
IN THE HIGH COURT OF AUSTRALIA

Western Australian Registry

No. 5 of 1964

NOTICE OF MOTION

In the matter of -

THE JUDICIARY ACT 1903-1960

And in the matter of -

AN APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA

B e t w e e n -

DARRYL RAYMOND BEAMISH

Applicant

- and -

THE QUEEN

Respondent

Coram: BARWICK, C.J.
KITTO, J.
MENZIES, J.
WINDEYER, J.
OWEN, J.

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 11TH SPETEMBER 1964, AT 11.10 A.M.

MR. F. T. P. BURT, Q.C., with him MR. C.H.SMITH, (instructed by Boultbee, Godfrey & Virtue) appeared for the applicant.

MR. R. D. WILSON, Q.C., with him MR. K. H. PARKER, (instructed by the State Crown Solicitor for W.A.) appeared for the Crown.

BARWICK, C.J: Yes, Mr.Burt?

MR. BURT: May it please the Court. This is an application for special leave to appeal from the judgment of the Court of Criminal Appeal which was delivered on 22nd May 1964, by which the applicant's appeal against his conviction on the charge of wilful murder, the conviction being dated 15th August 1961, was dismissed.

The motion for special leave appears at p.1 of Vol.1 of the Appeal Book. The Appeal Book, as the court can see, is in two volumes.

The case came before the Court of Criminal Appeal on a reference to it by the Minister for Justice under Section 21 of the Criminal Code. The matter came to the court in that way because there had been a petition to the Governor by the present applicant. The present applicant has already appealed in other proceedings altogether; he has appealed to the Court of Criminal Appeal against his conviction in the first instance, which appeal was not successful,and from that he made an application for special leave to appeal to this Court, in which he was not successful. But the submission that we make is that that history does not affect the jurisdiction to hear the second appeal nor does it affect the jurisdiction of this court.

BARWICK, C.J: The Statute says the regulation is to be treated as .....

MR. BURT: That is so, Sir. Actually in one of the High Court decisions - I think it was Davis. v. Cody - this happened.

The jurisdiction of the Court of Criminal Appeal which was invoked on this appeal is to be found in Section 689(1). It is the general head of jurisdiction on the basis that there has been a miscarriage of justice.

MENZIES, J: What does the court consider when the matter has been referred to it? Does it consider it having regard to the evidence in the case originally and one further matter which is brought to the attention of the court, that the conviction was correct?

MR. BURT: No, Sir, I would submit not.

MENZIES, J: What does it consider?

MR. BURT: It considers the material that your Honour has mentioned - namely, the evidence on the original trial. It considers the new evidence which the applicant now wishes to produce. But the question that it asks itself is not, with respect,quite the question that your Honour supposed.

(Continued on page 2A)

MENZIES, J: Well,what is the question - because we treat it as an appeal.

MR. BURT: Yes.

MENZIES, J: Appeal from what?

MR. BURT: This is an appeal from the conviction, the original conviction.

(Continued on page 3.)

MENZIES, J: Whether that conviction was right?

MR. BURT: No, I would submit not quite that.

OWEN, J: Whether the new evidence is such that a new trial should be granted?

MR. BURT: Yes, or perhaps I could put it this way: is the new evidence relevant, is it fresh, has it such a degree of cogency that had it been led before a jury the conviction of guilt which the prior evidence produced might have been displaced?

BARWICK, C.J: Is that right? These are the things, are they not: the Court on the appeal is to form a view whether there has been a miscarriage? That is the question. If there has, they must allow the appeal; if there has not, they must dismiss it. Then you seek to introduce new evidence, fresh evidence, so that the Court might consider that question, and when the fresh evidence is tendered there is a question about that evidence: will you receive that evidence? Then those questions that you pose are questions that go really to the reception of the evidence before you come to the final question: If you are in a Court of Criminal Appeal, "will you receive this evidence", and the questions are: is it cogent, is it credible, if added to what was already there could we say that a jury might have changed the result? If you admit the evidence you still have a further question: was there a miscarriage?

MR. BURT: Yes.

BARWICK, C.J: I think it is very important in this case that we identify this because you are seeking special leave and you must surely point to some basic error, because we are not going to sit as a Court of Criminal Appeal to review the evidence.

MR. BURT: Yes. I must quite clearly show that there is something special about this case which justifies the Court assuming jurisdiction with respect to it, and this is of course, I suppose, the major difficulty which is in the face of the applicant for special leave and it is no use the applicant attempting to finesse this point; it must be looked at or it must be established.

BARWICK, C.J: You do not wish to differ from what I put to you as to what the question is and what the mechanics of approaching it are?

MR. BURT: I accept it entirely. What happened in the Court of Criminal Appeal was that the Court of Criminal Appeal accepted the evidence in the sense that it looked at it, received it, then considered it, considered that it was relevant evidence, as clearly it was, considered that it was fresh evidence, as clearly it was, but did not consider that it was sufficiently cogent.

BARWICK, C.J: That is right.

MR. BURT: And really, the whole fate of the appeal turns on this requirement of cogency, and the submission that the applicant makes directed to establishing that this case is special, that it has something special about it, is dependent upon the requirement of cogency in its ..

application for fresh evidence. Very shortly, what the applicant submits is this: he concedes that the fresh evidence sought to be of use must be cogent but he submits that when you consider this question the answer to it cannot be arrived at merely by a consideration of the credit-worthiness of the person who is to give the fresh evidence, that the requirement of cogency goes a good deal deeper than that, and that in a case, which we submit is this case, where the fresh evidence takes the form of a confession to the crime of which the present applicant was convicted and where the confession is detailed and states as facts things which can be independently established as being true and facts which would not be known to any person unless he was in the position to observe him, and facts which could only be observed by a person in the vicinity of the crime at the time that it took place, let us say in the immediate vicinity, then the requirement of cogency does not really depend on the personal credit of the person to be called to give the fresh evidence. The requirement of cogency is established then because it can be said that as to this the new evidence must be true.

BARWICK, C.J: Suppose that after hearing a witness and after weighing the facts as to the matters you have mentioned, there are some circumstances that turn on the particular credibility of a witness: suppose after considering all this the Court feels, "We do not think that any reasonable jury could accept this confession", what error is there?

MR. BURT: I do not know that there is any error then. I have to persuade the Court that in substance what the Court of Criminal Appeal did was this, that they read Cook's confession, Cook being the person who was to give the fresh evidence, that they read partly inconsistent confessions which he had made on previous occasions, they knew of the retraction of a confession, they saw Cook in the box, and they came to the conclusion with which this applicant thoroughly agrees, that Cook is a person who has no credit as a witness, in the sense that one cannot have any confidence in believing anything that he says. This is really an abstract, a general proposition.

BARWICK, C.J: No general credit?

MR. BURT: Yes, no general credit, and the submission that the applicant makes is that the Court of Criminal Appeal really stopped at that. They came to the conclusion that this is a man who, as a man, has no credit at all, and therefore they said it followed that the confession which he had made could not be cogent. If I could point - - -

BARWICK, C.J: Before you come to that, do you agree that the Court of Criminal Appeal asked itself the right question?

MR. BURT: Yes, and no. They asked themselves the right question in terms but they did not understand the terms.

BARWICK, C.J: What you mean is that in answering it they got into some error?

MR. BURT: Yes.

BARWICK, C.J: Can you assign this error with particularity so that we can see it now?

MR. BURT: Can I perhaps refer to the transcript, purely because I think it points up what we consider to be the error. This is not in the appeal book, I am sorry, this is in the transcript of the argument, and I read it because it is so very shortly put.

OWEN, J: This is in the Court of Criminal Appeal?

MR. BURT: Yes. This is not reproduced.

BARWICK, C.J: You consider it a convenient way of putting this point?

MR. BURT: Yes, because in our respectful submission this is the point. In the argument before the Court of Criminal Appeal this question was debated at some length and obviously the answer to that question of the personal credit-worthiness of Cook, and discussion took place over many pages of transcript between myself and his Honour Mr. Justice Virtue, at the end of which his Honour Mr. Justice Jackson said this, at page 23:

> "Perhaps I might add to what my brother Virtue is saying that when you are talking about the cogency....(reads).....must be an element concerning the cogency of the confession."

We agree with that. His Honour goes on:

> "...because if it could be demonstrated that it was a confession.....(reads).....it simply could not have any cogency."

In our respectful submission, that is the non sequitur and it goes right to the heart of this application, and it is a mistake which in our respectful submission gives this application sufficient specialness to justify this Court giving special leave to appeal.

Perhaps I could illustrate what I am attempting to say broadly with regard to these facts. If it should appear that Cook is a person who has no credit at all - and surely this must be conceded by the applicant; the applicant does not look upon him with any favour, he is not a person being represented to the Court in the ordinary way of a person who asks the Court to believe him - we start by saying that Cook is a person utterly without personal credit but the applicant says that nevertheless if one looks to his confession one can show that he is stating as a fact certain facts which could not be known unless Cook had been in a position to observe them and facts which have independently been established to be true. So we say that whatever might be the personal credit-worthiness of Cook when he says this and when he says this throughout his confession, he is speaking the truth. He might lie on every other conceivable occasion but here he is speaking the truth.

BARWICK, C.J: Let us get down to particularity. Unless you take two things, one the position of the milk bottle, and some other small detail - - -

MR. BURT: The milk bottle, I think, was the most significant.

BARWICK, C.J: Yes. You are saying, are you, that the jury, with Cook before them, say, "We don't believe him when he said he was there that night to kill but it is quite true. He must have been there to have seen the milk bottle." Why does that mean that you ought to disturb the verdict? Why does it make his confession cogent because the fact that he was there is not the cogent fact? The cogency is of the confession of the killing. Suppose for a moment that you are right to say that the jury might very well accept the fact that this makes out what he said, that he was there at some stage that evening or morning, but you must add, "but they won't believe him that he killed"?

MR. BURT: I think, with respect, that that is propounding too high a test. We would say that the jury would believe he was in the flat on this night. It would not then be necessary for the jury to go on and form a positive belief that in fact he did kill. The question really is that if the jury believes that a man of Cook's character and obvious propensity, and so on, was in this particular flat on this particular night at or about the time this homicide was committed, would they then still retain a positive finding of guilt as against Beamish?

BARWICK, C.J: The strength of the Crown case - - -

MR. BURT: Would be so far weakened that the jury would no longer feel to the degree required of the criminal law that Beamish did in fact kill. This way, it drives out the conviction of guilt which the previous evidence produced as against Beamish, which is the critical factor.

BARWICK, C.J: The Court of Criminal Appeal said, in answer to that, "No"?

MR. BURT: Yes, because the Court of Criminal Appeal did not have regard to such things as the milk bottle.

(Continued on page 8)

MR. BURT (Continuing): They mentioned it, so to speak, in passing but they say, "Well, this may have happened on another occasion."

BARWICK, C.J: Perhaps you might take us to that. I have read the judgment, but of course not with your assistance.

MR. BURT: I could either take the court very quickly through the confession or would you like to be taken to the milk bottle?

BARWICK, C.J: I think this is the point in it: you are saying that this is a special case, you are entitled to special leave, not because you can point to an error in principle in the court below but because you can say that in answering the right question they have erred in that they have not given sufficient weight, or you may say any weight, to some facts established, which do not depend on the correct - - -

MR. BURT: I think I would put it that they really did not ask themselves the right question. The question they asked was: is this a cogent witness? not: is this cogent evidence? To that degree we would say they really asked themselves the wrong question.

BARWICK, C.J: I think you ought to go direct to those passages that you have which you think bear that out.

MR. BURT: Very well; I could start perhaps, and I think it has to be done in this way, by going to the confession of Cooke.

BARWICK, C.J: Cannot we do it in the judgment; that is where the error must show up.

MR. BURT: Very well, Sir. If I can start with the evidence of the milk bottle, take the court directly to that, it starts in Cooke's confession at p.326 in Vol.2 line 20 and the following where he said, "While I was crouching behind these bushes I heard the milk man walk up around the corner ....(reads).... and I noticed on the floor a bottle of milk." (p.327 line 3)

OWEN, J: Is this the statement made by Cooke to the police?

MR. BURT: This is the statement which was made by Cooke to the solicitors.

BARWICK, C.J: This is your fresh evidence?

MR. BURT: Yes.

BARWICK, C.J: This is annexed to the solicitor's evidence?

OWEN, J: He did also give evidence before the Court of Criminal Appeal?

MR. BURT: Yes, he gave some sort of evidence there. At line 5 on p.327 he said, "The door hinges were on the left hand side ....(reads).... the bottle of milk was definitely inside the door." The significance of the bottle of milk only becomes apparent when one looks at the evidence of Blight which was in the form of an

affidavit and formed part of the papers which constituted the petition. The evidence of Blight on this point is line 32 on p.336 where he said, "I attended at the office of the Sunny West Dairies and ascertained the name of the milk man who delivered milk to the flat of Jillian Brewer. I was informed that his name was George Northcott and that he was now a farmer at Beacon." I may say in passing that where Blight gives this sort of hearsay information the case was fought on the basis that this part of it was not disputed by the Crown. At line 36 on p.336 Blight said, "I contacted the said George Northcott ....(reads).... in the back door on the floor behind." (p.337 line 3) The significance of that, I suppose, is readily apparent - that the bottle was there but that it would not have been there at that time of the morning on any other night.

BARWICK, C.J: But it would have been there at some other time on any other night?

MR. BURT: It would have been there after 4 o'clock in the morning on any other night.

OWEN, J: .... looked at the evidence of the trial ....

MR. BURT: No. He remembers this because he was questioned, obviously, concerning it when the police first made their inquiries back in 1959, but this was not of course of any significance in the evidence of Beamish and nothing had been said about the milk bottle in the evidence of Beamish. The importance the applicants placed upon it rightly or wrongly was that this established that Cooke, had he gone into the flat at 3 o'clock on this morning, would have found a bottle of milk.

BARWICK, C.J: I was about to say to you that had he gone into the flat on any other morning at a different time he would have found a milk bottle, so this depends upon whether you believe that Cooke went there this night at 3 a.m., the milk bottle was not there - - -

MR. BURT: I submit it does. The other hypothesis, I suppose, is that he must be aware he went into the flat at 3 o'clock - - -

BARWICK, C.J: You start off with the fact that he is, and you are seeking to say he cannot be inventing on this occasion, because he found a bottle of milk and he says he found it at 3 o'clock on this day. The fact is that if he had gone in at any other time later he would have found the bottle of milk.

MR. BURT: Any time between 4 and 5 in the morning; this must be conceded.

BARWICK, C.J: So he does not corroborate, does he, at all; it still depends on his admission, "I went there at 3 a.m."?

MR. BURT: With respect I agree it does not establish positively that he was there but I would not with great respect say that it was of such little

probative value as your Honour would suggest, because there he is said to be inventing a story that he was in the flat at 3 a.m. but it does with great respect appear to be a great coincidence that the bottle of milk he speaks about being in the position it was, was in fact in that position on that morning at that time and on no other morning at that time.

BARWICK, C.J: He is not shown to have known the time the milk man normally went?

MR. BURT: No.

BARWICK, C.J: So when he said, "I found a bottle of milk there when I came in at 3 a.m. on this night", he does not make this night special as far as he is concerned?

MR. BURT: It may be, so to speak, a fluke, he may have fluked it and this, I suppose, is a comment that can be made with respect to other items of evidence upon which this application so strongly relies.

If I could mention the bus driver for a moment, but it is the cumulative effect of the flukes which are perhaps of some significance. However, this is the way it was put to the Court of Criminal Appeal.

BARWICK, C.J: And this is the same door which I think it was established not to be unlocked that he went through when he said here, "I pushed the door open".

MR. BURT: It was never established that it was locked.

BARWICK, C.J: It was normally locked?

MR. BURT: It was established that this was the custom that it was normally locked, and it was as a fact locked in the morning.

BARWICK, C.J: At the trial, of course, Beamish gave evidence of having unlocked it.

MR. BURT: That is so, and Dinnie gave evidence that the normal custom was to keep it locked, but there was no evidence one way or the other as to whether it was locked on this particular night, as a fact.

BARWICK, C.J: You disregard Beamish? Beamish had given evidence that it was locked.

MR. BURT: Yes.

BARWICK, C.J: That is the milk bottle. I was wondering whether you would care to refer us to the driver of the bus at the same time and look at both points in the judgment. Follow your own course.

MR. BURT: If I could go from this to the judgment. The point is dealt with by the Chief Justice at p.524 line 30 when he said, "But the episode of the milk man, Mr. Burt says, so clearly establishes that Cooke was in the area that the whole strength of the Crown case against Beamish is affected once it is accepted. I cannot follow such an argument." That is all

that his Honour the Chief Justice ever says about the milk bottle.

It is dealt with by his Honour Mr. Justice Jackson at p.544 line 48 where he says, "Cooke's reference to the bottle of milk inside the door ....(reads).... outweigh in my mind the overwhelming evidence that it is a fabrication." (p.545 line 9)

BARWICK, C.J: What is wrong with that?

MR. BURT: The only criticism one could make of that is that he could not have recollected this having happened at 3 o'clock on a previous occasion, but I still concede the force of what your Honour the Chief Justice has said, and it may really be what his Honour Mr. Justice Jackson is saying in a different way: that it could well be Cooke had been in the vicinity of these flats on another occasion; he may have broken into the flat on another occasion after 4 a.m. and found the milk bottle; not knowing it had been placed very recently before he broke in he may have assumed it had been there for some hours; and on this occasion, putting the time of his visit at 3 o'clock, he simply fluked the milk bottle being there. One must concede the possibility. The time of the homicide in Brewer was established sometime between 2 and 6 a.m., just in passing, from memory.

BARWICK, C.J: Could I ask this: Cooke would know that before he made these statements?

MR. BURT: I think it must be fair to say that because that would have been one of the things published. His Honour Mr. Justice Virtue deals with the milk bottle at the bottom of p.552.

OWEN, J: Was there any reference at the first trial to the existence of the milk bottle?

MR. BURT: None whatever.

BARWICK, C.J: This is material produced now by the appellant, the fact that there was a milk bottle?

MR. BURT: Yes.

OWEN, J: I am wondering whether, in giving evidence of the state of the room and the flat, a reference was made to the milk bottle?

MR. BURT: No. Extensive photographs were taken but no photograph appears of this particular part of the flat.

At the bottom of p.552 his Honour Mr. Justice Virtue says, "It is true that rather surprising coincidences have been pointed out, in particular that relating to the electric frypan and the milk bottle. But all are capable of explanation consistent with his lack of complicity in this crime."

His Honour does not go any further than to say what the explanation might have been.

That is all perhaps that one can usefully say concerning the milk bottle. If I can go now to what the learned trial judge and members of the Court of Appeal described as the other surprising coincidence, namely the fry pan, that appears in the confession at p.327 line 24. This was indeed a startling coincidence; no one knew anything about an electric fry pan; there was no evidence of an electric fry pan at all. The solicitor for Beamish knew nothing about a fry pan, but at the hearing in the Court of Criminal Appeal the Crown was good enough to produce photographs that had been taken of the interior of the flat which had not been used at the trial of Beamish.

(Continued on page 13)

MR. BURT (Continuing): In the course of that, they produced this photograph. The copy I have is unmarked, but it was tendered in the Court of Criminal Appeal. It shows an electric frypan substantially in the position in which Cooke described it. One can just see it. The photograph was taken on the morning after the homicide.

MENZIES, J.: Are you indicating, between Cooke and Beamish, ...

MR. BURT: Only to the extent that Cooke says so.

(In answer to Owen, J.) They would never have seen one another in person, and Beamish was deaf and dumb. I do not think there is any question of there being any communication between them at all.

MENZIES, J.: No attention was paid at all to that by .....

MR. BURT: No.

BARWICK, C.J.: Where is this?

MR. BURT: You can see it on the right-hand side of the picture. You cannot see all of it. You can see enough of it to identify the instrument. It is on the right-hand side of the draining portion of the sink. Can your Honour see it?

BARWICK, C.J.: No, I do not.

MR. BURT: It is on the extreme right of the picture. I have another copy. (Produced) If one looks at the refrigerator, one sees that the outline of the refrigerator cuts the frypan.

MENZIES, J.: In the shade of the refrigerator.

BARWICK, C.J.: Now, I see it. It has a frypan cover.

MR. BURT: Yes.

BARWICK, C.J.: Of course, there are not many other places you could put it. If you owned a frypan, it would be used on many more occasions than this night.

MR. BURT: It might have been an inspired guess for him to have said there was a frypan there.

BARWICK, C.J.: He might have been there on other occasions.

MR. BURT: It is also far more likely, I think, to say he saw the frypan on some other occasion. This is a distinct possibility, but, in our respectful submission, it is to say that that is shown as something fairly relevant.

KITTO, J.: It is not on the draining section of the sink.

MR. BURT: No. As his Honour, Mr. Justice Jackson, pointed out in his reasons, it is not directly on the draining portion of the sink Whether it had been moved prior to the photograph is not clear. I suggest it may have been because one can look at the photograph taken by the police of the interior of the flat, from which it clearly

appears that certain things were moved because they are in a different position. Nobody paid any attention to that point until it came out of Cooke's confession. Prior to that, it had no particular significance, or any significance, but what we are saying is that this is yet another remarkable co-incidence.

BARWICK, C.J.: You could say: "This man is fabricating it. He has a very remarkable memory. He is a prowler, who, as like as not, had been through this flat on some occasion. He is anxious to connect himself with this occurrence. He wants to lend colour to the story, and he has sufficient capacity to realize the significance of inserting some circumstantial details."

MR. BURT: Yes.

BARWICK, C.J.: He has a very good memory, so that the mentioning of the matter, in the mind of that kind of man, could be thought to be a good point.

MR. BURT: That is so.

BARWICK, C.J.: Why must one then regard this as a co-incidence? To say it is a co-incidence is to say there was something unusual in this - in this man's having said that night the frypan was there.

MR. BURT: It is unusual to this case that it is there.

BARWICK, C.J.: On the only occasion it is there?

MR. BURT: There is no evidence that it is there on other occasions. I think it is a reasonable inference to draw that it may well have been there on other occasions. There is no evidence that it was always kept there, but the strength of the applicant's case, with respect, does not reside in any individual co-incidence. It has a cumulative weight.

I think perhaps I could leave the other point for the moment and go to another quite startling co-incidence, which does not have the effect of placing Cooke in the flat on the evening of the homicide, but at least it clearly places him in the vicinity, in the area, on the particular night of the homicide.

This is the evidence given by Cooke in his statement relating to the bus driver. This, again, was not regarded as evidence particularly important by the Court of Criminal Appeal. The evidence relating to it is in Cooke's statement at p.323, at line 18. He has described his nocturnal prowlings on the evening of the murder. He was around Peppermint Grove drinking milk and whisky, or according to what he happened to find. He walks back up the hill towards these flats. He decides to go home, or at least catch a bus. He says:

"I caught this bus and got off at Williams Road .....(reads)..... Colin Lennox."

Colin Lennox is a private inquiry agent.

"At that stage I intended to knock off a few houses in that area."

What Cooke has said is "I caught a bus late in the evening, and, on this particular night - I do not know what date it was - - -" Cooke never knew what date it was apart from the fact that it was in December, just before Christmas.

He said: "I caught this bus, and I will tell you who the driver of the bus was." That information was checked out by Blight, and he deals with it in his affidavit at p.336. He said:

> "I interviewed Alan Rober Balmer who now resides .....(reads).....the driver of one of the late buses."

BARWICK, C.J.: That does not mean he was not on the night before or the night after.

MR. BURT: No, Sir. This again leaves open the possibility that there was some other night.

BARWICK, C.J.: Or he may have known, as the witness said, the driver on this route. He was on for considerable periods at night.

MR. BURT: Yes.

Again, it may have been a transposition in point of time. It may have been that he was on another night. Again, with great respect, this is yet another fluke - that he does not know the date of the Brewer murder, other than that it is towards the end of December.

Whatever the date was, on that particular night, he was in the area and caught a bus, and this was the man driving it. If you go back to the records of time sheets, this is checked out as being correct. It is simply another independent coincidence, but the date really is fixed beyond any room for error, I think, when you see what it is that Cooke next does.

Cooke says he got into the bus and went towards Perth, decided to steal a car with a view to coming back to Brookdale Flats to kill this girl he had already seen there that evening. This partly appears in his statement and in the evidence he gave before the Court of Criminal Appeal, but, to make his story true, of course, it was necessary to show, that he did, in fact, steal a car that night. This next fact is established.

Cooke says, in his statement, that he stole a car. He tells where he stole it, and, what is perhaps even more important, where he left it later. This appears at p.324 at line 10. He said:

> "I turned left and went up that street and then turned right into Davis Road."

This is prowling around the Nedlands area.

> "I there prowled around and found a Holden car .....(reads).....I drove back to Cottesloe."

He then told us what he did. If I could take the Court then to p.331, at line 18, he says:

> "I abandoned the car in Alexander Road, Rivervale, between Surrey Road and Kooyong Road. It was parked facing south."

This is checked out by Blight. At p.335 of his affidavit, he then said:

> "In order to ascertain whether any vehicle had been stolen from the Nedlands area.... ....(reads).....which is the next street to the east."

(Continued on page 17.)

MR. BURT (continuing): That again is, I suppose, capable of explanation by saying that it is quite true that on this particular occasion, on this night, he did steal a motor car, and one can further say, I suppose, that although he does not know the date upon which he stole the car, he may have read the following morning that there had been a murder and he merely associated two events together without being conscious of the precise day of the month. But here again, with great respect, this is another startling coincidence. This is a fact stated by Cooke in his confession which can be independently established to be true and which would not otherwise be known, and it is enough in our respectful submission at least to say - and I think the members of the Court of Criminal Appeal were prepared to go this far, or at least his Honour Mr.Justice Jackson was - that it was enough to be able to say that in all probability Cooke was in the vicinity of these flats on this particular night and that he did in fact leave on this particular bus and he did in fact steal the motor car.

Even if one takes it no further than that, if one leaves it at that for the moment, that in our respectful submission establishes a great sub-stratum of truth in the confession. It is the base of the confession in the factual sense, in the chronological sense.

BARWICK, C.J: Are you not putting it too high, Mr.Burt? All it establishes is that he was in the area.

MR. BURT: That is so, Sir.

BARWICK, C.J: When you begin without the premise you do not believe the rest of what he says, how does it support what he says?

MR. BURT: Well, it supports him to that extent.

BARWICK, C.J: That he was there?

MR. BURT: Yes. So the way I would put it on behalf of the applicant is to say this: That this confession, when checked out with the facts independently established, at least takes us to the stage at which we can say with some confidence that Cooke was in the area on this particular night.

Now, I do not for the moment take it any further than that, but I submit that one gets to that point with quite a high degree of confidence on the confession of Cooke.

I agree that then one must come to a narrower area of particularity, really, and I suppose one must ask then: Is there anything in the confession which, independently lined up with the facts, the other facts that we know, would establish that Cooke was in the flat - perhaps we could say at any time, firstly, without reference to this particular occasion; and when you say that, I think the answer must be: Yes, on one occasion or another Cooke has undoubtedly been in this flat.

Now, I do not think anyone would really quarrel with that. He draws a plan of the flat which is substantially accurate, and I think it enables one to say that on some occasion or another Cooke was in the flat. So we then have perhaps two points, two general conclusions that we can reach with a good degree of confidence: that he was in the area that particular night, and on some other occasion, or on some occasion he has been in the flat.

BARWICK, C.J: That is adding apples and pears, is it not?

MR. BURT: Yes, I agree with that, Sir. We now must bring it really together to endeavour to show that there is reason to believe that he was in the flat at or about the time of the murder. Of course, that is the next stage of particularity. In respect to that we do rely very heavily upon the evidence of the milk bottle, appreciating that it is subject to all sorts of comments; nevertheless this is what we rely upon as being a coincidence which, when added to the basis that we have already created, does enable one to say, if not possibly, believing that Cooke was there, at least that sufficient appears here to discharge the conviction of guilt referable to Beamish.

BARWICK, C.J: But why? I do not follow that for the moment. You begin with a very strong case against Beamish, and nothing that you have said about the milk bottle casts any doubt upon the assertion of Beamish that he opened the door which was otherwise closed.

MR. BURT: That is so, Sir.

BARWICK, C.J: So that to get to the stage that at some stage in that evening, if you like, Cooke was in the flat, does not bear on the cogency of the evidence for the conviction at the trial, surely.

MR. BURT: Well, it well might. It is hard perhaps to isolate a particular piece of evidence and form a conclusion about it. I quite agree with your Honour that Beamish said that the door was locked and he opened it in a certain way, but at the same time, of course, Beamish says originally that he went out of the flat without locking the door.

BARWICK, C.J: That is all right if he says that and Cooke came in and opened the door; that simply makes Cooke's presence there of no moment - at that time the murder had been committed.

MR. BURT: This is, one must concede, a possibility, but what we were putting to the Court of Criminal Appeal was that these are really jury matters.

BARWICK, C.J: The court is asked to say that in its view there has been a miscarriage. It has to have the responsibility of that.

MR. BURT: Yes.

BARWICK, C.J: And included in that, of course, is the weighing for itself of the cogency of this evidence.

MR. BURT: Yes, I agree, Sir.

Now, at the stage of the milk bottle, chronologically, of course, if Cooke is speaking the truth, hehas entered the flat. We now have to have a look at his confession to see what he did having entered the flat and to what extent that lines itself up with the facts that have been independently established.

I do not wish to spend a great deal of time on this, for this reason: that to a very large extent what he says he did when he got into the flat does line up with the facts that have been already established. But I appreciate the difficulty in it, because these were facts which were publicised in one way or another about the time of the trial of Beamish and we are now in an area in which the Crown can say - - -

OWEN, J: I may be wrong, but I thought his explanation of the blows he struck and the stabbings and so on were .....

MR. BURT: All I can say, with respect. is that they fitted in a good deal better than Beamish's did. And his description of the blows, in our respecful submission, was substantially accurate.

OWEN, J: The description of the furniture was wrong,was it not?

MR. BURT: Well, it is rather equivocal, Sir, concerning that, because he was asked to describe the furniture and he described it, I think, as period stuff, or words to that effect. As a matter of fact, I think that would be an accurate description of furniture in Brewer's bedroom, but it would be a completely inaccurate description of the furniture in the lounge of the flat. Whether Cooke was referring to bedroom furniture or lounge furniture did not appear. But, with respect, it did not matter much, because quite clearly I think without any doubt at all Cooke had been in the flat at one time or another, because he can not only draw the ground plan but he can place the furniture in it. Of course, he may have been able to draw the ground plan by being in the upstairs flat and knowing that it is likely to be reproduced, but he had actually been in the - - -

BARWICK, C.J: So to say that he had undoubtedly been there on some occasion would weaken what he says, the effect or the weight of what he says he saw on this evening.

MR. BURT: Well, no, with respect.

BARWICK, C.J: Because he speaks of nothing which can be said only to have existed that night in that flat - not even the milk bottle. The frying pan, the position of the furniture, the milk bottle, these I would say almost any night he came in he could see.

MR. BURT: Any night he came in at a different time.

BARWICK, C.J: It does not matter whether it was that time or another time.

MR. BURT: It would, with respect, Sir, If he had come in at 3 o'clock on any other night, he would not have found a milk bottle.

BARWICK, C.J: Yes, that is so.

MR. BURT: Whether he would have found a frying pan is unknown. He also speaks of a purse that he found when he came into the flat.

BARWICK, C.J: That is not independently established.

MR. BURT: A zipp purse. No, it is rather odd in a way that it is not, because one would have thought perhaps that the police inquiries would have extended at least to taking an inventory of what was in the flat. Cooke says, "I opened a purse." He tells us what was in it. But there is no other evidence one way or the other. It is not contradicted nor is it confirmed.

So far as his description of the actual homicide is concerned, there are features about it which make it infinitely more convincing,really, than Beamish's account - not that I am suggesting this should be judged as a competition between the two.

The two things which rather impress one about Cooke's description of the homicide is that he describes the two blows with a hatchet across the throat, which in itself is not terribly significant and it may well have been published at the time of the original crime, but what he does say in his confession is that, having carried out the attack with the hatchet, he then breaks off, disposes of the hatchet, has a bottle of lemonade and generally spends a bit of time around the flat, and then returns to the attack with some scissors.

This of course is quite a macabre story to tell. His Honour the Chief Justice really relied upon this as pointing out the unlikelihood of the story, and saying, "This is really too much. One cannot believe events would have happened in this way." But why I submit that it is a piece of evidence which is corroborative is this: that it is an inherently unlikely story, so that if someone was telling it simply in the hope of being believed, it is an unlikely story to have told.

BARWICK, C.J: Yes, but you have got to take into account there that he was telling it with the expectation of being believed.

MR. BURT: Well, let us suppose that he was. What is somewhat remarkable about it is that it fits the medical evidence whereas Beamish's account never really did. The medical evidence shows that there was a perceptible lapse of time between the hatchet attacks and the stabbing attacks. Dr. Pearson I think put it in the area ofhalf an hour - I do not know whether he quantified it in the end. But there was a perceptible lapse of time, the reasoning behind it being that there had been no bleeding from the stabbing wounds.

OWEN, J: The blows of the hatchet did the killing ?

MR. BURT: The blows of the hatchet. Death would have occurred I think half an hour after the hatchet blows. Yet there was no bleeding from the stab wounds. This led the

doctor to say that there had been this effluxion of time between the two attacks, and this is what Cooke says in his confession. This again, in our submission, is an independent confirmation of the truth of what he says. It does not establish anything, I agree, but it does independently establish at least the consistency of what he is saying with the facts.

BARWICK, C.J: But the Court of Criminal Appeal considered all that and formed its own view.

MR. BURT: With respect, they did not consider it, Sir. This is really why we say the case is special. They approached it rather the other way. They said, "We have seen Cooke. We know the type of man he is. We know he has made inconsistent statements. He may well be grinding an axe in an effort to set up a case of compulsive insanity, and so on. He is beyond the sanction of an oath. But, oath or no oath, he is a congenital liar, he is a romancer", and so on.

(Continued on page 22)

MR. BURT (Continuing): All of this we can agree with in general terms, and the Court of Criminal Appeal, in our respectful submission, started the consideration of the case really from that end and have come to the conclusion that Cooke could not be believed as a man, these things really did not figure in their deliberations on the matter at all.

MENZIES, J: They did regard it of course as coincidence, taking the hatch into account....(inaudible). That event they referred to, but can you tell me one or two things about this milk bottle? I have forgotten the actual facts of the case, but it was put through a hatch on to the floor?

MR. BURT: Yes.

MENZIES, J: And when it was put through by the milkman the door was closed?

MR. BURT: Yes.

MENZIES, J: And he puts it through the door, on the inside of the door?

MR. BURT: Through a gap.

MENZIES, J: And it goes on to the floor behind the door?

MR. BURT: Yes.

MENZIES, J: When Cooke comes along, according to him the door is open?

MR. BURT: No.

MENZIES, J: Does he not say that the door was open and he pushed it further?

MR. BURT: Unlocked, I think.

MENZIES, J: I thought he said that the door was open and he pushed it further. How could that door have been pushed open with the milk bottle still standing there?

MR. BURT: He pushes the milk bottle with it as it goes around, and he hears the scraping as it goes around.

MENZIES, J: I thought he said the door was open.

BARWICK, C.J: What is the page, again?

MR. BURT: Page 326 at line 28, the third last line: "I then started quietly pushing the door open and I felt something scrape the floor." Unlocked. "I had no watch on and this time was an estimate." The Court of Criminal Appeal really did not, in our respectful submission - this is something we have to make good on the facts if the Court will hear the appeal - they did not really give any proper consideration to these things. They started at a point which we would have been willing to concede, that Cooke is a liar.

WINDEYER, J: What led to this emphasis about the milk bottle in this confession?

MR. BURT: Nothing, Sir.

WINDEYER, J: You see, one would almost think that the man making the statement thought that some attention was going to be given to the presence of this milk bottle. If you look at page 327, "The bottle of milk was definitely inside the door." I see the significance of the milk bottle but I am wondering why so much significance appears to have been attached to it by the man making the confession at the time.

MR. BURT: It is very hard to say, of course. One has to have regard to that in the context of the confession as a whole. His Honour the Chief Justice to some extent was led to a disbelief of the statement because of the great detail that Cooke goes into, particularly with reference to matters which are rather collateral to the central matter, for instance that he bought a sweet called a "Cherry Ripe" and jay-walked across the road, and so on, but this statement was simply given by Cooke unprompted, so to speak.

WINDEYER, J: Yes. He goes into a lot of detail about a lot of things but I was struck by the phrase, "The bottle of milk was definitely inside the door", as if some question had arisen somewhere as to where the bottle of milk was. Nothing may turn on it at all but it is not the way in which one would ordinarily expect a person to say that there was a bottle of milk inside.

MR. BURT: I cannot really throw any light on it, Sir. There is a negative fact which may be of some significance here, too, that it was never suggested that Beamish wore gloves in the carrying out of whatever he may have done that night. There is no evidence of that at all. The evidence of Cooke in his confession is that he always wore gloves. One can perhaps accept that as being true because he had such a long and undetected career of crime. When he was ultimately arrested he was wearing gloves, which appears in the book, and it may then be significant to note that there was not one fingerprint in this flat on the morning after the homicide. There were Brewer's, but no strange fingerprints anywhere in the flat, which necessitates the conclusion, I think, that whoever did this crime was wearing gloves. It is inconceivable that anyone could have gone through the flat and done all the things which were done on this occasion without wearing gloves. There are other matters to be developed of course if the appeal - - -

WINDEYER, J: Cooke also confessed in some detail to a crime which he definitely did commit?

MR. BURT: To three, I think.

WINDEYER, J: I was thinking of Anderson as one.

MR. BURT: Anderson is a disputed one, Sir. That is the butt of the appeal. But having mentioned it, your Honour - - -

WINDEYER, J: Do not bother about it. That is the one which he retracted, in a sense, retracted his confession?

MR. BURT: Yes.

BARWICK, C.J: Along the line of Mr. Justice Windeyer's thinking about the milk bottle, it is rather remarkable that when you look at the photograph he selects the frying pan for mention, the frying pan, which you expect to be always there and perhaps likely to be in the washing up place, but there are other things there that are mobile and not always there, but he does not mention anything that one could say was only in that flat on that night in that position.

MR. BURT: We could not establish the position, to start with.

BARWICK, C.J: There is a photograph.

MR. BURT: With respect, Sir, if you look at the other photographs taken by the police, both of which purport to be photographs to be taken showing the inside of the flat, it is quite apparent that they had been moved.

BARWICK, C.J: That may be, but he does not mention anything to which attention could have been given to establish that they were things that were there in that position only that night.

MR. BURT: No, that is so, and I suppose really, to try to put that in its correct perspective, would this not be true of any room in a house, that by and large things are in the same position always? He could say, "I saw it on Tuesday and I saw it on Thursday". But, put the other way, there is nothing he says concerning the internal arrangement of the bedroom which is really wrong. When he describes, for instance, the curtains on the north window of the bedroom and says there was a chink between them and you could see through them, this is independently established as being correct. When he says that the other curtains which faced the west had a chink at one end because of some defect in the railing, this is independently established as being correct, and one can go through the entire - - -

BARWICK, C.J: He may have been through this flat more than once.

MR. BURT: Yes. It really brings us to the second point which might arise if the appeal is permitted, and that is as to the extent to which, if at all, the applicant, positioned as this applicant was, could use evidence of Cooke's criminal propensity as being relevant to the cogency of the present confession. This is one of the matters which is mentioned in the notice of motion and is dealt with at some length by his Honour the Chief Justice. He writes an appendix to his judgment. I think one thing one can conclude at least from the reasons of His Honour the Chief Justice is that this evidence is quite irrelevant when you are considering the cogency of a confession. In our respectful submission, that would be wrong to say that. It has, in our submission, a very, very great probative value.

OWEN, J: The other two Judges expressed no opinion about that, did they?

MR. BURT: No.

BARWICK, C.J: I do not know whether it really arises but is it your proposition that when you have got fresh evidence in a criminal appeal you can give evidence of propensity?

MR. BURT: Yes, that will be our proposition. The rule excluding it of course is to protect the person who is on trial, but to exclude it in a case such as this one seemed to produce the contrary end, but the basis of the rule is protective.

BARWICK, C.J: That is not a logical inference that you can draw. It is not a question of protecting anybody, that because I have propensity, therefore I did something about which there would need to be proof in evidence.

MR. BURT: No, it does not necessarily follow.

BARWICK, C.J: Not at all in a legal sense.

MR. BURT: I quite agree, but when you are judging the cogency of a confession in the circumstances of this case, what we establish is that this man Cooke says, "I murdered this girl under the circumstances confessed to," and so on. You are asked to say: is this a likely story, is it one which a jury might well believe or partly believe? If that be the true question, our submission would be that it is very relevant to know something about the person who said he did it.

OWEN, J: But whoever killed this girl....(inaudible)....Cooke in his killings has killed in a similar sort of fashion to the way in which this girl was killed, is that what you mean?

MR. BURT: Putting it very broadly, I put it that way. I say "very broadly".

OWEN, J: In his killings he left a sort of trademark?

MR. BURT: No, I do not know that I can put it as high as that. In other words, if it were Cooke who was being tried for the murder of - - -

OWEN, J: I am talking about the killing.

MR BURT: This really gives the system. If Cooke were being tried for the murder of Brewer, I am not suggesting that the Crown could lead as against him the evidence relating to these other killings, because there is not a sufficient stamp of system about it. But there is, broadly speaking, a great similarity, of course.

In the Birman murder, here is a case of a man breaking into a flat and stabbing someone, a girl who is asleep in bed. The Madrill case is perhaps even more remarkable because there - the facts are set out in summary form in the appeal book - he broke into a house in West Perth where two people were living. I think he was in the course of stealing He woke Madrill while stealing, attacked her and strangled her while another person was still in the flat. He took the body out on to the lawn behind the flat and there was then some further conduct that he carried on with the body in the backyard, all of which lends some

weight, perhaps, to the view that he may well have broken off in the course of the Brewer murder and done something which otherwise you might think was a very odd thing to do, to have a bottle of lemonade, running the risk of being caught, and so on. Our submission would be that it is highly relevant to have regard to the character of the person in a particular sense who has confessed to a crime.

BARWICK, C.J: Another way of looking at it is that this was publicised and you find someone else might be excited into doing the thing. All these are competing ideas and you get into a very dangerous, slippery field when it is a question of drawing legal inferences.

MR. BURT: I agree.

BARWICK, C.J: As of this moment, you are not making it a special ground for leave that this evidence was not regarded, this evidence of propensity? You would seek to make it a ground of appeal but it is not a ground for special leave?

MR. BURT: It is put forward, I think, in the - - -

BARWICK, C.J: I am asking what you are saying.

MR. BURT: I put it forward as an independent ground.

BARWICK, C.J: In this case for leave?

MR. BURT: Yes, because we may be able to unearth what can properly be described as a question of law, but the difficulty here from the applicant's point of view is that we cannot say positively that this evidence was disregarded by any members of the Court of Criminal Appeal.

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BARWICK, C.J: You had the benefit of it.

MR. BURT: With respect, we simply did not know. We think that, from the reasons of the Chief Justice, he would have said that this evidence is inadmissible, and I would disregard it altogether. Could I put the whole case on really a very broad ground and in this way: that if this evidence of Cooke's had been led before the jury on the trial of Beamish can anyone reasonably suppose that the jury would have nevertheless convicted Beamish?

BARWICK, C.J: I do not think that is the right question. The question is: was there a miscarriage on the material that is now available including, if you like, Cooke's evidence? That is a different question.

MR. BURT: I submit that if my question were answered - and I now forget which way I put it - either "yes" or "no" as the case may be, you say there was a miscarriage. If you had had this evidence before a jury, then in all probability the conviction of guilt that the other evidence had produced in the mind of the jury would have been displaced, in my respectful submission you say justice has miscarried.

OWEN, J: "in all probability" - it is putting it too high.

MR. BURT: It probably is putting it too high. I am trying to re-formulate the test in, I think, Craig.

BARWICK, C.J: I do not know if I made my point. There is a difference when the Court of Criminal Appeal is considering whether there is a miscarriage and adopting new evidence, it is able to say that this is material .... to be before us that no reasonable jury would accept, and when you formulate your question you have to suppose in the question that a jury might have accepted this evidence?

MR. BURT: That is so.

BARWICK, C.J: So that it is not the same question. If you look at it from the point of view of the Court of Criminal Appeal deciding for itself whether there has been a miscarriage, that court is entitled to say in its judgment whether this evidence would be believed by reasonable men on a jury. That is part of its function in deciding whether there has been a miscarriage, surely?

MR. BURT: I think, with great respect, that is putting it a little bit and significantly too high as against the applicant, the view of the law or the criteria which, your Honour, in our respectful submission is the correct one is that which was laid down by Mr. Justice Rich and Mr. Justice Dixon as he then was in Craig v. King reported in (1933) 49 C.L.R. p.429, the beginning of the report, it is p.439 where the criteria is laid down. Their Honours say, "A Court of Criminal Appeal has thrown upon it some responsibility ....(reads).... remove the certainty of the prisoner's guilt which the former evidence produced."

BARWICK, C.J: Yes, but by that time you have the cogency of the evidence. Their Honours there are taking the next step. When you have material which the Court of Criminal Appeal thinks a reasonable jury might credit then you ask yourself the next question, because as I put to you earlier surely the cogency of the evidence is at the point of reception by the Court of Criminal Appeal, if they say that this evidence is not such as a jury might reasonably accept, we do not accept it as material on this appeal, so they have for themselves the duty of deciding whether the evidence is such that reasonable men might accept it as material - - -

MR. BURT: Again, with respect, I think that is putting it too high, because in our respectful submission when the Court of Criminal Appeal is considering the cogency of the evidence they are really considering what effect it is likely to have upon a reasonable jury properly instructed.

WINDEYER, J: "likely to have"? I suppose that is so, but the actual sentence you have quoted is "...if considered in conjunction with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected."

MR. BURT: Yes, but then apply that to a criminal case. The test is the same, in our submission, whether it be a civil or a criminal case, but in a criminal case the application of the test is somewhat different because the result of the trial is affected if you have created a doubt.

WINDEYER, J: True.

MR. BURT: So it is not a question of whether the jury would in all probability have positively believed the truth of what had been said.

OWEN, J: I think it would be sufficient if it were likely to raise a reasonable doubt in the minds of the jury.

WINDEYER, J: Then it ought to affect the result.

MR. BURT: Our broad proposition I think can be formulated this way: even if Cooke is a person with no credit at all so that upon no matter could you accept his word standing on its own, nevertheless when you see what he says here and line it up with the known facts sufficient from it does appear to enable one to say that if that evidence were led before a jury they would not have convicted Beamish.

BARWICK, C.J: It is in that rolled-up way of stating it that for my part I see danger, and of course normally in the cases one does roll the two steps together, but the first step is that you seek in a criminal appeal to ask the Court of Criminal Appeal to receive the evidence, and at that point in time the court is entitled to say, "We will see what credit reasonable men can give to this evidence."

MR. BURT: Yes.

BARWICK, C.J: And in a formal way if they say, "This is not credible by reasonable men", in strictness you reject the evidence and then you do not get to the final question of whether the two pieces of evidence together are likely to produce a different result on a new trial.

MR. BURT: That is so, I follow that, but the hub of our complaint is - and whether we can make it good on the facts or not is perhaps another matter- that the Court of Criminal Appeal in substance refused to receive this evidence because they did not believe the witness as a person.

BARWICK, C.J: You notice that McDermott, in Sir Frederick Jordan's judgment, was referred to, and the King v. Stone is referred to in it. The King v. Stone is a very good case of evidence being rejected because of the lack of general credit of the would-be witness, and what Sir Frederick Jordan said on p.382 of Vol.47 (1947) of the State Reports New South Wales is, "If it is such that no reasonable jury would be likely to regard him" - the witness - "as credible, this of itself supplies a strong reason for rejecting the proposed new evidence, since it would add nothing that would influence a reasonable jury." If you express two things together you get a proposition like you put to us a moment ago.

MR. BURT: With respect, it depends upon the type of evidence that you are dealing with. Craig was a case rather similar to the case your Honour has just referred to. If the fresh evidence amounts to no more than the say-so of the witness giving it, and this is quite often the case where the fresh evidence is sought to establish an alibi and after the trial is all over someone suddenly pops up and says, "I remember you were in such and such an hotel; you could not have committed this crime; you were with me", in that type of evidence all one has is the say-so of the witness, there is nothing else to test the credit, there is no way you could independently establish the truth of what he said. This is Craig's case.

In that case I would agree that the personal credit-worthiness of the witness is altogether decisive; if you do not believe him there is nothing else you can resort to. But at the other end of the scale the facts may be such that while holding a positive disbelief in the witness as a witness on credit you may nevertheless be forced to say that when he says this it is true, and when he says this it is true, and in the end you might be able to say the totality of what he says, notwithstanding that he is a liar, he is capable of being believed.

In other words it is not right to say that so and so is a liar so I will never believe a word he says. A liar might in various circumstances be speaking the truth. In certain circumstances you might be able to demonstrate that he is speaking in the truth. In our respectful submission, this is this case.

I do not know if the court might recall I think it is Scott and Holly, which was a civil case, but it is interesting because the general question of credit of a witness - when you say a witness has or has not credit - is discussed by Mr. Justice Isaacs in it, and what he says is relevant here when he points out that credit of evidence is not always the same thing as credit of a witness.

BARWICK, C.J: You do not need to labour that, it is true enough, but here the fact that would be of significance is that Cooke committed a murder. The fact that he was in the flat, even, if you like, at some stage in this evening, in the district on that evening, would be nothing by itself. Test it in a simple way. Assume you had the evidence that there was at this trial from Beamish, the confessions, and not proved by Cooke but proved by someone else that Cooke was seen in the district - if you like he was seen at some time going into the house - you would have great difficulty in having a new trial if you were simply told that those were new facts. What you have been saying is somewhat different. You have been saying that although on observation of him and checking up the substantial details of what he said he is not credible as to the murder, because he ought to be credible about being in the district therefore you should believe him about the murder, that is really what you are saying.

MR. BURT: With great respect, no.

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MR. BURT (Continuing): I am not asking anyone to believe Cooke. What I am saying, very broadly, is this. We have been convicted of a wilful murder which took place in a flat on a particular night, substantially on our own confession. We now ask the Court to enable us to prove that, on that same night, in that flat, there was a man called Cooke, who might well have done the murder, and he says he did.

We say that, if that evidence is put in with our confession, and this case goes to the jury in this way, the jury will never convict.

BARWICK, C.J.: You cannot dispute that question before the Court of Criminal Appeal. They have not accepted that view.

MR. BURT: No, but the reason they have not is that they will not believe Cooke, and they give regard to the respects in which it can be demonstrated that this man, as to this, is speaking the truth.

BARWICK, C.J.: They take the view that these facts are coincidence and not facts which really .... to him.

MR. BURT: I think that is putting it quite fairly.

BARWICK, C.J.: They do not err in principle in that respect.

MR. BURT: I do not know that - - -

BARWICK, C.J.: It is a bit much to argue that.

MR. BURT: Had I answered, "No, they have not erred in principle," I would not, with great respect, have been saying, "Therefore, the case is not special." In our respectful submission, there is not one formula which would enable you to say the case is special or is not. I think Ralston v King brings it really down to the ultimate question: "Has there been a miscarriage of justice?

Perhaps I could put it the other way. If this Court feels that there is miscarriage of justice, then, I would submit that establishes that the case is special.

KITTO, J.: I must confess that I have some doubt that the question of miscarriage of justice has any application to a case like this.

MR. BURT: At this point?

KITTO, J.: At all. I may be quite wrong.

MR. BURT: I think, as before the Court of Criminal Appeal, it does not. I agree there may be other considerations here.

KITTO, J.: I do not know that the proviso has any application to a case of special evidence. I merely express a doubt, not a view.

BARWICK, C.J.: In this instance, this procedure does not involve the proviso. This is right at the root of the Court of Criminal Appeal function.

MR. BURT: This is the proviso, really.

BARWICK, C.J.: It is not a case of whether there is an irregularity.

MR. BURT: No.

BARWICK, C.J.: And you disregard it because of the proviso.

MR. BURT: That is so.

KITTO, J.: What I really meant was that, if you apply the test which the Court of Criminal Appeal did apply, to which you have referred, there remains nothing. There are no more questions to ask.

MR. BURT: I do not know that I follow.

KITTO, J.: Take the case where the evidence does satisfy the test. It is cogent, and you say, "Those tests have been satisfied." There is no remaining question of miscarriage of justice.

MR. BURT: Yes, because you have established - - -

KITTO, J.: Exactly. On the other hand, if you say the tests are not satisfied, of course, the question does not arise.

MR. BURT: That is so.

BARWICK, C.J.: This depends on how special it is. When you have fresh evidence, before you do really satisfy the test, it means that a different result is perhaps probable or likely, and that fact supplies the miscarriage.

MR. BURT: That is so.

BARWICK, C.J.: Because your code requires, before you allow the appeal, that you think there has been a miscarriage. You have these other rules about fresh evidence, but the statutory formula says that you need to be satisfied that there is a miscarriage.

MR. BURT: Perhaps a little the other way around. The emphasis is a little different in the normal case. The appellant says, "In the course of the appeal, something went wrong in law. There was a mistake of law." The Court of Criminal Appeal says, "We agree, but we will not allow the appeal because there has been no miscarriage of justice."

BARWICK, C.J.: I am thinking on that in relation to this sort of appeal where it is fresh evidence only - nothing wrong with the trial.

MR. BURT: Yes, but, in this case, this is what we have to establish: that there has been a miscarriage of justice, and this is all there is. This is the only ground of appeal. There is no room left for - - -

BARWICK, C.J.: You do establish it if you establish that you have fresh evidence which satisfies all the tests.

MR. BURT: Yes.

BARWICK, C.J.: Because, wrapped up in those tests, is the notion whether fresh evidence would result in miscarriage.

MR. BURT: The only test unspecified is cogency, and our submission is that the only reason why that is not specified is because Cooke is a person who, as a person, does not speak the truth.

BARWICK, C.J.: Have the Court of Criminal Appeal said he has not spoken the truth?

MR. BURT: Has not spoken the truth on this occasion. Could I mention one matter with reference to that? It goes back, perhaps, to the submission that the propensity of Cooke is relevant to the cogency of the evidence - of the new evidence.

WINDEYER, J.: The propensity of Cooke to commit murder?

MR. BURT: Yes.

WINDEYER, J.: To confess to a murder which he did not commit?

MR. BURT: We cannot say some of which he did not commit. The fact of the matter is that he confessed to a large number of murders, which it was established he had done.

WINDEYER, J.: I thought there were some. They are all subject to appeal?

MR. BURT: No. There is only one.

WINDEYER, J.: Are there any others to which he confessed?

MR. BURT: No.

WINDEYER, J.: There are no others to which it might be suggested he had falsely confessed?

MR. BURT: No. He was arrested at a time when Western Australia had half a dozen unsolved murders.

WINDEYER, J.: The only one is the subject of appeal?

MR. BURT: The only murder to which he confessed, which everybody says he did not do, is the murder of Brewer.

BARWICK, C.J.: Has he been tried for all the others?

MR. BURT: No. He has been tried for one.

BARWICK, C.J.: If you are giving evidence of propensity, there is the question whether his confession is right in the others.

MR. BURT: It has been accepted as so.

BARWICK, C.J.: By administration but not established by the Court?

MR. BURT: You again have regard to the type of man Cooke is - to show that he is a man who generally commits murder. All of them say, when they are saying why they do not believe Cooke, "We do not believe Cooke because the psychiatrist says he has a propensity to lie.

BARWICK, C.J.: They did not believe him?

MR. BURT: They rely - each of them, expressly - on the evidence of Ellis, who is a psychiatrist, which is directed directly to Cooke's propensity in one direction. They say, "We accept this. Ellis tells us he is a liar, and why he lies, but we do not accept the evidence as to his propensity in other directions."

BARWICK, C.J.: You start off by saying that you come here and admit that this is an appellant, a man, who tells lies almost as of nature?

MR. BURT: We have to say that a man situate like Beamish would be very fortunate if he found that the true murderer was a man of the utmost integrity. You have to almost start from that point.

MENZIES, J.: How long was it after his conviction that he first said he was responsible for this murder?

MR. BURT: I think he had said it before his conviction.

WINDEYER, J.: If you believe some hearsay - at least it seems to me hearsay as to what he told his wife he said at a very early stage.

MR. BURT: Yes.

WINDEYER, J.: I do not know how that gets in. It is what the detective said the wife said that he said, is it not?

MR. BURT: I do not rely on what he is said to have said to his wife. We are not relying on that at all. I think the first reference he makes to it - the precise date, I can find in the report - was before he was tried.

MR. WILSON: On the 10th September. He was arrested on the 1st September and charged with two or three offences of wilful murder on about the 3rd. He made this confession on the 10th, in different terms.

MENZIES, J.: I said when he first said.

MR. BURT: It is quite true that the confessions he made at various times were in somewhat different terms. When I say somewhat different terms, they varied in their detail. This, in normal cases, would go to credit, and so on, in a significant way, but, again, it must be borne in mind, perhaps, as the Court of Criminal Appeal said, that Cooke may well have tried to create a situation in which he could say he was a compulsive killer, or something of that sort.

He could have been endeavouring to lay the foundations of either a defence or a reason for postponing the inevitable. All this is perfectly true. It cuts both ways. If he is trying to set up a story that he is a compulsive killer, he may well feed inaccuracies into what is otherwise an accurate statement, and he may well say, "I killed the girl", one day, and the next day, say that he cannot remember, as if he is not quite master of the situation.

In the end, it comes back to what he said in his confession, which is corroborated with an affidavit, for what it is worth.

(Continued on page 34A.)

Primarily, then, the problem is to measure up what happened against the known circumstances. In our submission, even when you do that, you can say that, to a large extent, what he said is true. If so, then, you are obliged to say, in our submission, that, if this evidence had been led before the jury, the result might well be different.

OWEN, J.: Did he, in his confession, make some reference to the milkman - the milk bottle?

MR. BURT: I think a carton; a bottle or carton.

I do not think, on the application for leave, I can really take the matter any further.

WINDEYER, J.: Was there any association proved between Beamish, or any of these people, and Cooke?

MR. BURT: No, none whatever.

WINDEYER, J.: Cooke and his wife or any of the people?

MR. BURT: None whatsoever.

(Sitting suspended from 1 p.m. until 2.30 p.m.)

UPON RESUMING AT 2.30 P.M.:

BARWICK, C.J: Yes, Mr. Burt?

MR. BURT: May it please the court. His Honour Mr.Justice Windeyer this morning directed my attention to that part of Cooke's confession at p.327, line 9, relating to "The bottle of milk was definitely inside the door." I think if one reads the sentences immediately preceding that particular sentence and the sentence immediately succeeding it, one sees how it comes to be in the statement.

Cooke had been telling of the presence of the milkman in the vicinity. Then he talks of opening the door and noticing a bottle of milk on the floor, and one can understand it being asked of him, "Was the bottle of milk inside the door", because at that moment nothing had been said about the flap to the door, and without the flap it would not readily appear how it could be that the milk had got inside the door at that time.

So one sees it go that way. He said, "I have the impression that the floor was of speckled terrazzo. The bottle of milk was definitely inside the door." Then, to explain that, "At the bottom of the door there was a little hinged flap about 9 in. x 9 in."

WINDEYER, J: Yes, I see.

OWEN, J: Did he say, Mr. Burt, on about how many occasions he had been out to that part of the world, that area, at night?

MR. BURT: I do not think he said the number of occasions, Sir, but he said on many occasions, although he said he had never been to the flat before, but next door on the same level.

OWEN, J: It occurred to me that he might have known on his visits on other occasions where the milkman put the milk - through the flap - in which case, of course, it would be standing behind the door.

MR. BURT: Yes, but the person taking the statement did not know that while the statement was being taken, and that is why it appears, or this is why I suggest that it appears, the way it does appear in the statement. The interrogator of Cooke, the person who was given the statement, would have found it difficult to understand how the bottle of milk had got inside the door, he not knowing about the flap, so Cooke says, "It was definitely inside the door. There is a flap at the bottom of it through which it can be put." That is all.

OWEN, J: Yes, but, you see, if in the course of some of these nightly visits he discovered that the milkman always put the milk in through the flap, that is something he might have mentioned in his statement - that the milk bottle was inside the door - without his actually having been inside the flat at all.

MR. BURT: Yes, but if he had observed the milkman, of course, he would have observed him putting it in far later in the morning, if he had observed him on other occasions; and then he guesses - which might be too wild a guess - how much milk he put through on this particular occasion.

It is very important of course, as his Honour the Chief Justice indicated this morning, really to get to the kernel of this thing, to point to any evidence which would directly connect Cooke with the crime, place him in the flat at the approximate time of the crime, and of course, better still, if the applicant can do it, directly connect him with the commission of the crime itself.

The importance of that is appreciated, and to cover the ground as quickly as I can, perhaps I could take the court directly to the confession of Cooke, disregarding all the preliminary statements and proceeding directly to what he says concerning the actual assault, and to show you very quickly how that lines up with the independent witness.

The relevant portion of the confession commences at p.329 of the Appeal Book, at line 13, because this is the first reference to be found to the actual attack. He said there:

> "I struck her two quick blows with the blade of the hatchet either on the forehead or on the temple."

This would appear to be accurate enough. There were actually three blows on the forehead, and we will come to the other blow in a moment. He says:

> "The sound of the hatchet hitting her woke the dog and it immediately scampered under the bed barking."

There was independent evidence that the dog had been heard barking on that evening. Beamish too says it barked.

> "I patted the side of my leg a couple of times and made a soothing noise with my lips. The dog quietened....(reads).....but I remember quite clearly hitting her twice in the front of the throat with the blade of the hatchet."

This was never mentioned by Beamish - this attack on the throat - but the evidence relating to it appears in the evidence of Dr. Pearson at p.16, line 10, in the first volume. He says:

> "Dealing first of all with the scalp, there was a lacerated wound 2½ in. in length....(reads).... due to two separate injuries, approximately in the same place."

At p.18, line 9, he refers to the wound to the neck. He says:

> "Now in the neck: Across the front of the neck there was a long thing line, 3½ inches in length - that is it shown there."

He is referring to a model.

> "The right tip was punctured and the left tip was deeper than the right - over there. In between these two there was a light line, and the situation of the whole wound was just at the root of the neck."

Then he goes on to describe the wounds to the chest.

So the description of the wounding, as given by Cooke, to the head and the throat, appears to be substantially confirmed by the medical evidence.

Cooke then goes on at p.329 to describe the other wounds. He said:

> "I wrenched back the sheet - I think I hit her a couple of times in the ribs with the hatchet ....(reads).....it could even have been the face."

This all appears at p.329, and with respect this is extraordinarily important evidence if one attempts to align it with the facts. What Cooke is saying is at this stage he is facing towards the foot of the bed with the hatchet in the right hand attacking the deceased in the way that he describes. Then, reading from the bottom of the page 329, "I turned around", so he is turning round now to face the front of the bed, "and hit her with the side of the hatchet on the head - I do not remember exactly where, it could even have been the face. I hit her very hard on this occasion and I remember the handle splitting near the head."

This is important, with respect, for two reasons. In the first place, it establishes a hit on the right side of the face of the deceased with an instrument which as used now is really a blunt instrument; it is the side of the hatchet as he is turning around. When one goes to the medical evidence, you can see that some such wound did in fact happen.

WINDEYER, J: Mr. Burt, I do not want to interrupt you unduly, but the nature of the wounds, was that proved at the trial of Beamish, I mean published in the press, and so on?

MR. BURT: I do not know to what extent it was published in the press, Sir. It was certainly proved, because the post mortem report was put in. But this particular wounding was never proved in the confession of Beamish, as the wounds across the throat are not mentioned by Beamish, nor is this particular wound, and it never appears to have become significant in the trial of Beamish. The wound I describe now is a wound to the right hand side of the face of the deceased as with a blunt instrument. That appears in the post mortem report which is on p.302.

OWEN, J: Cooke was at liberty, was he, at the time of Beamish's trial?

MR. BURT: Yes, Sir. In the criminal life of Cooke he had at this time committed the murder of Birkman but he was still at liberty.

At p.302, in the post mortem report, there are there described injuries to the face - about the middle of p.302:

"There was an abrasion about 1 inch in length and running into the right eyebrow....(reads)... From the corners of the mouth there was a blood-stained discharge."

The evidence relating to that, as given by Dr. Pearson, appears at the top of p.18. He says:

"There was extensive bruising of the right cheek....(reads).....the right corner of the mouth."

(Continued on page 39)

MR. BURT (Continuing): This is an injury of course consistent with a blow with the side of the hatchet to the right side of the face, which could well have happened in the way Cooke is describing, as he turns around. But Cooke goes on to say that as a result of doing that the handle of the hatchet broke. This, with respect, is highly significant, too, because the hatchet handle did in fact break.

The hatchet was produced at the trial and if perhaps the Court would look at the photographs of it what becomes significant about it is that the shaft of the hatchet has fractured on the side, indicating that the side of the fracture has been put under tension, as would occur if the instrument had been used by hitting on the right side of the face with the point of the hatchet down. It is not the type of fracture that one would get with a blow one would expect if the hatchet were used as in chopping.

It is, with respect, somewhat significant that he describes this wound, which is confirmed by the medical evidence, describes how he did it and describes the result, in so far as the instrument used, of his doing it, which was confirmed by the photograph of the hatchet. He then goes on to describe the wounds in the vicinity of the ribs.

I will not waste the Court's time on it beyond saying it is substantially accurate. The original evidence relating to it is in the evidence of Pearson, particularly at page 18 line 18, and page 19 line 10. That I think is all that Cooke has to say concerning the original injury with the hatchet. He breaks off. He tells us at page 330 he went outside, dropped the hatchet where the hatchet was ultimately found - of course, Cooke may have known that by reading the evidence - and he tells us where he put the hatchet. He then had a bottle of lemonade. We know independently that there was lemonade in the flat.

Having done all that, he then returns to the attack with the scissors, and this refers to the lapse of time which occurs between the hatchet attack and the scissor attack that I mentioned this morning. Then his description of the scissor attack is on page 330, from line 22 and following, and then at page 330, line 30, he says: "I tossed the sheet back over her." Having pulled the sheet down at the bottom of the bed, "I tossed the sheet back over her and I walked out of the bedroom shutting the door behind me."

That is also somewhat significant. He is saying clearly enough that as he left the bedroom he shut the door, and Beamish, on the contrary, simply says that he ran out of the room. What is significant about it is that this door is generally left open and it was open when Dinny left the flat on the evening of the homicide, but when he comes back to the flat on the following morning this door is in fact shut. That appears on page 5, line 24. He says, "I got no response so I went back to the car. I keep a key on the car ring and I let myself in. I went across to the middle door, opened it, and came up against the bedroom door, which was shut." One can add that the photographs show that the door handle was a silver banana-shaped handle, and from the evidence of the police it had no fingerprints on it.

Then Cook says that he left the scissors on the room divider. There is some doubt as to what precisely that meant. They were in fact found on the room divider. He says he then locked the back door from inside, which was in fact the position on the following morning - the door was locked - and he then goes on to describe the abandonment by him of the motor car.

That is, I think, all that need be directly said concerning the evidence as to what appears in the confession, but I think I should very briefly, if I may, say something concerning Beamish's confession, because his Honour the Chief Justice said this morning that the case against Beamish was a strong one. I do not really wish to discuss this in detail but I think it must be said that the only evidence against Beamish really was his confession. I know it was repeated on one or two or perhaps more occasions, and that he was a deaf mute, so you start off with a case which is dependent upon the confession of a deaf mute.

But in addition to that, there are certain features of Beamish's confession which can be independently established to be wrong, so if it comes to a competition in point of cogency between the two confessions, I suppose one could criticise either of them.

Beamish's description of the woundings, without going into details, does not account for a number of the wounds, and this is mentioned by his Honour the Chief Justicein the Court of Criminal Appeal at page 504 of the appeal book, where he says, "As to Beamish not mentioning the cut across the throat", and his Honour's comment upon that:

> "That is not surprising. This act was done in a frenzy of blood lust...(reads).....the scissor stabs in relation to the sexual interference."

It can be said, I suppose, equally of either confession, but what is more striking about Beamish's confession - which, incidentally, is on page 71, or one copy of it is on page 71 of the appeal book - is that it starts with Beamish standing outside the bedroom window looking into the bedroom, but there is nothing at all in the case to tell us how he came to be there or what time of night it was that he was there, and in fact Beamish actually had the wrong day of the week, perhaps, for him to be there. I say "perhaps" because in fairness what he said was that it was Sunday night. It was actually Saturday night running into Sunday morning. There may not be a great deal of significance in that, but this is where the story starts so far as Beamish is concerned and it is obviously a very condensed story if it is in truth describing something that happened.

I say that for this reason, that it starts with Beamish looking through the bedroom window, seeing the deceased standing in the bedroom in the nude, and the next thing we know is that he walks into the flat - he pushes the key out and opens the back door and goes into the flat - and the deceased is then lying on

the bed asleep. There seems to be a great concentration of time there somewhere which is left unexplained as to what the time relationship between the first view of the deceased and the entry into the flat really is.

He then describes at page 75 the attack, and what is significant about it, I think, is that there is no appreciable lapse of time between the attack with the hatchet and the attack with the scissors. That appears I think specifically where he talks of the two blows on the head and of course omits any blows on the throat. He says that he jammed the dog in the door and rendered it unconscious, but there was nothing next morning to indicate that anything happened to the dog. He then says at page 76 that he pulled the sheets off the bed - he refers to them as blankets - and threw the pillow on to the floor. Then he describes a sexual assault with the blanket - by which he means the sheet - taken from the back of the bed and put over the deceased's head to enable him to do this thing. That having been done, he says he then ran out of the flat.

The difficulty with that is that when the deceased was seen on the following morning the sheet was tucked in at the foot of the bed, consistent with what Cook says, inconsistent with what Beamish says, and the position of the sheet, quite neatly tucked in at the bottom of the bed, can be seen in the photographs.

He then says firstly that he ran out of the back door and ran away. Of course, that was quite wrong. He corrected that later when detectives suggested that it must have been the front door, it could not have been the back door, because the back door was locked. At page 78 he talks of getting the hatchet off the wood heap, which again was quite wrong, and so on.

I will not go into it in detail because at present I am only applying for leave, but I am mentioning those matters to indicate that one can direct very many criticisms to the confessions of Beamish.

WINDEYER, J: Why was it suggested that Beamish would be making a false confession? Was any suggestion made about that?

MR. BURT: No, there was nothing to suggest that he was making a false confession.

WINDEYER, J: You are now suggesting that it was a false confession?

MR. BURT: Yes, but not false in the way it is suggested that Cook's was false. What I would suggest with respect to Beamish is that the confession was the product of a deaf mute, who was necessarily, and I do not say wrongly, led into it. The method of communication was so crude that the confession in very many points would be the product of a leading, and a very good example of it perhaps is the statement that he ran out the back door and the detective said, "Are you sure it wasn't the front door", and then he would say, "Yes, it was the front door." I am not saying that in criticism of Leitch, who had this very difficult job of interrogating Beamish, but I am suggesting that the confession was the product of that sort of process and lacked weight as a result of it.

But I do not think it was ever suggested that Beamish was himself consciously fabricating a confession. Of course, Beamish, one must say, too - and it probably militates against me - was speaking of an event that happened some 18 months before. Even in the case of Beamish, there was a very long time between the homicide and the actual interrogation. The homicide was on 20th December 1959 and the interrogation commenced in April of 1961.

WINDEYER, J: But a lapse of time is hardly a thing to make a person ready to say that he had killed somebody if he had not.

MR. BURT: Yes, I quite agree, Sir. It would be wrong of me to try to go into it at this time, but you are dealing with someone whose capacity to convey thought by words was almost non est.

(Continued on page 43)

MR. BURT (Continuing): One might reach this position and be able to put it fairly this way: that had Beamish not been discovered at all and had Cooke confessed in terms of this confession could anyone reasonably suggest that he would not have been convicted on it? This is not the ultimate test - - -

BARWICK, C.J: It is not a test at all. You have an untested confession; the tendency would be to accept it, I suppose.

MR. BURT: But if he were to be faced with this confession - put him perhaps in the position of Beamish. He at the trial steadfastly denied the truth of what he had confessed to. If Cooke had been similarly placed, having confessed in terms of this confession, what I submit is that undoubtedly he would be convicted, and I say it is relevant for this reason: if that conclusion is right then in our submission it does follow that if this witness is now to be put before a jury it will at least go so far as to displace the conviction of guilt produced by the confession of Beamish as against Beamish.

OWEN, J: When you refer to "this confession" I am not quite sure which confession you are referring to; there are a number of them, and they differ.

MR. BURT: I think it is perhaps fair to say that they differ a great deal; they certainly differ at very significant points. However, this is the evidence that the applicant was relying upon as being the fresh evidence, and I know it can be attacked bilaterally by saying Cooke said other things on other occasions.

BARWICK, C.J: When you say that he accurately described the rooms, he did not do that the first time, did he?

MR. BURT: Accuracy I suppose is necessarily a relevant thing.

BARWICK, C.J: You are relying, you say, on the correspondence of the now submitted document, which you say is the fresh evidence, and the fact, but there was no such correspondence in his first confession.

MR. BURT: It is a matter of degree, I think, Sir.

BARWICK, C.J: Did not the police officer point out to him the discrepancies?

MR. BURT: Yes, they pointed out certain discrepancies, and let the applicant face this squarely enough, and I think it is something the Crown would have to say, and it does go to cogency. In certain respects it could be shown on the police evidence that where he may have been wrong he was told what was right and the next time he gave the confession, it was right. This is something that is in the book.

BARWICK, C.J: You cannot brush it off lightly like that. When you say "I rely very much on this correspondence", for someone to say "yes, but he was told it was wrong the first time and he got it right the second time" - - -

MR. BURT: In some respects, yes.

BARWICK, C.J: That is a tremendous inroad upon your assertion that there is validity or importance in the correspondence of his last confession to the facts.

MR. BURT: I agree with you, and I do not wish to brush it off. Of course I would be happier if the circumstance were not present but I recognise it is present and I recognise the significance of its presence. I concede that it goes to cogency but of course it does not touch by any means all the points of Cooke's confession; of course it does not go very far to positively establish that it was wrong. I suppose one must have regard to this: if Cooke is confessing to a crime which, had he committed it, was committed some years before, the same can be said of Beamish to a lesser degree.

WINDEYER, J: Why to a lesser degree?

MR. BURT: Because of the time factor.

WINDEYER, J: So much time had not elapsed?

MR. BURT: Beamish was confessed to something that had happened 18 months before.

WINDEYER, J: If Cooke were indicted for wilful murder then all that is now said about the correspondence of Cooke's confession with the facts, assuming that had happened - he was indicted and denied this confession - could be said about Beamish's confession, I suppose?

MR. BURT: Beamish's confession did not correct his mistakes entirely.

WINDEYER, J: No, it is not so detailed, but one could say if Cooke were put upon his trial, and denied his confession, "Well, we have Beamish's confession". I suppose you would say that if Beamish were available he would be called as a witness?

MR. BURT: Yes, that is what would happen. You could have this situation exactly the other way round.

WINDEYER, J: Reversed?

MR. BURT: Yes, if Cooke had been tried first and it happened that Beamish's confession was somewhere available. The applicant's submission of course ts that this riddle must ultimately be resolved, and should ultimately be resolved by a jury.

WINDEYER, J: I appreciate what you say about that, Mr. Burt.

MR. BURT: The law on this matter really does not take any time, I think, to canvass. The court will remember White v. The Queen which was decided only two years ago and is reported in (1960) 107 C.L.R. at p.174 where the court said at p.176, "Efforts over a long period of years to define the effect of the word 'special' have broken down but it remains true that what we are required to look for is something that is special in the case. Prima facie we do not think the case is special unless it involves some point of law of general application and therefore of importance."

This is the prima facie position. Our respectful submission is that it does not necessarily follow that a point of law of special importance must be involved in every case, and with respect this has not always at least been thought to have been necessary. I think it is fair to say that in the history of this court one would see that Mr. Justice Starke had the most restrictive view of this matter whereas Mr. Justice Isaacs had the most liberal view and all other views would appear to fall within those two points. Yet with respect it is interesting to see - firstly perhaps in Rose v. King -reported in Vol.30 C.L.R. p.246 at p.251 in a joint judgment of the then Chief Justice Knox and Mr. Justice Gavin Duffy, and Mr. Justice Stark, they discussed the similarity, if there is one, between the position of this court and the Privy Council in criminal matters, in what their Honours say in one sentence at 251 is, ".... the overriding consideration upon the topic has reference to justice itself", which I submit means that in the end it is not possible to cramp the jurisdiction by saying that it must be shown that there is a point of law involved which is of itself an important question of law. All that need be shown, in our submission, in the end is that justice requires that the leave be given, so that if this court on a consideration of the material comes to the conclusion that there has been a miscarriage of justice then the leave should be given, with respect.

Of course in Craig's case, reported in (1933) Vol.49 C.L.R. p.429, leave was given, and that was a case substantially where leave was given on the basis of the fresh evidence, although it was not confined to that; there were other questions in Craig.

I am sorry; in the end it was refused in Craig with Mr. Justice Evatt and Mr. Justice McTiernan dissenting. It was given in Davis and Cody 57 C.L.R. at p.170.

With respect, on the application for the leave, I feel I can take the matter no further, and I merely leave it then on this basis: that a consideration of Cooke's confession, having regard to the facts which can be independently established, stamps the confession with a sufficient degree of cogency to enable one to say that had this confession been placed before a jury at the trial of Beamish and in the context of all the evidence against Beamish then the evidence which led to the conviction of guilt against Beamish on the first trial would not then be sufficient to carry the necessary conviction in the mind of the jury, and that the Court of Criminal Appeal went wrong really in principle because in assessing the cogency of the fresh evidence they allowed their assessment, and their proper assessment, of the truthfulness of Cooke as a person to control the result, and they did not give proper regard to the independent circumstances which established the cogency of the confession.

BARWICK, C.J: You saying it that way is to say what you repudiated before lunch, namely you say because the

facts about the milk bottle and the fry pan and the driver may be right although you think he is lying as to the murder yet that is reason for submitting the confession to the jury?

MR. BURT: No, I do not wish to put it that way.

BARWICK, C.J: That is perhaps a cruel way for me to put it, but is not that what you are saying, really, in substance?

MR. BURT: No, I submit not. I submit that what the Court of Criminal Appeal was saying was that because we have formed the general opinion that this man is a liar we therefore say he is lying when he says he murdered this girl, and we disregard the facts which, in the course of the confession are independently established to be true, which is rather, with respect, a different way of putting it.

BARWICK, C.J: But you are speaking as if those independent facts were the really relevant facts. The relevant facts are the facts that he said he knew this girl.

MR. BURT: That is the ultimate - - -

BARWICK, C.J: The court below, having said, "We do not believe anything he says because we believe he is a liar", they say he is a liar,"but we have examined closely his various efforts and we do not think any reasonable jury would believe his assertion that he killed her."

MR. BURT: That is the way they put it; I would say they are wrong in law because, with great respect, that is not the question. It is not whether a jury would positively believe that Cooke killed the girl; they do not have to go that far.

Our respectful submission is that once you find a person of Cooks's capacity in the flat on the night then that would be enough to displace the conviction of guilt which the evidence against Beamish apparently had produced before. It is a highly significant piece of evidence, of course, it can lead into a situation which is established by the evidence against Beamish, lead into it on the night of the homicide the character of Cooke's propensity, and then Cooke saying, "I did it", with great respect our submission would be that that would displace any conviction that might be produced in the mind of the jury by the other evidence against Beamish and that evidence standing alone.

BARWICK, C.J: Then you really say you could raise your application if you merely proved that a man who had been known to commit another murder was in the district and in this house at some time through the night, in the face of all that evidence at Beamish's trial.

MR. BURT: Yes.

(Continued on page 47)

MR. BURT: Yes. I would say, with great respect, that if, at the trial of Beamish, one had been able to establish that a man of Cooke's propensity had been in that flat during that night, that nothing more was known as to what he did in the flat, and he remained completely mute on the point of what he did in the flat, then, the mere fact, in our submission, that you have a man of that propensity in the flat that night would be enough for a jury to say: "We are not satisfied. Here is a multiple murderer whom we know to have been in the flat. We have a murder which is not outside the type of murders this man has committed in the past, and we are not prepared to say Beamish did it and not Cooke. We are not satisfied beyond reasonable doubt."

That, in my respectful submission, would be enough.

BARWICK, C.J.: The Court will adjourn for a few minutes.

(Sitting suspended from 3.16 p.m. until 3.50 p.m.)

IN THE HIGH COURT OF AUSTRALIA

Western Australian Registry No. 5 of 1964

NOTICE OF MOTION

In the matter of -

THE JUDICIARY ACT 1903-1960

And in the matter of -

AN APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA

B e t w e e n -

DARRYL RAYMOND BEAMISH

Applicant

- and -

THE QUEEN

Respondent

Coram: BARWICK, C.J.
KITTO, J.
MENZIES, J.
WINDEYER, J.
OWEN, J.

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON FRIDAY, 11TH SEPTEMBER 1964, AT 11.10 A.M.

For APPEARANCES - see page 2

JUDGMENT

BARWICK, C.J: The Court does not wish to hear you, Mr. Wilson.

This is an application for special leave to appeal from a judgment of the Court of Criminal Appeal. Mr. Burt has very properly confined himself to the grounds upon which special leave should be granted. He has developed these very fully, and very well, if I might say so.

However, the Court, taking into consideration all that has been said, is of opinion that there is no ground shown here for special leave, and, accordingly, special leave will be refused.

HEARING CONCLUDED

AT 3.53 P.M., THE COURT PROCEEDED WITH OTHER BUSINESS.
