

For these reasons I would allow the appeal and grant an injunction substantially in the limited form now claimed.

Appeal dismissed, with costs.

[Solicitors—For the appellant, Allen, Allen and Hemsley; for the respondent, A. B. Shaw and Co.]
F. M. B.

FULL COURT — (Latham, C.J.,
Rich, Starke, Dixon, McTiernan
and Williams, JJ.)
(Sydney.)

Nov. 12, 13.

O'LEARY v. THE KING.

Criminal law—Evidence—Charge of murder—Admissibility of evidence — Other acts of violence—During same drinking bout.

At a timber mill camp, one of a party of timber workers was murdered after several of the men had been spending the greater part of the day and a large part of the night under the influence of liquor.

One of the party having been convicted of the murder, it was objected upon appeal that evidence had been wrongly admitted that during a period of several hours before the murder the accused had attacked various members of the party without much or any provocation, and behaved in a dangerous and menacing way.—

Held (McTiernan, J., dissenting), that the evidence was admissible, not as showing the accused to be a violent man likely to commit a crime, but because the assaults and circumstances formed inseparable features in a transaction consisting of connected events of which the murder was an integral part.

MOTION.

In the Supreme Court of South Australia, before Napier, C.J., and a jury, C. P. O'Leary was tried upon a charge of having murdered a man named W. E. Ballard. The accused was convicted and was sentenced to death. It appeared in evidence that the two men were workers employed at the Government Timber Mill at Nangwarry, about twenty miles from Mt. Gambier; and, on Saturday, 6th July, several of the workmen visited Penola and Kalangadoo and had drinks. They afterwards spent some hours in the recreation-room at the mill camp, where O'Leary and others were under the influence of liquor and were quarrelsome. In the early hours of Sunday, 7th July, Ballard was found with wounds in various parts of his body and a number of burns. He died in the hospital at Mt. Gambier the following day.

After conviction, O'Leary applied to the Full Court for leave to appeal, on the ground that the Judge wrongly admitted as evidence and misdirected the

jury that, for the purpose of determining whether the identity of the accused as the person who caused the death of the deceased was proved, they could take into account and act upon evidence that the accused assaulted a man named Hollywood and one O'Toole and one Kimber, and threatened one Wilson and abused one Grant, and threatened to shoot him, and abused and threatened to assault one Parish.

Upon the hearing of the application before the Full Court (Mayo, Reed and Abbott, JJ.), it was contended that the matters objected to were inadmissible, because they showed no more than that O'Leary was violent and abusive over a period of some hours, and they only established that he was of bad disposition, with a tendency to commit offences of violence. The Full Court found that there was a continuity during a period of some hours of O'Leary's conduct of drinking and violence or threats of it, and that his conduct was sufficiently proximate to label him as being the one of the available group of people, and that the evidence went beyond mere indication of bad character.

The appeal was dismissed, and O'Leary applied to the High Court for special leave to appeal.

Dr. Louat for the applicant.

Chamberlain for the Crown.

Reference was made to the following:—

Peacock v. The King, (1911) 13 C.L.R. 619, 628, 17 A.L.R. 588.

The King v. Lovegrove, (1931) 49 W.N. (N.S.W.) 29.

R. v. Makin, (1893) 14 N.S.W. L.R. 18.

Makin v. Attorney-General, [1894] A.C. 57, 65.

Thompson v. The King, [1918] A.C. 221.

Rex v. Sims, (1946) 62 T.L.R. 431, 432.

Hardgrave v. The King, (1906) 4 C.L.R. 232, 13 A.L.R. 206.

The King v. Bond, [1906] 2 K.B. 389.

The King v. Finlayson, (1912) 14 C.L.R. 675, 18 A.L.R. 313.

Cohen v. Bateman, (1909) 2 Cr. App. R. 197.

Rex v. Johnson, [1938] V.L.R. 37, [1937] A.L.R. 655.

Griffith v. The King, 58 C.L.R. 185, [1937] A.L.R. 653.

R. v. Hutton, (1936) 36 S.R. (N.S.W.) 534.

The following judgments were delivered:—

LATHAM, C.J.—The appellant in this case has been sentenced to death for the murder of W. E. Ballard on 7th July, 1946. He applies for special leave to appeal from the Full Court of the Supreme Court of South Australia, which has dismissed an appeal by him.

The principal point argued relates to the admissibility of evidence of assaults upon other persons committed by the accused on 6th and 7th July. These assaults were violent and unprovoked, and the victims were fellow-employees of the accused, O'Leary, and of Ballard, the man who was killed. Ballard was struck violently about the head, eight or nine times,

and then kerosene was poured on him and his clothes were set on fire.

Evidence of the other assaults was admitted upon the ground that the attack upon Ballard was brutally violent, that Ballard was drunk and helpless at the time, and that the injuries inflicted were injuries to the head. The two former characteristics were present in the case of the other assaults proved, and in one or two of them there were head injuries. The Full Court held that the evidence was rightly admitted, in accordance with the principles stated in *Thompson v. The King*, [1918] A.C. 221, and *R. v. Sims*, [1946] 1 All E.R. 697.

In these cases evidence of similar acts by the accused was admitted for the purpose of identifying the accused with the person who had committed the crime, the crime being of a special character presenting specific features which showed that it was committed by a person who had certain abnormal characteristics. The crimes were, in *Thompson's Case*, gross indecency with male persons by a male, and in *Sims' Case* sodomy. These cases show that, where the acts done are of such a character as to point to a member of a special class of abnormal persons (for example, sexual perverts) as the person who did the act, evidence that the accused did such acts and so belonged to that class is admissible.

But in this case the crime is simply one of savage violence. It does not present the peculiar features pointing to a particular class of persons which were present in the cases of *Thompson* and *Sims*. It would be a dangerous extension of the rule as to evidence of similar acts to hold that the fact that a crime is savage and brutal is sufficient to justify the admission of evidence that on other occasions an accused person has been guilty of savage and brutal acts. Thus, I do not agree with the reasoning of the judgment of the Full Court.

But there is another ground on which, in my opinion, the evidence was admissible. All the assaults in question were incidents of a drunken orgy on the same day, begun at Penola, continued at Kalangadoo and at the camp where the man lived. Evidence that the accused had been drinking during the day and evening of 6th July and early hours of 7th July was admissible to show the probability that he would attack another man in a fit of drunken fury. Evidence that, on the day and night of the killing of Ballard he actually attacked particular fellow-employees without cause is also evidence which goes to show the probability that he would attack some other fellow-employee. Such evidence puts the act of attacking Ballard in a setting which makes it possible for the jury to obtain a real appreciation of the events of the day and the night. It is evidence of "facts and matters which form constituent parts" or ingredients of the transaction itself or explain "or make intelligible the course of conduct pursued"

—per Dixon, J., in *Martin v. Osborne*, 55 C.L.R. 367 at p. 375, [1936] A.L.R. 264. Upon this ground I am of opinion that the evidence was admissible.

But the evidence was not put before the jury in this way. The jury was asked to consider it as evidence of the disposition of O'Leary—"a man who had no "care for the ordinary feelings of pity or humanity "which restrain ordinary people." Such a direction is inconsistent with the well-established rule that evidence of bad character is not admissible against an accused person—*Makin v. Attorney-General of New South Wales*, [1894] A.C. 57.

But in the circumstances of the present case, all the other acts in question being part of one course of behaviour on the day and night of the crime, I am of opinion that the misdirection would not and did not result in any miscarriage of justice. The other objections to the summing up (which were not taken on the trial or before the Full Court) are in my opinion not of such a nature as to justify this Court in granting special leave to appeal.

The application should be refused.

RICH, J.—The substantial question in this application is whether the evidence objected to is admissible. The admissibility of such evidence depends upon its relevancy to the issue before the jury, and this relevancy depends upon the circumstances of each particular case.

I have come to the conclusion that the evidence of what took place during the latter part of the Saturday and the early hours of Sunday morning, when the killing took place, was admissible. I would not put the admissibility on the analogy to *Thompson v. The King*, [1918] A.C. 221, but rather on the ground that it forms part of the circumstances of the crime, including the drunken condition of the prisoner, how he reached that condition, how long it continued, and how while in that condition he was behaving. His violence, the fact that he exhibited this violence on slight or no provocation, and all the circumstances, form inseparable features of a transaction consisting of connected events. Dr. Louat has pointed out defects in the summing up, and he has emphasised the fact that in the charge the evidence objected to was placed before the jury on what, for shortness, I might call the lines of *Thompson's Case*. After full consideration, however, I have formed the opinion that these are not matters of so important or fundamental a character in the conduct of the trial as to lead us to grant special leave to appeal.

STARKE, J.—I agree that special leave should be refused. The prosecutor for the King relied upon two propositions for the admission of the evidence that has been challenged. The first was that evidence of similar acts may afford evidence of identity. He agreed that evidence that the prisoner was of bad

disposition was inadmissible, and that he must show that there were specific features in this case connecting the prisoner with the crime charged as distinct from evidence of bad disposition.

The Chief Justice and my brother Rich have referred to various facts, and those facts, to my mind, show that this case falls precisely within *Thompson v. The King*, [1918] A.C. 221, and *The King v. Sims*, [1946] 1 All E.R. 697. They show that there are specific features in this case connecting the prisoner with the crime charged. I shall refer to them generally. The prisoner and other persons were engaged in a drunken orgy; the prisoner was violently assaulting several of these persons at various times of the day; he was present in the neighbourhood of the cubicle in which the dead man was found; the dead man was injured by blows from a bottle, and the prisoner had in his possession shortly before the body of the dead man was found a bottle by which the injuries sustained by the deceased might have been inflicted. In addition, there was found close to the cubicle in which the dead man was found the prisoner's pullover. All these facts are specific features which connect the prisoner with the crime charged.

The other ground upon which the learned prosecutor relied is stated in Roscoe's *Criminal Evidence* (14th ed.), p. 102, in these words—"Thus evidence may be given, not only of the act charged itself, but of other acts so closely connected therewith as to form part of one chain of facts which could not be excluded without rendering the evidence unintelligible—part in fact of the *res gestae*." I should not have thought that doctrine applicable to this case at all. The assaults tendered and admitted were not, I think, so closely connected with the crime charged as to form part of one chain of facts: they were committed at various intervals during the day and night. If this be the proposition relied upon by the Chief Justice, I dissent from its application to this case.

I notice that *Roscoe*, after stating the proposition above stated, says—"That the question is not yet solved in a wholly satisfactory way appears from a collation of criminal appeals."

As to the other matters to which Dr. Louat has referred, they are not, in my opinion, matters which this Court should concern itself. They are matters for the Court of Criminal Appeal and involve no grave or substantial miscarriage of justice in any relevant sense.

DIXON, J.—In my opinion the evidence objected to was admissible, because, from the time on Saturday, 6th July, when the prisoner and the party with him came under the influence of drink, right up to the conclusion of the scene in the early hours of the following Sunday morning, in the presence of the

deceased's body lying in front of the huts, a connected series of events occurred which should be considered as one transaction. The part which the prisoner took in the drunken orgy which, as the facts suggest, culminated in the fatal attack upon the deceased man would appear to me to be relevant to the question whether the prisoner was the assailant, and if so whether he was at the time capable of forming, and did form, the intention which would make his crime murder.

The evidence disclosed that, under the influence of the beer and wine he had drunk and continued to drink, he engaged in repeated acts of violence which might be regarded as amounting to a connected course of conduct. Without evidence of what during that time was done by those men who took any significant part in the matter, and especially evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event. The prisoner's generally violent and hostile conduct might well serve to explain his mind and attitude, and therefore to implicate him in the resulting homicide. Examples of the admission of evidence of connected incidents of one transaction will be found in *R. v. Cobden*, (1862) 3 F. & F. 833, 176 E.R. 381; *R. v. Voke*, (1823) Russ. & Ry. 531 at p. 533, 168 E.R. 934, 935; *R. v. Rearden*, (1864) 4 F. & F. 76, 176 E.R. 473; and as to this case see, *per Cussen, J.*, *R. v. Herbert*, [1916] V.L.R. 343 at p. 349, 22 A.L.R. 149. In my opinion, for the reason given, evidence of his conduct was admissible for the purpose stated.

In the charge to the jury the evidence was not presented exactly in this way. It was put rather that the crime, in its circumstances, was of a description which showed that it must have been committed by a man of a particular disposition, that such a disposition amounted to a specific means of connecting or identifying the culprit, and that the prisoner's conduct earlier in the period might be considered to show that, for the time being, he possessed that disposition. I do not think that this is an accurate way of treating the purpose for which the conduct of the prisoner was admissible. I am unable to see in the mere brutality of the crime or the fact that the assailant concentrated his attack on the head of the deceased any such specific connection with the prior acts of the prisoner as to afford, so to speak, an identifying mark of the sort referred to in the decisions which appear to have been in the learned Judge's contemplation.

For that and other reasons placed before us by Dr. Louat, I have had some misgivings concerning the charge to the jury. But, thinking the evidence objected to was admissible, and recognising the strength of its incriminating effect, I have come to the conclusion that the difference between the manner

O'LEARY v. THE KING

in which it might correctly have been used and the use in fact made of such evidence, is not a sufficient reason to justify our intervention. Nor do I think that, by the addition of the further points made in criticism of the charge, a case is made out for our granting special leave to appeal.

McTIERNAN, J.—I would allow this application and the appeal, and I would quash the conviction and order a new trial. I would order a new trial in view of the evidence except the evidence of prior assaults on persons other than the deceased. I think that the evidence of other assaults was not admissible. I agree with what my brother Starke has said about the application of the doctrine of connected events to the evidence of assaults on persons other than the deceased. If, however, that evidence were admissible on that ground, there was a fundamental error because the jury were directed on the basis that the evidence was admissible for other reasons. These were put here by the learned prosecutor for the King. In my opinion the evidence was not admissible. Regarding the summing up generally, I think that Dr. Louat's criticism of the summing up is in substance correct. It is not necessary to deal with more than one of the contentions. The direction as to the nature and probative force of circumstantial evidence was incorrect. I apprehend that this is in effect conceded by Mr. Chamberlain. But I do not agree that the defects were cured by the direction as to the onus on the Crown to prove guilt beyond reasonable doubt. I think that a jury would use the direction regarding circumstantial evidence to determine whether or not the Crown made out its case beyond reasonable doubt. This direction about circumstantial evidence was fundamental. I think that the defect in this direction constituted a substantial miscarriage of justice.

I have also reached the conclusion that it was a substantial miscarriage of justice to treat the assaults committed by the accused on other occasions as a connecting link between him and the murder. The assaults were dealt with in this way by the trial Judge. In the first place, to do so violated the principle stated by the Privy Council in *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57. I refer to what the Lord Chancellor said at page 65. In the second place, the admission of the evidence cannot be justified by the cases of *Thompson v. The King*, [1918] A.C. 221, or *Rex v. Sims*, (1946) 62 T.L.R. 431, even if either of these can be rightly regarded as extending the principle under which evidence of so-called similar acts is admissible in a criminal prosecution. There is no resemblance whatever between the evidence of the assaults and the evidence which was held admissible in *Thompson's Case* (*supra*). The possession of certain articles was held in that case to go to identity. In the present

case the evidence of the assaults is not tendered to prove the possession by the accused of any physical thing which tended to show that he was the man who killed Ballard.

The evidence of the assaults proves that the accused was a man of violence when in liquor. That disposition is not comparable with the possession of any physical thing which may become an identifying mark. Such evidence may prove that the accused was the kind of man who was likely to commit the crime charged; but that in itself is not sufficient to prove that he was the man who committed the crime. To put it another way, the evidence of the assaults tended to prove that the accused was a violent man; but it was not evidence admissible to prove that he was the violent man who committed the crime. That such a man committed the crime is proved by the method whereby Ballard met his death. But the fact that the accused was a violent man does not provide a nexus between the crime and the accused. I refer to what Lord Sumner said in *Thompson's Case* (*supra*), at p. 235. In my opinion the evidence as to the assaults puts the accused in the class of ordinary men gone very wrong, rather than in the class of perverts. It was to the latter class that Lord Sumner's observations were directed.

In *Sims' Case* the Court of Criminal Appeal in England considered the question whether upon the trial of the accused for sodomy evidence of similar offences on other occasions was admissible. The Court said that the consideration of the question began with the principle that evidence is admissible if it is logically probative, i.e., if it is logically relevant to the issue whether the prisoner committed the act charged. The Court said that the evidence was not to be excluded merely because it tended to show that the prisoner was of a bad disposition, but it should be excluded if it showed nothing more than that fact. The Court said that there are many cases where evidence of specific acts or circumstances connecting the prisoner with specific features of the crime had been held admissible even though the evidence showed him to be of a bad disposition. In such cases the evidence proves more than the possession of a bad disposition. The Court said that one of these cases is where the issue is as to the identity of the accused. This statement was relied upon to justify the admission of the evidence about the assaults in the present case. But, in speaking of a case where the issue is as to identity, the Court said this—"We think that evidence is admissible "of a series of similar acts done by him (the "accused) to other persons because while one witness "to one act might be mistaken in identifying him, "it is unlikely that a number of witnesses identifying "the same person in relation to a series of acts with "the self-same characteristics would all be mistaken." These observations do not apply here. In the present

case there is no question of any mistake by a witness in identifying the accused.

In applying the general principle whether the evidence of similar acts was logically probative or, in other words, logically relevant to the issue whether the prisoner in *Sims' Case* had committed the act charged, the Court said that the crime of so doing was in a special character. It applied the observations made by Lord Sumner in *Thompson v. The King* (*supra*) about pervers. The Court went on to say—"On this account, in regard to this crime, the "repetition of the acts is itself a specific feature "connecting the accused with the crime, and evidence "of this kind is admissible to show the nature of "the act done by the accused. The probative force "of all the acts together is much greater than one "alone; for, whereas the jury might think that one "man might be telling an untruth three or four are "hardly likely to tell the same untruth unless they "were conspiring together." This statement, too, has no application to the present case. The evidence as to the assaults has strong probative force on the issue whether or not the accused had a propensity to do physical injury to others. But it has no probative force on the question whether he was the man who committed the offence charged. There is, in my opinion, no connecting relationship between the evidence of the other assaults and the crime with which the accused was charged. I think that such evidence is merely evidence of a propensity to commit crimes of violence. I think the evidence does not fall within the principle of *Sims' Case* or any other case where evidence of similar action was admitted. It is not admissible in the present case to establish the identity of the accused with the person who committed the crime charged.

Taking the general criterion laid down in *Sims' Case*, I think that the evidence of the assaults is not logically probative or logically relevant to the issue whether the accused committed the act charged. He was a very violent man and addicted to acts of brutality when in drink. There is no evidence that he ever used the jagged end of a bottle in committing an assault or that he ever did or threatened incendiarism. The evidence showed that the accused's weapons were principally his boots and fists. The evidence of the assaults does not show similar acts of violence to those which brought about Ballard's death. Hence, in the present case it is not easy to see how the evidence of the assaults is relevant in strict logic to the issue whether the accused committed a murder which was effected by means unlike those which the accused used to commit acts of violence.

WILLIAMS, J.—I agree with the majority of the Court that special leave to appeal should be refused. I also agree with the majority, after considering

carefully everything that Dr. Louat had to say, that the only point of sufficient gravity to justify this Court granting special leave to appeal would be that the evidence of the other acts of violence and threats of violence by the appellant were wrongly admitted as evidence to prove that he was the person who committed the crime. In my opinion this evidence was rightly admitted. It is not merely evidence that the appellant was a violent man who was likely to commit the crime, in which case it would have been inadmissible. It is evidence of certain significant incidents which took place in a series of connected occurrences which commenced with the drunken orgy on the 6th of July and concluded with Ballard's death in the early morning of the 7th. The murder occurred in an isolated camp, so that it is highly probable that it was committed by one of the inhabitants. The fact that the appellant alone of all these inhabitants was in the course of the orgy committing acts of violence and threatening violence must have in these circumstances probative value as making it logically probable that he was the man who assaulted Ballard. It is therefore evidence of facts relevant to prove the main fact, that is to say, the identity of the assailant, and as such, as indicated in the cases cited by my brother Dixon, is admissible on ordinary principles.

Application refused.

[Solicitors—For the applicant, Harding and Breden for W. A. Seales; for the Crown, A. J. Hannan, Crown Solicitor.] F. D. C.S.

Supreme Court.

Before Fullagar, J.

July 24, 29.

FORGE v. MAYS.

Police offences — Game of "housey-housey"—Not a raffle — Police Offences Act 1928 (No. 3749), sec. 88 (3) (c).

The essential feature of a raffle which distinguishes it from other forms of lottery is that it involves a disposal of an article as distinct from a competition for a money stake provided by the entrants.

ORDER TO REVIEW.

Henry Victor Mays was charged on the information of Christopher Forge, a senior constable of police, in that on the 28th March, 1946, he did conduct a lottery. At the hearing of the information it appeared that a bazaar had been held in a Richmond park for charitable purposes. On the day in question the game of "housey-housey" was played in a pavilion at the bazaar. For a fee of 2s. each player was entitled to play in two games which were conducted by giving the players numbered cards each divided into twenty-