25/85

IN THE PRIVY COUNCIL

Appeal No. 65 of 1984

ON APPEAL FROM THE COURT OF APPEAL IN HONG KONG

B E T W E E N:

KONG CHEUK KWAN

Appellant

- and -

THE QUEEN

Respondent

CASE FOR THE APPELLANT

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1. Introduction

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This is an appeal against a judgment dated 9th March 1984 of the Court of Appeal of Hong Kong, dismissing an appeal against a conviction of manslaughter on 25th March 1983, following a trial in the Hong Kong High Court of Justice before Penlington J. and a jury.

Vol. I p.820

I p.800

2. On the 11th July 1982, a hydrofoil ferry, the "FLYING FLAMINGO", left Hong Kong for Macau. The same morning, the "FLYING GOLDFINCH", another hydrofoil owned by the same company, left Macau for Hong Kong. It was daylight. The weather was fine with good visibility. At about 9.25 a.m., the two craft collided at full speed. Two of the passengers

I p.127 1.31

I p. 69 1.43

I p.151 1.36

I p.113 1.5

I p.364 1.53

Record

Vol. I p.207,11.42-5 on the "FLYING FLAMINGO" lost their lives. At the time of the collision, the Appellant Captain

I p.152, 1.40 Kong Cheuk Kwan was at the helm of the "FLYING

I p.152, 1.41 GOLDFINCH"; the first mate Ng Yui-kin was performing lookout duty. On the "FLYING

I p.127, 11.54-6 FLAMINGO", the deck officer Ho Yim Pun was at the

I p.128, 1.33 helm, and Captain John Coull was on lookout duty.

I p.1 3. The helmsman and lookout from both vessels were charged with manslaughter, and each pleaded

I pp.4-5 not guilty. At the trial, which took place between 7th and 25th March 1983 before Penlington J, and a jury of seven, the Crown called seventeen factual witnesses, including seven passengers from the "FLYING FLAMINGO" together with the four seamen and the two radio officers from the two vessels. Two senior ship surveyors,

I pp.203-213,218-265 Mr Tang and Captain Pyrke, gave expert evidence.

I pp.334-591

4. At the conclusion of the Prosecution case,

Vol. II pp.592-704 submissions were made on behalf of each Defendant that there was no case to answer. The learned

II p.704, 1.24 trial judge ruled that Ng Yui-kin, the first mate of the "FLYING GOLDFINCH", had no case to answer, and directed his acquittal. The other three

II p.710, 1.13 Defendants, including the Appellant did not give

II p.711, 1.8 or call evidence.

Record

5. The Appellant was convicted by a unanimous verdict, and sentenced to 18 months' imprisonment; he was immediately released on bail pending an appeal. Mr Ho was acquitted by a unanimous verdict. Captain Coull was acquitted by a majority verdict of 5 to 2.

Vol. II p.800, 1.22
II p.805, 1.3
II p.805, 1.7
II p.800, 1.27
II p.800, 1.31

6. The Appellant's appeal against conviction was heard by the Court of Appeal, (Hon. McMullin V.P., Li and Silke, JJA), between 17th and 24th January 1984. A reserved judgment was given by the Vice-President on the 9th March 1984; leave to appeal against conviction was granted, but the appeal was dismissed. The Appellant's bail was extended, pending his further appeal.

II p.820
II p.849, 1.43

7. Issues

The grounds on which this appeal is based are:-

(a) that in the light of the following considerations, the Learned Judge ought to have held that there was no case for the Appellant to answer:-

Record

(i) on the evidence adduced by the prosecution it was not possible to assess the navigation of Captain Kong in accordance with the Collision Regulations or the tenets of good seamanship;

(ii) the Appellant's voluntary statement was treated by the prosecution as self-serving yet was relied upon by the Learned Judge in considering the submission of no case to answer: he improperly treated the same as admissible in evidence and as containing in part the case which the Appellant had to answer;

(b) that the Learned Judge's summing up was seriously defective in failing to give any proper guidance to the jury as to the issues and the evidence and argument relating to each issue and in the following particular respects:-

Record

(i) it contained a misdiretion as to the ingredients of the offence of manslaughter;

(ii) it erred in its treatment of the status and relevance of the Appellant's voluntary statement;

(iii) it failed to direct the jury on the law and the expert evidence so as to require that the Appellants navigation was assessed in accordance with the Collision Regulations and the tenets of good seamanship.

8. The Direction on Involuntary Manslaughter

It is probably convenient to deal with the direction on manslaughter first since the discussion does not involve any review of the evidence. As appears from the summing up, the Judge prepared a written direction as to the offence of manslaughter, copies of which he gave to the jury.

Vol. II p.773, l.33

Record

"The direction I give you, which I have had typed because I think this is not a trial involving a test of memories so I am going to give you a copy of this before you retire, but I will read (it) out, this is the direction on the question of manslaughter by negligence. That is that the Defendant and, of course, each of them considered separately, is guilty of manslaughter if the Crown have proved beyond reasonable doubt, firstly, that at the time he caused the deceased's death and, of course, you must be satisfied that each of the accused did cause the deceased's death, there was something in the circumstances which would have drawn the attention of an ordinary prudent individual and in this case you would consider the ordinary prudent Deck officer or helmsman in the position of the Defendant, to the possibility that his conduct was capable of causing some injury albeit not necessarily serious to the deceased including injury to health which doesn't apply here, and that the risk was not so slight that an ordinary prudent

Record

individual would feel justified in treating it as negligible and that, secondly, before the act or omission which caused the deceased's death, the Defendant either failed to give any thought to the possibility of there being any such risk or having recognised that there was such a risk he, nevertheless, went on to take the risk: or was guilty of such a high degree of negligence in the means that he adopted to avoid the risk as to go beyond a mere matter of compensation between subjects and showed in your opinion such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."

It is the Appellant's submission that this direction was wrong and had the effect of proposing an insufficiently stringent test of the character of conduct which is required to establish the offence:-

Record

(a) The general circumstances of the case were that the victim was allegedly killed as a result of the reckless or grossly negligent navigation of the Appellant's area in which there exists a public right of navigation;

(b) There is no material distinction between reckless navigation of a motor vessel and the reckless driving of a motor car, and thus the instant case should be considered pari passu with the driving cases;

(c) In Reg. v. Governor of Holloway Prison ex parte Jennings [1983] 1 AC 624, their Lordship's House accepted that the elements of manslaughter by gross negligence and the statutory offence of causing death by reckless driving were identical;

Record

(d) The Trial Judge ought, accordingly, to have given the Jury a direction along the lines suggested by Lord Diplock in R v. Lawrence [1982] A.C. 510 (H.L.E.) at p.526:-

> "In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things:-
>
> "First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property: and second, that in driving in that manner the defendant did so without having given any thought to

Record

the possibility of there being any such risk or having recognised that there was some risk involved, had nonetheless gone on to take it."

(e) Such a direction was expressly adopted for cases of manslaughter by their Lordships' House in R v. Seymour [1983] 2 A.C. 493. Further, it was prescribed in that case that to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high (per Lord Roskill at p.508).

9. The Trial Judge's direction was defective in various respects:-

(a) Name of offence

Vol. II p.773, l.38 The offence was simply called "manslaughter by negligence" without any epithet such as "gross".

Record

(b) Description of conduct

(i) The relevant conduct of the defendant is defined in terms of there being "the possibility that his conduct was capable of causing some injury albeit not necessarily serious... and that the risk was not so slight that an ordinary prudent individual would feel justified in treating it as negligible" instead of being defined as required by Seymour in terms of conduct which is such as "to create an obvious and serious risk of causing physical injury to another person". The Trial Judge's direction is merely a definition of ordinary common law negligence, not of gross negligence. Vol. II p.773, 1.50

(ii) There was no warning that the risk of death being caused by the Appellant's navigation must be very high.

(c) State of mind

In the second part, an additional state of mind has been added to those

Record

adverted to in the Lawrence direction,

Vol. II p.774, 1.12

namely a "high degree of negligence in the means adopted to avoid the risk".

10. The relevant type of conduct

The Court of Appeal accepted that:-

(a) The first part of the Trial Judge's

II p.844, 1.42

written direction appeared "on the face of it to mean that provided the jury were satisfied that the Defendant's conduct had involved even a small risk of minor damage they could nevertheless convict him on the charge".

II p.844, 1.50

Accordingly "it obviously proposes a test of a very much less stringent character than that which appears in the first limb of (the Lawrence) direction".

(b) Although it had been emphasised in Seymour that, to justify a manslaughter charge the risk of death being caused by the manner

Record

of the Defendant's driving must be very high, "such a direction was not given...". Vol. II p.846, 1.35

11. The learned Trial Judge did not have the advantage of the decision in Seymour at the time of his summing up. (Indeed, even the decision of the Court of Appeal in Seymour [1983] 76 Cr. App. R. 211 had yet to be reported.) In the circumstances the Court of Appeal thought it right to go on to see whether the summing up taken in its entirety was enough to put the jury "on the right track". However, it is respectfully submitted:- II p.846, 11.43-46

(a) the "right track" is not enough if Lawrence correctly lays down the appropriate direction. The direction must be the same as, or equivalent to, the model;

(b) in any event, it is manifestly unsatisfactory to have regard to other parts of the summing up by way of "repair" to these deficiencies.

Record

The whole point of the Trial Judge giving a written analysis of the crime to the jury was to ensure that they had a "carefully chosen formula" so that they might be "properly instructed". (This is in contrast to the objection taken by the Crown to the jury being allowed to have a copy of the Collision Regulations.) The written direction would inevitably outweigh the impact of any oral directions on the topic in the remainder of the summing up. Indeed, the jury were entitled to regard the written direction as definitive.

Vol. II p.838, l.28

II p.799, l.11

12. In any event, the Appellant would further submit that examination of the summing up as a whole does not reveal any material on which it would be safe to conclude that any deficiencies in the written directions were repaired:-

(a) Whilst, in contrast to the written direction, the Trial Judge referred frequently later in his summing up to gross negligence, nowhere did he

Record

deal with what constituted the difference between negligence and gross negligence. The only other conduct discussed by way of comparison to gross negligence is something which is "merely an oversight" or "merely a trivial mistake". That comparison is unhelpful and inadequate (see R v. Bateman [1925] 19 Cr. App. R. 8 per Hewart L.C.J. at p.16).

Vol. II p.774 1.35
II p.774 1.36

(b) The best adjective to get the flavour of the offence across to the jury was "reckless": cf. Andrews v. D.P.P. [1937] AC 576 per Lord Atkin at p.583. Yet the word does not appear in the summing up.

13. The relevant state of mind

(i) The additional phrase at the end of the second part of the written direction (in terms of "such a high degree of negligence in the means that he adopted to avoid the risk

II p. 774, 1.12

Record

as to go beyond a mere matter of compensation...") was set out as if it was a further category of the necessary mens rea. It is not and nor can it cure a misdescription of the actus reus since the "risk" to be avoided has already been misdescribed in the earlier part. The risk should have been "obvious and serious".

(ii) Further, the reference to "compensation" and "negligence" should not be treated as necessary or, indeed, helpful: R. v. Seymour [1983] 76 Cr. App. R. 211 per Watkins LJ at p.216. The definition of the crime in terms of conduct amounting to "a crime against the State" and "deserving punishment" has for long been regarded as circular: cf. Andrews v. D.P.P., supra, per Lord Atkin at pp.582 and 583.

Record

14. Criticism by the Court of Appeal of Seymour

The Court of Appeal, in reviewing the summing up as a whole, has tempered its criticism because of its expressed doubts as to the scope and relevance of the decision in Seymour:-

(a) The Court suggested that the application of Seymour to all manslaughter by gross negligence cases might "outflank" earlier cases on the scope of the necessary mens rea - such as R. v. Stone and Dobinson [1977] 64 Cr. App. R. 186: Gray v. Barr [1971] 2 All ER 949. Vol. II p.846, 1.47 II p.847, 1.14

(b) Accordingly, it is suggested by the Court of Appeal that the decision in Seymour should be confined to cases of reckless driving of motor vehicles. II p.847, 1.15

(c) In addition it is suggested by the Court of Appeal that the decision of the Court Appeal in Seymour to the effect that:- II p.847, 11.30 seq

Record

(i) the Lawrence direction was of general application to all offences resting on a basis of recklessness;

(ii) that it should be given to juries without being in any way diluted; and

(iii) that it is no longer necessary or helpful to make reference to compensation and negligence;

Vol. II p.847, 1.40 was not endorsed by their Lordship's House.

15. Seymour was the first decision of their Lordships' House specifically directed to the appropriate direction in a negligent manslaughter case since Andrews v. D.P.P. supra. The decision in the Appellant's submission is clear and there should be no room for judicial doubts as to its scope. Accordingly, as regards the points set out in the previous paragraph, the Appellant respectfully submits:-

Record

(a) The Court of Appeal appear to have placed some reliance on certain academic criticism of Seymour, in particular the short commentary in the Criminal Law Review (1983) p.742-745. (This article was never referred to in argument, nor was Gray v. Barr cited.) There is no justification for the criticism that the decision in Seymour was "self-contradictory" or that it fails to have regard to the implications of the decision on manslaughter generally. Vol. II p.847, l.4

(b) It is difficult to see why a distinction should be drawn between the reckless driving of a motor vehicle (say a motor bus) and the reckless navigation of a motor vessel (say a passenger hydrofoil): cf. Andrews per Lord Atkin at p.583.

(c) There is no indication in the speeches in their Lordships' House in

Record

Seymour of disapproval of the reasoning in the Judgment of the Court of Appeal.

16. The Defendant's Statement

Vol. I p.268 The Crown adduced all the Defendants' statements during the oral evidence of the investigating Police officer. It was made clear, however, that

Vol. I p.29, l.30 the prosecution was not relying upon any of the statements as to the truth of any part of their contents. In the result, as pointed out by 10

Vol. II p.823, l.20 the Court of Appeal, "these statements played a somewhat equivocal part in the trial". The problem arose from the decision of the Court of Appeal of Hong Kong in Cheng Chiu v. The Queen [1980] HKLR 50. It was there decided not to follow English law on the admissibility and relevance of a defendant's exculpatory statement as exemplified by R. v. Storey [1968] 52. Cr. App. R. 334. By virtue of Cheng Chiu the statement of a defendant in Hong Kong was admissible for all 20 purposes, whether exculpatory or not.

17. In the Appellant's Petition for Special Leave to Appeal it was respectfully submitted that the decision in Cheng Chiu was ripe for review on the following grounds:-

Record

(a) The effect of the decision could, as in this case, "make the prosecution's approach to such statements appear ambivalent".

(b) The extent to which the decision was applicable at the stage of submission of "no case" is uncertain, particularly where the Crown is not presenting the relevant statement as true in whole or in part.

19. Since the hearing of the Petition, in Leung Kam-Kwok v. The Queen, decided on the 17th December 1984 No. 36 of 1984, Your Lordships' Board disapproved Cheng Chiu and removed the divergence between English law and Hong Kong law on the admissibility and status of voluntary statements in a criminal trial. This change is very significant as regards two stages of the Appellant's trial:-

(a) No case

(1) The Appellant submits that the voluntary statement made by him on 3rd August was Part II p.28

Record

irrelevant in considering whether, at the close of the Prosecution case, there was a case to answer. The Crown

Vol. I p.29, l.35

put the Appellant's statement before the jury on the basis that it was untrue. Thus having adduced evidence of the statement,

I pp.389 et seq.

the Crown sought to show, by reference to the evidence of their expert witness, Captain Pyrke, that the Appellant's account of what had led up to the collision was impossible. The Crown

I p.382 l.21 et seq.

argued further that, since the Appellant's account was untrue, the lie itself would have some probative value as corroboration.

(2) In fact that Appellant's statement explained the collision in terms of the gross negligence of the

Record

other vessel, "FLYING FLAMINGO", turning to port in gross breach of the Collision Regulations. It was, therefore an exculpatory or "self-serving" statement, and its significance ought to have been limited to showing the attitude of the accused at the time he made it. If the statement were untrue, that fact at most would only have a bearing on the Appellant's credibility, an irrelevant consideration when ruling on a submission of no case. (It is further submitted that the statement, even if found to be false, could not have any probative value as corroboration, because the Crown itself had expressly advanced no case, and had adduced no evidence, of precisely what led up to the collision which was susceptible of corroboration.)

Record

(3) The submission on behalf of the Appellant of no case was made in the alternative i.e. in the first place, without

Vol II p.597, l.1

regard to the Appellant's statement and, second,

II p.610, l.41

taking account of it. It was, of course, the Appellant's case that, if the effect of Cheng Chiu was to allow the admission of the statement at the 'no case' stage, then this added weight to the submission since the Crown were treating the same as exculpatory. In fact, as is

II pp.613 et seq.

clear from the argument, the Learned Judge in considering the submissions formed his views on the basis of the Appellant's Statement. As regards one Defendant he

II p.773, l.5

allowed his submission of no case to answer on the basis of the Appellant's statement (see below). As regards the

Record

Appellant himself, the Learned Judge was principally troubled by the discussion in his statement of an alteration of course to starboard made shortly before the collision. Thus it appears that an exculpatory statement, which in the light of the decision in Leung was not admissible, appears to have formed the substance of the case which the Appellant was to answer. Vol. I pp.588-589

(b) Summing up

The Appellant's statement also played an ambivalent and unsatisfactory role in the Learned Judge's summing up.

(1) First of all, the Learned Judge sought to explain to the jury why he had ruled that there was insufficient evidence againt Ng Yui-Kin, the mate of "FLYING GOLDFINCH". He stated that this direction was based on the Vol. II p.772, 1.38 II p.773, 1.5

Record

contents of the Appellant's statement in that it asserted that the Appellant was aware of the approach of the other vessel. Thus, the Learned Judge was seen to be able to rely on the truth of the Appellant's statement to hold that there was no causative significance in a failure of Ng Yui-kin to keep a lookout, despite the fact that the Crown's case, made plain in opening and thereafter, was that the Appellant's statement to the Police was untrue and no reliance could be placed on any part of it.

Vol. I p.29, l.35

(2) In contrast, having in the first place accepted the statement as true for the purpose of acquitting Ng, the Learned Judge went on to point out that the statement was inconsistent with a whole body of evidence that the other vessel had not turned to port, and was therefore unlikely to be true. If this analysis was right, as the

Vol. II p.792, l.28

Record

Learned Judge accepted, the statement went to the Appellant's credit but did not establish any affirmative case. Yet again, despite this, the Learned Judge, went on to observe that, "Those statements are before you to be given such weight as you think fit": He then proceeded to direct the jury on the basis that the accuseds' statements, and in particular that of the Appellant, were true. He ought to have directed the jury that, insofar as the statements were exculpatory, they were not evidence of the truth of their contents, and each could not found a basis for finding gross negligence on the part of its author.

Vol. II p.689, 1.4

II p.785, 1.26

19. The Court of Appeal's treatment of the Statement

The Court of Appeal wrongly suggest that the Crown's case was that the statement left events "unexplained save in terms of gross negligence" on the part of the Appellant. This was not so. All the Crown was saying was that, if the other vessel

II p.823, 1.39

Record

had not turned to port, the Appellant's account was impossible and therefore untrue. Indeed, if the statement was true, it explained the events in terms of gross negligence of the other vessel in having turned to port: something which was

Vol. II p.828, l.24 "unusual" and "irresponsible": page 12. Such an alteration would in any circumstances have been a flagrant breach of the Collision Regulations. Since the Crown did not assert any particular admission against interest arising out of the

Vol. I p.29, l.35 statement (to the contrary it was said to be all untrue) then it was irrelevant and unfair for the Court of Appeal to go on to consider whether the statement, if true, was an account involving negligent navigation by the Appellant. The Appellant respectfully submits that all those difficulties would have been avoided if the statement had not been admitted in evidence.

20. The Collision Regulations/Seamanship

The Court of Appeal accepted the Appellant's submissions that:-

(a) It was necessary to pin-point the negligence attributable to each defendant bearing in mind the

II p.822, l.34 Collision Regulations 1977.

Record

(b) The material for assessing the situation in such terms was insufficient to support a finding of a case to answer. Vol. II p.827, 1.40

(c) In any event, there were numerous errors in the summing up relating the expert evidence of Captain Pyrke which would have "a serious bearing on the verdict" to the extent that the relative approach of the vessels was material. II p.836, 1.11

21. In nevertheless not allowing the Appeal, responsibility for this collision has thus been directed without regard to the relative approach of the vessels or to the Collision Regulations. The Court of Appeal sought to justify this on the basis that it was permissible to confine consideration of the facts to an alleged "circle of danger" over the last 30 seconds. The Appellant submits that this approach cannot be justified:- II p.836, 1.33

(a) The right approach in a ship collision is to consider who created a situation of danger by virtue of breaches of the Collision Regulations.

Record

(b) Such an exercise is impossible within the confines of the last 30 seconds; let alone the last 10 seconds, which is the most any passenger saw. Indeed, it is difficult to see any significance in the passenger's evidence. The mounting danger over the last few seconds would have been equally apparent to passengers on the other vessel.

Vol. II p.836, 1.32

(c) Despite the comment that "the whole thrust of the prosecution case was that whatever had gone on before the entry into the circle of danger, there had thereafter been... an adequate and mutual opportunity of avoiding danger by stopping the engines...", the concept of the circle of danger was never mentioned during the trial and was only introduced by the Crown during the course of the hearing of the appeal.

Record

(d) If the previous navigation is to be disregarded, the Court of Appeal should have disregarded it for all purposes. The fault, if fault there was, was a failure to stop. This was, as the Court of Appeal thought, mutual since an alteration to starboard by one vessel, whether substantial or not, can only be criticised in the context of the earlier navigation and mutual approach. However in the context of the last 30 seconds, an alteration to starboard by one ship in, say, an attempt to avoid collision cannot be regarded as culpable in contrast to failure to do anything by the other.

Vol. II p.828, 11.30-33

(e) Putting the point another way, the alteration to starboard can only be the object of legitimate criticism if the mutual approach up to half a minute before collision was safe or alternatively was unsafe by reason of the fault of the same vessel. If attention is confined to the last 30

Record

seconds, then it is unfair to pose the alternative criticisms put by the Court of Appeal to the effect that either the Appellant altered a safe situation into a dangerous one or altered a dangerous situation into a disastrous one. The safety or otherwise of the situation before the change of course can only be assessed in the context of what happened before the last 30 seconds.

Vol. II p.833, ll.7-23

(f) In this context, the Court of Appeal have not dealt adequately with the content of Captain Kong's statement or Captain Pyrke's comments on it:-

(i) As already submitted, to the extent that the whole basis of the story is untrue (namely that the other ship <u>did not</u> turn to port) it goes only to credit. It

Record

cannot help in assessing the legitimacy of a starboard alteration made at the circumference of the circle of danger.

(ii) Captain Pyrke's comment that the starboard manoeuvre was "useless" was in the context of being useless to avoid collision. The same comment can be made about the other vessel which just keeps on going. Furthermore the Appellant's statement was not to the effect of an alteration of course of 7 degrees but of an alteration of 7 degrees of helm. Captain Pyrke was asked to assume the former. It was in this context only that he said the proper action was to stop. He never advised that a hard-a-starboard manoeuvre was unsafe.

Vol. I p.419, 11.28-38

I p. 271, 11.22-24

I p.419, 1.15

Record

Vol. II p.850

22. On the 25th June 1984, Your Lordships' Board granted the Appellant special leave to Appeal to Her Majesty in Council.

23. The Appellant respectfully submits that the judgment of the Court of Appeal of Hong Kong was wrong and ought to be reviewed, and this appeal allowed with costs, for the following (amongst other).

REASONS

1. BECAUSE the Trial Judge failed to hold that the Appellant had no case to answer.

2. BECAUSE the Trial Judge improperly treated the Appellant's statement as admissible for all purposes.

3. BECAUSE the Trial Judge wrongly followed the decision of the Hong Kong Court of Appeal in Cheng-Chiu v. The Queen [1980] H.K.L.R. 50.

4. BECAUSE the Trial Judge misdirected the jury on the elements of the crime of manslaughter.

Record

5. BECAUSE the Trial Judge failed in considering the submission of no case and during his summing up to ensure that the conduct of the Appellant was assessed according to the Collision Regulations and the tenets of good seamanship.

6. BECAUSE the Learned Judge's summing up taken as a whole was unsatisfactory.

7. BECAUSE the Appellant's conviction is unsafe.

DAVID STEEL

MICHAEL LONGMAN

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