examination relating to the man Peter John Lawless referred to in ground 13.

Obviously a person in custody in the remand yard will be thrown into contact with and into the company of people some of whom are professional criminals or people of very bad character. No inference adverse to the credit of a witness can be drawn from the circumstance that while he is in custody, not free to leave the remand yard, he becomes acquainted with persons in the same situation, even though they may be subsequently convicted of a serious crime, as was Lawless, who was later convicted of murder. Cross-examination as to such an association would therefore ordinarily be impermissible.

In the case of Waugh, however, it is apparent from the cross-examination that the Crown had instructions from Waugh as to conversations between him and the applicant which provided a basis for questioning him as to fears he entertained and expressed about being identified as one of the kidnappers. It was permissible, accordingly, to cross-examine him as to his association with Waugh and as to any conversation between them on such matters, going as it did to the issue. But the cross-examination went further and elicited that Boland senior had at the applicant's request sent Waugh $40 to come to Bendigo, that the applicant had written in code form a letter to Waugh containing a passage "Don't forget I want to see you", that he knew his parents were in communication with Waugh and that Waugh on one day during the second trial was present at the Court. The letter written by the applicant and letters, partly in code, written by his mother to Waugh were in the hands of the Crown and Mr Lennon informed us that Waugh was an important source of instructions providing a basis for cross-examination of both the applicant and his parents. The letters written by Mrs Boland senior were written at the request of her husband and they made it very clear that the applicant's parents had some particular concern in having Waugh present at the Court on an occasion during the second trial. There was ample ground in this material for the Crown to think that the presence of Waugh was desired for some improper purpose in connexion with that trial and the Crown was warranted in probing it in cross-examination. It was relevant in part to the credibility of the applicant and in part to the credibility of his parents who corroborated the alibi evidence of the applicant as to 30 September and 6 October. The letters had been used and the contents thereof put to the witnesses in cross-examination. It may have been unnecessary to tender the documents but we think there was no error on the part of learned trial Judge in receiving them in evidence.

Grounds 12,14,15 and 16 therefore fail.

We pass now to ground 13 which complains that the learned trial Judge should not have permitted cross-examination of the applicant as to his association after his arrest with a person Peter John Lawless.

As to this, it appears that the cross-examiner was attempting to show that the applicant had, whilst in custody in the remand yard, consulted Lawless, who was likewise awaiting trial, concerning the preparation of the applicant's defence. The cross-examiner put to the applicant--and the applicant accepted the suggestion—that Lawless had some reputation at Pentridge as a man with some knowledge of the law. The applicant did not accept the suggestion that he had sought Lawless' assistance in devising a defence, and this part of the cross-examination got nowhere.

Mr Beach also complained of the fact that in the course of cross-examining the applicant as to the letter which he had written to Waugh and which contained an allusion to Lawless under the nickname "Pear" the cross-examiner had elicited from the applicant the fact that Lawless had been convicted of murder. Mr Beach complained that this was a matter prejudicial to the applicant in the mind of the jury. Mr Lennon conceded that it might have been sufficient if he

had merely elicited the fact that the allusion in the letter meant that Lawless had been convicted, without going on to elicit that he had been convicted of murder. But even if it were unnecessary or undesirable to bring before the jury the fact that Lawless had been convicted of murder, we do not think that a reasonable jury could have used this circumstance against the applicant, having regard to the fact that whilst in Pentridge the applicant was substantially not free to choose his associates. We do not think that this cross-examination gave rise to any miscarriage of justice. We are therefore of the view that ground 13 fails.

The next ground argued—ground 25—was "That the learned trial Judge ought to have directed the jury to disregard all the evidence at the trial of an identification parade held at Russell Street Police Headquarters on Tuesday, 10 October 1972".

The evidence of the identification parade played an important part in the trial. The question of the admissibility of this evidence was first raised early in the trial when the witness Vincent was giving evidence. Mr Francis stated that he was "formally objecting to all the evidence of this lineup" on the grounds that it was illegally obtained and also unfairly obtained. But at the same time he intimated that he had no objection to the evidence being led in the presence of the jury provided that the learned trial Judge indicated to the jury that he would at a later stage give them directions as to the use they could make of the evidence. Mr Lennon for the Crown intimated that he had no objection to that course. In the first instance the trial Judge indicated that he thought that the proper procedure was to take the evidence on a *voir dire*, but after being told that a *voir dire* might take two weeks, he finally acceded to the proposal that he take the evidence as to the identification parade in the presence of the jury. The trial Judge told the jury that in due course he would direct them about the use they could make of that evidence.

Thereafter the evidence as to the identification parade both from the Crown witnesses and the applicant was led in the presence of the jury. This evidence occupied many days. At the conclusion of all the evidence at the trial, Mr Francis submitted that the jury should be directed to disregard the evidence relating to the identification parade on two grounds--

(1) that it had been illegally obtained;

(2) that the learned trial Judge should in the exercise of his discretion exclude it on the basis of unfairness.

Discussions with counsel then took place on the questions whether the identification parade had been illegally held because of the absence of consent on the part of the applicant and whether evidence illegally obtained was necessarily inadmissible and further whether in any case the Judge in the exercise of his discretion should not withdraw the evidence in question from the jury on the grounds of unfairness. The learned Judge decided, without reaching a final decision on the illegality or otherwise of the identification parade, that his proper course was to leave the evidence to the jury for their consideration with an appropriate warning against the dangers inherent in identification evidence.

Ground 25 complains that the Judge erred in not directing the jury to disregard this evidence. This ground, literally construed, could be established only if—

(a) the identification parade was illegally held and that circumstance rendered the evidence legally inadmissible, or alternatively

(b) the trial Judge, notwithstanding his discretion to admit or reject such evidence, taking into account illegality and unfairness could only, in the proper exercise of such discretion, have rejected the evidence.

Counsel for the applicant submitted that ground 25 was wide enough to entitle him to attack the trial Judge's decision to leave the evidence for the consideration of the jury not merely on the ground (a) that the decision itself was one which it was not open to him to make, but also on the ground (b) that whether or not this decision was open to him in the exercise of his discretion, the exercise of his discretion had miscarried in that he had not, as required by law, taken into account one of the relevant considerations, namely the illegality of the identification parade.

In the course of argument we intimated to the applicant's counsel that we did not consider that ground 25 was wide enough to entitle him to argue ground (b) as distinct from ground (a). Thereupon counsel for the applicant sought leave to amend the grounds of appeal by adding a further ground No. 35 so as to raise the latter contention. Upon consideration we announced on 24 April our decision to refuse such leave.

In our opinion ground 25 fails for the reasons that—

(a) even if the evidence from the identification parade was obtained illegally that in itself did not render such evidence inadmissible (see *Kuruma v R* [1955] AC 197; [1955] 1 All ER 236; *R* v *Matthews and Ford* [1972] VicRp 1; [1972] VR 3 at p13);

(b) it was in our opinion clearly open to the Judge in the exercise of his discretion to have allowed the jury to take into consideration as evidence at the trial this evidence which at the suggestion of applicant's counsel was heard not on a voir dire but in the presence of the jury.

Indeed not only do we see no legal objection to the Judge taking the course that he did, but we are satisfied that in all the circumstances of the trial he took the only course properly open to him, whether or not the identification parade should be considered to have been illegally held. In the circumstances and after the jury had heard all this evidence—in great detail—from the witnesses Miss Gibbs, Ferris and Vincent, as well as from the police witnesses, to have excluded such evidence from their consideration would have made a mockery of the trial.

Indeed we did not understand applicant's counsel to have seriously contended that upon our reading of ground 25 as expressed in the notice of appeal it could succeed.

We pass now to deal with grounds 29 to 32 which challenge the admissibility of conversations between O'Halloran and his wife (grounds 29 and 30), of conversations between O'Halloran and one Bolding (ground 31) and finally of a conversation between O'Halloran and one Beck, a solicitor practising in Bendigo (ground 32).

We have earlier, in dealing with ground 2, set out the substance of O'Halloran's evidence as to conversations he had with the applicant at Bendigo at various dates between Easter and June 1972.

In cross-examination O'Halloran's evidence as to the conversations with the applicant in the car-yard at Bendigo at some time after Easter 1972 was attacked as being a concoction. It was elicited by the cross-examiner that although O'Halloran had been aware of the kidnapping and of the police appeals for information which might serve to identify the kidnappers, he did not volunteer any information to the police before the applicant was arrested, that although subsequently aware that the applicant had been arrested and charged he (O'Halloran) did not then communicate his information to the police, that he did not offer this information to the police to enable them to use it at the committal proceedings or at the first trial, and that though aware that a further trial was to be held, he did not even then come forward with this information to the police. Furthermore, he at no stage volunteered the information to the police, but communicated it to them only when members of the police force called on him at his house a few days before he was called as a witness at the third trial.

In explanation of his failure to inform the police of his conversations with the applicant, O'Halloran advanced various reasons which, he claimed, had actuated him. He said that he did not want to become involved, that he had been advised that his child had a "hole in the heart" and needed an operation to repair this defect, that he and his wife had recently opened a shop in partnership with another married couple, and that he feared that this business might suffer if it became known that he had, in the past, been an associate of the applicant. He said further that he had believed that the evidence led at the first trial would be sufficient to result in the applicant being convicted.

These reasons might or might not have been accepted by the jury as a sufficient explanation of O'Halloran's failure to disclose information as to the conversations he had had with the applicant between Easter and June 1972. Nevertheless the Crown might well have been doubtful as to the jury's reaction. Accordingly, to buttress or to restore O'Halloran's credibility, the Crown sought

leave to elicit from O'Halloran, in re-examination, the substance of conversations he had had with his wife shortly after his conversations with the applicant, and of conversations which he had, shortly after the applicant's arrest, with Bolding and with Beck respectively.

The learned trial Judge, rejecting Mr Francis' contentions, ruled that the cross-examination involved an imputation that O'Halloran's evidence had been recently fabricated and accordingly permitted the Crown, by way of rebuttal of such imputation, to elicit evidence from O'Halloran, in re-examination, as to these various conversations and subsequently to call Mrs O'Halloran, Bolding and Beck to testify as to their conversations with O'Halloran.

Accordingly, O'Halloran then gave evidence that at his home one evening, after a telephone call—presumably from the applicant—which he had refused to take, he told his wife that he did not want to speak to the applicant, and told her further that he had been approached by the applicant at Innes' Car Yard, the previous week, to take part in a kidnapping, that it involved a ransom of $1 million being asked from the Government, and possibly they would have to live on their nerves for two or three days. Mrs O'Halloran was later called and gave evidence of a conversation with her husband the substance of which was that, following an incident of a telephone call at their home one night, he told her that the applicant had approached him, about a week previously, about doing something which would involve one million dollars, which would greatly embarrass the Government, as it has never been done in Australia before, that it would have involved leaving the country, but that they would get a free pardon because the crime would embarrass the Government, and that her husband had told the applicant not to tell him any more because he (O'Halloran) was not interested.

Ground 31 relates to evidence, which was given both by O'Halloran and Bolding as to the terms of a conversation which they said took place at the Clayton Service Station on the Monday following the kidnapping. According to O'Halloran, he said to Bolding: "I have a good idea who carried this out", and when Bolding replied, "Who was it?", O'Halloran said: "Boland." O'Halloran further said that in response to some indication of disbelief on Bolding's part, he then told Bolding how the applicant had approached him to take part in a kidnapping for which there would be one million dollars ransom, which would involve the State Government, and that they would have to live on their nerves for two or three days, and that there would be a pardon by the State Government. Bolding gave evidence to the same effect.

Ground 32 relates to evidence of a conversation between O'Halloran and Beck. O'Halloran said he consulted Beck about a week after the applicant had been arrested and asked Beck what he should do as to giving information as to the conversation which he had had with the applicant some six months previously. O'Halloran said that in the course of this consultation, he told Beck that he had been approached by the applicant to take part in a kidnapping, that the applicant had said there was a one-million dollar ransom involved, that they would have a pardon from the State Government, and that they would have to live on their nerves for three to four days. According to O'Halloran, Beck told him that the decision was his and it was for him to do what he wanted to do.

Beck gave evidence confirming the substance of O'Halloran's evidence as to this conversation.

The ruling given by the learned trial Judge was attacked on the basis that the evidence in question merely served to confirm the evidence of O'Halloran as to his conversation with the applicant and that according to a well-established principle evidence of such a character is inadmissible: see per Menzies, in *Nominal Defendant v Clements* [1960] HCA 39; (1960) 104 CLR 476 at p485; [1960] ALR 701, where his Honour said:

> "It is now firmly established that an earlier statement is not admissible merely as confirmation of the evidence given by the witness; furthermore, if there be nothing more than that the evidence of a witness has been attacked in the course of cross-examination, that does not in itself render admissible earlier statements by the witness consonant with his evidence."

The principle is, however, subject to an exception where the witness is cross-examined on lines calculated to show that his evidence has been fabricated at some point of time subsequent to the event or matter to which it relates. In such a case the law allows evidence to be given of

earlier out-of-court statements by the witness consistent with his testimony if made by him in such circumstances that evidence thereof "rationally tends to answer the attack" of fabrication—to use the phrase of Dixon CJ in the oft-quoted passage from his judgment in *Nominal Defendant v Clements* [1960] HCA 39; (1960) 104 CLR 476 at p479; [1960] ALR 701; 34 ALJR 95. In that passage Dixon CJ set out the nature and scope of the general rule and the exception, commonly called the "recent invention" exception, in the following terms:

> "If the credit of a witness is impugned as to some material fact to which he deposes on the ground that his account is a late invention or has been lately devised or re-constructed, even though not with conscious dishonesty, that makes admissible a statement to the same effect as the account he gave as a witness if it was made by the witness contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account is a late invention or re-construction. But in as much as the rule forms a definite exception to the general principle excluding statements made out-of-court and admits a possibly self-serving statement made by the witness, great care is called for in applying it."

The view has been expressed that this exception "depends upon the principle which is applied every day in practice, that a witness has a right to explain a matter relied on in cross-examination for the purpose of discrediting him, provided that it is really capable of explanation": per Holmes, J in *R v Coll* (1889) 24 LR Ir 522 at p541. See also *Flanagan v Fahy* (1918) 2 Ir R 361 at p389 per Ronan LJ and *Wojcic v Incorporated Nominal Defendant* [1969] VicRp 40; [1969] VR 323 at p326.

It was said, however, that all that was suggested by the cross-examination in the present case was "invention" as distinct form "recent invention", and that this did not let in the evidence now under consideration. The basis on which O'Halloran's evidence was attacked as an "invention" was that he had not until about the time of the third trial told the police of his conversations with the applicant although there had been various occasions prior thereto when it would have been natural for him to have done so if such conversations had in fact taken place. The Crown said that the imputation made in the cross-examination was, accordingly, that O'Halloran had invented the alleged conversations at some point of time subsequent to the kidnapping. As is stated in *Wigmore on Evidence* (3rd ed.), vol IV, s1129, the charge of recent invention is often made "not so much by affirmative evidence as by negative evidence that the witness did not speak before, at a time when it would have been natural to speak". In such a case, to admit evidence of earlier out-of-court statements by the witness consistent with his testimony "rationally tends to answer the attack", for as Wigmore remarks (op. cit.):

> "The effect of the evidence of consistent statements is that the supposed fact of not speaking--from which we are to infer a recent contrivance of the story—is disposed of by denying it to be a fact, inasmuch as the witness did speak and tell the same story."

In the present case the attack on O'Halloran's evidence was directed to "the supposed fact of not speaking", i.e. his failure or omission to have told his story to the police immediately after the kidnapping when (to his belief) they were seeking information which would enable them to discover the identity of and arrest the kidnappers, and to similar failures or omissions to disclose his information to the police before the committal proceedings, the first trial and the second trial respectively.

The learned trial Judge—to whose opinion great weight must be given by an appellate court—see *Nominal Defendant v Clements*, *supra*, at (CLR) pp479-80 per Dixon CJ and p495 per Windeyer J—concluded that this cross-examination imputed or laid the foundation for imputing an "invention" by O'Halloran at some time subsequent to the kidnapping and at some stage prior to his being called as a witness at the third trial. We think that at least this conclusion was open to the learned trial Judge. He had heard counsel's questions and the tone of voice in which they were uttered and he was in a better position than an appellate court to decide what suggestion they conveyed.

The conclusion he reached accordingly justified him in permitting in rebuttal of such imputation evidence of statements by O'Halloran to the like effect as his account in the witness-box and made by him "contemporaneously with the event or at a time sufficiently early to be inconsistent with the suggestion that his account was a late invention": see per Dixon CJ in *Nominal Defendant v Clements*, *supra*, at (CLR) p479.

The requirement in the passage last cited is clearly satisfied, and the evidence given of the statements made by O'Halloran was such as rationally tended to answer the imputation of recent invention.

As already indicated, we would not be entitled, as an appellate court, to interfere with the ruling of the trial Judge in this matter unless we considered it was not reasonably open to him to conclude that the relevant imputation was involved in the cross-examination. We are not of that view: on the contrary, we think that the conclusion he reached was clearly open to him and one to which we would ourselves have been disposed to come. Consequently we find no error on the part of the learned trial Judge in admitting the evidence the subject of grounds 29 to 32, and these grounds, accordingly, fail.

Ground 34 complains of the failure of the learned trial Judge to discharge the jury without verdict after a juror named Butler had communicated with the trial Judge concerning an article in the *Readers' Digest* issue of August 1972, as to which the juror desired certain questions to be put to certain of the witnesses.

It appears that on 7 November the juror wrote a letter addressed to the learned trial Judge in which he drew to the Judge's attention an article in the *Readers' Digest* of August 1972 entitled "Canada's Trial by Terror", describing the kidnapping by members of the Quebec Separatist Movement, the F.L.Q., of the British Trade Commissioner to Canada, Mr Cross, and of Pierre LaPorte the Quebec Minister for Labour and Immigration. The juror said in his letter to the Judge that he had been struck by some similarities between the kidnapping in that case and the kidnapping in the present case, and he submitted a list of questions which he would like to have asked. He brought his letter and his set of questions, together with a copy of the *Readers' Digest*, into court, and all were brought to the attention of the Judge.

The documents were made available to counsel and with their assent his Honour read to the jury the letter and the questions. One of those questions related to some evidence given by Miss Gibbs as to a conversation with the applicant on 6 October in which reference had been made to the Ustashi having a training camp on the River Murray. After discussion between the learned trial Judge and counsel, the question was put in an amended form to a police officer, one Baker, which elicited a reply to the effect that he knew of no evidence connecting the Ustashi with the crime. The jury, on being asked by his Honour whether the evidence so given sufficiently dealt with the matters so far as the question proposed, requested a break to discuss the point. The envelope containing the documents was then handed to the jury and on their return to court, some further discussion took place which we think is of no present materiality. There the matter rested until 26 November when, in the course of Mr Francis opening his case to the jury, the topic was again raised by the same juror in a letter addressed to his Honour, accompanied by the Readers' Digest and questions which he suggested should be put to the applicant. The questions related first to the fact that the man who had purchased the Kombi van had given his surname to the vendor as Cobb and that an advertisement in the *Readers' Digest* referred to "Cobb and Co" and secondly to whether Mrs Buchanan spelt her christian name in the same way as a woman referred to in the article as "Suzanne Longteau".

The learned trial Judge, in the absence of the jury, read and made available to counsel the letter and the questions and later with their concurrence disclosed the communication in full to the jury. Having done so his Honour said:

> "I will, I think, let you see these documents and this book which you probably have not seen before. Have you seen the book, the article? No, I think not. But I want to say this, of course, that you must try this case and decide this case on the evidence that is given in this Court. You have been listening now for some eight weeks, I fear, to the Crown case. We are about to hear the evidence for the accused. I am sure that you will pay the same attention and give the same careful consideration to that as you gave to the — as you have given to the case for the Crown.
>
> "I would think, unless counsel have any objection, I think the appropriate thing to do is to let the jury see these things and they can look at them at some moment in their spare time. It might be convenient to hand it to you, Mr Foreman, at the break if we have one this afternoon and you can look through them, glance through them then. I do not think that I should do anything further about them. Very well then, the matter is now disposed of."

As appears from the transcript, Mr Francis then resumed his opening address to the jury. The learned trial Judge was faced with the difficulty that the juror had obviously fastened onto certain similarities between the kidnapping with which the applicant was charged and the Canadian kidnapping described in the *Readers' Digest* article. That article could have no relevance unless it were shown that the applicant had read the article and read it prior to the kidnapping. The Crown case contained no such evidence and indeed, when Mr Lennon later put the question to the applicant in cross-examination the applicant said that he had read the article only recently.

The learned trial Judge was placed in somewhat of a dilemma. If he impounded the copy of *Readers' Digest* and did not show it to the rest of the jurors, it was quite likely that the other jurors might nevertheless ascertain the substance thereof from Butler. The only practicable alternative was to ventilate the matter openly before the jury. The learned trial Judge took the view that it was not proper for him to receive any communication from any juror except in the presence of the whole jury, and he seems to have considered that he was obliged to disclose this article in the *Readers' Digest* to the jury. We do not think he was so obliged, but the question is whether the course which he took presents such a departure from the accepted course of legal proceedings as to constitute a miscarriage of justice.

It is of importance, in that connexion, that the course taken by the learned trial Judge was one which he adopted after debate and with the full concurrence of counsel, and that counsel for the accused at the trial did not make an application for the discharge of the jury. Considerations of that character are of course not conclusive—*vide Stirland v Director of Public Prosecutions* [1944] AC 315 at pp327-8; [1944] 2 All ER 13; (1944) 30 Cr App R 40—but at least they provide material bearing significantly on the question whether the accused was really prejudiced by the course adopted. Mr Beach contended that the trial Judge should have of his own motion discharged the jury. It would require a particularly strong case to persuade an appellate court that a judge should, having the concurrence of counsel in the course he took, none the less turn about face and, uninvited, discharge the jury. We think this case certainly did not provide an occasion for the Judge to do so. In our opinion he very properly continued with the trial after giving the jury the warning we have already quoted.

Two other aspects of the matter may be mentioned. The first is whether the incident showed that the juror Butler at that stage had prejudged the issue of the accused's guilt: cf. *R v Giles* [1959] VicRp 76; [1959] VR 583; [1959] ALR 1127. We do not think that any such inference can be drawn and we would refer to what was said by the Full Court in *R v Matthews and Ford* [1973] VicRp 18; [1973] VR 199 at pp205-7. The questions as framed did not indicate that the juror Butler had made up his mind to convict the applicant irrespective of evidence still to be given and they were quite consistent with the maintenance of a fair mind to decide the issue.

The other aspect is this. Whilst it is permissible for jurors to formulate questions on matters which they wish to have clarified, it is important that a juror should not forget that he is a juror and that he should not become an inquisitor nor assume the role of counsel. We do not think, however, that the questions framed by the juror Butler were so numerous or of such a character as to be inconsistent with his true function as a juror.

For all these reasons we think that ground 34 fails. All grounds of appeal having failed, the consequence is that the application for leave to appeal must be dismissed. Appeal dismissed.

Solicitor for the applicant: George Madden, Public Solicitor.
Solicitor for the Crown: John Downey, Crown Solicitor.
