LAW REPORT.

("New Zealand Law Reports," 1916, page 265.)

[COURT OF APPEAL—(STOUT, C.J., DENNISTON, EDWARDS, COOPER, CHAPMAN, SIM, STRINGER, JJ.)—27TH AND 28TH SEPTEMBER AND 19TH NOVEMBER, 1915.]

REX *v.* ROGAN.

Criminal Law—Evidence—Indecent Assault—Indictment containing Three Counts for Offences against Three Persons—Severance refused—Whether Evidence on each Count admissible on all—Evidence of other Similar Offences—System—Admissibility.

Prisoner was indicted upon three counts in one indictment, the first count being for an indecent assault on a boy G., the second for an indecent assault on a boy R., and the third for an indecent assault on a boy M. The prisoner's relation to each boy was that of master to pupil. The assaults were charged as respectively occurring on or about the 26th December, 1914, the 12th February, 1915, and the 10th March, 1915. The first two, according to the evidence, took place in the prisoner's room in the industrial school in which he was an attendant and the boys were inmates, and the third in the boys' dormitory at the same school. Evidence was given by G. and R. of other alleged indecent assaults by prisoner on them, both in the prisoner's room and in the dormitory, and by G., R., and M. that prisoner made them commit an indecent act on him after practically each assault. Evidence was also given by three other boys, H., B., and J., who were called to speak of similar offences committed by prisoner against them, in respect of which offences no prosecution was instituted. The only direct evidence, both of each assault charged and of the presence of each boy in the prisoner's room upon the alleged occasion, was that of the boy alleged to be assaulted; and it was admitted by the Crown in the Court of Appeal that, apart from the evidence objected to, there was not sufficient evidence upon which a jury could safely have convicted the prisoner. The offences to which the witnesses spoke were similar in detail to one or other of the two classes of offence committed against G. The evidence was that in practically every case in his room the prisoner had offered the boys sweets to come there, and that in the dormitory he gave or offered them sweets after the assault. Except in R.'s case the whole of the alleged acts of the prisoner, both as to the boys named in the indictment and the other boys, occurred in or about the period the 26th December, 1914, to the 15th March, 1915; but the acts given in evidence by R. were said to have begun more than two years previously.

Counsel for the prisoner applied before trial to have the counts in the indictment severed; and on the hearing of this application he stated that the defence was an absolute denial of the presence of the boys in the prisoner's room except in the two instances mentioned by J., as to which an explanation of innocent medical treatment was offered, and an absolute denial of the alleged acts at the boys' beds.

(There was a difference of judicial opinion as to whether this defence had been varied by setting up the defence of innocence association before the Magistrate and by the cross-examination at the trial. Chapman, J., who presided at the trial, considered it had not, but Stout, C.J., considered it had.)

The Judge refused to sever the counts in the indictment, and admitted the evidence of the conduct of the accused towards the six boys mentioned. The prisoner was convicted on the first count and acquitted on the other two.

Held, per *Curiam* (Denniston, Sim, and Stringer, JJ., dissenting), That the evidence of the five other boys was admissible, and the conviction should be upheld.

Rule in Makin *v.* Attorney-General of New South Wales ([1894] A.C. 57, 65) fully discussed.

Per Denniston, Cooper, Sim, and Stringer, JJ. (Chapman, J., dissenting).—The ruling in Makin *v.* Attorney-General of New South Wales ([1894] A.C. 57, 65), that evidence of other crimes than those covered by the indictment is admissible "to rebut a defence which would otherwise be open to the accused," must be held to be subject to the qualification that there is a reasonable probability that the defence will be set up.

Judgments of Darling and Bray, JJ., in Rex *v.* Bond ([1906] 2 K.B. 389, 409, 417), and of Williams and Cooper, JJ. (Edwards, J., concurring with the latter), in Rex *v.* O'Shaughnessy (31 N.Z. L.R. 928, 937, 943; 14 G.L.R. 640, 644, 647), approved.

Per Stout, C.J.—1. In cases of this character, if there are more charges than one against a prisoner, and if the charges are in date close to one another, and especially if they are against a person who stands in close relation to the person assaulted, it cannot be said there should be a separate trial on each count.

Reg. *v.* Davies (5 Cox C.C. 328) and Castro *v.* The Queen (6 A.C. 229; 14 Cox C.C. 546) followed.

2. As the refusal to sever the counts was warranted, the evidence of the three boys mentioned in the indictment was admissible.

3. The evidence of the other three boys would have been inadmissible if there had been an inevitable inference that, on proof of the boy G. being in the room, he was there for an unlawful purpose; but as that inference was not inevitable, the evidence was admissible to prove system.

4. It was also admissible to rebut the defence of innocent association, which was left open to the prisoner inasmuch as the defence was a general plea of "Not guilty."

Rex *v.* Bond ([1906] 2 K.B. 389), Rex *v* Ball ([1911] A.C. 47), Reg. *v.* Ollis ([1900] 2 Q.B. 758; 19 Cox C.C. 554), and Rex *v.* Shellaker ([1914] 1 K.B. 414) followed on points 2 to 4.

Rex *v.* Fisher ([1910] 1 K.B. 149), Rex *v.* Barron (110 L.T. 350; 24 Cox C.C. 83), Perkins *v.* Jeffery ([1915] 2 K.B. 702), Rex *v.* O'Shaughnessy (31 N.Z. L.R. 928; 14 G.L.R. 640), and Rex *v.* Willoughby (32 N.Z. L.R. 1295; 16 G.L.R. 35) distinguished.

Per Edwards, J.—1. The rule in Makin's case ([1894] A.C. 57, 65) is not exhaustive. Rex *v.* Bond ([1906] 2 K.B. 389, 414), Rex *v.* Ball ([1911] A.C. 47), and Rex *v.* Finlayson ([1912] 14 C. L.R. 675) followed.

2. Evidence of other offences than those charged in an indictment is always admissible in corroboration of the direct evidence where there is such a connection between them as to show a systematic course of crime, but there must first be evidence otherwise admissible sufficient to go to the jury in proof of the offence charged.

Reg. *v.* Rhodes ([1899] 1 Q.B. 77), Rex *v.* Bond ([1906] 2 K.B. 389, 414), Rex *v.* Finlayson ([1912] 14 C. L.R. 675), Rex *v.* Boyle & Merchant ([1914] 3 K.B. 339) followed; Perkins *v.* Jeffery ([1915] 2 K.B. 702), as an authority that evidence as to other offences in proof of system or course of conduct is inadmissible unless the defence of accident, or mistake, or absence of intention is definitely put forward, dissented from.

3. The evidence is also admissible to rebut the defence of innocent association, which defence was still open to prisoner notwithstanding that his counsel intimated before trial that he would not rely on such defence.

Rex *v.* Rodley ([1913] 3 K.B. 468) not followed.

4. Where evidence is tendered which is legally admissible, but is of little evidential value, and is in the opinion of the presiding Judge calculated unduly to prejudice the prisoner, the evidence should not be excluded, but the jury should be clearly reminded that the onus of proof is on the prosecution, and specially cautioned to scrutinize the evidence carefully.

Rex *v.* Christie ([1914] A.C. 545) and Perkins *v.* Jeffery ([1915] 2 K.B. 702) discussed.

5. If, in the guise of evidence of system, evidence of other crimes is wrongly put forward where there is no reasonable ground for supposing that system can be proved, that evidence should be excluded.

Per Cooper, J.—There is a real nexus between the acts committed by the prisoner on G. and the acts deposed to by the other boys, which indicates "system" and not merely criminal propensity; and the evidence of the other five boys was relevant and properly admissible.

Per Chapman, J.—1. The evidence of the five other boys was admissible to show the sinister character of the prisoner's preparations and the criminal object of the whole scheme. It is as admissible to explain a necessary step in the process as to explain the final criminal act.

Rex *v.* Bond ([1906] 2 K.B. 389, 405, 414, 415) and Reg. *v.* Cooper (3 Cox C.C. 547) followed.

2. The defence of innocent association, although expressly disclaimed, was yet open.

Rex *v.* Dale (16 Cox C.C. 703) followed; Rex *v.* Finlayson ([1912] 14 C. L.R. 675) approved.

3. Evidence "to rebut a defence which would otherwise be open to the accused" cannot be excluded by the attitude of the accused or his counsel, even if it may be excluded by circumstances which make it practically impossible for the jury to take such a defence into consideration.