Criminal procedure; joint trials—further problems
Counts standing or falling together

(i) R. v. ANDREWS WEATHERFOIL LTD.[1]

S, D and A Ltd. were charged on a number of counts with offences of bribery and corruption under s. 1, Public Bodies Corrupt Practices Act 1889 (U.K.).[2] It was alleged that S during the time when he had been a member and chairman of a local authority housing committee and member of the council had used his position on the council to obtain sums of money from a number of building firms, including A Ltd. and JLC Ltd. in return for support in obtaining building contracts from the council.

A Ltd. were charged with corruptly offering emoluments from employment to S for favouring them, and S was charged with agreeing to receive those emoluments. A Ltd. and S were convicted on those charges.

S was also convicted of corruptly accepting emoluments from one X. At a separate trial, X had been acquitted of offering those emoluments to S.

D was charged with corruptly offering £500 to S as a reward for promoting the interests of JLC Ltd. and S was also charged with agreeing to receive that sum. The judge referred to the respective counts against S and D as 'mirror counts' thereby indicating to the jury that they should stand or fall together. S and D were convicted on those counts.

On appeal to the Court of Appeal, Criminal Division, they contended, inter alia, that the judge was wrong in indicating to the jury that the counts against S and D stood or fell together. Reading the judgment of the Court Eveleigh J. said:

> Two counts in an indictment may be so closely connected that an acquittal or conviction on one would logically to a layman to lead to an acquittal or conviction on another. The strict regard for the rules of evidence and the burden of proof, however, may lead to different verdicts, as those practising in the courts are well aware. It is consequently undesirable, however closely connected the facts of the two counts may be, for the judge to adopt the expression 'mirror counts'. In cases of corruption it is possible to envisage a bribe being corruptly offered and innocently accepted and possible even the other way round.

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1 [1972] 1 All E.R. 65.
2 Cf. ss. 529-530, Criminal Code (W.A.).

However, on the facts of the case it was held that it was impossible to conceive that the £500 was corruptly received by S unless corruptly given by D and the appeal by S and D was disallowed. The appeal by A Ltd. was allowed on other grounds.[3]

Evidence of film of each accused re-enacting crime

(ii) R. v. LOWERY (No. 1)[4]

L and K were tried jointly for murder. Two films were prepared by the police in which the two co-accused, whilst in custody, re-enacted the crime. It was contended that the film which K made was in the main an attempt to inculpate L and that it was not admissible as against L any more than oral allegations made by K out of court would have been, and vice versa. It was submitted that the films should not be dealt with in the same way as verbal statements made out of court by persons being tried jointly are commonly dealt with, that is by being allowed into evidence against the maker with a warning to the jury as to how they must treat such material. It was argued that the evidence in the form of a film re-enactment is distinguishable from evidence of oral admissions because the unusual and graphic form of representation makes the film more potent evidence.

Smith J. rejected these contentions. He said:

> I think that basically the same procedure should be adopted as to admitting in evidence admissions by one accused implicating the other whatever be the form which the admission evidence takes, whether it be evidence of oral admissions, or written admissions, evidence of tape recordings or evidence of re-enactments. No doubt circumstances can arise in which the value of admission evidence is so much impaired by the conditions in which the admissions were made that it would be unsafe to allow it to go before the jury.[5]

A situation of that kind did not arise on the facts of this case.

Summing up the evidence separately

(iii) SMITH v. R.[6]

S was tried in the Supreme Court of Victoria before Nelson J. and convicted of having conspired with M and nine others to cheat and

3 [1972] 1 All E.R. 65, 73.
4 [1972] V.R. 554.
5 Idem; see also R. v. Lowery (No. 3) [1972] V.R. 939, 952 (F.C.).
6 (1970) 121 C.L.R. 572.

defraud a bank.[7] At the trial the judge first summed up to the jury the evidence generally in relation to all the accused and then in particular in respect of M. He directed the jury to consider its verdict upon the counts against M. M was found guilty. The judge then summed up the evidence relating specifically to the other accused persons, against whom the case for the prosecution was that each of them had conspired with M, separately or in groups and received verdicts upon the counts against them.

Affirming the decision of the Supreme Court of Victoria the High Court approved this procedure. The objection to the course taken was that the jury, upon a summing up which was complete as to M only, had to decide whether or not there was a conspiracy between M and at least one of the other persons charged as parties to the alleged conspiracy. M alone could not have been convicted.[8] His conviction, therefore, involved an affirmation by the jury that at least one of the other accused was a conspirator with him. If it had turned out otherwise, it would have been necessary for the jury to have been instructed to acquit M too, notwithstanding its earlier verdict against him. The trial judge clearly contemplated this possibility. The High Court held that the trial judge had a discretion to conduct the trial as he did and there was no error of law.

Menzies J. noted that it was a

> long-established practice that a person charged with conspiracy with a named person can be tried and convicted alone . . . So a person can be convicted with another (a) who is uncaught;[9] (b) who is dead;[10] and (c) who is amenable to justice but not charged.[11] If recognition, that a person can only be convicted of conspiracy with another or others, does not prevent one person being tried alone as a party to the conspiracy alleged, surely such recognition does not prevent the taking of separate verdicts against persons charged with and tried together for conspiracy with one another.[12]

Concurring Walsh J. observed that it was not desirable to enunciate general rules or tests as to the manner in which a trial judge should exercise his discretion in such cases, and said:

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7 R. v. Mitchell [1971] V.R. 46; noted 9 WEST. AUST. L. REV. 387.
8 R. v. Manning (1883) 12 Q.B.D. 24; Kannangara Aratchige Dharmasena v. R. [1951] A.C. 1.
9 R. v. Kinnersley (1719) 93 E.R. 467.
10 R. v. Niccolls (1745) 93 E.R. 1148 and R. v. Kenrick (1843) 114 E.R. 1166.
11 R. v. Sayers [1943] S.A.S.R. 146.
12 121 C.L.R. 572, 581.

> The course which should be regarded as the normal course is that of inviting the jury to consider, at the same trial and after a summing up which has dealt with the whole trial and with the cases for and against each of the accused, all the verdicts which need to be returned. . . . the practice of asking the jury to return verdicts only after there has been placed before the jury everything which they will be required to consider, including the complete charge of the presiding judge, ought still to be followed as a general rule in conspiracy trials as well as in other joint trials.[13]

Admissibility of evidence of co-accused

(iv) NELSON v. O'NEIL[14]

O'N and R were charged with kidnapping, robbery and vehicle theft in California. At their trial a police officer testified that after the arrest of O'N and R, R had made an unsworn oral statement admitting the crimes and implicating O'N as his confederate. The trial judge ruled the officer's testimony admissible against R, but instructed the jury that they could not consider it against O'N. On direct examination R denied having made the statement, asserted that the substance of the statement was false, and stuck to his story in every particular in cross-examination by the prosecutor. O'N's counsel chose not to cross-examine R. The jury convicted both O'N and R. O'N contended that the admission of the officer's statement violated the Bruton rule.

In essence the Bruton rule[15] in the United States is that where the jury hears a co-defendant's confession implicating the defendant, the co-defendant becomes in substance, if not in form, a witness against the defendant. The defendant must constitutionally have an opportunity to confront such a witness. This the defendant cannot do if the co-defendant refuses to take the stand and permit himself to be cross-examined.

In the current case R's confession was made out of court. The question was whether cross-examination can be full and effective where the declarant is present at the trial, takes the witness stand, testifies as to his activities during the period described in his alleged out-of-court statement, but denies that has made the statement and claims that its substance is false. The Supreme Court held that in such a situation the defendant was not denied either the opportunity

13 Idem 583.
14 (1971) 402 U.S. 622.
15 See (1971) 29 L. ed. 2d. 931.

or the benefit of full and effective cross-examination of the co-defendant.

The value of the case in Australia is limited by the fact that many aspects of American criminal procedure and evidence depend upon the interpretation to be given to the Constitution of the United States.

Disparity between sentences

(v) R. v. KITE[16]

K and B were jointly charged on two counts of shopbreaking and larceny. K was sentenced to imprisonment for three years with hard labour on each count, the sentences to be served concurrently. B received sentences of twelve months' imprisonment on each count to be served concurrently, but these sentences were suspended on his entering into a bond to be of good behaviour for two years under the supervision of a probation officer. J complained against the disparity between the sentences.

The reason for the disparity in the sentences lay in the respective records of K and B. The circumstances of the crime afforded no ground for discriminating between K and B. K had a long record of previous convictions; B had a short record. K maintained that he was being punished for his previous crimes. The Supreme Court of South Australia ruled that the disparity was too great in this case. It accepted that the sentence imposed could not be said to be manifestly excessive in itself and it was right that there should be some discrimination. K's sentence was reduced to two years' imprisonment with hard labour on each count, the sentences to be served concurrently.

Giving the judgment of the Court, Bray C.J. observed—

(i) where other things are equal persons concerned in the same crime should receive the same punishment, and that where other things are not equal a due discrimination should be made between them;[17]

(ii) the mere fact that one convicted person has received too light a sentence is no reason why another convicted person should receive similar treatment;

(iii) if there is excessive disparity it does not follow that the one with the heavier sentence was treated too severely; it may be that the one with the lighter sentence was treated too leniently;

16 (1971) 2 S.A.S.R. 94; subsequently applied in O'Malley v. French (1971) 2 S.A.S.R. 110 and R. v. Harris (No. 2) (1971) 2 S.A.S.R. 255.

17 Referring to R. v. Tiddy [1969] S.A.S.R. 575.

(iv) as far as possible convicted persons should not be left with a sense of injustice or grievance, at least if there are reasonable grounds for such a feeling;[18] and

(v) in an exceptional case the appeal court may reduce a sentence of an appellant because of excessive disparity between his sentence and the sentence passed on a co-defendant, even though if both sentences had been the same, or approached each other more nearly, the court would not have interfered.[19]

These observations are consistent with the judgment of the Court of Criminal Appeal of Western Australia in *Holton v. R.*[20]

Acquittal of one accused not justification for acquittal of other

(vi) R. v. JONES[21]

Two young men, J and H, were charged with the rape of X, a widow aged 57, whom they had met at a hotel. The spent the evening drinking together and at closing time X offered to drive J and H in her car to the bus stop. According to X, the two men then forced her out of the driving seat and J then drove and later crashed the car. J and H thereupon carried X to an open space behind a fence where they both had sexual intercourse with her against her will. According to J and H the events all took place with X's consent. The jury found H not guilty but J was found guilty. J contended that this finding was unreasonable: either they should both have been found guilty or both not guilty.

Dismissing the appeal the Court of Criminal Appeal of New South Wales said—

> It is our view that justice must be seen to be done to the Crown as well as to the accused, and here we can see no reason which would justify Jones being acquitted except that the jury generously acquitted Howes.[22]

Even though there may have been little justification for the acquittal of H this was not a good reason for J being acquitted also.

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18 Referring to R. v. D'Ortenzio and Burns [1961] V.R. 432 at p. 433, and R. v. Tiddy, note 17.

19 Referring to R. v. Richards (1955), 39 Cr. App. R. 191 and R. v. Goldberg [1959] V.R. 311.

20 [1970] W.A.R. 85.

21 [1971] 1 N.S.W.L.R. 613.

22 Idem at p. 618.

Criminal procedure; parole and other problems
Appropriateness of parole system

(i) R. v. CHAPMAN[1]

C, a citizen of the United States, pleaded guilty to a charge under customs legislation of importing "LSD" into Australia and was sentenced to five years penal servitude with a non-parole period of two and a half years. At the trial there was evidence that C had come to Australia in 1970, but had returned from time to time to the United States to purchase "LSD" for distribution in Australia. His operations were on a large scale and it appeared he was the main source of this drug in New South Wales and Victoria.

Section 4, Parole of Prisoners Act 1966 (New South Wales) provides that where a person is convicted by a court and sentenced to a term of imprisonment of not less than twelve months the judge shall specify such a period, in any case of not less than six months, before the expiration of which the person so sentenced shall not be released on parole pursuant to the Act.[2]

The Court of Criminal Appeal of New South Wales made the following observations on this section—

(i) This is known as the non-parole period.

(ii) It is only in cases where it is considered undesirable that the non-parole period be fixed that a judge may avoid the consequences of the section.[3]

(iii) The judge may refrain from specifying a non-parole period by reason either of the nature of the offence or the antecedent character of the person convicted.

(iv) He must give reasons in writing for not specifying a period.

(v) Where a non-parole period is specified the Parole Board considers whether or not the prisoner should be released on parole and may make in some instances, in its discretion, a parole order, meaning that a prisoner can be released from prison on parole.

(vi) Parole is peculiarly appropriate to those who are to be rehabilitated locally.

(vii) Many aspects of parole are inappropriate in the case of a prisoner who is an alien.

Otherwise dismissing the appeal, the Court deleted the non-parole period from the sentence.

1 [1971] 1 N.S.W.L.R. 544.
2 See R. v. Hall (1969) 90 W.N. Pt. 1 (N.S.W.) 488.
3 Cf. s. 37, Offenders Probation and Parole Act 1963-1969 (W.A.) which is phrased in similar but not identical terms.