IN THE PRIVY COUNCIL No. 31 and 32 of 1961

ON APPEAL
FROM THE COURT OF APPEAL FOR EASTERN AFRICA

B E T W E E N :

THE QUEEN Appellant

- and -

SHARMPAL SINGH s/o PRITAM SINGH Respondent

- and between -

SHARMPAL SINGH s/o PRITAM SINGH Appellant

- and -

THE QUEEN Respondent

(CONSOLIDATED)

CASE FOR THE RESPONDENT-APPELLANT
SHARMPAL SINGH s/o PRITAM SINGH

Record

1. These are Appeals by Special Leave from the Judgment and Order of the Court of Appeal for Eastern Africa, dated the 28th November 1960, whereby the Court of Appeal for Eastern Africa allowed the Appeal of the Appellant, Sharmpal Singh, from the Judgment of the Supreme Court of Kenya, dated the 3rd June 1960, quashed his conviction of murder and set aside the sentence of death and in lieu thereof convicted him of manslaughter and sentenced him to imprisonment for 8 years. By Order dated the 26th June 1961 the Appellant Sharmpal Singh was given Special Leave to Appeal in forma pauperis and Special Leave to Appeal was also given to the Crown.

pp.106 and 137

p.55

pp.139 and 140

2. The Appellant, Sharmpal Singh and the Crown are hereinafter referred to respectively as "the Accused" and "the Prosecution".

The Accused contends that he ought not to have been convicted either of murder or of manslaughter, while the Prosecution contends that the conviction of murder ought to be restored. The principal

Record

questions to be determined in these Appeals are whether the Courts below properly directed themselves on the issues of murder, manslaughter or accident, and whether in any event the evidence proved that the Accused was guilty either of murder or of manslaughter.

3. Both murder and manslaughter are defined in the Penal Code of Kenya (Laws of Kenya 1948 Vol. 1 Ch. 24) as follows :-

> 198. "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."
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> 199. "Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder."
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> 202. "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -
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> (a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;
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> (b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
>
> (c) an intent to commit a felony;
>
> (d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

4. The Accused was tried in the Supreme Court
p.1 before Wicks J. and three Assessors with the murder, contrary to section 199 of the Penal Code, of his

Record

wife Ajeet Kaur (hereinafter called "Ajeet"). Each of the Assessors delivered his opinion that the Accused was not guilty, but the trial Judge disregarded these opinions and convicted the Accused as charged. p.54

5. The Accused had been married to Ajeet for eight or nine months and Ajeet was several months pregnant. No motive or reason for the Accused to kill Ajeet was suggested at any stage of the proceedings against the Accused. The only evidence relevant to this issue was that the Accused and Ajeet were very happy together and that she had never made any complaint about his behaviour.

6. The evidence against the Accused was entirely circumstantial. The Accused and Ajeet shared a flat with Ajeet's brother and his wife and their two children. Ajeet was found by her brother-in-law early in the morning lying in the courtyard outside the flat with two stab wounds in her body. There was medical evidence that these stab wounds had been inflicted a quarter of an hour or more after death. Apart from these wounds Ajeet had no other external injuries, but there was medical evidence arising from post-mortem examination that she had a number of small internal injuries or conditions, particularly in the area of her neck and front left chest, which indicated that she had died of asphyxia. The Accused both in a statement made to the Police and a statement made from the dock denied all knowledge of Ajeet's death, and his brother-in-law testified that just before he went out into the courtyard and found Ajeet's body, he saw the Accused in bed in his room and apparently asleep. It was contended on behalf of the Accused that the evidence was consistent with or did not exclude the possibility that Ajeet had been attacked by one or more assailants from outside the flat while she was in or going to or from the toilet. The toilet was outside the flat with its entrance in the courtyard, and admission to the courtyard could be gained by anyone because the gate was broken and open. The Trial Judge rejected this contention and accepted the hypothesis put forward on behalf of the Crown that the Accused had strangled or asphyxiated Ajeet during sexual intercourse, and had then carried her out to the courtyard, stabbed her and disposed of some of her belongings, in order to fake a robbery. There was medical evidence that Ajeet had had sexual intercourse just before death and that her bed and

Record

nightclothes were wet with urination, which was a common feature of asphyxia. The Court of Appeal also accepted the hypothesis that the Accused had killed Ajeet "during or just after a sexual embrace", but holding that the evidence did not exclude a reasonable possibility that the Accused might not have had the intention of killing or doing grievous harm or knowledge that his act would probably cause death or grievous harm they substituted a verdict of manslaughter.

7. It is not sought on behalf of the Accused to contravert the concurrent findings of fact reached by the Courts below that the Accused caused the death of Ajeet while having sexual intercourse with her, but it is submitted that the evidence was fully consistent with her death being caused accidentally. It is also submitted that the Trial Judge misdirected himself or failed to direct himself on the issue of malice and that both Courts below misdirected themselves or failed to direct themselves on the issue whether or not the Accused had caused the death of Ajeet by an unlawful act and whether the evidence was consistent with accident.

8. Four medical witnesses gave evidence for the Prosecution. Two of them, Doctors Ngure and Rogoff, had carried out separate post-mortem examinations. Doctor Ngure stated that there were no external injuries (other than the stab wounds) and no external or internal bruising. He gave the following opinion :-

p.26

p.27, l.44

> "I was very doubtful of the cause of death, I formed the opinion that the stab wound of itself would not cause the death of the woman. She had not lost enough blood. There were signs of asphyxia, these were the conditions I have described in the respiratory system. At the time the reason for the asphyxia was obscure. I was of opinion that death was due to asphyxia mainly, and possibly from haemorrhage and shock from the stab wound."

9. Doctor Rogoff stated that there were no external marks and no external abnormalities on the body. On internal examination he found more signs of asphyxia than had been apparent to Doctor Ngure, and in particular he found extensive bruising and haemorrhage in the area of the chest and the front of the neck. He gave the following opinion :-

p.15, l.19

Record

"As regards the neck and chest, the injuries could have been caused by the hands being on the throat and the knee or elbow on the chest, this would be the simplest way of causing it. The injuries to the neck and chest were, in simple language, internal bruises caused by pressure which could have been applied in all sorts of ways. I just give the simplest way in which they could be caused. Such pressure would be fatal if enough was used over a sufficiently long period of time also to cause the heart to stop beating. To asphyxiate a person, all that is necessary is to stop breathing and cut off the blood supply to the brain. One could asphyxiate by pressure on the chest. The pressure would need to be resisted. That is if the person was lying, pressure downwards with resistance at the back. The effect of this is to stop breathing by stopping the rise and fall of the chest. In order to put sufficient pressure on the front of the chest, there must be resistance at the back. Depending on the surface, bruising would or may not be caused to the back. By surface I mean if the body is pressed onto a rocky or rough surface, the back can be expected to show the marks of the object on which it lay, usually by internal bruising. If the body is lying on a soft surface, no external or internal bruising of the tissue of the back need be caused. A bed with a thin mattress I would class as soft. I found no marks of bruising on the skin or on a sectionary of the back on the deceased body .... One of the causes of vagal inhibition is pressure on the neck. The artery branches and at the point of branching there is a nerve centre, pressure at this point for a short time, say a minute, can cause vagal inhibition, that is the actual stopping of the heart. The pathological features of vagal inhibition are similar to asphyxia. In all cases of strangulation an element of vagal inhibition is present." p.17, l.16

In the course of cross-examination he gave the following answers :-

"Q. You have examined many cases of strangulation? p.20, l.19
A. Quite a few.

Record

Q. It is usual in cases of strangulation for there to be marks on the outside?
A. Not at all, there can be and need not be.

Q. In a case of normal strangulation great force is used?
A. No great force is often used, but it does not need great force to cause strangulation.

Q. Where unnecessary force is used marks will be left?
A. Not necessarily. In a recent case of the strangling of an Asian woman, the only external sign was a mark near the left ear where it is presumed she turned to pull the hands away. Marks can be left or need not be.

Q. If a person is strangled gently there would be no marks?
A. Marks could be left, it depends on where the fingers were in relation to the blood vessels, the direction of the force applied.

Q. If a victim were being strangled gently how long before death takes place?
A. From a few seconds to a matter of minutes.

Q. If an expert who knew the human anatomy did it, little sign would be left?
A. If an expert; yes, a matter of a few seconds and little internal evidence would be left, a matter of knowing where to press.

Q. Do you agree it is difficult to cause homicidal strangulation without leaving marks on the neck?
A. I do not agree.

Q. It could be that no external marks are left?
A. It is a question on which no dogmatic answer can be given, as I have said it depends on the position of the hands in relation to the blood vessels, the direction of the pressure, the state of the victim, whether in repose or excited, it is a very open subject.

Q. Murderers usually use more force than is necessary for taking life?
A. I agree.

Q. In this case no fractures at all?
A. No, but the hyoid bone was very flexible

Record

and bent very easily when I handled it and this is probably why it did not break.

Q. The injuries on the chest, the internal bruising was on the left side?
A. Yes.

Q. No bruising on the right side at all?
A. No.

* * * * *

Q. The compression of the chest could have been caused by a violent sexual embrace? p.22, l.26
A. Not impossible. It is difficult to imagine it in the normal way.

* * * *

Q. The compression of the chest could of itself cause death? p.22, l.33
A. Yes, but not likely, but it would not cause the internal damage to the neck.

Q. Either the injury to the neck or chest could cause death?
A. Yes, that is possible."

10. Doctor Treadway, who did not carry out a post-mortem examination, but was called to the hospital when Ajeet was brought in, in answer to certain questions in cross-examination put on the assumption that Ajeet was suffering from certain infections (which was not established) testified as follows :-

"Q. If such a woman were to be embraced violently during coitus could it cause compression of the chest that might lead to asphyxia? p.12, l.1
A. I imagine it would need to be extremely violent.

Q. In a person who was suffering from these four things, if she were embraced during a sexual embrace, she would need less force to cause asphyxia?
A. Yes.

Q. A highly excited sexual embrace could cause this compression of the chest?
A. Yes, conceivably."

Record

At a later stage of his cross-examination he testified as follows :-

p.13, l.3 "Q. A person who has been strangled say with the fingers must have some external marks on the neck?
A. Should have.

Q. If the person was strangled with a ligature the victim should have marks of injury on the neck?
A. Not necessarily.

Q. Taylor's Medical Jurisprudence 11th Edition Vol. 1 p.494/5 "The general .... to the throat." You agree with this?
A. By and large yes.

Q. In this case no visible marks on the neck?
A. Not easily visible."

The passage referred to in Taylor's Medical Jurisprudence is as follows :-

"The general features of asphyxial death found in strangled bodies have been noted above, viz., intense venous congestion in general, capillary stasis, haemorrhages into the substance of the lung and into mucous membranes punctate petechiae in the skin and conjunctivae, prominence of the eyes, protrusion of the tongue, or its pressure against the teeth, and bloody froth and mucus in the trachea. Circulation ceases with life, so it is utterly impossible that a ligature placed round the neck after death could produce these appearances: the presence of these signs strongly suggests that death was due to asphyxia. Nevertheless they are not in themselves pathognomonic, for, as Gordon and Turner have insisted, they occur in other suboxic deaths. Their local distribution in the head and neck is, however, strongly presumptive of strangling.

Evidence of violent compression or constriction of the neck during life is obtained from the presence of ecchymoses about the marks on the neck, haemorrhages above the level of the constriction, and swelling and lividity of the face. These are phenomena which cannot be simulated in a dead body by the application of

Record

any degree of violence. When the constriction is produced within a few minutes after death, a depression results, but it is highly unlikely that there will be any lividity or swelling of the tissues above. The experiments of Casper showed the impossibility of producing on a dead body anything at all resembling an ante-mortem strangulation mark.

In the absence of ecchymosis in the neck, it will be difficult to form an opinion, unless from circumstantial evidence. It must be remembered, however, that there may not always be any well defined marks, for a person may be strangled by the application of pressure to the neck through some soft medium. In the absence of all marks of violence round the neck, we should be cautious in giving an opinion which may affect the life of an accused party, for it is difficult for homicidal strangulation to be accomplished without the production of some appearances of violence on the skin. It is doubtful whether strangulation ever takes place without some marks being found on the neck indicative of the means used, but there is a remote possibility that death could be caused in this manner, without leaving any appreciable trace of violence. Suicides and murderers generally employ much more violence than is necessary for the purpose of taking life. If a soft and elastic band were applied to the neck with gradually increased force, it might be possible that death from strangulation would result without there being any external sign indicating the cause of death. Thugs, and other Indian robbers, were thus accustomed to kill their victims with great dexterity.

One must be prepared to consider whether, in the absence of any mark, death might not have resulted from another cause of suboxia. There is nothing to justify a witness in stating that death has resulted from strangulation if there should be no local asphyxial changes or marks of violence about the neck or face of the deceased. The state of the countenance alone will not warrant the expression of an opinion, for there are many kinds of death in which the features may become livid and shot with petechiae from causes totally unconnected with the application of external violence to the throat."

Record

11. This medical evidence, it is submitted, is fully consistent with the Accused, while lawfully making love to his wife, having caused her death accidentally, as for instance by lying on top of her with his hand, forearm and elbow pressing against her neck and chest. It is further submitted that in any event the Courts below were under a duty to consider whether or not there was evidence or sufficient evidence of murder or manslaughter within the definitions contained in the Penal Code of Kenya.

12. The judgment of the Trial Judge contained the following passage:-

p.72, l.50

> "In cross-examination, Mr. Treadway was asked about four diseases or disabilities which Ajeet may have been suffering from, which I have referred to, and the evidence was then as follows: "Q. If such a woman were then to be embraced violently during coitus could it cause compression of the chest that might lead to asphyxia? A. I imagine it would need to be extremely violent. Q. In a person who was suffering from these four things, if she were embraced during a sexual embrace, she would need less force to cause asphyxia? A. Yes. Q. A highly excited sexual embrace could cause this compression of the chest? A. Yes, conceivably. Q. And could also cause shock and haemorrhage? A. I find that very hard to believe." Then Dr. Rogoff was asked in cross-examination, "The compression of the chest could have been caused by a violent sexual embrace?", and Dr. Rogoff replied, "It is difficult to imagine it in the normal way." This evidence could be the basis of a defence, or a possible explanation of the facts, and I take it to be such, particularly in view of the principle that circumstantial evidence to justify the inference of guilt must be incapable of explanation upon any other reasonable hypothesis than that of guilt. The evidence is that Dr. Rogoff took a vaginal smear and on examination found a large number of fresh spermatozoa present, this being an indication of intercourse just before death. If the intercourse had been with an intruder or intruders, the same difficulties of reconciling the evidence arises as if Ajeet had just been strangled, but with the additional factors of the possible alarm during the commission of a

Record

rape and that Ajeet's drawers and trousers were properly adjusted. There are a number of possibilities: if the trousers and underpants were taken off to make the rape possible then if Ajeet was strangled in the course of the rape the micturition would take place then and when the underpants and trousers were replaced they would have been dry, and dry when found. As a variation, if the rape was completed and the underpants and trousers properly adjusted before Ajeet was strangled, this just adds the hazards of the rape to the circumstances of robbery which I have referred to. If the person having sexual intercourse and causing the asphyxia was the Accused then the possibilities of the assailant being an intruder or intruders or an inmate all go. The Accused made an unsworn statement in which he said that on that night be had intercourse at about a quarter to 11 p.m. or 11 p.m. If the evidence I have referred to related to this intercourse, be it later, and death from asphyxia took place during it, would the Accused replace Ajeet's drawers and trousers? Would they then have been dry? It would appear to be unlikely. However, whether it was during intercourse or whilst Ajeet was just lying in her bed, to strangle one's wife is murder, be it to stiffle her complaints because she objects to intercourse, or refuses to submit to it, or even, she having consented to intercourse, the Accused strangled her to gratify his lust. Regarding the suggested illnesses, as I have said, I accept that at the time of her death Ajeet was a normal healthy girl. Consider the facts proved, inferring that the Accused was the assailant. The Accused strangles Ajeet, either during intercourse, before it, or after."

13. The Court of Appeal dealt with the matter at the end of their Judgment as follows:-

"At the hearing of the appeal the court raised the query whether, even accepting that the death had been caused by the appellant, the evidence was sufficient to establish beyond reasonable doubt that the appellant intended to cause death or grievous bodily harm or knew that his act would probably cause death or grievous harm, so that his crime would be murder. This was a matter not relied upon by counsel for the appellant in the memorandum of appeal or in his argument before this Court. p.134, l.15

Record

That does not relieve us from the necessity of considering it, particularly having regard to the principle that circumstantial evidence must exclude all reasonable possibilities save that of guilt. The learned judge considered the question and mentioned the medical evidence indicating that the deceased had had sexual intercourse shortly before her death and the appellant's statement that they had had intercourse at about a quarter to eleven or eleven p.m. He quoted the following medical evidence:

"In cross-examination, Mr. Treadway was asked about four diseases or disabilities which Ajeet may have been suffering from, which I have referred to, and the evidence was then as follows: 'Q. If such a woman were then to be embraced violently during coitus could it cause compression of the chest that might lead to asphyxia? A. I imagine it would need to be extremely violent. Q. In a person who was suffering from these four things, if she were embraced during a sexual embrace, she would need less force to cause asphyxia? A. Yes. Q. A highly excited sexual embrace could cause this compression of the chest? A. Yes, conceivably. Q. And could also cause shock and haemorrhage? A. I find that very hard to believe.' Then Dr. Rogoff was asked in cross-examination, 'The compression of the chest could have been caused by a violent sexual embrace?' and Dr. Rogoff replied, 'It is difficult to imagine it in the normal way.'"

That, of course, is not the whole of the medical evidence and relates particularly to the chest pressure. Dr. Rogoff also said:-

"As regards the neck and chest, the injuries could have been caused by the hands being on the throat and the knee or elbow on the chest, this would be the simplest way of causing it. The injuries to the neck and chest were, in simple language, internal bruises caused by pressure which could have been applied in all sorts of ways. I just give the simplest way in which they could be caused. Such pressure would be fatal if enough was used over a sufficiently long period of time also to cause the heart to stop beating."

Record

There were no external marks upon the throat of the deceased and, though the medical evidence indicates that marks may or may not be left by a strangler, we think that the absence of marks indicates that there was no violent struggle and is more consistent with a firm pressure. In our opinion, these injuries are quite consistent with the appellant having killed his wife during or just after a sexual embrace, applying pressure in an excess of sadism to frighten, or torment her, or to overcome resistance. The learned Judge said:

"The accused made an unsworn statement in which he said that on that night he had intercourse at about a quarter to 11 p.m. or 11 p.m. If the evidence I have referred to related to this intercourse, be it later, and death from asphyxia took place during it, would the accused replace Ajeet's drawers and trousers? Would they then have been dry? It would appear to be unlikely. However, whether it was during intercourse or whilst Ajeet was just lying in her bed, to strangle one's wife is murder, be it to stifle her complaints because she objects to intercourse, or refuses to submit to it, or even, she having consented to intercourse, the accused strangled her to gratify his lust."

We are, with respect, unable to agree with all that is said in that passage. To strangle one's wife is only murder if the act of strangulation is done with the intention of killing or doing grievous harm or with knowledge that the act will probably cause death or grievous harm - section 202 of the Penal Code. We do not think that the circumstantial evidence eliminates as a reasonable possibility that the appellant did not have such an intention or such knowledge, but caused a great deal more harm than he intended or anticipated. The learned Judge considered it unlikely that the appellant would have replaced the trousers of the deceased in such circumstances, or that they would have been wet. Why not? The trousers could have been left in the bed during sexual intercourse and become wet in that way. Before taking the body outside to simulate death by an attack by an intruder the appellant could be expected to replace the trousers and underpants. With respect we are

Record

unable to agree with the reasoning of the learned Judge on this particular matter. The evidence of the relations between the appellant and the deceased shows that they lived a happy married life. The deceased was pregnant and no motive whatever has been shown for an intentional killing.

In all the circumstances we are of opinion that the evidence did not exclude the reasonable possibility that the appellant killed his wife by an unlawful assault but without the intent necessary to constitute legal malice. The fact that such a case was not relied upon in the Supreme Court or before this Court does not relieve either Court from considering it: Mancini v. Director of Public Prosecutions (1942) A.C.1. The learned Judge in the Supreme Court did consider it and he rejected it, but, taking the view of the evidence most favourable to the appellant, we have reached a different conclusion.

For these reasons the appeal is allowed, the conviction of murder is quashed and the sentence passed by the learned Judge set aside; in lieu thereof the appellant is convicted of manslaughter contrary to section 198 of the Penal Code and sentenced to imprisonment for eight years."

14. It is submitted that the Court of Appeal were right in rejecting the criterion applied by the Trial Judge and in deciding that the intent necessary to constitute malice had not been proved. The evidence did not establish that the Accused had "strangled" his wife by manual constriction of her neck. If it be contended that on the principle of the House of Lords decision in Director of Public Prosecutions v. Smith (1961) A.C.290 the Accused must be presumed to have intended the natural and probable consequences of his acts, it is submitted that that decision has no application to Section 202 of the Penal Code of Kenya, and further that in any event there was no evidence that, and the Trial Judge did not consider whether, the Accused must as a reasonable man have intended or known that the pressure which he applied to his wife was likely to cause her death. It is submitted, on the other hand, that the Court of Appeal erred in holding that he had killed his wife "by an unlawful assault." There was no evidence of any assault such as to

Record

constitute an unlawful act by a husband against his wife with whom he was lawfully having intercourse, and indeed this finding is inconsistent with the Court of Appeal's own finding that "the absence of marks indicates that there was no violent struggle and is more consistent with a firm pressure." If (by implication) the Court of Appeal found that the Accused killed his wife "by applying pressure in an excess of sadism to frighten or torment her, or to overcome resistance", it is submitted that there was no evidence to justify this finding and that in any event the evidence was at least equally consistent with death being caused accidentally and without any cruel or hostile act or intention. It is submitted that the Court of Appeal wrongly failed to apply the statutory definition of manslaughter and to consider what constitutes "an unlawful act" as between husband and wife during intercourse and that on the proper application of this definition the Accused was not guilty of manslaughter in the circumstances of this case unless he was proved to have made a deliberate and hostile attack against his wife.

15. The Accused respectfully submits that the Appeal of the Prosecution should be dismissed and that his Appeal should be allowed and that the said Order of the Court of Appeal should be set aside and his sentence of imprisonment quashed for the following among other

R E A S O N S

1. BECAUSE neither of the Courts below considered or directed themselves upon the issue of accident which was open on the evidence as a defence to the charge.

2. BECAUSE neither of the Courts below considered or directed themselves upon the issue whether the Accused had caused the death of Ajeet by an unlawful act.

3. BECAUSE there was no evidence to support the findings of the Court of Appeal that the Accused caused the death of Ajeet by an unlawful assault or by applying pressure in an excess of sadism to frighten or torment her or to overcome resistance.

4. BECAUSE the Trial Judge misdirected himself in holding that "to strangle one's wife is

Record

murder" without considering whether the Accused was guilty of "malice aforethought" as defined by Section 202 of the Kenya Penal Code or of "an unlawful act" as defined by that Section and by Section 198.

5. BECAUSE the circumstantial evidence was equally consistent with accidental death caused during lawful intercourse as with death caused by a deliberate and hostile act.

6. BECAUSE the decision in Director of Public Prosecutions v. Smith has no application to Section 202 of the Kenya Penal Code, or, if it has, there was no evidence and no finding by either of the Courts below that the Accused must as a reasonable man have intended or known that his act would probably cause death or grievous bodily harm to Ajeet.

JOSEPH DEAN

JOHN A. BAKER

Nos. 31 & 32 of 1961

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ON APPEAL
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- and -

THE QUEEN Respondent

(CONSOLIDATED)

CASE FOR THE RESPONDENT-APPELLANT
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