HIGH COURT OF AUSTRALIA

FRENCH CJ
HAYNE, HEYDON, KIEFEL AND BELL JJ

CHRISTOPHER CLARK JONES APPELLANT

AND

THE QUEEN RESPONDENT

Jones v The Queen
[2009] HCA 17
29 April 2009
B40/2008

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Queensland

Representation

P J Callaghan SC with P E Smith and A M Hoare for the appellant (instructed by Ryan & Bosscher Lawyers)

A W Moynihan SC with B J Power for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Jones v The Queen

Criminal law – Evidence – Joint murder trial – Admissibility of evidence adduced by accused of bad character or propensity of co-accused – Whether appellant prevented by trial judge from fully adducing relevant admissible evidence – Whether jury misdirected as to use of evidence of appellant's bad character.

Criminal law – Appeals – Application of proviso.

Words and phrases – "substantial miscarriage of justice".

Criminal Code (Q), s 668E(1A).

1 FRENCH CJ, HEYDON, KIEFEL AND BELL JJ. On 1 April 2005 the decapitated body of a youth, Morgan Jay Shepherd, was found buried in a shallow grave in bushland near Dayboro, a township north of Brisbane. The deceased's head was found nearby. There were numerous stab wounds to the body. It was not possible to determine whether many, or all, save one, had been inflicted post-mortem. It was possible that death had been occasioned by a single stab wound to the neck.

2 The deceased was last seen alive in the company of James Patrick Roughan ("Roughan") and the appellant at Roughan's home in Sandgate. The three had been drinking together. The appellant and Roughan were jointly charged with the murder of the deceased. Each pleaded not guilty to that charge. Each pleaded that he was guilty of being an accessory after the fact to the unlawful killing of the deceased by the other and to interfering with a corpse.

3 The Crown case was that either or both the appellant and Roughan murdered the deceased or that one of them murdered him and the other enabled or aided that other in the attack with the intent of causing death or grievous bodily harm[1].

4 In out of court statements tendered at the trial Roughan and the appellant each claimed that the other had assaulted the deceased and then obtained a knife and stabbed him in the neck. The appellant's account was that he was in fear of Roughan. He described Roughan as a "psycho" and he said that Roughan had been charged with stabbing "one of his mates" on another occasion. Roughan was on bail at the date of the offence on a charge of the attempted murder of a man named McKenna ("the McKenna assault").

5 The case against the appellant was a strong one. Apart from his admission to having been present at the time of the killing, there were a number of witnesses who gave evidence of admissions made by him to his involvement in the murder. Three of these witnesses had assisted in disposing of the body of the deceased. Each had pleaded guilty to being an accessory after the fact to the murder and received a reduction in sentence on the strength of each undertaking to give evidence in the prosecution of the appellant and Roughan[2]. Two of the witnesses who gave evidence of admissions made by the appellant were not criminally concerned in the offence. The appellant and Roughan travelled together in the same prison van on an occasion after each was charged with the murder. Their conversation was secretly recorded. The appellant's statements made in the course of the conversation may be thought supportive of the Crown case but did not include any unequivocal admission of guilt.

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1 Section 7(1) of the *Criminal Code* (Q).

2 Under s 13A of the *Penalties and Sentences Act* 1992 (Q).

6 Neither the appellant nor Roughan gave evidence at the trial. Each was convicted of murder. Each appealed against his conviction to the Court of Appeal. Roughan's appeal was allowed and a new trial ordered. He has since been convicted of the murder of the deceased at the second trial. The appellant's appeal was dismissed.

7 The appellant appeals by special leave from the orders made by the Court of Appeal on the ground that there was a miscarriage of justice arising as the result of two errors in the conduct of the trial[3]. These were, first, that the trial judge (Atkinson J) prevented the appellant's counsel from "fully adducing the evidence" that Roughan had attempted to murder a friend on another occasion. An examination of the course of the trial shows that this complaint is without substance. The second ground complains of a misdirection[4]. The impugned direction was found to be erroneous in the Court of Appeal. The appellant's complaint in this Court is with the Court of Appeal's decision to nonetheless dismiss his appeal. No error in the approach the Court of Appeal took to the application of s 668E(1A) of the *Criminal Code* (Q)[5] is established. For the reasons that follow the appeal should be dismissed.

The first ground of challenge

8 At the trial the appellant's counsel sought to cross-examine Detective Sergeant Williams, the officer who had arrested Roughan and charged him with the murder, to elicit details of the circumstances of the McKenna assault. The trial judge allowed evidence to be adduced from Detective Williams of the fact that Roughan was on bail charged with an offence that involved the stabbing of a mate. The evidence was relevant to the credibility of the appellant's account that he was in fear of Roughan. In a series of rulings, she refused to allow cross-

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3 The Notice of Appeal contains a third ground, 1(c), which was abandoned.

4 Notice of Appeal, par 1(b): "The Learned Trial Judge misdirected the jury in directing them that they could use the evidence of the Appellant's bad character to reason that the co-offender was a less violent and dishonest person than the appellant."

5 Section 668E(1A) of the *Criminal Code* (Q) provides that the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

examination of Detective Williams about his knowledge of the circumstances of the McKenna assault.

9 In the Court of Appeal, the appellant's ground of challenge was that the trial judge did not allow counsel to "fully cross-examine Det Williams about the Att murder charge that Roughan had been charged with especially after Roughan's counsel in effect led evidence of Roughan's good character." The Court held that the trial judge had been right to refuse to permit cross-examination of Detective Williams as to the detail of the allegations against Roughan because cross-examination on these lines could only have elicited hearsay[6]. The ground of challenge in this Court raises a different and wider complaint. Save in one respect, to which it is necessary to return, the appellant accepts that the ruling confining the cross-examination of Detective Williams was correct. His complaint is that the practical effect of the rulings was to foreclose any opportunity for his counsel to adduce admissible evidence of the facts of the McKenna assault. It appears that this wider ground was raised in the Court of Appeal.

The course of the trial

10 On the first day of the trial the appellant's counsel foreshadowed his intention of cross-examining Detective Williams "to get a background of the basis of why [Roughan] was charged [with the attempted murder of McKenna]". Counsel identified two bases for the admission of the evidence. The first was that the appellant's knowledge of Roughan was relevant to an understanding of why he behaved in the way that he did. The second was that "the jury, when weighing up who might be responsible for [the murder of the deceased], can look at this character and decide who they believe is responsible for the murder."

11 In the course of exchanges with counsel, her Honour said:

> "[I]f you want to have a collateral trial of whether or not he committed those offences, then you take yourself out of, I would have thought, admissible evidence."

12 Her Honour subsequently ruled:

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6 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 404 [73] per Keane JA, 406 [88] per Muir JA, 410 [101] per McMurdo J.

> "With regard to Jones' interview and his expression of fear of Roughan because of his knowledge of Roughan being charged with attempted murder and grievous bodily harm, which is not objected to by [counsel for Roughan], I will allow evidence of that. It does appear as if it will have to be led by the Crown but it is not at the Crown's insistence to lead it because it is being requested by [counsel for the appellant] in furtherance of his case and not objected to by [counsel for Roughan].
>
> At present I'm minded to allow limited questioning of the arresting officer on that matter but I haven't yet decided to what extent I will allow you to question him on that. I can see that it is a positive advantage to Jones' case that the arresting officer confirms that he was arrested for that offence and there may be some limited details that may be of assistance to Jones' case *but to the extent that it then starts to become a collateral – a trial of collateral issues, that is, whether or not Roughan actually committed that offence I won't allow questions as to that*." (Emphasis added)

13 The appellant submits that this ruling ("the initial ruling") governed all that followed, because in the context of the discussion that preceded it, it was clear that her Honour viewed any evidence concerning the facts of the McKenna assault as involving a collateral issue. The initial ruling, it is said, made it pointless for counsel to consider options including calling McKenna or the other witnesses to the McKenna assault.

14 There was further discussion of the scope of the cross-examination of Detective Williams on the fourth day of the trial. In the course of this the Crown Prosecutor gave her Honour a copy of a document titled "QP9", which contained a summary of the police brief of evidence against Roughan in relation to the McKenna assault. The allegation was that Roughan had stabbed McKenna in the back. The police had located the knife at the scene and obtained statements from McKenna and two witnesses. Roughan was alleged to have made admissions to being present and in possession of a fishing knife at the scene. His admissions fell short of an acknowledgment that he had intentionally stabbed McKenna. He said that he had the knife with him because he had been out fishing. He claimed that McKenna sustained the stab injury in the course of a struggle in which he, Roughan, was defending himself from unlawful attack by McKenna.

15 After reading QP9 the trial judge pointed out to the appellant's counsel that "[t]he problems, though, are with the quality of the evidence that you're wanting to get out. I just want to think about that for a minute." Her Honour went on to say:

> "[M]y view is that I should allow you to cross-examine the arresting officer about those matters [that Roughan was on bail on a charge of stabbing a mate], but any further than that I don't think it goes to anything that's relevant in this case and it's very prejudicial to Roughan.
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> COUNSEL: Well, just on the prejudice aspect, that's not a basis for excluding it, your Honour, as I understand the authorities.
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> HER HONOUR: Well, it's not relevant. I can't see how it goes to – positively goes to your case."

Shortly after this ruling the appellant's counsel applied for a separate trial. He submitted:

> "I am not allowed as I understand your Honour's ruling to cross-examine the police officer about the attempted murder in detail, I'm not allowed to lead from the – or cross-examine the witness Hore about the statement [Roughan] made to her about the attempted murder charge".

16 The reference to cross-examining the witness Hore was with a view to adducing evidence that Roughan had said to her "he thought he was going to get five years for that attempted murder". The appellant does not complain of this ruling. It is accepted that proof of this assertion would not serve to establish any relevant propensity on Roughan's part. The application for a separate trial was refused.

17 After the close of the evidence counsel for the appellant made a further application:

> "Your Honour, I just renew my application to lead the evidence that your Honour ruled that I couldn't ask about in relation to Roughan's committing the – or being charged with the offence of stabbing his mate, and I wish to refer to the QP9 which your Honour ruled I couldn't. That there has been an attempt to put evidence of good character before the jury of Roughan and as the Crown Prosecutor has said, he will re-open the case if your Honour wishes to re-consider that ruling. I submit that it has been raised in that positive light albeit no convictions in Queensland and some minor discrepancies or minor touches with the law where he's only received a caution.
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> HER HONOUR: It would be different I think if he'd been convicted of it but the problem with his being charged with it is that he is entitled to the presumption of innocence and the dangers of the prejudicial effect of it. The fact that he has been charged with stabbing a mate and was on bail is

itself, I think, relevant to your case and that's why I've allowed you to lead that. So I've tried to, in that difficult case, walk the line between allowing you to lead what's probative in your case but not allowing it to go over the line into something that's unduly prejudicial in Roughan's case and so I don't think I'll change my mind."

18 Senior counsel for the appellant submitted that trial counsel's application was met by the same "flawed response" as the application which led to the initial ruling. He complained that her Honour had not inquired as to the nature of the evidence that was sought to be adduced. The reasoning of which he complained is that her Honour took into account that evidence of the McKenna assault would occasion prejudice in Roughan's trial and that she considered the evidence was not relevant to any issue in the appellant's trial. The first consideration would have substance if it had led to the rejection of relevant, admissible evidence in the appellant's case. However, it did not. The application was the renewal of the application to adduce hearsay evidence of the contents of QP9 in the event that the Crown case was re-opened.

19 In this Court the appellant put in issue the characterisation of all of the assertions in QP9 as inadmissible hearsay. This was because the document included a summary of admissions said to have been made by Roughan. The appellant relied on the analysis in *Freer and Weekes*[7] in support of the admissibility of an out of court third party confession. The question of whether evidence of third party confessions are an exception to the rule against hearsay was left open in *Bannon v The Queen*[8]. The question in that case involved an out of court confession to the offence with which the accused was charged. This appeal does not require determination of that question nor the question of the admissibility of declarations against penal interest which are not exculpatory of the accused. There was no application to examine Detective Williams to ascertain whether the admissions were made in his presence. There is nothing in QP9 to establish that they were. There was no application to cross-examine the police officer to whom the admissions were made on the basis of the point now taken. Indeed, the first time this point appears to have been taken was in the

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7 *R v Freer and Weekes* [2004] QCA 97 at [81]-[91] per Jerrard JA (Jones and Holmes JJ agreeing).

8 *Bannon v The Queen* (1995) 185 CLR 1; [1995] HCA 27; see also *Nicholls v The Queen* (2005) 219 CLR 196 at 266 [183] per Gummow and Callinan JJ; [2005] HCA 1 and *Ali v The Queen* (2005) 79 ALJR 662 at 665 [11] per Gleeson CJ, 666 [21] per Hayne J (McHugh J agreeing); 214 ALR 1 at 5, 6; [2005] HCA 8.

appellant's submissions in reply in this Court. Furthermore, the admissions did not serve to establish any relevant propensity since Roughan gave an innocent explanation for being in possession of the knife and claimed to have been acting in self-defence.

20 In the Court of Appeal each of their Honours accepted that evidence of the propensity of one accused may be relevant and admissible in the case of a co-accused[9]. They differed concerning the basis for the admission of evidence of this character. Keane JA considered that where the evidence is of conduct evidencing propensity the facts must exhibit the kind of "striking similarity" which makes it probable that the co-accused committed the crime with which he and the co-accused are charged[10]. McMurdo J considered[11] that the propensity of a co-accused may be established by evidence that does not show striking similarity between the other matter and the subject charge, nor any other characteristic as described in the joint judgment in *Hoch v The Queen*[12].

21 In *Pfennig v The Queen* a tendency to treat evidence of similar facts, past criminal conduct and propensity as if they raise the same considerations in terms of admissibility was noted[13]. It was explained that the requirement that evidence of similar facts when adduced by the Crown possess a "striking similarity" is because the capacity of the evidence to establish a step in the proof of the prosecution case on the criminal standard depends upon the improbability of its having some innocent explanation. The appellant was not seeking to adduce similar fact evidence to prove Roughan's guilt by a process of improbability reasoning. He was seeking to demonstrate that Roughan was a person having a particular propensity which made it more likely that Roughan had killed the deceased, as the appellant claimed that he had done. The issue which appears to have troubled Keane JA was whether evidence of some general propensity in Roughan to behave violently had a capacity rationally to bear on the determination of the likelihood that it was he who carried out this murderous assault.

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9 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 403 [68]-[70] per Keane JA, 406 [88] per Muir JA, 410 [102] per McMurdo J.

10 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 403 [72].

11 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 410 [102].

12 (1988) 165 CLR 292 at 294-295; [1998] HCA 50.

13 *Pfennig v The Queen* (1995) 182 CLR 461 at 483 per Mason CJ, Deane and Dawson JJ; [1995] HCA 7.

22 In *Lowery v The Queen*[14] expert evidence adduced by one accused of the personality of his co-accused was held to have been rightly admitted. The offence involved the motiveless, sadistic killing of a young girl. The expert evidence tended to establish that Lowery possessed a personality with sadistic traits and that his co-accused did not. *Lowery* has been said to be high authority for the proposition that the propensity to violence of a co-accused may be relevant to the issues between the Crown and the accused tendering the evidence[15]. In *R v Randall* it was said that there must be cases in which the propensity of one accused may be relied on by the other irrespective of whether he has put his character in issue[16]. As the admissible evidence of Roughan's propensity which the appellant claims to have been prevented from adducing is unknown, this appeal does not provide the occasion to consider the principles discussed in *Randall.* It is trite to observe that all evidence, including that adduced by an accused in order to raise a doubt as to guilt, must be relevant in the sense that it could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings[17]. At the trial, in the course of the submissions made prior to the initial ruling, the appellant's counsel identified the propensity which he sought to establish as "a propensity to violence". On the appeal senior counsel identified it with greater particularity, as a propensity to form an intention to kill and to use a knife to give effect to that intention. Accepting for present purposes, that proof that Roughan was a person with a propensity to have this state of mind and to act in this way, may support a reasonable possibility that the appellant's account (given in his interview with the police) was true, the fact remains that counsel did not seek to adduce admissible evidence that Roughan had such a propensity.

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14 [1974] AC 85.

15 *R v Randall* [2004] 1 WLR 56 at 65 [29] per Lord Steyn (the other members of the House of Lords concurring); [2004] 1 All ER 467 at 476; see, too, *Knight v Jones; Ex parte Jones* [1981] Qd R 98; *Priestley and Mason* (1985) 19 A Crim R 388; *Winning v The Queen* [2002] WASCA 44.

16 *R v Randall* [2004] 1 WLR 56 at 64 [29] per Lord Steyn; [2004] 1 All ER 467 at 476.

17 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1029-1030 [31] per McHugh J; 190 ALR 370 at 377; [2002] HCA 31; *Nicholls v The Queen* (2005) 219 CLR 196 at 215 [37] per McHugh J.

23 The initial ruling and the subsequent rulings did not prevent the appellant's counsel from seeking to adduce direct evidence of the circumstances of the McKenna assault. Her Honour's remarks are to be understood in the context of the rulings that she was asked to make. The applications were to adduce hearsay evidence of the detail of the incident in cross-examination. The submission that her Honour should have inquired whether counsel wished to adduce direct evidence of the McKenna assault must be rejected. There was no indication at any time in the trial that counsel was seeking to lead evidence of the McKenna assault in the appellant's case. The renewed application to lead evidence of the contents of QP9 was made after the appellant had elected under s 618 of the *Criminal Code* (Q) not to adduce evidence in his defence. In *Ali v The Queen*, Gleeson CJ observed that an appellate court will generally not know what is in counsel's brief and speculation about why a particular line was not pressed will often be uninformed and fruitless[18]. It is simply not known whether trial counsel was in a position to lead direct evidence of the McKenna assault. It is to be noted that he had succeeded in adducing evidence that Roughan was on bail at the date of the offence on a charge involving the stabbing of a mate. A forensic decision not to adduce evidence in the defence case and thus preserve the right of last address[19] would be understandable in the circumstances.

The second ground of challenge

24 At the trial, evidence was adduced of the appellant's bad character. This comprised evidence that the appellant had used, and supplied to others, cannabis and speed, that he smoked cannabis in front of his infant daughter, that he had bashed a person, and that he had a criminal history involving assault and offences relating to property.

25 The trial judge directed the jury that[20]:

> "[E]vidence that is only admissible against James Roughan is evidence that you have heard in this case that Chris Jones has used illegal drugs such as speed and cannabis and has some criminal convictions. That is only relevant in the prosecution case against James Roughan to endeavour to demonstrate that James Roughan was a less violent and dishonest

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18 *Ali v The Queen* (2005) 79 ALJR 662 at 664 [7]; 214 ALR 1 at 4.

19 Section 619 of the *Criminal Code* (Q).

20 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 405-406 [80].

> person than Jones. You must not use it for any other purpose. You may not seek to draw some inference from it that because Chris Jones has committed other offences, or has been said to be involved in undesirable conduct, that he is therefore more likely to have committed the offence you are considering. In other words it would be quite wrong for you to say having heard that evidence that the defendant is the sort of person likely to have committed the offence. If you accept this evidence you may use it only to consider whether it [assists] the prosecution in the way I have described to prove its case against James Roughan."

26 The evidence of the appellant's criminal convictions was led without objection. No application was made at the trial for a re-direction arising out of her Honour's direction concerning the evidence. The direction was not the subject of a ground of appeal in the Court of Appeal. Roughan challenged a direction in like terms relating to the evidence that he was on bail for another offence involving stabbing a mate. Keane JA pointed out that it was an error to invite the jury to reason from the fact that Roughan had been *charged* with an offence that he was a person of more violent disposition than the appellant. His Honour went on to observe that the direction – that evidence may be used to establish that the appellant was of a less violent disposition than Roughan, but not that Roughan was the sort of person likely to have committed the offence – involved a distinction so fine as to be illusory[21]. When his Honour came to consider the appellant's case he concluded that the direction relating to the appellant's bad character was wrong for the latter reason[22]. McMurdo J agreed with Keane JA's criticism of the direction relating to Roughan's bad character[23]. However, his Honour did not consider that the direction relating to the appellant's bad character was wrong. He considered that it was a direction that the jury would be able to understand and apply[24]. In McMurdo J's view, there was no risk that the jury would reason towards the appellant's guilt from knowledge of his convictions. This provided an explanation for the stance that his counsel had taken in not objecting to the evidence; he wished to have the jury compare the appellant's relatively minor matters with knowledge that Roughan was charged with an offence involving the stabbing of a mate[25].

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21 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 401 [59].

22 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 406 [81].

23 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 408 [94].

24 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 410-411 [105].

25 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 410-411 [105].

27 Muir JA expressed his general agreement with the reasons both of Keane JA and McMurdo J[26]. It was accepted on the appeal that this Court should treat the Court of Appeal as having held that the direction concerning the appellant's bad character was a misdirection and, accordingly, no occasion arises to consider the difference between the views expressed by Keane JA and McMurdo J on this question.

28 Keane JA discussed the proviso in s 668E(1A) of the *Criminal Code* (Q) in the course of addressing Roughan's appeal[27]. Roughan's appeal succeeded because the admission of the evidence that he had been charged with stabbing a mate was irretrievably prejudicial. The prejudice was exacerbated by a direction that this evidence could be used, when considering the appellant's case, as confirming that the appellant was of a less violent disposition than Roughan. His Honour held upon a review of the trial that it was not possible to be satisfied of Roughan's guilt beyond reasonable doubt. In this context he observed that the Court was not in a position to assess the reliability of the evidence of the three accomplices.

29 Keane JA did not think that the evidence of the appellant's bad character was significantly prejudicial. In his opinion it was not capable of supporting an inference that the appellant was disposed to engage in the kind of murderous assault to which the deceased was subject, much less that he was more likely to have done so than Roughan[28].

30 In *Weiss v The Queen* it was said that there are cases in which it is possible for an appellate court to conclude that an error at trial would have had no significance in determining the verdict[29]. This was such a case. Keane JA described the impugned direction in the appellant's case as innocuous. He observed that it had occasioned no real forensic disadvantage to the appellant[30]. Given the issues in the trial and the conduct of it, which included the trial judge's direction as to the use the jury might make of the evidence of Roughan's bad

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26 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 406 [88].

27 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 402 [62].

28 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 406 [82]-[83].

29 *Weiss v The Queen* (2005) 224 CLR 300; [2005] HCA 81.

30 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 406 [83].

character, this assessment of the effect of the misdirection was well open. Moreover, after a detailed review of the evidence Keane JA concluded that the case against the appellant was one of overwhelming strength[31]. That conclusion was also well open.

31 The Court of Appeal did not err in finding that no substantial miscarriage of justice actually occurred in the trial of the appellant.

32 For these reasons the appeal should be dismissed.

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31 *R v Roughan and Jones* (2007) 179 A Crim R 389 at 406 [83].

33 HAYNE J. I agree that the appeal should be dismissed. I agree with the joint reasons.

34 There is no occasion in this case to decide whether or when evidence about the alleged propensity to violence of a co-accused would be admissible. The particular evidence which it was sought to lead about the alleged propensity to violence of the appellant's co-accused was hearsay and for that reason not admissible.

35 In *Lowery v The Queen*, the Privy Council said[32] that in the circumstances of that case it would be unjust to prevent either of two co-accused from calling *any* evidence of probative value which could point to the probability that the perpetrator was the one rather than the other. Accordingly, expert evidence said to show[33] that one of two men accused of a brutal murder had a "basic callousness", and that the other did not, was held[34] to be relevant and admissible. Some emphasis was given[35] to the fact that the accused who was alleged to have a "basic callousness" had put his character in issue, but the proposition that it would be unjust to prevent the adducing of *any* evidence of this kind was not expressed in terms that readily admit of qualification. And as Lord Steyn later rightly pointed out in *R v Randall*[36], it may be doubted that the Privy Council was correct to say in *Lowery*[37] that the evidence in question was "not related to ... criminal tendencies".

36 These questions apart, the House of Lords held in *Randall*[38] that one of two co-accused jointly tried for murder was entitled to tender evidence of the propensity to violence of the other co-accused as relevant to the issues between the prosecution and the accused tendering the evidence. The evidence was treated as relevant not only to the co-accused's credibility, but also the likelihood of his having attacked the deceased.

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32 [1974] AC 85 at 101.

33 [1974] AC 85 at 100.

34 [1974] AC 85 at 103.

35 [1974] AC 85 at 101-102.

36 [2004] 1 WLR 56 at 64 [29]; [2004] 1 All ER 467 at 476.

37 [1974] AC 85 at 101-102.

38 [2004] 1 WLR 56; [2004] 1 All ER 467.

37 Whether the applicable principle is expressed as it was in *Lowery* or as it was in *Randall*, the adducing of evidence by one co-accused about the propensities of another co-accused presents real difficulties for the conduct of a trial, especially a joint trial. There may be a question about whether the admissibility of evidence of this kind depends upon the accused against whom the evidence is led having first put his or her character in issue. There are also other more deep-seated questions that may require examination. In particular, if it is suggested that where each of two co-accused attributes guilt of the offence to the other, one may tender evidence about the criminal propensities of the other, there is no little risk of the trial being diverted into the byways of collateral issues about the nature, extent and probative significance of those propensities. And questions like whether or how a rule of the kind described in *Pfennig v The Queen*[39] could, or should, be applied in these circumstances, or whether a rule of that kind, if applied, would address the fears that the tribunal of fact would be diverted from focusing upon the central issues that are being tried in the matter, are questions that did not arise and were not examined in argument in this matter. Nor was there any consideration of whether or when, if evidence of the criminal propensities of one co-accused is to be admitted, the trial should nonetheless continue as a joint trial. These are questions that are to be reserved for another day.

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39 (1995) 182 CLR 461; [1995] HCA 7.