[HIGH COURT OF AUSTRALIA.]

O'LEARY . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1946.

SYDNEY, *Nov.* 12, 13.

Latham C.J., Rich, Starke, Dixon, McTiernan and Williams JJ.

Criminal Law — Evidence — Similar acts — Relevance — Admissibility — Murder — Accused—Connection with crime—Disposition of accused—Drunken orgy—Assaults committed by accused during orgy—Nature of assaults—Similarity between injuries thus inflicted and injuries sustained by deceased—Connected course of conduct—Res gestae.

B, an employee at a timber camp, and other fellow employees including the applicant took part in a drunken orgy which commenced on Saturday morning and continued until late on Saturday night. At about midnight B retired to his cubicle which was a short distance from that of the applicant. In the early hours of Sunday morning B was found in his cubicle in a dying condition. An examination of B showed that he had been struck on the head eight or nine times with a bottle after which, kerosene having been poured over him, his clothes had been set on fire. Shortly before the discovery of B the applicant had in his possession a bottle. A pull-over belonging to the applicant was found close to B.'s cubicle. The applicant was found guilty of the murder of B. At the trial evidence was admitted that the applicant at various times during the orgy had violently assaulted other employees. Some of these assaults were unprovoked and all consisted of brutal blows at the head. During the afternoon the applicant had aimed a blow at B.

Held, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting), that the evidence was admissible.

By *Latham* C.J., *Rich*, *Dixon* and *Williams* JJ. (*Starke* and *McTiernan* JJ. dissenting), on the ground that the evidence disclosed a connected series of events which should be considered as one transaction.

By *Starke* J. on the ground that the evidence consisted of specific features which connected the applicant with the crime charged.

The trial judge directed the jury that they could consider the challenged evidence as evidence of the disposition of the accused "as a man who had no care for the ordinary feelings of pity or humanity which restrain ordinary people."

Held,

(1), by *Latham* C.J., *Rich*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting), that the misdirection was not such as to warrant special leave.

(2), by *Latham* C.J., that the direction was inconsistent with the well-established rule that evidence of bad character was not admissible against an accused person.

Thompson v. *The King*, (1918) A.C. 221, and *R.* v. *Sims*, (1946) 62 T.L.R. 431, referred to.

APPLICATION for special leave to appeal from the Supreme Court of South Australia.

Charles Patrick O'Leary was tried at the Circuit Court at Mount Gambier, South Australia, on an information which charged him with the murder of one Walter Edward Ballard on 7th July 1946. He was found guilty of the murder and was sentenced to death.

An appeal by O'Leary to the Full Court of the Supreme Court of South Australia was based upon three grounds, namely, (i.) that the trial judge wrongly admitted evidence of certain assaults, abuse and threats by O'Leary upon and to a number of men other than Ballard, and misdirected the jury that they could take into account and act upon that evidence for the purpose of determining whether the identity of O'Leary as the person who caused Ballard's death was proved; (ii.) that the trial judge wrongly admitted as evidence two photographs of Ballard taken after his death; and (iii.) that there was no evidence or sufficient evidence to prove O'Leary guilty of murder.

The evidence admitted at the trial as to the incidents that occurred prior to and after the discovery of Ballard at about 5.30 a.m. on 7th July related to a period which commenced during the forenoon of the previous day. O'Leary, as well as Ballard and a number of the witnesses, was employed at the Government timber mill at Nangwarry. On Saturday morning, 6th July, a party of them visited Penola. After drinking some wine and beer they returned to the camp at the mill for lunch. In the afternoon several men, including O'Leary and Ballard, went to Kalangadoo. They spent a good deal of time in drinking at the hotel, and returned to the camp at about six o'clock p.m. From that time onwards several men were continuously in or around the camp, and others returned to it at later stages. One Kimber, who had been knocked down by O'Leary at Kalangadoo during the afternoon, but not without some provocation,

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was again assaulted in the camp just after his return with the others about six o'clock p.m. without any further provocation, and as a result he was removed to hospital during the evening, and Ballard accompanied him there. Ballard returned to his cubicle about midnight and, apparently, locked the door. There was no evidence as to Ballard's movements or whereabouts after this stage until he was seen in his cubicle by O'Leary and a witness at about 5.30 o'clock on the Sunday morning, nor was there any evidence that O'Leary was in Ballard's company or spoke to him at any time during the period between about six o'clock p.m. on the Saturday and 5.30 o'clock on the Sunday morning. O'Leary admitted in a statement to the jury that he had known Ballard for some time, and had worked with him at another camp, but there was no direct evidence that O'Leary knew what cubicle Ballard occupied prior to entering it at about 5.30 a.m. on the Sunday. The only suggestion that O'Leary might bear some ill-will towards Ballard was the evidence that during the journey back to the camp from Kalangadoo O'Leary aimed a blow at Ballard when the latter attempted to pick up a bottle of wine that had fallen on to the floor of the caravan, at the same time saying "leave it alone." The blow was intercepted by another witness, Stanley Charles Parish, and Ballard made no attempt to retaliate. The evidence of the terrible injuries to Ballard's head and the burns on his body coupled with the medical evidence showed that he had been savagely attacked by some person with the intention of doing him grievous bodily harm; and that after the wounds had been inflicted a fire was deliberately lit on the clothing he was wearing. The nature and situation of the wounds and the circumstances disclosed with regard to the burns excluded the possibility of either kind of injury having been self-inflicted. Shortly after the discovery of Ballard, the applicant had in his possession a bottle. A pull-over, belonging to the applicant, was found close to Ballard's cubicle. There was evidence that at midnight Ballard was in a somewhat drunken condition and that he was an inoffensive man and unlikely to offer provocation to anyone.

Several witnesses gave evidence that during the evening of the Saturday in question O'Leary: (*a*) punched one Ernest Alfred Hollywood about the head with heavy blows, knocked him down and continued to punch him while he was on the floor of his cubicle; (*b*) grabbed one Francis Fergus O'Toole by the throat and threatened "to do" him; (*c*) struck and knocked over one Brian Alfred Kimber and then, whilst wearing "military" boots, kicked Kimber in the body and in the head; and (*d*) abused and threatened to assault and shoot three other persons. All the persons so assaulted or

threatened were fellow employees of O'Leary's and the evidence showed that at the time of the assaults upon them Hollywood, O'Toole and Kimber were very much under the influence of intoxicating liquor.

The Crown's contention was that the challenged evidence was admissible as being relevant to the issue whether O'Leary murdered Ballard, and that it showed more than a general disposition to violence or bad character in him. The conduct was claimed to constitute a series of similar acts in comparison with the acts as a result of which Ballard's injuries were caused, in that (i.) in each case a drunken and defenceless victim was attacked or threatened without provocation; and (ii.) where the injury was inflicted it was with one small exception to the head, face or throat. Apart from the burns Ballard's injuries were to the head and face. The contention on behalf of O'Leary, in effect, was that the matters objected to were not relevant, and so were inadmissible, because they showed no more than that O'Leary was violent and abusive over a period of some hours, and therefore only established that he was of bad disposition or had a tendency to commit offences of violence; and that even if they were properly described as "similar acts" they were admissible only for a limited purpose, and not as evidence to establish the identity of O'Leary as the person who murdered Ballard. The two photographs, one of which showed the injuries to Ballard's head and the other the burns, were objected to on the ground that in view of the evidence by the medical witnesses they were unnecessary as proof of injuries, and, therefore, were merely matter of prejudice against O'Leary.

The Full Court of the Supreme Court dismissed the appeal whereupon an application was made to the High Court on behalf of O'Leary for special leave to appeal from that decision.

Louat, for the applicant. The summing up by the trial judge was defective in that he: (*a*) did not instruct the jury as to the correct way to regard circumstantial evidence; (*b*) did not leave to the jury the applicant's version of the facts; (*c*) extracted from the evidence a series of damaging inferences which it was the function of the jury to draw, if at all; (*d*) misdirected the jury on the question of opportunity to others to commit the crime; and (*e*) did not properly instruct the jury as to the use of the evidence of similar acts, if admissible. This evidence does not come within any known category of evidence of similar acts. The trial judge was in error in admitting the evidence of assaults on other persons. Even assuming that that evidence was admissible there was not sufficient evidence to

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warrant the conviction. The evidence showed only a temporary ill feeling and does not show any long-standing or continued ill feeling between the applicant and the deceased. There was no evidence: (*a*) as to the total number of people in the camp; (*b*) that the applicant knew where the deceased's room was situated; (*c*) that the applicant had ever entered the room of the deceased; or (*d*) that the applicant saw or was with the deceased during the period commencing at about six o'clock p.m. on the Saturday and ending at about 5.30 a.m. on the Sunday. There was nothing in the evidence to exclude opportunity on the part of any one of a number of men who were associated with the camp. The applicant had no motive to attack the deceased. The principle is that evidence is not admissible merely for the purpose of showing disposition. This type of evidence must be treated with considerable care and the jury must be instructed as to the use they may make of it: See *R.* v. *Lovegrove* (1). To direct the jury that having "the picture of the actions of the accused" it was for them to say whether he answered to the description of a person who would do to the deceased "what was done to him that night" was in conflict with *Makin* v. *Attorney-General for New South Wales* (2); *Thompson* v. *The King* (3), and *R.* v. *Sims* (4). Part of the summing up was based upon conjecture and was prejudicial to the applicant. Circumstantial evidence and the duty of the jury to acquit in certain circumstances was discussed in *Peacock* v. *The King* (5). *Makin* v. *Attorney-General for New South Wales* (2) and *Thompson* v. *The King* (3) contain an exhaustive and authoritative definition of the limits of evidence as to similar acts. *Makin's Case* (2) shows that the only headings under which evidence of similar acts may be admitted are design or accident or to rebut a possible defence; See also *Thompson* v. *The King* (6). Where there are acts which without the evidence of similar acts point to or constitute a prima-facie case that a certain person committed the crime then the alibi with regard to that case becomes a matter of defence and in advance he may be restrained from making anything of that defence but, in the absence of other incriminating evidence, use cannot be made of evidence of similar acts to fasten a crime on to a certain person; See also *Hardgrave* v. *The King* (7); *R.* v. *Bond* (8); *R.* v. *Finlayson* (9), and *Halsbury's Laws of England*, 2nd ed., vol. 9, p. 186. The facts in *R.* v. *Sims* (4) were not similar acts within

(1) (1931) 49 W.N. (N.S.W.) 29.
(2) (1894) A.C. 57.
(3) (1918) A.C. 221.
(4) (1946) 62 T.L.R. 431.
(5) (1911) 13 C.L.R. 619, at pp. 629, 630.
(6) (1918) A.C., at pp. 227, 232, 234.
(7) (1906) 4 C.L.R. 232, at p. 237.
(8) (1906) 2 K.B. 389.
(9) (1912) 14 C.L.R. 675.

the meaning of the authorities cited above. This crime was not a crime of passion, it must have been committed by a person "in cold blood." The acts which are here alleged to be similar acts are not the type of similar acts which would be admissible under the above-mentioned authorities. The kind of similar acts that would be admissible in crimes of violence are fairly well defined as being where there is a repetitive pattern, the same thing done in the same way. There is an inadequacy of direct evidence connecting the applicant with the deceased. In the absence of (*a*) adequate direct evidence, and (*b*) evidence as to motive, even accepting the evidence of similar acts, this was not a case against the applicant fit to be left to the jury.

Chamberlain, for the Crown. The submission that the murder was premeditated was based upon a misunderstanding of the evidence. It was obvious that someone had gone to the door of the deceased's hut, wakened him up and attacked him then and there, probably after some discussion. The circumstances surrounding the murder and the nature of the injuries sustained by the deceased indicated that the slayer was a person who was capable of inflicting violence of that sort for no reason that would operate on the mind of an ordinary person. They indicated a very extraordinary degree of ferocity and a person oblivious to any sense of pity or responsibility. The evidence of similar acts showed the applicant as possessing those characteristics. That evidence showed cruel and cowardly attacks on people who were unable to defend themselves; and unrestrained violence to vital points, such as the head and throat, and no specific motive for any of them. Although not identical, there was much more in common between those acts and the acts surrounding the death of the deceased than was the case in *Thompson* v. *The King* (1). The summing up must be regarded as a whole and so regarded it was adequate. The jury was directed, as required by *Peacock* v. *The King* (2) that unless the guilt of the accused was established beyond a reasonable doubt, he should be found not guilty of the charge. The degree of proof necessary for the Crown to establish, namely proof beyond reasonable doubt that the applicant was the author of the crime, was clearly put to the jury. The summing up contained a correct statement of the law as gathered from *Thompson* v. *The King* (1). There is no logical difference between this case and *R.* v. *Ball* (3). As was pointed out in *R.* v. *Makin* (4) each act or tendency must be regarded with other acts or tendencies so long as opportunity

(1) (1918) A.C. 221.
(2) (1911) 13 C.L.R. 619.
(3) (1911) A.C. 47.
(4) (1893) 14 L.R. (N.S.W.) 1.

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is shown, so long as there appears a set of circumstances consistent with the guilt of the accused quite independently of the evidence of similar acts, regard may be had to those similar acts upon the question of whether the act charged was committed by the accused. The evidence is admissible for the purpose of rebutting a defence of accident, or of showing a design. The evidence of similar acts in this case was admissible to show that the applicant was in a state of mind that he might do the act charged against him, as a circumstance or circumstances pointing to the fact that he did in fact do it (*Thompson* v. *The King* (1); *R.* v. *Ball* (2)). That evidence showed that the applicant was a person who was easily upset and who passed into a frame of mind in which he would commit violence for little or no reason, and that there were "explosive" possibilities with a man possessed of a "hair-trigger" temperament. After he had heard the evidence tendered by the Crown the applicant gave an account of himself, his actions and whereabouts during the critical hours which, although fitting in with that evidence, was inconsistent with the account given by him prior to hearing that evidence (*Pitman* v. *Byrne* (3); *Eade* v. *The King* (4); *Wills* on *Circumstantial Evidence*, 7th ed. (1937). The trial judge properly directed the jury that if they thought it reasonably possible that the applicant was so much under the influence of intoxicating liquor as to be unable to form a specific intention of murder they should find a verdict of manslaughter only (*R.* v. *Bond* (5)). The summing up should be read as a whole and so read it is manifest that it is a perfectly proper legal direction and a proper analysis of the evidence. The Court will not interfere with a conviction because a misdirection of fact was made unless the appellant has satisfied the Court that that misdirection has in all probability led to a miscarriage of justice. There is a difference between a misdirection of law and a misdirection of fact. If there was a misdirection of law it is for the Crown to satisfy itself that the result anyway was proper; if there was a misdirection of fact it is for the appellant to satisfy the Court that that led to a miscarriage of justice (*Cohen* v. *The King* (6); *Archbold* on *Pleading and Evidence in Criminal Cases*, 31st ed. (1943), p. 307). It is for the jury to determine the facts and the jury's verdict should be adhered to provided they had material upon which they could reasonably so find. It is not a question of whether the Court has a reasonable doubt: *Archbold* on *Pleading and Evidence in Criminal Cases*, 31st ed. (1943), p. 308. The correctness of the general

(1) (1918) A.C. 221.
(2) (1911) A.C. 47.
(3) (1926) S.A.S.R. 207.
(4) (1924) 34 C.L.R. 154.
(5) (1906) 2 K.B. 389.
(6) (1909) 2 Cr. App. R. 197, at p. 207.

proposition laid down in *R.* v. *Sims* (1) is indisputable. The ultimate object of admitting such evidence is that it proved or aided the act charged or that the accused did the act charged (*R.* v. *Bond* (2)). The evidence may be admissible for either purpose although not in itself sufficient to prove the charge (*Thompson* v. *The King* (3) ; *Martin* v. *Osborne* (4)).

[DIXON J. referred to *R.* v. *Wylie* (5).]

Such evidence is admissible to prove the act charged if it consists in the identification of the person alleged to be guilty of the offence, as in *Thompson* v. *The King* (3) ; if it shows the existence of the state of mind rather than the doing of the act more probable by a person having the opportunity to do it (*R.* v. *Ball* (6), See also *R.* v. *G. J. Smith* (7)). It was admissible because it showed a course of conduct on the part of the accused in which the doing of the act charged formed a probable and not unexpected part (*Makin* v. *Attorney-General for New South Wales* (8) ; *R.* v. *Makin* (9) ; *R.* v. *G. J. Smith* (7)). The evidence was admissible for the purpose of assisting, with other circumstances, in proving the act charged. The jury's verdict was the only one possible on the evidence.

Louat, in reply. It is not disputed that the evidence objected to has a bearing on identity but it does not prove, and has no bearing upon whether the accused committed the act charged. This type of evidence is excluded by the courts not because it throws any light on the guilt of an accused person but because it throws a blinding light. All the cases cited to the Court on the admissibility of evidence of " similar acts " show that the evidence must reveal a repetitive pattern with special features, for example in *R.* v. *G. J. Smith* (7) there were thirteen " similar acts." There is no repetitive pattern in this case nor does the evidence disclose any " special features." On the question of the defined limits of the use of evidence for purposes of identity See *R.* v. *Aiken* (10) ; *R.* v. *Johnson* (11) ; *Griffith* v. *The King* (12) ; *R.* v. *Hutton* (13) and *Phipson* on *Evidence* 8th ed. (1942), p. 151. The direction given to the jury as to reasonable doubt, was insufficient (*R.* v. *Turnbull* (14) ; *Davies* v. *The King* (15)).

(1) (1946) 62 T.L.R. 431.
(2) (1906) 2 K.B. 389.
(3) (1918) A.C. 221.
(4) (1936) 55 C.L.R. 367.
(5) (1804) 1 Bos. & Pul. (N.R.) 92, at p. 94 [127 E.R. 393, at p. 394].
(6) (1911) A.C. 47.
(7) (1915) 11 Cr. App. R. 229.
(8) (1894) A.C. 57.
(9) (1893) 14 L.R. (N.S.W.) 1.
(10) (1925) V.L.R. 265, at p. 268.
(11) (1938) V.L.R. 37.
(12) (1937) 58 C.L.R. 185.
(13) (1936) 36 S.R. (N.S.W.) 534.
(14) (1920) 20 S.R. (N.S.W.) 592, at pp. 594, 595.
(15) (1937) 57 C.L.R. 170, at pp. 180-182.

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Chamberlain, by leave. *R.* v. *Aiken* (1), does not conclude the matter, and must be read with the decision in *Thompson* v. *The King* (2).

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 grounds 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* (2), and *R.* v. *Sims* (3).

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* (2), gross indecency with male persons by a male, and in *Sims' Case* (3) 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* (2) and *Sims* (3). 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

(1) (1925) V.L.R., at p. 268.
(2) (1918) A.C. 221.
(3) (1946) 62 T.L.R. 431.

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 the 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* (1). 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 for New South Wales* (2)).

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.

(1) (1936) 55 C.L.R., at p. 375. (2) (1894) A.C. 57.

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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's Case*, (1), 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 emphasized 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* (1). 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's Case* (1), and *Sims'* *Case* (2). 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 pull-over. All these facts are specific features which connect the prisoner with the crime charged.

(1) (1918) A.C. 221.

(2) (1946) 62 T.L.R. 431.

The other ground upon which the learned prosecutor relied is stated in *Roscoe* on *Evidence in Criminal Cases*, 14th ed. (1921), 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* on *Evidence in Criminal Cases*, 14th ed. (1921), at p. 102, 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

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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* (1); *R.* v. *Voke* (2); *R.* v. *Rearden* (3), and as to this case see per *Cussen* J. in *R.* v. *Herbert* (4). In my opinion, for the reasons 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 recognizing the strength of its incriminating effect, I have come to the conclusion that the difference between the manner 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.

(1) (1862) 3 F. & F. 833 [176 E.R. 381].
(2) (1823) Russ. & Ry. 531, at p. 533 [168 E.R. 934, at p. 935].
(3) (1864) 4 F. & F. 76 [176 E.R. 473].
(4) (1916) V.L.R. 343, at p. 349.

These were put here by the learned prosecutor for the King. In my opinion the evidence was not admissible at all. Regarding the summing up generally, I think that Dr. *Louat's* criticism of it 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* (1). I refer to what the Lord Chancellor said (2). In the second place, the admission of the evidence cannot be justified by the cases of *Thompson* v. *The King* (3); or *R.* v. *Sims* (4), 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* (3). 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

(1) (1894) A.C. 57.
(2) (1894) A.C., at p. 65.
(3) (1918) A.C. 221.
(4) (1946) 62 T.L.R. 431.

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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* (1). 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* (2) 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" (3). 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* (2) had committed the act charged, the Court said that the crime of sodomy was in a special character. It applied the observations made by Lord *Sumner* in *Thompson* v. *The King* (4) about perverts. The Court went on to say "On this account, with regard to this crime, the repetition of the acts is itself a specific feature connecting the accused with the

(1) (1918) A.C., at p. 235.
(2) (1946) 62 T.L.R. 431.
(3) (1946) 62 T.L.R., at p. 432.
(4) (1918) A.C. 221.

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 " (1). 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* (2) or any other case where evidence of similar acts 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* (2) 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

(1) (1946) 62 T.L.R., at p. 433. (2) (1946) 62 T.L.R. 431.

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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 sixth of July and concluded with Ballard's death in the early morning of the seventh. The murder occurred in 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.

Special leave to appeal refused.

Solicitor for the applicant, *W. A. Scales*, Adelaide, by *Harding & Breden*.

Solicitor for the Crown, *A. J. Hannan*, Crown Solicitor for South Australia, by *F. P. McRae*, Crown Solicitor for New South Wales.

J. B.