fraud, which together with its somewhat unique use and application of "intention" and in its absence of loss or damage as an element that its place in the criminal law is in part the control of business practice and commercial morality perhaps because the civil law in these areas with its remedy of compensation is simply inadequate.

W. D. WILLESEE

Evidence: Corroboration and Accomplices

KAHN v. R.[1]

This case raises the problem of corroboration of evidence of accomplices in criminal trials. A dictum of Lord Simonds in *Davies v. Director of Public Prosecutions*[2] on this topic was rejected by the Western Australian Court of Criminal Appeal.

The position in Western Australia is succinctly expressed by Nevile J. who pointed out that in this State the position is that in a criminal trial it is the duty of the trial judge to give a warning to the jury that it would be dangerous for them to convict an accused unless the evidence of an accomplice was corroborated. His Honour said that this rule of practice has hardened into a rule of law with the consequence that if the trial judge fails to give the necessary warning any resultant conviction must be set aside unless the case fell within the proviso to s. 689(1) of the Criminal Code, being a case where there was no substantial miscarriage of justice.

It was accepted by the Court of Criminal Appeal that it is the duty of the trial judge to explain which persons may be classified as accomplices and that it is for the jury to decide who is in fact an accomplice. The Court decided that only a person who could be convicted as a principal offender can be said to fall into the category of an accomplice. In deciding this the Court felt itself bound by its own prior decision in *R. v. Lewis*.[3]

The concept of an accomplice has caused much perplexity and it is desirable to investigate the rationale of the rule. In *R. v. Baskerville*[4] the rule was said to have arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is a criminal. However valid this reason may appear, it is not in accord-

1 [1971] W.A.R. 44 (Virtue S.P.J., Nevile and Burt JJ.).
2 [1954] A.C. 378, 401.
3 (1906) 8 W.A.L.R. 83.
4 [1916] 2 K.B. 658.

ance with the view that a person would lie because he was involved in that crime, rather than because he was generally a criminal "type".[5]

Should the view in *Baskerville* prevail, then any criminal, whether implicated in the pertinent crime or not, would be prone to lie simply because he was a criminal. And therefore the rule requiring corroboration should apply to any criminal and hence any criminal could be considered an accomplice for the purposes of the rule. It is submitted that the opposite view is correct.

The divergence of views as to the basis of the rule must necessarily affect subsequent reasoning as to the boundaries of the term accomplice. Two schools of thought appear to have emerged. The wider of the two is well represented by Philp J. in *R. v. Sneesby.*

> A person may still be an accomplice even if he could not be charged as a principal offender with that which the prisoner is charged. . . .[6]

The narrower school of thought is exemplified by *R. v. Ready and Manning*[7] where it was held that an accessory after the fact of an attempt to procure a miscarriage was not an accomplice within the rule.

With these two views in mind, it is now convenient to examine the decision of the House of Lords in *Davies v. Director of Public Prosecutions*[8] where Lord Simonds defined accomplice in the relevant context. His Lordship spoke of cases where there is evidence on which a reasonable jury could find that a witness was a participant in the alleged crime, in which situation a judge should direct the jury that it is dangerous to convict on the participant's evidence alone. His Lordship stated participant to mean any person who was either a principal, or an accessory before or after the fact. But the Supreme Court declined to follow this dictum and preferred the narrower view.

In adopting the attitude it did, the Supreme Court recognized that it may have been lessening an accused's chance of acquittal by limiting the instances in which a warning should be given to the jury. However, Burt J. mitigated this possibility by adopting the position expressed in *McNee v. Kay,*[9] viz, that if the witness in question is chargeable only with a different but cognate offence, it would be permissible to apply the same kind of caution as if he were an accomplice. The defence

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5 Hale's PLEAS OF THE CROWN (1800, 3rd ed.) p. 304.
6 [1951] St. R. Qd. 26, 28.
7 [1942] V.L.R. 85.
8 See note 2.
9 [1953] V.L.R. 520.

cannot claim the warning as a matter of right, nor can the prosecution complain if it is applied. Further mitigation appeared in the judgment of Neville J. inasmuch as where the authorities refer to 'the crime charged', in Western Australia the pertinent crime must be interpreted as including any other crime of which on the indictment an accused could be found guilty. This widens the opportunity for a warning to be given because it increases the number of offences to which a person may be an accomplice.

The effects of the decision will be small when one bears in mind that the Court has confirmed its own prior decision in *R. v. Lewis.*[10]

P. J. BOGUE

Criminal procedure; joinder of counts and of accused

Consideration has been given in this Review to some of the problems arising out of joinder of accused[1] and joinder of charges.[2] The problems continue to arise. The following recent cases illustrate the strictness with which the courts insist that in criminal trials, where there are two or more accused, the charges must be in perfect order.

(i) R. v. SCALIA[3]

S, L and H were charged with offences of indecent assault, carnal knowledge of a girl between the ages of 10 and 16, and rape. Count 1 charged L with indecent assault; count 2 charged H with indecent assault; count 3 charged S with assault; count 4 charged L, H and S with carnal knowledge of the girl without consent, i.e. rape; count 5 charged S, L and H at the same time and place with carnal knowledge without her consent, i.e. another charge of rape; count 6 charged L with carnal knowledge of the girl being between the ages of 10 and 16; and count 7 charged S with a similar offence. H pleaded guilty to count 2 and was acquitted on counts 4 and 5, namely of rape. S and L were found guilty of rape on counts 4 and 5.

Rule 3 of the presentment rules contained in the Sixth Schedule to the Crimes Act 1958 provides that there should be separate counts for each separate charge. The Full Court held that it is not possible to have two accused men found guilty on the one count of two

10 See note 3.
1 9 WEST. AUST. L. REV. 386.
2 Idem 198.
3 [1971] V.R. 200 (Full Court—Winneke C.J., Smith and McInerney JJ.).