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.).

separate and distinct crimes. Both S and L had been found guilty of an independent and separate act of rape as a principal offender. The irregularity went to the root of the trial, was not curable, the convictions were set aside, and a retrial was ordered.[4]

(ii) R. v. GINIES[5]

G was presented on counts 1 and 2 of conspiracy to cheat and defraud and counts 3-7 of fraudulently inducing or attempting to induce investment shares contrary to s. 191(1), Crimes Act 1958. S was also presented on counts 1 and 2 of conspiracy and on counts 5, 6 and 7 based on s. 191(1).

Both G and S were convicted on all counts and G was sentenced to eight years' imprisonment on each count of conspiracy and three years' imprisonment on the other counts in the presentment, all sentences to be served concurrently.

G appealed and conducted his appeal in person. At the trial G was unrepresented by counsel although his co-accused, S, was represented until the close of the Crown case.

The charges related to a machine sold to a company by G and for which at all material times the company remained indebted to G for a substantial amount of money. It was alleged that large sums of money had been raised by both G and S by false and fraudulent statements and that by such means various persons were induced or attempts were made to induce them to subscribe to shares in the company.

G contended, amongst twenty-five other grounds, (i) that the counts 1 and 2 of conspiracy were separate and distinct from the other five counts, (ii) that the other counts 3-7 alleged substantive offences, two which involved him alone, and (iii) that great difficulty arose in separating the evidence applicable to counts 3-7, two of which were outside the conspiracy period. In short it was unfair to him and likely to confuse the jury if all counts were to be tried together.

Giving the judgment of the Full Court Winneke C.J. remarked that submissions of this kind constantly arose in the conduct of criminal proceedings. The trial judge had exercised his discretion whether the counts should be severed

4 *R. v. Holley* (1969) 53 Cr. App. Rep. 519 followed; see [1969] CRIM. L.R. 437.

5 [1972] V.R. 394 (Full Court—Winneke C.J., Little and Barber JJ.).

> . . . and, accordingly unless it can be shown, in accordance with well-established principles, that his discretion miscarried, this Court cannot interfere with the way in which the learned judge exercised his discretion . . .[6]

There was no likelihood of unfairness or injustice to G as to outweigh the convenience of having all the charges tried in the course of the one proceeding.

G contended further that any conspiracy involved in the allegations contained in the final three counts of the presentment merged in the completed offence therein alleged. He submitted that he would have been convicted twice over on the same facts and that, therefore, a conviction on count 1 was a bar to a conviction on counts 5, 6 and 7 or vice versa.

> In that event the test is not simply whether the facts relied upon in respect of the respective counts are the same, but whether the applicant has been convicted of an offence which is either the same or practically the same in each instance.[7]

Unless the two offences are the same or substantially the same a conviction on one is no bar to a conviction on the other. But in the present case the Court found that the two offences were not the same or substantially the same either in character or as stated in the presentment. Conspiracy and the statutory offence contained in s. 191(1) have quite separate and distinct essential elements and simply because the statutory offence may, like all offences, be committed by persons acting jointly, does not make it partake of the same character as the common law misdemeanour of conspiracy.

(iii) R. v. SPEROTTO[8]

S and B, two girls aged 17, were waiting near a suburban railway station for another girl to join them to attend a dance when they were approached by two young men, one of whom offered to drive them to the dance, and they entered the car for that purpose. The men drove the girls to a dark and isolated place in a park where they were joined by two other cars full of men, one of which was driven by SA. In consequence of events which then happened ten men, in-

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6 At p. 397, applying *R. v. Callaghan* [1966] V.R. 17, 20 (F.C.) and *R. v. McGill* [1967] V.R. 683, 685 (F.C.).

7 At p. 399, applying *R. v. Weeding* [1959] V.R. 298, 301 (F.C.) and *Connelly v. Director of Public Prosecutions* [1964] A.C. 1254 (H.L.).

8 (1970) 71 S.R. (N.S.W.) 334 (Court of Criminal Appeal—Herron C.J., Sugerman P., Asprey J.A., Nagle and O'Brien JJ.).

cluding SA and SP, were charged upon an indictment containing two counts, one of raping S, the other of raping B. SP was found guilty of raping S and guilty of attempting to rape B; SA was found not guilty of raping S but guilty of raping B.

Each of the two counts were joint charges against the ten accused, so that each count charged them with the commission at the time and and place specified of the one offence of rape upon the particular girl in the count. The Court of Criminal Appeal held that it was competent to secure a conviction of either of SA or SP only in respect of one specific act of penetration which he either personally committed or aided and abetted. So understood, the count was not defective on its face, for aiders and abettors may be indicted as principals in the first degree.

At the trial evidence was led that all or most of the accused had committed an act of penetration upon the girl mentioned in each count and the jury were directed that upon each count not only might each of the ten accused, including SA and SP, be convicted upon any one specific act of penetration proved if he was shown to have been either the perpetrator of that act or had aided and abetted it, but also that each one of them might be convicted for any such act which he had himself committed, whether or not he had aided and abetted any other accused in any such act. The problem thus concerned the situation where the persons accused are alleged to have been concerned with more than one offence and they are charged in the one indictment in respect of their participation in those offences in circumstnces where it is proper that they be so indicted.

The Court of Criminal Appeal (New South Wales) followed the consistent line adopted by the Courts of Criminal Appeal and Appeal (England) in three modern cases.[9] Giving the judgment of the Court Herron C.J. said

> It is not essential . . . that the count should specify the principal in the first degree, for the Crown may not be able or be prepared to commit itself upon the evidence as to which of those accused is such principal. The jury may convict those whom they consider were involved either in the first or second degree even if unable to find who was the principal in the first degree. Nevertheless, where practicable, it is desirable that counts should be indicted charging separately those whom it alleges to be principal in the first degree and second degree respectively. If more than

[9] R. v. Scaramanga [1963] 2 Q.B. 807; R. v. Parker [1969] 2 Q.B. 248; and R. v. Holley, see note 4; reference was also made to R. v. Potter [1959] Qd. R. 378.

> one penetration, and therefore more than one offence, is to be charged in the one indictment by some one or more of the same accused it is necessary that separate counts be included in respect of each such offence. And if the Crown seeks to make a case simply upon separate acts of intercourse by a number of accused, it would only be necessary by separate counts to charge each accused with the act alleged against him.[10]

The Court chose to reject an earlier decision in *R. v. Fenwick*[11] in which Herron C.J. had previously participated, quashed the conviction, and ordered a retrial.

Reference was made to one Canadian case, *R. v. Sekyer*,[12] where a conviction of two men on one count of rape was set aside where the evidence disclosed that one had committed two assaults, the other one and that each had been a party to the rape committed by the other. But in *R. v. Starr*,[13] which was not referred to, four persons were indicted jointly on a charge of rape and the Crown alleged a joint enterprise or common intent. Two of the accused made confessions, and applications were made to have them tried separately from the other two and from each other. The application was dismissed. A case in which a joint enterprise or common intent had been alleged was one in which a joint trial was prima facie desirable. Moreover the Crown was entitled to elect to treat the four acts as a continuous transaction. Although it would complicate the task of the jury in separating the evidence, this complication did not make the indictment bad in law.

(iv) R. v. KENNEDY[14]

K and D were charged on separate informations alleging each had assaulted one man occasioning actual bodily harm. The evidence disclosed that they were engaged in a joint venture. The hearing proceeded as a joint trial with each accused testifying and both were found guilty. It was contended that a joint trial of separate accused upon separate informations is a nullity in all cases. The Ontario

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10 At p. 344.

11 (1953) 54 S.R. (N.S.W.) 147 (Court of Criminal Appeal—Street C.J., Owen and Herron JJ.): the indictment was a charge of rape against two accused. It was contended that there were not separate and individual counts against each of the accused. It was held that it should be read jointly and severally.

12 (1962) 133 Can. C.C. 98 (British Columbia).

13 [1965] 3 Can. C.C. 138 (Manitoba).

14 [1971] 2 O.R. 445 (Ontario).

Court of Appeal rejected this submission and held that the rule that two separate indictments may not be tried together is not a rule of law, but a rule of practice which must admit of exceptions. It was an irregularity curable where neither accused suffered any prejudice.

(v) DIRECTOR OF PUBLIC PROSECUTIONS v. MERRIMAN[15]

J and his brother F were charged in the same count of an indictment wounding P, the landlord of a public house, with intent to do him grievous bodily harm. P was stabbed seven times by one or other of the brothers. F pleaded guilty; J pleaded not guilty. The trial judge told the jury that they need not go into the question whether J and F were acting together but should make up their minds whether they were sure that J had stabbed P first. If so, they should convict: if not, they should acquit. After retiring for only 11 minutes, the jury found J guilty.

The Court of Appeal allowed J's appeal on the ground that as F had already pleaded guilty to the same count, the judge ought to have told the jury that they must be satisfied also that when J struck the blow he was acting in concert with his brother, and although the evidence at the trial indicated that J was assisting his brother throughout the brawl, the Court quashed the conviction.

The House of Lords held that it is open to a jury, when trying a joint charge to which one defendant has pleaded guilty, to convict the remaining defendant of committing independently the offence which is the subject matter of the joint charge. In so doing the House firmly overruled *R. v. Scaramanga, R. v. Parker* and *R. v. Holley*.[16] Lord Diplock agreed with the reasoning in *R. v. Fenwick*,[17] presumably unaware of its fate at the hands of the Court of Criminal Appeal in New South Wales in *R. v. Sperotto*.[18] Lord Morris said that if A and B were jointly charged with wounding C it was open to the prosecution to secure a conviction of both A and B on the ground that they acted jointly or—no matter how either A or B pleaded—to secure the conviction of either or both on the ground of an independent commission of the offence. Viscount Dilhorne placed emphasis on s. 2 of the Criminal Appeal Act 1968 which gives the Court of

15 [1972] 3 All E.R. 42, reversing R. v. Merriman [1971] 2 All E.R. 1424.
16 See note 9.
17 See note 11.
18 See note 8.

Appeal a discretion to dismiss an appeal which might be decided in favour of an appellant "if they consider that no miscarriage of justice has actually occurred". He regarded the point as entirely technical and it was not a case where there had been a miscarriage of justice.

Lord Diplock held that whenever two or more defendants were charged in the same count of an indictment with any offence which men could help one another to commit it was sufficient to support a conviction against any and each of them to prove *either* that he himself did a physical act which was an essential ingredient of the offence charged *or* that he helped another defendant to do such an act, and that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent.

Conclusion

Clearly in framing a charge where there are a number of accused persons the prosecution must charge each accused person separately with a specific offence even if there was a common purpose and a common intent. If six men are alleged to have raped a girl then there should be six counts. Presumably if say one of the six rape the same girl twice there should be two counts in respect of the two offences. Each count must contain a statement identifying the particular accused person's part if there is a common purpose, say, in a case of assault. But if an accused person stabs a victim with, say, five successive stabs of a knife and a second accused stabs the same victim with say three stabs at the same time and place, then it would appear that two counts would suffice in respect of each of the two accused.

Where one would disagree with the Victorian Full Court in *R. v. Scalia*[19] and the New South Wales Court of Criminal Appeal in *R. v. Sperotto*[20] is in the action taken in quashing the convictions. Surely the irregularity was curable. Can it be seriously argued that the accused were prejudiced by the irregularity? The decisions of the Ontario Court of Appeal in *R. v. Kennedy*[21] and the House of Lords in *Director of Public Prosecutions v. Merriman*[22] were the better decisions. In New South Wales and Victoria technical irregularity was allowed to become a miscarriage of justice.

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19 See note 3.
20 See note 8.
21 See note 14.
22 See note 15.

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.).