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.

Pre-empting discretion of parole board

(ii) R. v. HARRIS (No. 2)[4]

He was convicted of breaking and entering with intent to steal, and was sentenced to imprisonment with hard labour for three years, with a non-parole period of two years. The fixation of the non-parole period at two years had the effect of excluding, for all practical purposes, the discretion of the Parole Board under the Prisons Act 1936-1969 (South Australia). No special reason was given by the trial judge for doing this. Delivering the judgment of the Supreme Court Bray C.J. said—

> In our view there should be a special reason before that is done. It is true that the statute gives the court power to fix a non-parole period even for the full term of the sentence . . . but we think that normally the Parole Board should be given some opportunity to exercise the important functions with which the statute had clothed it. If a non-parole period is to be fixed of such a duration that in effect the Parole Board is effectively excluded from the case, there ought to be some special reason for that.[5]

Meaning of non-parole period

(iii) R. v. CLENSHAW[6]

C pleaded guilty to four counts of breaking into, entering and stealing from dwellings, and asked the court to take into account fourteen other similar offences. C was aged 19, and although he had been engaged in committing these crimes for nearly one year, this was the first time he had been sent to gaol. He was sentenced to two years' imprisonment on each of the first three counts, such sentences to be served concurrently, and one year on the fourth count, to be served at the expiration of the other sentences. The trial judge fixed a non-parole period of one year and six months.

Delivering the judgment of the Court of Criminal Appeal of New South Wales, Herron C.J. said—

> A non-parole period merely means that the Parole Board has the opportunity to consider the question of the release of a prisoner at an earlier time than is achieved by the total sentence with ordinary remissions. It is a matter entirely for the discretion of the Parole Board, and one with which this Court has said re-

4 (1971) 2 S.A.S.R. 255.
5 (1971) 2 S.A.S.R. 255 and referring to R. v. Eckhardt (1971) 1 S.A.S.R. 347.
6 [1971] 1 N.S.W.L.R. 576.

> peatedly it has no wish to interfere. We prefer to leave it entirely to the discretion of the Parole Board to see whether after a period of time it considers that the applicant could be released safely on licence with or without certain restrictive conditions and to have his future supervised, during the unexpired period of the sentence at any rate, by the Adult Probation Service or by some other officer designated by the Parole Board; and possibly in this case to see whether some oversight of future of this young man could not be carried out by a family . . . with whom he had been associated during his lifetime.[7]

The Court substituted a non-parole period of six months and pointed out that it would not be automatic for him to be released on parole at the end of the non-parole period.

Declining to fix a non-parole period

(iv) R. v. COMBO[8]

C was sentenced to five years imprisonment with hard labour upon a charge of indecent assault upon a male person. The trial judge declined to fix a non-parole period. The Court of Criminal Appeal of New South Wales held in fixing a non-parole period the court ought to take into consideration the likely length of remissions (a) because, if remissions are not taken into account, the non-parole period may be rendered nugatory by the earlier unconditional release of the prisoner on account of remissions, and (b) because it is the policy of the legislature to confer upon the Parole Board power to impose conditions on the release of the prisoners and to supervise those conditions.

In all the circumstances of the case it was held that a non-parole period should be fixed.

The Court also held that the consideration that a prisoner may be released before the expiration of his sentence should not be taken into account in determining the length of the sentence.[9]

Convictions for Commonwealth and States offences

(v) KIDD v. R.[10]

What happens when a person is convicted of a Commonwealth offence for which the court wishes to sentence him to a term of im-

7 Idem at p. 577.
8 [1971] 1 N.S.W.L.R. 703.
9 R. v. Enos (1956) 40 Cr. App. R. 92 and R. v. Assa Singh [1965] 2 Q.B. 312 followed.
10 [1972] V.R. 728.

prisonment, but is already serving a sentence for a State offence? In this case K was serving a sentence of five years' imprisonment, with a minimum term fixed of two and a half years, in relation to an offence under State law. The trial judge sentenced him to two years' imprisonment, with a minimum term of eighteen months, on the Commonwealth offence. He directed this sentence to commence at the expiration of the State sentence.[11]

There are provisions in both Commonwealth and State legislation governing the order in which sentences are to be served where any of the sentences is one in respect of which a minimum term is fixed.[12] But there is no provision which governs the case where sentences consist of both Commonwealth and State sentences.

The Full Court of Victoria held that the situation where, either (i) K would have to undergo a term of six and a half years' imprisonment before being eligible for release on parole, or, alternatively, (ii) where he would be released after the expiration of the minimum term of the State sentence but be recalled at the expiry of that period of parole to commence to serve the Commonwealth sentence, was neither reasonable in the circumstances nor practicable, and the sentence on the Commonwealth offence should be set aside. Having regard to the circumstances, including previous sentences for comparable offences and the prior record of K, a sentence of twelve months' imprisonment was imposed without any minimum term, such sentence to be served at the expiration of the minimum term under the State sentence.

Presumably a similar principle would apply should K have been serving a sentence of imprisonment for a Commonwealth offence and have been convicted for a State offence whilst serving the first sentence of imprisonment. Again, presumably, it would be possible to sentence him to a term of imprisonment for a Commonwealth offence to be served concurrently with a State offence sentence of imprisonment.

Prejudical remark made by witness

(vi) R. v. WARING (No. 2)[13]

During the trial of W on a charge of breaking and entering and stealing, a witness called by W who was conducting his own defence,

11 By virtue of s. 19 (1), Crimes Act 1914-66 (Commonwealth).

12 Section 535 (2), Crimes Act 1958 (Victoria); s. 4 (7), Commonwealth Prisoners Act 1967 (Commonwealth).

13 [1972] Qd. R. 263.

made, under cross-examination, a remark strongly suggesting that W had a criminal record. W was subsequently convicted. On appeal he contended that the trial judge should have discharged the jury.

The Court of Criminal Appeal of Queensland was faced with two schools of thought on the correct procedure to be followed. The first is to be found in *R. v. Hally*[14] where Gibbs J. said—

> Where a statement with regard to a prisoner's previous record or of that kind is inadvertently made from the witness box to the prisoner's prejudice and his counsel applies for the trial to be begun again before another jury, the trial ought to be begun again . . .[15]

The second school of thought is to be found in *R. v. Weaver*[16] whether or not to discharge the jury in such circumstances is for the discretion of the trial judge on the particular facts and the appeal court will not lightly interfere with the exercise of that discretion. *Hally* was a Queensland case, whilst *Weaver* was a decision of the English Court of Appeal (Criminal Division). The Court preferred the latter decision and Douglas J. said that it was—

> a matter for the discretion of the trial judge on the particular facts of the case as to whether the trial should have been stopped or not.[17]

W was not represented at the trial and did not object when the improper remark was made. The trial judge was not called upon to exercise a discretion. The Court of Criminal Appeal held that he had erred in not informing K of his right to object and apply to have the jury discharged.

Conviction of offence different from that charged

(vii) R. v. LILLIS[18]

L was charged with burglary of a rotary grass mower from a conservatory. Giving evidence for the prosecution the daughter of the owner said she had given permission to L to take the mower away for repairs. The mower was not seen by the owner again. There was evidence that L had dishonestly misappropriated it. The trial judge accepted that a prima facie case of burglary had not been established

14 [1962] Qd. R. 214.
15 Idem at p. 122.
16 [1968] 1 Q.B. 353.
17 [1972] Qd. R. 263 at p. 270.
18 [1972] 2 All E.R. 1209.

but invited the jury to consider whether L was guilty of theft even though he had not committed the theft in the conservatory. On appeal L contended that the reduced charge had to be an ingredient of the offence originally charged and that theft outside the building could not be an ingredient of burglary.

At common law on an indictment charging burglary the accused could be acquitted of that offence but found guilty of larceny.[19] The problem for the English Court of Appeal, Criminal Division was whether the position had been changed by the Theft Act 1968 and the Criminal Law Act 1967. It was held that the position had not changed. L had not been put at a disadvantage by having to meet an allegation substantially different from that with which he was originally charged.[20]

The Beamish Case—a postscript

In 1959 Beamish was convicted of the murder of Jilian Brewer, aged 22, at Cottesloe, Western Australia. Beamish, who is deaf and dumb, was sentenced to death, but this was later commuted to life imprisonment. The case aroused considerable controversy.[1]

Beamish was released on five years' parole in March 1971. In May 1972 Beamish was convicted of aggravated assault on an eight-year old girl and was sentenced to six months' imprisonment. This conviction during his five-year parole term automatically meant that he had to resume the original life sentence. His case is not due to be reviewed again by the Parole Board until June 1973.[2]

19 Cf. s. 602, Criminal Code (W.A.).
20 Applying R. v. Springfield (1969) 53 Cr. App. R. 608.
1 See 7 WEST. AUST. L. REV. 583, 604 and 8 WEST. AUST. L. REV. 115, 132.
2 The West Australian, September 29, 1972.