APPENDIX 6

FACC000002/2003

FACC No. 2 of 2003

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 2 OF 2003 (CRIMINAL)

(ON APPEAL FROM CACC NO. 401 OF 2000)

Between:

HKSAR	Respondent
AND	
ZABED ALI	Appellant

Court: Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Clough NPJ and Sir Anthony Mason NPJ

Date of Hearing: 11 June 2003

Date of Judgment: 11 June 2003

Date of Handing Down Reasons: 27 June 2003

JUDGMENT

Chief Justice Li:

1. At the conclusion of the hearing, the Court allowed the appeal, quashed the conviction and ordered a re-trial, with reasons to be handed

down later. This judgment sets out the Court's reasons for taking that course.

The Conviction

2. After trial by judge (Sakhrani J) and jury, the appellant was convicted of the murder of Razzack Mohammed Abdur "the deceased" and was sentenced to life imprisonment.

The prosecution's case

3. On 28 June 1999, the deceased was found dead inside a room in a guest house in Mirador Mansion, Tsim Sha Tsui. The deceased's face, including his eyes, nose and mouth, were covered with multiple layers of black plastic and adhesive tape. And his body and hands were tied with steel wire and adhesive tape. The likely cause of death was suffocation.

4. The prosecution's case was that the appellant had committed the murder either alone or with others. It was essentially based on circumstantial evidence which consisted of the following:

(a) The appellant was the person who rented the room in question using a false name on 26 June 1999.

(b) Fibres from a pair of the appellant's shorts were found to match those taken from debris from parts of the deceased's body and from the mattress in the room.

(c) DNA evidence strongly suggested that the appellant had drunk from a soft drink bottle found in the room and that the appellant's blood was on the deceased's jeans.

(d) The appellant's fingerprint was found on one of the rolls of adhesive tape used to tie up the deceased's arms.

(e) Testimony from Mohammed Al Rabby with the nickname of Omar ("Omar") of his conversation with the appellant some 10 days before the murder. ("Omar's evidence")

Omar's evidence

5. The admissibility of Omar's evidence is the crucial issue in this

appeal. Both Omar and the appellant came from Bangladesh and they were acquaintances. In summary, Omar's evidence was that during their conversation some 10 days before the murder, the appellant said that his father had been killed when he was a child by the Sharbahara Party in Bangladesh, that he was going to kill someone in revenge and that he had a fixed target whom the appellant did not name. But later in the conversation, the appellant said that he was just joking. The relevant parts of Omar's evidence should be set out:

"One day I asked him what does his father do. He said that his father was killed by a party called Sharbahara Party in Bangladesh, or something like that, when he was young."

"Then later he said that, 'I also have ... I also want to take revenge. I want to kill somebody ...'"

"He said that 'I want to take a revenge of my father's killing and I would ...'"

"I have a promise to myself that I would get back to ... I would take revenge of my father's killing. I would also kill somebody."

"When I asked him, he answered me the question, and I later asked him 'who had killed your father?' Then I asked him 'Why do you want to commit a murder?' Then later he said that, 'No, I just joked.'"

"No, he said that, 'I have a fixed target', but later he told me that he just joked."

"He was very sad, as if he was about to cry."

6. The deceased also came from Bangladesh. According to the evidence of the deceased's brother who was called by the prosecution, neither he nor the deceased was involved in politics. There was no evidence that the appellant and the deceased knew each other. The prosecution evidence was that the deceased came to Hong Kong from time to time to purchase items for resale in Bangladesh. He transacted his business in cash and carried large sums of cash. Shortly before his death, he had agreed to purchase goods worth some HK$72,300 and would take delivery and pay cash on 28 June 1999, the day his body was found. None of the money which the deceased was believed to be carrying (which may have been in excess of US$30,000) was recovered.

7. In his opening address, counsel for the prosecution said that whoever did this must have wanted something from the deceased. Counsel adverted to the possibility of a revenge attack of some kind "for reasons we do not know" but dismissed it immediately, saying: "There [is] simply no evidence as to

that." In his closing address, he put to the jury that the motive was robbery. He suggested that they could "draw a proper inference that this was a robbery which basically went wrong". It is clear that the prosecution invited the jury to consider the case as one of murder committed in the course of robbery. At no stage was the jury asked to consider it as one of revenge killing.

The defence case

8. The appellant gave evidence. He claimed that he was not a party to the killing and only came upon the body of the deceased after death. He accepted the scientific evidence and sought to explain it away. His version was in brief as follows. He had rented the room with two friends Babor and Kayum so that they could chat and have snacks. Babor told him that one of his big brothers had promised a reward of HK$60,000 if he could seize a key and papers from a man called Raju. But the appellant told them he did not wish to participate. He became intoxicated and went to sleep. After leaving the room in the morning, he later returned to it with Babor, having collected a duplicate key to the room from the reception. Babor had represented to him that Raju had gone to the room, and that they had already got the papers from Raju but had left the key which they needed to retrieve in order to collect the reward. On returning to the room, he and Babor found the dead body. They used tape to tie it up and put it away from open view. At this stage, he saw that he had cut one of his fingers which was bleeding. As to the conversation with Omar, the defence case was that it did not take place and that Omar was a dishonest witness.

The judge's ruling

9. Before the trial began, on the basis of Omar's deposition, the defence objected to the admissibility of his evidence. Counsel for the prosecution argued that his evidence was relevant to the appellant's state of mind and "as to whether [he] was capable of forming the intent to kill". Counsel for the defence argued that the evidence was "entirely prejudicial and non-probative". The judge ruled that the evidence was admissible. In his ruling, the judge simply said that he was satisfied that Omar's evidence was relevant to the prosecution's case and he was not satisfied that its prejudicial effect outweighed its probative value. He did not state why the evidence was

considered to be relevant.

The judge's summing up

10. In the closing address, counsel for the prosecution invited the jury to consider Omar's evidence as showing that the appellant was "capable of harbouring an intention to kill someone". This was the same basis as that put to the judge when admissibility was argued. However, in his summing up, the judge did not explain the relevance of Omar's evidence. He was sceptical of it and told the jury that "you might think that his evidence does not really assist you in this case and that you should ignore it." But he did not go so far as to direct the jury to disregard it. The relevant part of the summing up was as follows:

"You will have to examine Omar's evidence with great care. Is he the sort of person whom you should believe? Is he telling you the truth about what happened? Do you think that the defendant, who was not even a close or a good friend of his, would have told him what he said he was told by the defendant, namely, that he wanted to take revenge for his father's killing and that he wanted to kill somebody? You may well ask yourselves why someone would tell an acquaintance something like that. And who was this fixed target? There was no mention of the deceased or anyone else. There is no evidence that the defendant even knew the deceased at that time. Is Omar a reliable witness? If you accept what he said, do you think that the defendant was joking about it when he spoke to Omar? Bear in mind, members of the jury, that people sometimes do say that they wish so and so were dead, or that they would like to kill someone, but do they really mean it? It is for you to say whether you accept or reject what the witness said but you might think that not much reliance can be placed on what he said. You might think that his evidence does not really assist you in this case and that you should ignore it."

The Court of Appeal

11. Before the Court of Appeal, the prosecution conceded that Omar's evidence was not admissible but maintained that as the judge had virtually invited the jury to ignore it, the evidence had no impact on the verdict. It was argued that the proviso that no miscarriage of injustice had been caused by the irregularity should be applied and the conviction should be upheld. See the Court of Appeal's judgment **HKSAR v Zabed Ali** [2002] 4 HKC 349 at paras 49, 106 and 126.

12. The Court of Appeal by majority (Mayo VP and Yeung JA, Stock JA dissenting) upheld the conviction. Notwithstanding the prosecution's concession, Mayo VP and Yeung JA held that Omar's evidence was admissible. But their reasoning was different. Mayo VP held that the

evidence was relevant to whether the appellant had the intent to kill. He considered that the evidence "established that in certain circumstances, the [appellant] was prepared to form an intent to kill another person. Even though the case which was being run by the prosecution was that the killer or killers were committing the offence for financial gain, it was a relevant factor that there might be evidence that the [appellant] would be prepared to kill for some other motive". (See paras 53 to 55).

13. Yeung JA held that the evidence was admissible on the basis that the evidence of an expression by the appellant of an intention to kill someone shortly before the murder took place "tends to connect" the appellant to the charge. (See para 97). Yeung JA expressed the view that if contrary to that conclusion, the evidence were inadmissible, the proviso could not be applied and the conviction should be quashed.

14. Stock JA dissented. He considered that Omar's evidence was inadmissible as in the circumstances of the case, it was mere propensity evidence. The appellant's comments to Omar only evidenced a potential propensity to kill. In his view, the proviso could not be applied and the conviction should be quashed.

Leave to appeal

15. The Appeal Committee granted the appellant leave to appeal on the substantial and grave injustice ground.

The prosecution's concession on appeal

16. On the appeal before the Court, Mr Reading SC for the respondent, ("the prosecution"), who did not appear before the courts below, retracted the concession made in the Court of Appeal and argued that Omar's evidence was admissible. But he made a different concession. He accepted that even if the evidence were admissible, the judge failed to give a proper direction to the jury on its relevance. Accordingly, he conceded that the appeal should be allowed and the conviction should be quashed, with an order for a re-trial. Although it was common ground that this should be the result, the proper basis for allowing the appeal remains an issue. This turns on the question whether Omar's evidence was admissible. The question, being one of

admissibility, is one of law.

The principles

17. In considering the principles in this area of the law of evidence, Lord Herschell's well known statement in **Makin v. The Attorney-General for New South Wales** [1894] AC 57 at 65 is often cited, as it was in two of the judgments in the Court of Appeal in the present case.

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

However, in referring to the **Makin** statement, it is fundamental to recognise that the common law in this area has since been extensively developed.

18. The first part of Lord Herschell's statement sets out the exclusionary rule rendering inadmissible evidence tending to show that the accused has been guilty of other criminal acts *for the purpose of* leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. The statement focused on the evidence in issue in **Makin** which was evidence tending to show other criminal acts by the accused. But it is well established that the exclusionary rule is not so confined. The evidence subject to the exclusionary rule has been described as:

"...evidence of the character or of the misconduct of the accused on other occasions (including his possession of discreditable material), tendered to show his bad disposition ..."

See *Cross and Tapper on Evidence* (9th ed.) 335.

19. The second part of Lord Herschell's statement refers to the circumstances in which evidence of bad character or propensity may be admissible. The effect of the statement is that *if* the evidence is relevant to an issue in the case, *for reasons other than* to show a mere propensity to commit another offence, it may be admissible, notwithstanding that it also shows

propensity. See **Attorney General of Hong Kong v. Siu Yuk-shing** [1989] 1 WLR 236 at 240E-F. The evidence may be admissible for the purpose of proving a matter in issue and not for the purpose of showing mere propensity. Whilst the evidence *may* be admissible, whether it should be ruled admissible as a matter of law would now depend on the application of the test laid down in the leading authority of **DDP v. P** [1991] 2AC 447.

20. In that case, Lord Mackay (at 460E-F) held that the essential feature of admissibility of evidence of bad character or propensity:

"is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused ..."

His Lordship went on to say:

"Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."

21. The well established exclusionary rule remains to be applied and the test in **DPP v. P** would not be applicable to evidence excluded by the rule. The rule excludes mere propensity evidence. This is evidence of the accused's bad character or propensity whose *only* purpose is to show that the accused is likely by reason of his bad character or propensity to have committed the offence. As the law has developed, the rationale of the exclusionary rule is that whatever probative value mere propensity evidence may have, it should be excluded because of its prejudicial effect.

22. In **Makin**, Lord Herschell observed (at 65) that in applying the principles, "it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other". It has been persuasively argued that:

"many of the difficulties experienced by the courts in their attempts to apply Lord Herschell's remarks in *Makin* might have been eliminated if his two famous sentences had been delivered in the converse order, making it clear that the second was not so much an exception to the first, as the first to the second."

See *Cross and Tapper on Evidence* (9th ed.) 339. See also *Schiff: Evidence in the Litigation Process* (4th ed.) Vol.2 1187 and *McNamara: Dissimilar*

Judgments on Similar Facts (1984) 58 ALJ 143. The approach suggested is that the relevance of the evidence to the issues in the case should first be considered. After all, relevance is the cardinal test in the law of evidence. One should then apply the exclusionary rule to bar evidence which is mere propensity evidence. This approach was in fact adopted by Stock JA in his judgment in the present case (para. 116).

23. The argument in favour of this approach has considerable force. On this approach, taking into account the test in **DPP v. P**, the question of admissibility should be considered along the following lines.

(1) The matters in issue which the prosecution has to prove to establish guilt, having regard to the charge, must first be identified. For this purpose, the defences open to and any specific defence raised by the accused would be taken into account. However, in the well known words of Lord Sumner in *R v. Thompson* [1918] AC 221 at 232:

"The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Obviously, if a fact which the prosecution has to prove is accepted by the defence, it would not be in issue.

(2) The evidence the admissibility of which is in question should be focused on.

(3) The following questions should then be asked: what is the matter in issue to which the evidence is said to be relevant and why, that is, what is the reason for saying that the evidence is probative of that matter in issue?

(4) If in answer to those questions, it is concluded that the evidence is relevant to a matter in issue for reasons *other than* to show mere propensity on the part of the accused to commit the crime in question, that is, it is not mere propensity evidence, then the test in *DPP v. P* has to be applied in deciding as a matter of law whether it is admissible: whether its probative force in support of an allegation against the accused is sufficiently great to make it just to admit it, notwithstanding that it is prejudicial to the accused. It is only where the test is satisfied that the evidence would be ruled admissible as a matter of law. If it is not satisfied, the evidence would be ruled

inadmissible. But if in answer to the above questions, it is concluded that it is mere propensity evidence, then it would be inadmissible on the basis of the exclusionary rule.

24. This appeal is only concerned with the question of admissibility. But it should be observed that if the evidence of bad character or propensity is admitted in accordance with the principles discussed above, it would be necessary for the judge to give an adequate direction to the jury as to how to approach the evidence. The jury should be directed as to the matter in issue to which such evidence might be relevant and how it might be relevant. And the jury should be told that the fact that the accused has a bad character or the propensity as shown by such evidence does not mean he is guilty of the offence charged. See *Archbold* (2003) para. 13-41.

25. If the evidence is ruled admissible as a matter of law, whether the judge still has a residual discretion to exclude the evidence on the ground that its prejudicial effect would outweigh its probative value is a much debated question. See *Archbold* (2003) para. 13-27a, *Cross and Tapper* (9th ed.) 374, *Phipson* (15th ed.) para. 17-48. Some argue that the judge still has such a discretion. Others argue that no such discretion remains as the test for admissibility in **DPP v. P** already provides for the balancing exercise between probative value and prejudicial effect. This question does not arise in the present case and no view is expressed on it.

Omar's evidence

26. Having discussed the relevant principles, the admissibility of Omar's evidence can now be considered. The appellant was charged with the murder of the deceased. The prosecution had to prove that the appellant killed the deceased with intent to kill or cause grievously bodily harm. The prosecution's case, based on circumstantial evidence, was that it was a murder committed in the course of robbery. As prosecution counsel put it to the jury, "this was a robbery which basically went wrong". The defence case is that the appellant had nothing to do with the killing and he only came across the body of the deceased after death.

27. On Omar's evidence, during a conversation with him some 10 days

before the murder, the appellant said he was going to kill someone in revenge for the killing of his father by the Sharbahara Party and that he had a fixed target who was not named, although later on he said that he was just joking.

28. What is the matter in issue to which Omar's evidence is said to be relevant and what is the reason for suggesting that the evidence is probative of that issue? Mr Reading SC relies on two matters.

29. First, it is submitted that Omar's evidence is relevant to the appellant's motive for killing the deceased. The argument is that evidence of the appellant's statements to Omar that he was going to kill someone in revenge for the killing of his father and that he had a fixed target goes to show that his motive for the killing of the deceased with which he was charged was revenge. This may be what Yeung JA had in mind when he held that an expression by the deceased of an intention to kill someone shortly before the murder "tends to connect" the appellant to the charge.

30. This argument of relevance to motive must be rejected. Although the establishment of motive is not an essential ingredient of the offence of murder, it is usually part of the prosecution's case that the defendant had a motive. Here, the motive alleged by the prosecution was robbery. The prosecution's case was that it was a murder committed in the course of robbery. Indeed, revenge was disavowed by the prosecution during opening when the possibility of a revenge attack was adverted to but immediately dismissed with the statement that there was simply no evidence as to that. That being so, the statements made by the appellant to Omar that he was going to kill in revenge were simply not relevant to motive. The motive on the prosecution's case was robbery and these statements concerning revenge were not probative of the motive of robbery.

31. Even if the prosecution had alleged revenge as a motive for the murder, either instead of robbery or on the assumption that it is properly open to the prosecution, as an alternative to robbery, it is doubtful whether on the evidence as presented at the trial, Omar's evidence of the appellant's statements that he was going to kill in revenge would have any probative value in relation to the motive of revenge. It must be noted that there was no evidence to indicate that the deceased was a possible target or within a class

of persons who were possible targets. For example, there was no evidence that the deceased had any connection with politics, let alone with the Sharbahara Party. On the contrary, the deceased's brother gave evidence that neither he nor his brother was involved in politics. Further, had the prosecution alleged revenge as a motive, even if Omar's evidence of the appellant's statements could be said to have any probative force, it is even more doubtful whether any probative force would be sufficiently great to make it just to admit it, notwithstanding its prejudicial effect on the accused, so as to satisfy the test for admissibility in **DPP v P**.

32. The second matter relied on by Mr Reading SC to which Omar's evidence is argued to be relevant is the appellant's intent to kill and that he did kill the deceased, as opposed to coming across the dead body innocently. In the Court of Appeal, Mayo VP accepted that the evidence was relevant to whether the appellant had the intent to kill. Although the intent to kill and the killing are two separate issues, as Mr Reading accepts, they should be treated together in the context of this case for the purpose of considering the admissibility of Omar's evidence.

33. This argument must also be rejected and can be disposed of shortly. It is important to examine why on this argument, Omar's evidence of the appellant's statements that he was going to kill in revenge and that he had a fixed target is said to be relevant. The argument in support of relevance is that the appellant's statements that he was going to kill made it more likely that he had the intent to kill and did kill the deceased as charged. In other words, the evidence tends to show propensity on the part of the appellant to commit murder. The purpose and the only purpose of admitting the evidence is to show propensity. This is *mere* propensity evidence which must be excluded as inadmissible by the exclusionary rule.

34. For the reasons set out above, at the conclusion of the hearing, the Court allowed the appeal and made the orders referred to at the commencement of this judgment.

(Andrew Li)	(Kemal Bokhary)	(Patrick Chan)
Chief Justice	Permanent Judge	Permanent Judge

(Philip Clough)	(Sir Anthony Mason)
Non-Permanent Judge	Non-Permanent Judge

Representation:

Mr James McGowan (instructed by the Legal Aid Department) for the appellant

Mr John Reading SC and Mr Vincent Wong (of the Department of Justice) for the respondent