



IN THE PRIVY COUNCIL

No. 2 of 1973

O N A P P E A L

FROM THE SUPREME COURT OF VICTORIA

B E T W E E N

CHRISTOPHER RUSSELL LOWERY

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

RECORD

10 1. This is an appeal by special leave from the judgment of the Full Court of the Supreme Court of Victoria (Winneke, C.J., Little and Barber, JJ.), sitting as a Court of Criminal Appeal, dated the 17th September, 1971, which dismissed the Appellant's application for leave to appeal against his conviction in the Supreme Court of Victoria (Smith, J. and a jury) of the murder of one Rosalyn Mary Nolte.

p.533

pp.509-533

20 2. The Appellant together with one Charles Ian King, was presented for trial before the Supreme Court sitting at Ballarat on the 8th June, 1971, on a charge of having at Mt.Napier in the said State on the 31st January, 1971 murdered Rosalyn Mary Nolte. On the 23rd June, 1971, after a trial lasting ten days, the Appellant and King were both found guilty of murder and were sentenced to death by hanging.

p.1

pp.502-3

RECORD

pp. 504-5

pp. 509-533

3. The Appellant applied on the 2nd July, 1971 to the Full Court of the Supreme Court of Victoria for leave to appeal against his said conviction. By its judgment dated 17th September, 1971, the Full Court ordered that the said application be dismissed. By the same judgment, the Full Court ordered that an application by King for leave to appeal against his conviction be also dismissed.

4. The case for the prosecution at the trial was that the deceased was murdered by strangulation by the Appellant and King acting in concert or one aiding and abetting the other. The evidence established that the method of killing was the tying up of the deceased in a complicated manner, the natural result of which was that she would die from strangulation caused by the weight of her own body. There was no evidence of motive other than the obtaining of sadistic satisfaction by the causing and observing of such a death. There was no evidence of any sexual interference with the deceased. There was no evidence that anyone other than the Appellant or King took any part in causing the death of the deceased. Both the Appellant and King were admittedly in the vicinity of the killing of the deceased when she was killed. 10 20

5. The defence of the Appellant was that the killing was entirely the work of King, who committed it initially in the absence of the Appellant and without his knowledge or connivance, and subsequently, when the Appellant discovered the murderous actions of King, in the face of attempts by the Appellant to prevent it. 30

6. The defence of King was that the killing was entirely the work of the Appellant and the Appellant, in his defence, had reversed their true roles. King maintained that at the time of the killing he was in a drugged condition, resulting in his either being unable to form the necessary murderous intent or being legally 40

insane at the time.

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7. The evidence adduced by the Crown established the following relevant facts :-

10 (a) The deceased was a girl of 15 years of age living with her mother at Hamilton, a provincial city in the State of Victoria. On the evening of Sunday, the 31st January, 1971, she left her home, taking her dog with her, for a walk. At approximately 8.00 p.m., she was walking with the dog in the main street of Hamilton; at the same time the Appellant was driving a panel van along that street with King as a passenger. The panel van came to a stop and after some conversation between King and the deceased, she entered the vehicle. It appeared that King, according to the Appellant, 20 falsely pretended that he would take her to see one Garry Bailey at a party. The three occupants then drove some ten miles out of Hamilton to Mt.Napier, a bushland reserve. Approximately the last half mile of the journey was along a narrow unmade bush track, wide enough for one vehicle only, and flanked on either side by heavy thick scrub. In that area the deceased 30 either left or was removed from the vehicle and was stripped of her clothing save for her socks. She was then attacked, she sustained many injuries from kicks or punches, and one of her elbows was broken. She was tied up with plastic covered electric flex cord, which was knotted round her neck. One end of it was passed around her ankles, with her knees 40 flexed behind her, and the other end secured her wrists and arms behind her back; the flex was placed around those portions of her body several times, and it was so tightly drawn that the weight of the body caused

RECORD

such tension of the flex on or about the throat as to strangle her. Strangulation was the cause of death. The deceased was left in the scrub in that tied-up state. The Appellant and King subsequently left the scene together in the panel van. After they reached the main road the dog was put out of the vehicle and left by the roadside.

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(b) The body of the deceased was found on Wednesday, the 3rd February, 1971.

Exhibits

"BB" pp.535-536  
"FF" pp.536-539  
"GG" pp.549-550  
"OO" pp.550-553

On that day and on the 4th February, both the Appellant and King gave false accounts to the police of their movements on the evening of the killing. On the 6th February,

Exhibits

"PP" pp.539-549  
"HH" pp.553-565  
Exhibit "PP"  
pp.539-549

both the Appellant and King made further statements to the police in the form of records of interview. In

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p.540 l.34  
p.541 l.4

his record of interview, the Appellant said that at about Christmas, 1970, he and King 'decided to see what it would be like to kill a chick', that

p.541 l.12

in subsequent talks between them the idea 'just sort of built up and up', and that when they saw the deceased on the Sunday evening, they decided there was a chance to use their idea.

pp.541-547

The Appellant described the events at Mt. Napier in terms which attributed to King the main responsibility for the killing, but showed that he had

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p.543 ll.9-10  
Exhibit  
"HH" pp.553-565  
p.562 l.25

participated by assisting King to tie the flex around the deceased. In King's record of interview, he also referred to discussions which had taken place earlier between him and the Appellant

p.556 l.19

as to killing a chick, saying that the Appellant had originated such talk but that he (King) had not taken it seriously. He said that he had no memory of the journey from Hamilton to Mt. Napier; as to the violence which

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occurred there, he said that he had lapses of memory but he recalled that the Appellant was kicking and hitting the deceased. King attributed to the Appellant responsibility for the acts causing death, but there were passages in the interview which provided evidence of acting in concert or at least of aiding and abetting. At one point, King said that he might have helped to tie up the deceased and at another that he did remember helping the Appellant to tie up the deceased.

RECORD

p.556 11.22 &  
32-33  
p.558 1.31 -  
p.559 1.16

p.559 11.36-  
37  
p.561 11.10-  
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8. At the close of the case for the prosecution, evidence was given by and on behalf of the Appellant as follows :-

(a) The Appellant gave evidence on oath that he had driven his vehicle to Mt. Napier at the request of King, because he thought that King wanted to have sexual intercourse with the deceased. After the vehicle stopped on the bush track, King and the deceased walked away whilst the Appellant remained for some time in the vehicle, assuming that the other two had walked away for the purpose of having sexual intercourse. King later returned, obtained some flex, and walked away with it. After a time, the Appellant became curious, left the vehicle and walked some 60 yards along the track to find that King had secured the flex around the deceased's neck and was attacking her. The Appellant attempted twice to stop King's assaults on the deceased, but was knocked down and threatened by King; then King told him to get up and pick up the deceased's clothes, which he did. When King told him to throw the clothes away, he did so. The Appellant denied

pp.71-163

p.75 11.13-  
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p.76 1.8

p.76 1.34-  
p.77 1.10

p.77 11.17-  
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p.78 11.6-10

p.78 11.11-14

p.78 11.20-  
22

p.78 11.26-  
27

RECORD

p.71 11.9-11  
Exhibit "PP"  
pp.539-549

p.88 1.34-  
p.89 1.2

p.135 11.  
31-36  
p.84 11.15-17,  
31 -  
p.85 1.7

pp.126-127  
135-136

p.88 11.22-  
24

p.71 1.16

p.163 1.26

p.71 11.24-26  
p.163 11.17-  
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pp.169-172

ever being a party to the planning of the killing of the deceased or to the actual killing. As to his record of interview, the Appellant admitted that it correctly set forth what he had told the police, but he denied the truth of all the statements therein which tended to incriminate him. He said that such statements were made by him to comply with a direction given to him by King on Saturday, the 6th February, that if it appeared that the police could prove that he (King) had killed the deceased, the Appellant should state that he helped to kill the deceased and that they had planned to kill a chick. The Appellant said that he complied with King's direction because of threats made by King to him to do him and his wife injury and because he was terrified of King. The Appellant said that at the time the record of interview was being taken he believed that King was making a statement of his own guilt.

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(b) The Appellant gave evidence that he had never been charged with any serious offence, that he was happy in his marriage and in the prospect of the birth of his first child (who was born on the 1st March 1971), that he and his wife were about to move into their new house and that he had good hopes for his financial future. Evidence from two witnesses was called as to the Appellant's general reputation.

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9. At the close of the case for the Appellant, evidence was given by and on behalf of King as follows :-

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pp.172-303

p.179 11.8-  
14, 31-32

(a) King gave evidence on oath that on the afternoon of the killing he had taken eight or nine methedrine tablets, followed shortly by a tablet of L.S.D.;

thereafter, his appreciation of reality began to become distorted. During the course of the evening he suffered a series of hallucinations. He remembered the deceased getting into the panel van driven by the Appellant. He faintly remembered being driven along a road and being in the van alone in the scrub somewhere with the dog. He recalled walking about in the scrub. In an hallucination, he said, the Appellant seemed to be grotesque. He could see the Appellant kicking the deceased; he could not appreciate what was going on. He did not think anything was wrong. He said that at one stage the Appellant walked away, leaving the deceased with him and that the deceased had asked him whether the Appellant was going to kill her, to which he replied that he did not know. He further recalled that, when the Appellant returned, the Appellant appeared to have his hands on the deceased's throat and later was wrapping flex around her neck. The Appellant tied up the deceased. The Appellant might have told him to hold the deceased's feet up, but he could not remember doing so. He said that he found the situation very confusing, with hallucinations followed by flashes of reality. They left the deceased in the scrub and drove back to Hamilton, leaving the dog on the way.

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p.180 11.1-10

p.181 11.20-33

p.181 1.35

p.182 11.2-7

p.182 1.9

p.182 11.31-33

p.182 11.27-28

p.183 11.5-7

p.183 11.8-12

p.183 1.16-17

p.183 11.23-24

p.183 11.25-26

p.183 11.33-34

p.183 11.37-40

p.184 11.14-16

(b) Evidence was given by three medical practitioners on behalf of King in relation to the likely effects on King's consciousness and appreciation of reality of his alleged taking of drugs. The purpose of this evidence was to negative on King's part the mens rea involved in the crime of murder and to support a defence of insanity.

(c) Professor Cox, a psychologist, was called on behalf of King. He had interviewed,

p.203

RECORD

p.304 11.19-25  
p.330 11.31-33

p.306 11.11-23

p.307 11.37-42  
p.308 11.29-33

p.308 1.40-  
p.309 1.25

p.319 1.38-  
p.320 1.18

once each, both the Appellant and King and had submitted them to tests commonly employed by clinical psychologists in making assessments of personality. Throughout his evidence strenuous objection was taken by Counsel for the Appellant to evidence being led of matters allegedly revealed in those examinations which were prejudicial to the Appellant. Initially, Counsel for King said that the evidence of Professor Cox sought to be adduced was directed to the issues in the defence of King in relation to the mental element in murder and to the defence of insanity. Counsel for King later said that the evidence of Professor Cox was directed to the issue raised by the Appellant that he was terrified of King; Counsel for King developed his submission by saying that evidence as to personality would be evidence of matters making it more or less probable that one particular accused played the leading role. The learned Judge ruled in the following terms :-

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'It seems to me that each of these accused has made a statement to the police on 6th February in which he has told the police of happenings out at Mt. Napier in which he the person making the statement is cast in the secondary role and the other accused is cast in the leading and dominant role. Now one of the questions for the jury to determine will no doubt be in relation to each of those statements, whether it is a correct account of what really happened out there. And it appears to me that evidence by this witness as to the qualities of dominance, leadership, dependence, or submission, matters of that kind in either of these accused

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10 would tend to establish facts which will make it more or less probable that what really happened out at Mt. Napier is what is stated in one or other of those statements to the police, not a matter of intelligence but of general personality. That is the basis on which it appears to me that the kind of evidence in question is admissible. Opinion evidence, in my view, of facts which may be regarded by the jury as rendering more probable some facts in issue'.

When Counsel for the Appellant asked the learned trial Judge to rule that the evidence of Professor Cox should be limited to the issue of dominance of one accused over the other, the learned Judge refused to do so.

p.320 1.19-  
p.321 1.7

20 (d) Professor Cox then gave evidence that King showed consistent evidence of a rather massive denial of underlying feelings of depression and of a passive dependent personality. He said that there was also evidence in King of some impulsiveness, of some quite aggressive impulses over which his control was rather tenuous or weak and of some capacity to relate adequately to other people. He said that those qualities were consistent with such a person taking drugs. His conclusion was that King was an immature, emotionally shallow youth, who seemed likely to be led and dominated by more aggressive and dominant men and who conceivably might act or behave aggressively to comply with the wishes or demands of another person. In relation to the personality of the Appellant, Professor Cox said that the Appellant showed consistent evidence of little capacity to relate to other people; that he showed a strong aggressive drive with weak control over the expression thereof; that he showed ostentatious compliance

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p.326 11.23-25  
p.326 1.39-41

p.327 11.1-3

p.327 11.3-6  
p.327 11.16-21  
p.328 11.17-25

p.327 1.36 -  
p.328 1.3

p.333 11.31-36

p.333 11.36-38

RECORD

p.333 11.38-40  
p.334 11.17-20

covering a basic callousness; and that there was evidence also of impulsiveness.

(e)

p.338 11.20-40  
p.340 1.40-  
p.341 1.11  
p.341 11.29-35

Objection was then taken by counsel for the Appellant to the admissibility of further evidence by Professor Cox in relation to the Appellant's alleged traits of sadism and psychopathy. After hearing submissions, the learned Judge ruled in the following terms :-

'Well, Mr. Ogden, I think the proper course to take here is to allow you to put this matter of sadistic tendencies having been revealed in the case of the accused Lowery on the footing that you make the comparison in some such way as has just been done with this witness by me'

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(i.e. comparison between the Appellant and King).

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p.341 1.36  
p.341 11.37-44

'MR. OGDEN: Yes, Your Honour. HIS HONOUR: That I should reject the proposal to enter upon an inquiry in terms of what is anti-social, but that if you can elicit from the witness that his tests disclosed a known kind of personality disorder expressing it in general terms of that kind, and without using these terms suggestive of insanity, you may proceed in that field too.'

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p.349 11.9-21 The learned Judge later directed the witness in the following terms :-

'.... insofar as you may be asked for the characteristics of a psychopath or a psychopath's

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personality, I would like you to  
confine your list . . . to those  
personality traits which are  
relevant to this question that  
we have been debating as to which  
of these accounts as to how the  
events happened is made more  
probable by the personality of  
the parties and do not go into  
any characteristics that go  
into tendencies to lying or  
fraud, deceit or anything of  
that kind.'

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(f) Professor Cox continued his evidence-in-  
chief by saying that in one of the  
Thematic Apperception Tests (involving  
the subject making up a story about what  
is happening in various photographs shown  
to him) one of the stories given by the  
Appellant indicated that he obtained  
some sadistic pleasure from observing  
the suffering of other people. There  
was no such indication in any of the  
tests given to King. He said that the  
Appellant's personality was psychopathic.  
In cross-examination by counsel for the  
Crown, Professor Cox said that the  
personality of King was also psychopathic  
but was a less severe case of psychopathy  
than that of the Appellant. In cross-  
examination by counsel for the Appellant,  
Professor Cox admitted that it was "a  
little unusual' that a psychopath should  
(as the Appellant had) reach the age of  
19 without any trouble with the police  
except driving an unroadworthy car.  
When asked to assume certain facts about  
the Appellant which were established  
by the evidence, and to say whether those  
facts shook his assessment of the  
Appellant as a psychopath based on one  
brief interview, the witness answered,  
'To be shaken in the assessment I would  
want clear independent evidence of what  
I would call non-psychopathic

p.349 11.25-  
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p.349 11.34-  
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p.350 11.16-  
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p.355 11.14-23

p.359 11.  
29-38

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p.361 11.  
15-17

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p.362	11.11-22	characteristics.' He stated that he had not tested King whilst King was under the influence of drugs or alcohol and that he was therefor unable to express an opinion as to their relative roles of dominance and compliance when King was so affected.	
pp.365-378		10. At the close of the case for King, the Appellant was given leave to call evidence in rebuttal in relation to that of Professor Cox. Dr. Springthorpe, a medically qualified psychiatrist, was called on behalf of the Appellant. He said that he had interviewed the Appellant for almost two hours and that he found no evidence that the Appellant was either a psychopath or a sadist. He said that, in his view, it was unwise to form a diagnosis of psychopathy simply on the results of the tests employed by Professor Cox, unless there was also a substantial history of psychopathic conduct, which did not appear in the case of the Appellant. He said that the tests employed by Professor Cox were to a considerable extent subjective. He said that a history lacking evidence of psychopathic behaviour was of greater significance than the findings of the said psychological tests.	10
p.365	11.26-28		
p.366	11.27-33		
p.368	11.33-37		20
p.368	11.10-11		
p.368	11.41-end		
pp.453-455		11. In the course of his charge to the jury, the learned Judge summarised the evidence of Professor Cox, but without referring to the witness' admission in cross-examination by counsel for the Appellant mentioned in para. 9(f) above. He said that it was submitted on behalf of King that of the two accused the Appellant was more likely to have killed the deceased. He gave no direction to the jury as to the use to which Professor Cox's evidence should be put and gave the jury no warning that such evidence was not probative of the Appellant's guilt.	30
pp.466-467	1.45		
p.486	11.13-16	12. At the conclusion of the learned Judge's charge to the jury, counsel for the Appellant applied to have the jury discharged without verdict having regard to the prejudicial nature of Professor Cox's evidence, which would lead the	40

jury to believe that the Appellant was likely to commit murder and that the Appellant had a motive for killing the deceased. The learned Judge in rejecting the application ruled, inter alia, in the following terms :-

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p.476 1.9 -  
p.483 1.10  
p.496 1.19 -  
p.497 1.8

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'These applications for re-direction raise a number of matters of some of which are of considerable importance. The first one raised by Mr. Wright related to a question which was much in debate during the course of the evidence, namely, the admissibility of the evidence of Cox, as to the results of his tests. I considered, for reasons which I gave during the course of the evidence, that within limits such evidence was admissible; and during the course of the evidence and the submissions to the jury I have extended my view as to how far such evidence was admissible. I have extended it beyond the original restricted ground which I initially gave. I indicated when I gave that initial ruling that such an extension might emerge.

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The problem which Mr. Wright now puts is how far the admission and use of that evidence is consistent with the general rule that evidence is not admissible to show that an accused person is the kind of person who would be likely to commit a particular crime. The question of the limits of that restrictive rule is a difficult one, and in determining it, it must be remembered that the primary purpose of the rule is to protect accused persons from the use of such evidence by the Crown. How far such a rule can operate to prevent one accused person from proving his innocence against attacks made by a co-accused is a very important aspect. I concluded here, not without considerable thought, that this evidence was admissible, and I have not changed that view.'

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13. The Full Court in a Judgment dated the 17th September, 1971, rejected submissions made on behalf of the Appellant that the evidence of pp.509-533

RECORD

p.516 11.29-  
end

p.520 11.22-  
end

p.157 1.43-  
p.158 1.3

Professor Cox was irrelevant to any issue in the trial as it lacked any probative force or, alternatively, that such evidence was inadmissible because it did no more than tend to show that the Appellant had a disposition or propensity, or was the sort of person likely, to commit crimes generally of the nature charged. The Full Court held that the opinions of Professor Cox were evidentiary material tending to make it less probable that King was the killer and therefore had probative value which made such opinions relevant to the issue between the Crown and King. The Full Court further held that the position of King was to be distinguished from that of the Crown and that it was permissible for King to tender the evidence of Professor Cox in disproof of his own guilt. In the Full Court's view it was not appropriate to restrict an accused person in defending himself by excluding such evidence when it tended to rebut his guilt or to prove his innocence, although such evidence was relevant solely as tending to prove his co-accused's disposition to commit a crime such as that charged.

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14. The Appellant respectfully submits that the Full Court erred in holding that Smith J., correctly admitted the evidence of Professor Cox. The Appellant submits that this evidence should have been excluded, or the jury should have been directed to disregard it entirely, because it was speculative and unscientific. The witness's conclusions were based simply on one interview with the Appellant, whereas by the witness's own admission, confirmed by the evidence of Dr. Springthorpe, knowledge of the circumstances of the Appellant's life, which the witness did not possess, might have shaken those conclusions. The evidence of Professor Cox as to the alleged sadistic trait of the Appellant was limited to an indication in one story in one of the tests that the Appellant obtained some sadistic pleasure from observing the suffering of other people; there was no evidence that the pleasure obtained from observation was related to, or disclosed, any tendency to act in a sadistic manner.

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Whereas evidence was given that the Appellant's control over his aggressive impulses was weak, there was no evidence as to the likely degree of his control over the trait of sadistic observation. There was no evidence in this connection that the Appellant was more than a voyeur. It is respectfully submitted that the possession of a personality trait, without evidence that it was ever likely to be translated into overt action, but related to observation alone, had no probative value that the Appellant did, or was likely to, commit the offence charged. It is further respectfully submitted that for Professor Cox's evidence to have any probative value in this case it was necessary to show a tendency in the Appellant to act sadistically.

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15. It is respectfully submitted that, if Professor Cox's evidence (contrary to the Appellant's submission in paragraph 14 hereof), did show that the Appellant was likely to commit crimes generally of the nature charged, such evidence should have been excluded as a matter of law. Evidence which has no relevance beyond indicating that an accused person has a disposition to commit the crime charged, or to commit crimes generally, is inadmissible. The impugned evidence in the present case was admitted for the purpose of showing that of the two accused the Appellant was the more likely killer. In other words, its only purpose and its only possible effect was to show the Appellant's disposition to commit a crime such as that charged or to commit crimes generally.

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16. It is respectfully submitted that Professor Cox's evidence did not fall within any of the exceptions (such as to prove identity, to show system or to rebut accident) to the general rule excluding evidence of propensity to commit crimes generally, and was therefore inadmissible. It is submitted that, whenever evidence is properly admissible under one of the said exceptions, it is admitted despite its tendency to reveal disposition and never because it does so.

17. It is respectfully submitted that the general rule excluding evidence of propensity to

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commit crimes applies between co-accused just as it does between the Crown and an accused person. An accused person is not entitled to defend himself by attempting to establish the guilt of his co-accused by means by which the Crown would not be allowed to establish it.

18. It is respectfully submitted that Professor Cox's evidence was objectionable because it amounted to proof of disposition as part of the Appellant's character (and thus to evidence of bad character) on the basis of pure opinion unrelated to any existing fact proved in evidence or as to any act alleged to have been committed by the Appellant. It is respectfully submitted that evidence of psychological condition insofar as it reveals traits or tendencies is not admissible in criminal cases in order to establish the guilt of an accused person. Such traits or tendencies are too remote to prove the commission of acts. 10

19. It is respectfully submitted that the admission of Professor Cox's evidence was of major significance in the trial of the Appellant. The case for the prosecution was that the killing was sadistic and callous, committed for one motive only, namely, sadism. The Appellant's defence was that he had no motive for such a terrible killing; his defence involved the calling of character evidence and the contention that there was nothing in his past to indicate that he would take part in such a killing. The impugned evidence, if accepted, could be seen at one stroke to provide the missing motive for the Crown and to destroy the Appellant's defence. The Appellant therefore respectfully submits that the wrongful admission of Professor Cox's inadmissible evidence caused him grave prejudice and deprived him of the right to have his defence fairly considered by the jury. 20 30

20. That it is respectfully submitted that, if the evidence of Professor Cox was to be admitted in defence of King, the learned Judge should have ordered that the Appellant be tried separately, or alternatively should have acceded to the request made by Counsel for the Appellant, as set out in 40



paragraph 12 above, that the jury be discharged without verdict in the Appellant's case.

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21. The Appellant therefore respectfully submits that this Appeal should be allowed and that his conviction and the sentence passed upon him be quashed for the following (among other)

R E A S O N S

1. BECAUSE the evidence of Professor Cox insofar as it related to the Appellant was inadmissible.
2. BECAUSE the evidence of Professor Cox set out in paragraph 9(f) of this Case was inadmissible.
3. BECAUSE the learned Judge exercised his discretion wrongly in admitting the said evidence.
4. BECAUSE in all the circumstances it would be unsafe to allow the conviction to stand.

MERVYN HEALD

STUART N. McKINNON

No. 2 of 1973

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE SUPREME COURT OF VICTORIA

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B E T W E E N

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Appellant

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CASE FOR THE APPELLANT

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