Privy Council Appeal No. 2 of 1973

Christopher Russell Lowery – – – – – *Appellant*

v.

The Queen – – – – – – – – *Respondent*

FROM

THE FULL COURT OF THE SUPREME COURT OF THE STATE OF VICTORIA SITTING AS A COURT OF CRIMINAL APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH APRIL, 1973

Present at the Hearing:

LORD MORRIS OF BORTH-Y-GEST
LORD HODSON
LORD SIMON OF GLAISDALE
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

The appellant Christopher Russell Lowery and a friend of his named King were convicted of the murder on the 31st January 1971 of Rosalyn Mary Nolte, a young girl of 15 years of age who was known to them. Both young men (each was 18 years of age) were present when the girl was killed: the killing was quite deliberate: it did not take place for any purpose of gain or as the result of any actual or attempted sexual intercourse. After the discovery of the girl's body each man made various statements. At the trial each man imputed responsibility to the other. Additionally in the case of King, issues of insanity and automatism were raised. The trial extended over a period of some twelve days. Very many witnesses were called. No application for separate trials had been made and any such application would have been difficult to present having regard to the facts and circumstances of the case: the case for the Crown was that both men were acting in concert as principals in the first degree or alternatively that one was a principal in the first degree and the other, as an aider and abetter, a principal in the second degree. At the trial King in support of his case called a witness (Professor Cox) to the admissibility of whose testimony objections were taken and argued. At the conclusion of the summing-up (which while extending over three days occupied the whole of one day and part of the other two days) certain matters were raised in the absence of the jury. One of these matters related again to the

admissibility of the evidence of the witness above referred to: there was a submission that the jury should be discharged or that there should be some re-direction. After such re-direction on certain matters as the learned judge decided was appropriate the jury convicted both men. They applied to the Full Court of the Supreme Court sitting as a Court of Criminal Appeal (Sir Henry Winneke C.J., Little and Barber JJ.) for leave to appeal. For the reasons given in the Judgment of the Court delivered by Sir Henry Winneke C.J. each application was dismissed.

The appeal now brought by Lowery is based principally upon the contention that the evidence of the witness above referred to should not have been admitted. It is to be noted that the witness was not called by the prosecution but was called as part of the case for the defence of King. In order that the contention which is advanced may be stated and examined it is necessary to summarise the main facts of the case and to outline the course of the trial. Their Lordships cannot do better than to quote that part of the judgment of the Court of Criminal Appeal, which, as was accepted on behalf of the appellant, contained a convenient summary of the facts and of the proceedings. Such part of the judgment was in the following terms:

> " Rosalyn Nolte was a young girl of 15 years of age living with her parents in Hamilton. On the evening of Sunday the 31st January, she left her home between approximately 6.15 and 6.30 p.m. taking her Corgi dog with her for a walk. Later in the evening, at approximately 8 p.m., she was walking with the dog in Grey Street, Hamilton and at the same time the applicants were driving along that street in a Holden panel van owned and driven by the applicant Lowery. The panel van was brought to a stop, and after some conversation between the applicants and the girl, she entered the panel van with the dog. It would appear plain from the evidence that deception of some kind was practised by the applicants upon her, and that she was no consenting party to the journey on which the panel van was then driven to a bush area known as the Mt. Napier Reserve, some ten miles out of Hamilton. The last half mile, approximately, of that journey was along a narrow unmade bush track, wide enough for one vehicle only, and flanked on either side by heavy thick scrub.
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> " In that area the girl either left or was removed from the vehicle, and save for her socks, she was stripped of her clothing. She was then attacked by one or both of the applicants, and in the course thereof she suffered many injuries from kicks or punches and one of her elbows was broken. She was tied up by the applicants, or one of them, with plastic covered electric flex cord, which was knotted around her neck so that it bit deeply into the flesh. One end of it was passed around her ankles, with her knees 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 such pressure and tension of the flex on or about the throat as to strangle her. It may be interpolated at this point that strangulation was, according to the medical evidence given at the trial, the cause of the girl's death.
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> " It would appear from some of the evidence that the tying up of the girl commenced on the unmade track by passing the flex around her throat, that by pulling on the flex she was then dragged by one or both of the applicants into the scrub at the side of the track, and that the tying up was then completed. Other evidence,

however, may be taken to indicate that the tying up procedure was completed on the unmade track, and that she was then dragged into the scrub. On either view, she was left to remain in the scrub in the tied up state.

" The applicants then departed from the scene in the panel van, and after reaching the main road the Corgi dog was put out of the vehicle and left by the roadside. The applicants then returned to Hamilton where they visited a sports centre and spoke to several persons, and later drove out of the town and threw from the car a transistor which the deceased girl had been carrying at the time when she was picked up. The applicants then visited the home of Lowery's parents-in-law, Lowery being a married man of 18 years of age whose wife was expecting a child. King also was 18 years of age, but unmarried. After participating in or witnessing a game of cards at that home, the applicants, together with Lowery's wife and others, went to a drive-in theatre, and ultimately returned to their respective places of abode in the early hours of Monday morning, the 1st February.

" The body of the deceased was found on Wednesday, the 3rd February. In the interim the applicants had agreed on a false story to give to the police in the event of their being questioned. On the 3rd of February, in separate signed statements both applicants told the police, in substance, that the deceased had entered their vehicle in Grey Street and had been then driven to the Commercial Hotel corner where, with the dog, she left the van and went on her own independent way. On the day following, in further and separate statements signed by them, each applicant repeated that story, but added to it an account of their driving out of Hamilton and meeting a hitch-hiker, whom they drove to Coleraine. The falsity of these accounts, directed to create an alibi for themselves, was exposed in records of interview made and signed on Saturday the 6th of February, and was conceded by them at the trial.

" In the record of interview signed by Lowery, he narrated that at about Christmas 1970, he and King, " decided to see what it would be like to kill a chick," and that in subsequent talks between them, the idea " just sort of built up and up "; and when they saw Rosalyn on the Sunday night, they decided there was a chance to use their idea. He described the events of the Mt. Napier Reserve in terms which attributed to King the main responsibility for the killing, but which plainly showed that he had participated, assisting King to tie the flex about the girl's body.

" In the record of interview signed by King, he also spoke of discussions which had earlier taken place between him and Lowery as to killing a chick. He said any such talk was originated by Lowery, and he added that he did not value it seriously. He alleged that he had no memory of the trip from Hamilton to the Mt. Napier Reserve. As to the violence which there occurred, he again alleged lapses of memory, but he recalled Lowery was kicking and hitting the girl, that she complained her arm was broken, and at one stage asked him whether Lowery was going to kill her, to which he replied he didn't know, he's gone mad. The burden of his statements in the record of interview was to fasten on Lowery responsibility for the acts causing death, but there were various passages therein which provided evidence of concert, or at least evidence of aiding and abetting.

" On the following day, Sunday the 7th of February, each accused, and particularly King, re-enacted at the scene of the killing events which he said had there occurred on the night of the 31st of January. At the trial objection was taken to the admissibility of a film showing the re-enactment, but the learned trial Judge found that the accused voluntarily took part in re-enacting the events, and in the exercise of his discretion allowed it to be admitted in evidence, and shown to the jury. The learned Judge also admitted in evidence, after argument, a number of photographs, some of which showed the deceased in the position in which her body was found in the scrub, and others of which, taken after she had been removed from that position, revealed some of the injuries inflicted upon her, and clearly described the manner in which she had been tied up.

" The material to which we have already referred, supplemented in various ways by other evidence, was led by the Crown at the trial, and the case against the two accused was primarily put on the basis that they were acting in concert as principals in the first degree. Alternatively it was put that one was a principal in the first degree and the other an aider and abetter, and so a principal in the second degree.

" At the conclusion of the Crown case, the applicant Lowery gave evidence on oath. He admitted that the record of interview correctly set forth what he had told the police on Saturday the 6th of February, but he denied the truth of all the statements therein which tended to incriminate him. He said that such statements were invented by him to comply with a direction which he said King had given him on the Saturday morning, that if it looked as though the police could prove that King killed the girl, Lowery should admit he was in it with King and helped him to kill the girl, and that they had planned to kill a chick. He said that at the time the record of interview was being taken, he believed that King was making a statement of his own guilt, that the time had accordingly come to comply with King's direction, and he complied because of threats made by King to him and to his wife to do them injury.

" The truth, according to Lowery's evidence, was that he had driven the panel van at King's direction to the bush area because he thought King wanted to have sexual intercourse with the girl; that when the van stopped on the bush track King and the girl then walked away whilst he remained for some time in the van; that King subsequently returned, obtained some flex, and walked away with it. After a time he, Lowery, became curious, and after walking some 60 yards along the track he found that King had secured the flex around the girl's neck, and he observed him ill-treating her. He tried on two occasions to stop King's assaults on the girl, but he was knocked down and threatened, and eventually he lent some minor assistance in tying the girl up. Lowery also introduced into his evidence a matter which had previously not been mentioned by him or by King to the police, namely, that before seeing the girl on the 31st January he observed King put a tablet in his mouth which King then told him was acid—that is a drug called LSD. The taking of drugs by King on this occasion loomed large in King's evidence as subsequently given. In association with that subject, it is convenient at this stage to mention a document which was put to Lowery in cross examination by Counsel appearing for King. This document, which was subsequently admitted in evidence as Exhibit 'K1', was one which King said he thought was in

Lowery's handwriting, and that it was handed to him by Lowery at the holding cells in Ballarat shortly prior to the trial, Lowery then telling him, 'This is what you want to say in court.' Lowery denied the document was in his handwriting or that he had handed it to King. It commenced with the words, 'At approximately (blank) on Sunday the 31st I took (blank) tablets of methedrine until 7.15 p.m.' It proceeds to say, 'At 7.15 Lowery arrived at my parents' home and a few minutes later I took an envelope from my pocket and from it I took a tablet of LSD.' The document then relates the picking up of Rosalyn Nolte, and as to the events in the bush it contains an account ascribing to King the doing of the acts which led to the girl's death. The Crown relied on this document as one in which Lowery proposed to King that Lowery should tell the Court the story he gave in evidence; that King should confirm it, and advance as his own defence the story of taking drugs.

"King also gave evidence on oath, and in the course of it he said that between three and 5 p.m. on Sunday 31st January he took eight or nine methedrine tablets, followed shortly thereafter by a tablet of acid (LSD), and that at about 6 p.m. things started to get distorted. He recalled the girl Rosalyn getting into the panel van driven by Lowery and the latter saying, 'Something about a chance, or something'. King did not, according to his evidence, 'jerry to what he meant. I was getting pretty stoned then'. He did not remember the journey out to the Mt. Napier Reserve and when he did realise the van 'seemed to be out in the scrub somewhere', he suffered, as a result of the drugs, a series of hallucinations. He recalled getting out of the van and that after walking about he came across Lowery and the girl, and he then saw Lowery kicking her as she lay on the ground. He said he could not appreciate what was going on; that he did not think anything was wrong. He said that at one stage Lowery walked away, leaving the girl with him, and that Rosalyn then asked him whether Lowery was going to kill her, to which he replied that he did not know. He further recalled that when Lowery returned, Lowery had his hands on the girl's throat and later was wrapping flex around her neck; that Lowery dragged her down into a ditch; that he went down there at Lowery's dictation; and that Lowery might have told him, 'to hold her feet up or something'. It should be added that King said in evidence that between Christmas 1970 and the 31st January Lowery had talked about what it would be like 'to kill a chick', but he had never taken such remarks seriously.

"King called as a witness a psychologist, Professor Cox of Melbourne University, who had interviewed both of the accused and had submitted them to tests commonly employed by clinical psychologists in making assessments of personality. He said that King showed consistent evidence of a rather massive denial of underlying feelings of depression and of a passive dependent personality. He said there was also evidence in King of some impulsiveness, of some quite intensive aggressive impulses over which his control was rather tenuous or weak, and of some capacity to relate adequately to other people, to feel with and for other people. 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 could act out or could behave aggressively to comply with the wishes or demands of another person. In relation to the personality of Lowery, the finding of Professor Cox was that

he showed consistent evidence of little capacity to relate to other people; that he showed a strong aggressive drive with weak controls over the expression of those aggressive impulses; that he showed ostentatious compliance covering a basic callousness; and that there was evidence also of impulsiveness. Cox also said that in one test given to Lowery, one of the stories given indicated some sadistic pleasure was obtained from observing the sufferings of other people. Cox was asked whether in relation to King there was any such indication in the tests, and he replied in the negative.

" The admissibility of the evidence of Professor Cox was contested by counsel for Lowery and the admission thereof at the trial is one of the grounds of his appeal to this court.

" Three medical practitioners were also called as witnesses by King. Their evidence was directed to negative on King's part the elements of a conscious and voluntary act involved in the crime of murder, and also to support a defence of insanity. In either aspect the opinions expressed by the doctors were based on the assumption that King had taken drugs and also consumed some beer, as he stated in his evidence."

It may be added that after the evidence adduced by King had been called there was fresh evidence called on behalf of Lowery. A medical practitioner (Dr. Springthorpe) who for over thirty years had practised as a psychiatrist gave evidence that he had conducted an " interview and assessment " of Lowery.

From the narrative of the facts of the case it can be seen how matters stood when the time came for the evidence of King and of his witnesses to be given. It was common ground in the case that no-one other than the two accused had any part in the killing of the girl. As the learned trial Judge said in the course of his report to the Court of Criminal Appeal—

" The method of killing her was to tie her up in a complicated manner, the natural consequence of which was that she would die slowly from strangulation caused by the weight of her own body. There was no evidence of motive beyond the obtaining of satisfaction by causing and observing such a death, and accordingly the killing appeared to be the work of a person or persons with a special kind of personality, aggressive, sadistic, callous and arrogantly self-centred."

Furthermore the evidence given by Lowery notwithstanding anything contained in his last statement to the Police was that the killing was entirely the work of King and that he (Lowery) had made strong efforts to stop King. Beyond this, as the learned Judge said in his report to the Court of Criminal Appeal—

" Lowery himself had not only called evidence as to his reputation with a view to showing that his disposition made him unlikely to have committed such a crime as this, but in addition he had for the same purpose given evidence that he had never been charged with any serious offence, that he had been happy in his marriage, happy in the prospect of the birth of the child and happy in the prospect of moving into his new house, and that he had had good hopes for his financial future. He also called his wife to confirm his evidence on some of these matters."

In his re-examination Lowery, in support of his evidence to the effect that after what had happened he was in fear of King and feared what

King might do, said that King was a member of an organisation called Hell's Angels whereas he (Lowery) was not. In answer to a question by his Counsel Lowery proceeded to say that he had expectation about his father's business. When enquiry was made as to the relevance of this evidence the questions being put were justified as being put (*a*) to show that "his prospects were just opening before him and in those circumstances such an activity as is suggested to him would completely wreck them" and (*b*) "in rebuttal of the suggestion that he was interested in this sort of behaviour or would wish to plan such a venture over a period of time or follow it through". Finally in re-examination Lowery was asked whether he had any motive whatsoever to take a girl away and kill her: he answered that he had not.

When the time came for the evidence by and on behalf of King to be presented the position was that not only was there the Crown case that both accused had acted in concert but there was the testimony of Lowery that it was King who had been the killer and that he (Lowery) had been physically overborne when he tried to stop King and had afterwards been put in fear by King's threats of what he might do (including a threat of violence to Lowery's wife if he (Lowery) did not say certain things that King wished him to say) and further that he (Lowery) was not only of good character but was not "interested in this sort of behaviour". As the central theme of King's defence (if issues concerning insanity and automatism failed) was that it was Lowery who had been the killer it is manifest that it became necessary in King's interests that the suggestions made by and on behalf of Lowery should be displaced.

It was in this setting that the witness Professor Cox was called on behalf of King. Before referring to the substance of the evidence which the witness gave it will be convenient to indicate the nature of the objections which at the trial or on appeal were submitted against its admissibility. It was said that the evidence was not relevant to any issue and was of no probative value in considering the guilt of the accused: that evidence of the psychological condition of an accused person as tending to prove his guilt ought never to be introduced either by the prosecution or by the defence of a co-accused person: that the evidence whether adduced by prosecution or by defence ought to have been excluded as a matter of law because its introduction would merely show disposition: that the evidence did not fall within any of the exceptions denoted in *Makin v. Attorney General for New South Wales* [1894] A.C.57 to the general rule there stated.

When considering evidence which is tendered to a Court it is always helpful to distinguish between relevance and admissibility and weight: in some cases the value and the admissibility of evidence as corroboration has separately to be considered. No question relating to corroboration arises in the present case. Questions of weight are for a jury. In the present appeal attention is focussed upon the evidence of one witness out of very many who were called in the course of a lengthy trial. How far the evidence assisted the jury must be a matter of speculation. Their Lordships are only concerned to consider whether the Court of Criminal Appeal were right in upholding the admissibility of the evidence. The questions arise whether the evidence was (*a*) relevant and (*b*) admissible: not all evidence that is relevant is admissible. In some circumstances evidence that may have some relevance is not admissible because its prejudicial effect heavily over balances its probative value and as a matter of fairness or of public policy a Court will not allow the prosecution to call such evidence.

The evidence of Professor Cox showed that he was and for nearly 20 years had been a psychologist by profession and that he carried on his vocation in two ways *viz.* (*a*) as a Professor in the Faculty of Education in the University of Melbourne and (*b*) as a clinical psychologist. In the latter capacity he had held two appointments at Hospitals as an honorary psychologist and he had (in the early 1950's) been for two years in charge of a psychological research unit in the Australian Military Forces. In the course of his work he had seen between five and six thousand people individually for the purpose of making assessments of personality and character. He was fully cross-examined as to his qualifications.

Professor Cox had interviews in turn both with Lowery and with King. In each case he applied certain well known tests. His evidence was as to the results of the tests in each case. These tests were " the main stock in trade " of clinical psychologists. The tests were partly intelligence tests but primarily were tests as to the general personality of the person interviewed. The learned Judge at the trial after objection and argument allowed evidence to be given as to the respective results of the tests of the two men in so far as they threw light on qualities of dominance or leadership or dependence or submission or on the general personalities of the two men.

So far as the test for intelligence was concerned the witness used what was called the Wechsler Adult Intelligence Scale Test which was said to be the best known test of adult intelligence and which was used in many places. As to King the witness found that he functioned at what he called a " bright normal or a good level, above average ". As to Lowery the witness found that he functioned " at the top end of the average band of the population ".

In regard to the tests for personality the witness used two tests—the first being what is called the Rorschach Test and the second being what is called the Thematic Apperception Test. The witness gave the results of the two tests in the case of King and combining the two test records the witness said that the picture was that " of an immature—by that I mean immature for a young man of his age—an immature, emotionally shallow youth who seems likely to be led and dominated by more aggressive or dominant men and who conceivably could act out or could behave aggressively to comply with the wishes or the demands or orders of another person." The record of the tests was consistent with King's statement in evidence that he was frightened by Lowery while the events were taking place.

The same two tests for personality were used by the witness in regard to Lowery. The resultant findings of the witness were that Lowery showed little evidence of capacity to relate adequately to others, that he had a strong aggressive drive with weak controls over the expression of aggressive impulses, and a basic callousness and impulsiveness. The attribute of callousness had not been found in King. Another finding indicated by one of the Thematic Apperception Tests was only given in evidence after further arguments had been addressed to the Court in the absence of the jury. The ruling of the learned Judge was that the witness should confine himself to those personality traits which would be relevant to the question as to which account of the killing was the more probable and that the witness should not go into any which related to tendencies such as tendencies to lying or fraud or deceit or the like. The further finding was that one of the tests indicated in Lowery's case that some sadistic pleasure was obtained from observing the suffering of other people. In relation to King the results of the tests had given no such indication. Lowery's personality could be

described as a psychopathic personality it being made clear that in this context the word " psychopathic " conveyed no suggestion of insanity or of mental disease but merely of personality disorder. To be shaken in this assessment the witness said that he would need evidence of non-psychopathic characteristics. King also showed some features of a psychopathic personality but they were less severe than in Lowery's case. Lowery showed little evidence of capacity to feel for others: King's capacity to feel for others was below the average. Both men showed aggressive tendencies with weak control over them but Lowery's aggressiveness was more intense. Both men showed impulsiveness: that in Lowery being a little more but not a great deal more marked.

Their Lordships have referred above to the evidence of Dr. Springthorpe who was called to give evidence as a psychiatrist in regard to a visit he paid to Lowery (a few days later than the visit of Professor Cox) in order " to interview and assess " him. On the basis of a history given to him and of his own examination Dr. Springthorpe's view was that Lowery was not a psychopath and he found no evidence that Lowery was a sadist. In regard to the various tests he said that the intelligence tests were reliable and in the hands of an expert clinical psychologist the margin of error would be less than 5%. He agreed that the Rorschach and the T.A.T. Tests used by Professor Cox were recognised tests of qualities of personality but he said that he would be sceptical of making a diagnosis of a psychopathic personality on the tests alone for the reason that a psychopathic personality does not develop suddenly and he had no evidence of abnormality of behaviour and personality in Lowery's case prior to the set of incidents of the 31st January 1971. If Lowery had shown none of the peculiarities in his previous behaviour that was of much more importance in making a diagnosis than the findings on two particular psychological tests.

Having referred fully to the nature of the evidence given by Professor Cox the question as to its admissibility may now be considered. There was no doubt that Rosalyn Mary Nolte was killed in the bush area some ten miles out of Hamilton when Lowery and King were present and when no one else was present. As was pointed out in the Court of Criminal Appeal the very nature of the killing showed that it was " a sadistic and otherwise motiveless killing ". Any prospect of the acquittal of either of the two accused could only have been on the basis that one alone was the killer and that the other took no part whatsoever. That was what Lowery alleged when he said that King alone was the killer and that he (Lowery) was powerless to save the girl. In *R. v. Miller and Others* (36 Cr. App. R.169) Devlin J. (as he then was) referred to the duty of Counsel for the defence to adduce any admissible evidence which is strictly relevant to his own case and assists his client whether or not it prejudices anyone else. The case for King was that Lowery had alone been the killer and that King had been heavily under the influence of drugs and had been powerless to stop Lowery. It was furthermore the evidence of each of them, in spite of what they said in their statements, that the idea or suggestion of seeing " what it would be like to kill a chick " emanated from the other. In all these circumstances it was necessary on behalf of King to call all relevant and admissible evidence which would exonerate King and throw responsibility entirely on Lowery. If in imaginary circumstances similar to those of this case it was apparent that one of the accused was a man of great physical strength whereas the other was a weakling it could hardly be doubted that in forming an opinion as to the probabilities it would be relevant to have the disparity between the two in mind. Physical characteristics may often be of considerable relevance (see

Toohey v. Metropolitan Police Commissioner [1965] A.C.595). The evidence of Professor Cox was not related to crime or criminal tendencies: it was scientific evidence as to the respective personalities of the two accused as, and to the extent, revealed by certain well known tests. Whether it assisted the jury is not a matter that can be known. All that is known is that the jury convicted both the accused. But in so far as it might help in considering the probabilities as to what happened at the spot to which the girl was taken it was not only relevant to and indeed necessary for the case advanced by King but it was made relevant and admissible in view of the case advanced by Lowery and in view of Lowery's assertions against King.

The case being put forward by Counsel on behalf of King involved posing to the jury the question " which of these two men is the more likely to have killed this girl? " and inviting the jury to come to the conclusion that it was Lowery. If the crime was one which was committed apparently without any kind of motive unless it was for the sensation experienced in the killing then unless both men acted in concert the deed was that of one of them. It would be unjust to prevent either of them from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other.

Lowery put his character in issue. If an accused person puts his character in issue in the sense of asserting that he has never been convicted of any offence then provided that it is fair to do so it may be shown that he has had convictions. If an accused person puts his character in issue in the sense of adducing evidence that he is of good general reputation then it may be legitimate to call rebutting evidence of an equally general nature. When an accused person puts his character in issue he is in effect asking a jury to take the view that he is not one who would be disposed to have committed or would be likely to have committed the crime in question. An accused person of good character is permitted to advance such a consideration. But if an accused person is not of good character the law has been firm in the principle recognised by Lord Herschell L.C. in *Makin v. Attorney General for New South Wales* (*supra*) when he said: " It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered in the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried ". Lord Herschell proceeded to refer to certain well-known exceptions from the general rule.

It may here be stated that it was not suggested by the Solicitor-General that the contested evidence either could or would have been adduced by the prosecution.

In reference to this matter the Court of Criminal Appeal said, and in their Lordships' view rightly said:

> " It is, however, established by the highest authorities that in criminal cases the Crown is precluded from leading evidence that does no more than show that the accused has a disposition or propensity or is the sort of person likely to commit the crime charged;"

and further,

> " It is, we think, one thing to say that such evidence is excluded when tendered by the Crown in proof of guilt, but quite another to say that it is excluded when tendered by the accused in disproof

of his own guilt. We see no reason of policy or fairness which justifies or requires the exclusion of evidence relevant to prove the innocence of an accused person."

The evidence of Professor Cox as will have been seen was not as such evidence in regard to the character of Lowery and King but rather was evidence as to their respective intelligences and personalities.

In this connection complaint was made of misdirection by the learned Judge at the trial in that though he reminded the jury of the evidence of Professor Cox when dealing with King's defence he also referred to the evidence when dealing with the evidence of character adduced on behalf of Lowery. It was further said that the jury were given no guidance as to how they should consider or use the evidence. Though in the grounds of appeal advanced in the Court of Criminal Appeal there were complaints of misdirection they were not in that Court pursued. In their Lordships' view if the evidence of Professor Cox was admissible the suggested misdirection was, in the setting of the case, of relatively minor significance and in their Lordships' view need not be further examined. Lowery and King were each asserting that the other was the completely dominating person at the time Rosalyn Nolte was killed: each claimed to have been in fear of the other. In these circumstances it was most relevant for King to be able to show, if he could, that Lowery had a personality marked by aggressiveness whereas he, King, had a personality which suggested that he would be led and dominated by someone who was dominant and aggressive. In support of King's case the evidence of Professor Cox was relevant if it tended to show that the version of the facts put forward by King was more probable than that put forward by Lowery. Not only however was the evidence which King called relevant to this case: its admissibility was placed beyond doubt by the whole substance of Lowery's case. Not only did Lowery assert that the killing was done by King and not only did he say that he had been in fear of King but, as previously mentioned, he set himself up as one who had no motive whatsoever in killing the girl and as one who would not have been likely to wreck his good prospects and furthermore as one who would not have been interested in the sort of behaviour manifested by the killer. While ascribing the sole responsibility to King he was also in effect saying that he himself was not the sort of man to have committed the offence. The only question now arising is whether in the special circumstances above referred to it was open to King in defending himself to call Professor Cox to give the evidence that he gave. The evidence was relevant to and necessary for his case which involved negativing what Lowery had said and put forward: in their Lordships' view in agreement with that of the Court of Criminal Appeal the evidence was admissible.

For these reasons their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

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In the Privy Council

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