COMMENT

THE TREATMENT OF SEXUAL OFFENDERS IN TASMANIA

Basic to the needs of a society as we know it is the existence of law, and one of the main functions of the law is to guarantee, in accordance with well-recognized principles, both the person and the property of the individuals in the community. My main purpose, therefore, is to examine the problem that sexual offenders present to the community and the measures that our own State has taken to try and solve that problem, placing emphasis not so much on the curative aspect, but on the aspect of community security.

Some definition of the phrase "sexual offender" must obviously be given. Crimes against morality are dealt with in Chapter XIV of the Tasmanian Criminal Code. The main crimes are: unnatural crimes (homosexuality and bestiality); defilement of girls under eighteen years of age; defilement of insane persons and defectives; indecent assaults upon females; incest; indecency in a public place or in the public view; rape.

Other crimes listed as crimes against morality will be disregarded on the basis that their commission is motivated not by lust but by financial gain—such crimes as procuration and abortion.

First of all, a few comments may be made upon some of the crimes listed. Controversy has always surrounded the question of homosexuality. On the one hand there are those who regard it as an "abominable" crime (this adjective is always linked with it) and one that is repugnant to the laws of God and man. On the other hand there are those who think that the law should be drastically changed and that only those should be punishable who commit such crimes in circumstances where the corruption of youth is involved or where public decency is infringed. Whatever view one takes, the plain fact is that homosexuality is a criminal offence in Tasmania and any attempt to alter the law would undoubtedly meet with powerful opposition.

Defilement of girls under eighteen years of age is a crime against Section 124 and more charges are brought under this section than under any other section in the morality chapter of the Code. The circumstances from which such charges arise vary greatly, ranging from something approaching the borderline of rape down to acts of sexual intercourse by mutual consent in fulfilment of a real affection between the parties. In my view, many of the young men who infringe Section 124 of the Code are in no sense of the word criminals. Although they may present problems in family relations, they present no real problem to the community. I do not wish to enter on any discussion of the question of whether the

age of consent should be eighteen or sixteen, or any other age, but I am reminded of the story (said to be true) of a Tasmanian politician who served in Parliament a good many years ago, and who was very hard of hearing. During an election campaign meeting, the question of the school leaving age was fully discussed. Questions to the candidate then followed and one member of the audience asked him whether he was in favour of the law allowing young people between the ages of sixteen and eighteen to have sexual intercourse. Thinking the question still related to the school leaving age, the candidate replied, "Of course I do, and what's more, I think it ought to be compulsory."

One of the most serious crimes in the Criminal Code is the crime of rape, involving as it does the violation of a woman without her consent and accompanied, as it often is, by violence in a greater or lesser degree. Indecent assault on very young girls (where no real consent from the victim can be expected) is for all practical purposes akin to rape, and it is in relation to these two classes of offenders that the problem associated with the treatment of sexual offenders is found in its most acute form.

The next aspect to be considered is the extent of the problem created by the sexual offender. Here a sense of perspective must be kept. The extent of the problem may easily be exaggerated. Unfortunately, no serious attempt has been made to evaluate in statistical form the prevalence of, and the reasons for, crime in this State, a task that must be undertaken at an early date. In the United Kingdom the Home Secretary has recently set up a small specialised research unit to carry out research into the problems of crime and the treatment of offenders. We must follow suit.

The figures that I now place before you are taken from the records of the Solicitor-General's Department of the State of Tasmania and they cover the years 1947 to 1956 inclusive. The figures are not official but I believe them to be accurate. In this ten-year period the number of persons who came before the Supreme Court in its criminal jurisdiction was 1,582. (The population of Tasmania, taking a mean figure for the period, can be regarded as 300,000). Of this number, 295 were charged with sexual offences. The approximate percentage of sexual offences in relation to all criminal offences was, therefore, 18.6%. This figure in itself, however, could be very misleading. Of the 295 persons charged with sexual offences, 123 of them were charged with defilement of a girl under eighteen years of age, and out of these 123 persons 88 of them (a little over 70%) were released on bond or dealt with otherwise than by being sent to gaol.

Of course it cannot be denied that a large number of sexual offences are never detected by or reported to the Police—in this category would mainly fall acts of homosexuality, incest and defilement where there was a genuine consent by the girl. But from these figures I draw the inference that the number of sexual offenders who commit crimes that are a menace to the personal safety and security of members of the community is small. If this inference is sound, it gives grounds for satisfaction but not for

complacency. There are inherent risks associated with sexual offenders. Assuming that the reason for the commission of most sexual crimes is the gratification of a sexual lust, situations can easily arise where a woman's reactions may turn what would otherwise be a defilement into a rape, or may turn a rape into a murder.

What provision has this State made for the punishment and treatment of persons convicted of sexual offences? In 1951 the Tasmanian Parliament passed the Sexual Offences Act but it expressly provided that it did not come into force until a Proclamation was made bringing it into operation. This was only done in April, 1956, so first of all I should describe what courses were open to a Judge up to that time. In dealing with a person convicted of a sexual offence, the Judge could exercise any of the following powers: sentence the offender to imprisonment not exceeding twenty-one years; impose a fine of unlimited amount; release the offender under the Probation of Offenders Act; pass sentence upon the offender but suspend the execution of the sentence upon such conditions as the Judge might think fit; direct that the offender be detained during the Governor's pleasure in a reformatory prison; in the case of a male person convicted of any crime in the commission of which he has inflicted serious personal violence on any person, order that the offender be whipped with such number of strokes or lashes with such instrument in such manner and at such time, not being more than six months after sentence, as the Judge might direct.

I may say that in eighteen years' experience as a Crown Law Officer, I have never known this last power exercised in Tasmania, but it is a power that is not infrequently used in South Australia. The Crown Solicitor of South Australia has given the following details of whippings ordered in the last ten years. There have been 18 such cases, ten of them being for sexual offences and the remainder for robbery with violence. A South Australian Committee consisting of two lawyers and two psychiatrists which some years ago investigated the treatment of sexual offenders was firmly convinced that whipping was a punishment that should be enforced in proper cases. No defendant who had been whipped ever came before the Court again, so far as the Committee could discover. Since 1940 whipping has been a compulsory punishment in South Australia in cases of sexual interference against girls under 13 years of age, unless the Judge was of opinion that there were special reasons for not imposing it.

The imposition of a sentence is a matter that under the Tasmanian Criminal Code lies entirely in the discretion of the presiding Judge and it cannot be interfered with on appeal unless the sentence is manifestly wrong. Apparent dissimilarity in sentences is often commented upon but it is impossible to expect uniformity in punishments awarded, for two reasons:

(1) The detailed circumstances of a particular case are never identical in all respects with another.

(2) There will always be some degree of variation in the views of individual Judges as to the seriousness of different crimes.

The maximum fixed sentences imposed by Judges in this State in the last ten years in respect to the four main sexual crimes are as follows: rape, 12 years; indecent assault, five years; incest, four years; unnatural carnal knowledge, four years.

Before going on to deal with the Sexual Offences Act, one comment of a utilitarian nature. Deprive a person by judicial process of his liberty and you must find somewhere to put him. In this respect, Tasmania at the present time and for a long time past, has been in a deplorable situation. Except for holding centres, there are only two penal institutions in the State. The Gaol Farm at Hayes was established in the year 1937 and it has fully justified itself. Prisoners sent there live under reasonable conditions and they are given some measure of opportunity to rehabilitate themselves. The Hobart Gaol is another story. No-one who has been through it could fail to be shocked by it. Part of it was built in 1813 (two years before the Battle of Waterloo) and the remainder of it in 1837 (the year that Queen Victoria came to the Throne as a girl of eighteen). Its capacity is 100 prisoners, but in recent months there have been as many as 148. There are no facilities for segregation and no facilities for treatment of sexual offenders. A new and modern gaol is now to be built, but to say that this is not before its time is an understatement of the first magnitude.

Now a few comments about the Sexual Offences Act. This statute represents an attempt by Parliament to provide machinery whereby Judges might legitimately escape from the dilemma that has confronted them for so long—incarceration in an outmoded gaol where of treatment there is none, or release back into the community with the attendant risks. Unfortunately, the restrictions on public finance have so far robbed the statute of the practical beneficial results it was intended to bestow. In the first place, the Act only applies to certain particular offences, these being homosexuality and other unnatural offences; defilement of girls under eighteen; defilement of insane persons and defectives; indecent assault; procuring defilement of women by threats, fraud or administering drugs; detaining females in a brothel; incest; indecency in a public place or in the public view; publishing obscene publications; rape; and abduction of young girls with intent to defile. If on a conviction for any of these offences the Court is of opinion that the person convicted is likely, by reason of his moral, mental or physical disposition to repeat the offence charged, or some similar offence, notwithstanding the sentence to be imposed, it may order his examination.

If this is done the Director of Mental Health then appoints three persons, of whom one shall be a registered medical practitioner, one a practising psychiatrist, and one a psychologist who is a Fellow or Associate of the British Psychological Society, to examine the offender. They report back as to whether, in their opinion, the offender is likely, by reason of his moral, mental or physical disposition, to repeat the offence or some similar offence, "and if so, whether and, if so, how, he can in their opinion be treated for that disposition and whether in their opinion he is likely,

if at large, grievously to harm or vex any person by committing or attempting to commit, such an offence." Upon receiving this report the Director of Mental Health makes his return to the Court when the Crown or the offender may traverse it.

Thereafter the Crown is entitled to move the Court for a segregation order or a treatment order. On such an application the Court can examine the persons making the report as to the grounds for their opinions and the Crown and the offender may cross-examine. The Crown is also entitled to tender the personal history of the offender. If the Court thinks that the offender is likely to commit a sexual offence again, it makes either a segregation order or a treatment order, the first if it considers that he is likely if left at large "to harm or vex any person," the second if the Court considers that the offender will benefit by treatment.

A segregation order empowers the Governor of the State to cause the person against whom it is made to be detained at some place appointed by him for the purpose. A person detained under a segregation order, and not undergoing a sentence of imprisonment, is to be subjected only to such restraint as is necessary to ensure that he remains in the appointed place and as is necessary for the good order of that place. He is entitled to all reasonable and proper treatment calculated to make him fit for discharge. Segregation orders expire on the quarter day next after the end of one year from the date of the order (unless extended, and sometimes that is done). On the other hand, the Act empowers the Director of Mental Health to give a person detained under a segregation order a certificate that in his opinion that person is fit to be at large, and upon filing the certificate in the Supreme Court he is entitled to have the discharge of the order entered and his release brought about.

A treatment order requires the person against whom it is made to submit himself at such times and places as the Director of Mental Health may specify, there to be treated in accordance with the Director's instructions. When the Director is of opinion that the person against whom a treatment order has been made is cured of his indisposition he can give him a certificate and when the certificate is filed in the Supreme Court the offender is entitled to have the treatment order discharged.

If during the currency of a treatment order there is any evidence that the offender is likely, if left at large, "grievously to harm or vex any person, by committing a sexual offence," the Crown may apply to the Court for a segregation order to take the place of the treatment order.

To what extent have the provisions of this Act been invoked by the Court since it came into operation on the 1st April, 1956? Not very much as yet. On some twelve or fifteen occasions persons have been ordered to be examined under the Act, but in no single case has there been a segregation or treatment order made.

Bearing in mind all that I have said about the nature of sexual offences, the power of the Courts to deal with offenders, the facilities that in fact exist, and all the other circumstances, the question remains: What is the

best method of dealing with the sexual offenders? I claim no knowledge of psychiatry, psycho-therapy, psychology or any other allied technical subject. Most people assume that there is some sort of treatment that is likely, wholly or partly, to cure the sexual offender. I very much doubt that. As a layman I am open to persuasion, but it will take cogent facts and arguments to convince me that there is any really effective treatment in the majority of cases. But that some will respond to treatment I do not question.

Professional experience in the criminal courts has indicated to me that alcohol undoubtedly plays a large part in the commission of many sexual offences. It is elementary that drink lets down barriers and releases latent proclivities in an individual. If an offender is detained in custody, then drink is denied him. If he is released upon probation, a difficult but necessary task is placed upon the shoulders of the Probation Officer to ensure that facilities for drinking to excess are restricted to the greatest degree possible.

The first aim of the penal system must be to protect society. Of old, this protection was provided by the removal of the offender. In the England of 150 years ago, he was hanged or transported. Views on punishment differ with the times. Sir Robert Peel regarded it as a most dangerous experiment when stealing £5 from a dwelling house ceased to be a capital offence. Lord Ellenborough when Lord Chief Justice thought transportation as a punishment for stealing 5/- from a shop was a quite inadequate substitute for the death penalty, and it is said that an English Solicitor-General (Sir William Garrow) argued passionately that the Government could not exist without the protection of drawing and quartering.

The three attributes of punishment — retributive, reformative and deterrent—have received different emphasis at different periods in our development. At the times of which I have just been speaking, the reformative element counted not at all. The pendulum has now, of course, swung strongly the other way although the deterrent aspect of punishment was recently emphasised (quite rightly, in my opinion) by the Full Court of New Zealand in the case of *R. v. Radich* [1954] N.Z.L.R. 86:

> "The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on

these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment."

However, it must be remembered that crime is never the result of just one factor. There is always a multiplicity of causes that together lead to anti-social behaviour. To grasp why an individual behaves as he does, it is necessary to look at every facet of his life—his physical and mental condition, his inherited characteristics, his social and economic background and its influence on him, his family environment and his reactions to it and his particular temperamental make-up.

Assuming that it becomes necessary in the interests of society to deprive a convicted sexual offender of his liberty, the question arises whether, generally speaking, an indeterminate sentence or a fixed sentence is the proper course to follow. The Judge who has the responsibility of awarding a sentence has a heavy responsibility indeed. He may, and usually does, call for reports both psychiatric and otherwise, but the final responsibility is his and his alone. He gets from the psychiatrists (as he is entitled to get) the best judgment that they can form, but I cannot help feeling, under existing conditions, that the psychiatrist often forms his prognosis in a time that is too short to allow the best possible result to be achieved. It would be as unfair to place the sole blame for this on the psychiatrist as it would be to place it on the Judge. The great volume of civil and criminal litigation of today involves a Judge in constant changes from one jurisdiction to another and from one place to another and the main burden of psychiatrical work falls upon the State Directorate of Mental Health which would no doubt claim (with complete justification) that it is understaffed and overworked. It can only be hoped that future conditions will alter so as to allow a longer period for the more thorough observation and examination of sexual offenders before sentence is passed.

I am a strong supporter for the indeterminate sentence even though it has traditionally found little favour in England. It has been part of our system for many a day and Judges have long had the power to impose it. Its value is that the offender and his then existing circumstances come under the regular supervision of a Board, unlike the man with the fixed sentence who serves his sentence and is then put back into circulation in the community. A segregation order under the Sexual Offences Act is, of course, a form of indeterminate sentence because the Court has the power, in proper cases, to keep on extending it. The Act seems to me a clear and correct recognition that the practice of imposing a fixed gaol sentence on a sexual offender has failed and that, in the interests of the community, he should be detained until the appropriate authority can say that the point of time has been reached when the release of the offender is a reasonable risk that can be undertaken. The only alternative to a fixed sentence is an adaption of the American system under which an offender is sentenced by the Court to imprisonment ranging from a minimum to a maximum period—the power of the Judge to protect the

community is retained whilst the Executive is given some latitude in adjusting the period of time actually served to any post-sentence changes in the offender's personality or circumstances.

The Tasmanian Legislature is to be congratulated on the way it has performed its part of the task of providing proper means for dealing with sexual offenders. The time for congratulating the Executive Government will come only when it has provided places of detention that can properly be described as modern, adequate and suitable, and when it has established proper facilities for the giving of modern up-to-date treatment.

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