> If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the court to draw a distinction between them, they must be held both to blame, and equally to blame. . . . The court will not wash its hands of the case simply because it cannot say whether it was only one vehicle which was to blame or both. In the absence of any evidence enabling the court to draw a distinction between them, it should hold them both to blame, and equally to blame.

This dictum has now been applied by the Divisional Court in *W. & M. Wood (Haulage) Ltd. v. Redpath*[6] and by the Court of Appeal in *Davison v. Laggett*.[7] It was specifically disapproved by the Australian High Court in *Nesterczuk v. Mortimore*.

Madan J. preferred Denning L.J.'s 'accommodation approach' to Dixon J.'s 'active approach'. He held that it was 'not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame'.[8] But it looks as if the Australian and English views on head-on collisions, where there is a dearth of evidence to show which driver is responsible, are likely to remain apart.[9]

D.B.

R. v. LUDLOW[1]

Joinder of charges

The break with precedent in regard to joinder of charges in *Connelly v. Director of Public Prosecutions*[2] has so far received little attention in Australia. In England it was a rule of practice based on *Jones*[3] that a second charge is never combined in one indictment with a charge of murder. The rule found its way into the Australian codes

6 [1966] 3 W.L.R. 526.
7 (1969) 133 J.P. 552.
8 [1970] E.A. 115, 118.
9 The wider implications of the law governing the burden of proof in criminal and civil cases are more fully examined by Dr. Edwards at pp. 169-196.
1 [1970] 2 W.L.R. 521.
2 [1964] A.C. 1254.
3 [1918] 1 K.B. 416.

and into New South Wales.[4] But the other two common law states have the choice of adopting *Connelly* as they have a wider discretion.

Two cases suggest that the Australian courts have not found their legislative fetters unduly restrictive in regard to joinder of charges.

In *Williams*[5] it was held that a single indictment may contain counts charging an accused person with murder and also with being an accessory after the fact of murder. Street C.J. followed *Lockett*[6] that there was no rule of law that separate and distinct felonies cannot be tried together in one indictment. In *Packett*[7] the High Court of Australia, in interpreting section 311(3) of the Criminal Code of Tasmania, held that an indictment for murder must be confined to charges of murder, but may properly include several charges of murder if the murders are founded on the same facts or are, or form part of, a series of crimes.

Independently of *Connelly* the Court of Appeal of Eastern Africa has held that there should be no departure from the established rule of practice that no other count should be joined to a count of murder or manslaughter except where the additional count is based on precisely the same facts as the more serious charge.[8] In Canada where the accused was charged with two counts of murder it was held that joinder was not prohibited by the Criminal Code although such joinder was generally undesirable.[9]

Following in the wake of *Connelly* comes *Ludlow*. *Connelly* concerned the joinder of another charge with that of murder; *Ludlow* concerns the joinder of ordinary offences. The facts in *Ludlow* were that on August 20 the accused was seen emerging from the window of a public house and there was evidence that he had been attempting to steal. On September 5 in another public house in the same area the accused ordered a round of drinks for himself and two others.

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4 s. 567 Criminal Code (Queensland) and s. 564 Criminal Code (W.A.) contain a final clause that the 'section does not authorize the joinder of a charge of wilful murder, murder, or manslaughter, with a charge of another offence'; s. 311(3) Criminal Code (Tasmania): 'No indictment for murder shall contain a charge for any other crime'; s. 370 Crimes Act 1900 (N.S.W.), see n. 22 below.

5 (1932) 32 S.R. (N.S.W.) 504, discussed at 6 A.L.J. 231.

6 [1914] 2 K.B. 720.

7 (1937) 58 C.L.R. 190.

8 Sebuzkira, [1965] E.A. 684; both this case and Connelly were subsequently followed in Sabasajja, [1968] E.A. 384 where the accused was charged on two counts of murder and arson; the joinder of a charge of arson did not involve the addition of any new matter.

9 Haase, [1965] 2 C.C.C. 16, affirmed [1965] 2 C.C.C. 123n.

He refused to pay and after an altercation struck the barman and snatched back the note he had given the barman. He was charged on one indictment with attempted larceny (in respect of the events on August 20) and with robbery with violence (in respect of the events on September 5).

Interpreting Rule 3 of Schedule 1 of the Indictments Act 1915[10] Lord Pearson, giving the single judgment of the House with which the other four Lords concurred, held that the two charges could properly be joined in that the two offences, having been committed in neighbouring public houses within a comparatively short time, could properly be described as a 'series of offences' and were of a 'similar character'. The trial judge had not wrongly exercised his discretion in refusing to order that the two charges be tried separately.

Lord Pearson approved[11] the passage in *Kray*[12] where the Court of Appeal said:

> offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases.

He helpfully defined 'nexus' as meaning 'a feature of similarity which in all the circumstances of the case enables the offences to be described as a series'.[13] In this case they had the 'same essential ingredient of actual or attempted theft, and they involved stealing or attempting to steal in neighbouring public houses at a time interval of only sixteen days'.[14]

Lord Pearson reviewed all the English cases of any consequence. He accepted that the offences charged in the same indictment could be too numerous and complicated to disentangle so that a joint trial of all the counts would be likely to cause confusion and the defence might be embarrassed or prejudiced. He added:

> I think the experience of judges in modern times is that the verdicts of juries show them to have been careful and conscien-

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10 'Charges for any offences . . . may be joined in the same indictment if those charges . . . form or are part of a series of offences of the same or a similar character'.

11 [1970] 2 W.L.R. 521, 528.

12 [1969] 3 W.L.R. 831; neither Connelly nor Kray are referred to in BOURKE'S CRIMINAL LAW (VICTORIA), (2nd ed., 1969).

13 [1970] 2 W.L.R. 521, 528.

14 Ibid.

> tious in considering each count separately. Also in most cases it would be oppressive to the accused as well as expensive and inconvenient for the prosecution, to have two or more trials when one would suffice.[15]

Clearly in this case there was no multiplicity or complexity in the two counts. *Kray* differed in that it was complicated but even there it was held there was no embarrassment to the accused nor was it beyond the comprehension of the jury.

The legislative provisions governing the discretion of the judges in Australia appear to be a little tighter where they differ. In Victoria they do not differ[16] but it would appear that the Supreme Court prefers separate trials as a general rule. In *Brent*[17] the accused was charged with four counts charging indecent assault on four different occasions during a period of two months. The circumstances and character of the alleged assaults were very similar. Two of them were alleged to have been committed against the same girl and the other two against two other girls. Irvine C.J. said that the court had to consider whether the minds of the jury are likely to be affected in dealing with the credibility of witnesses whose evidence is directly relevant to another offence. Cussen J. added that the case might have been in a different category if there had been four counts relating to the same girl. Lord Pearson might suggest that juries are better informed than they were fifty years ago when this case was decided. But in the 1960s in Victoria the rule had hardened. In *Bell*[18] Lowe J. ordered separate trials where the accused was alleged to have committed several offences against two different girls as it might tempt the jury to use evidence in relation to one girl in establishing the charge in relation to the other. But if juries are to be wrapped in cotton wool then perhaps they should not be deciding cases at all. The rule has not been restricted to cases of indecent assault: in *Aiken*[19] it was held that where the accused was charged with two offences of larceny as a bailee arising out of two independent transactions, the facts of the two cases being similar, there should have

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15 Id. at 530.

16 Rule 2 of Sixth Schedule, Crimes Act 1958 (Victoria) is the same as Rule 3 of Schedule 1, Indictments Act 1915, see n. 10 above.

17 [1919] V.L.R. 46. In Bildson, [1966] 1 O.R. 787 the facts were almost identical and the Canadian court also held that separate trials should have been held.

18 [1962] V.R. 135; also Staiano, (1919) 25 A.L.R. (C.N.) 21 where it was held that on three counts of indecent assault against three different girls on three different occasions each of the counts should be tried separately.

19 [1925] V.L.R. 265.

been separate trials. If *Ludlow* is accepted as good law by the Australian courts each of these cases would be decided differently in the future.

In *Rodriguez*[20] three persons were charged with conspiracy to defraud, one being further charged on seven counts of forgery and another on seven counts of uttering false documents. Caution prevailed and it was held that the charges could not be joined. Although not prepared to overrule *Rodriguez* the Court of Criminal Appeal of Queensland did hold in *Gassman*[21] that where two accused were charged on one count with conspiracy to steal and on a second count with stealing, the charges were properly joined. A similar decision was reached in *Pellow*[22] where the Court of Appeal of New South Wales was prepared to hold that one count of conspiracy and two counts of obtaining money by false pretences should not necessarily be regarded as unsatisfactory. In *Andrews*[23] the accused was charged with five counts, two of larceny and three of breaking and entering. The Court of Criminal Appeal of South Australia held there was no prejudice to the accused.

The rule allowing joinder is only permissive, but it may be even more oppressive to bring the accused for trial on each offence separately. *Connelly* establishes that where offences may be joined they ought to be joined. *Ludlow* reiterates the rule. If they are not joined and the accused is acquitted on one of the counts the question arises, as it did in *Connelly,* whether he can be charged with the other count or counts or whether he can plead autrefois acquit.

This very situation arose in *Riebold*[24] where two accused were jointly indicted on 29 counts of which the first two were counts of conspiracy, which would stand or fall together, and the remaining 27 alleged matters that were the overt acts on which the prosecution relied. The prosecution elected to proceed on the second count of conspiracy and the accused were acquitted. The prosecution sought leave to proceed on the other counts. Barry J. said:

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20 [1939] Q.S.R. 227; s. 567 Criminal Code (Queensland) places the emphasis on an indictment containing 'one offence only' but the proviso appears to give as wide a discretion to the court as the English provisions.

21 [1961] Qd.R. 381.

22 (1956) 73 W.N. (N.S.W.) 478; s. 370 Crimes Act (N.S.W.) narrows the court's discretion: 'In every case not capital, counts may be inserted in the same indictment, against the same person, for any number of distinct offences of the same kind, not exceeding three, committed against the same person . . .'

23 [1943] S.A.S.R. 44.

24 [1965] 1 All E.R. 653.

> I am perfectly satisfied here that what the prosecution seek to do is to secure a retrial of this whole case, and I am equally satisfied that, if such retrial were to take place, it would become a complete reproduction of the trial which took place . . . at some considerable length at the Stafford Assizes. The issues would certainly be the same . . .

In *Assim*[25] Lord Parker C.J. observed:

> Questions of joinder, be they of offences or offenders, are matters of practice on which the court has, unless restrained by statute, inherent power both to formulate its own rules and to vary them in the light of experience and the needs of justice.

Ludlow is bound to be a controversial decision. The 'nexus' of which Lord Pearson spoke is thin. Nevertheless on balance it seems preferable that where possible the accused should be confronted with all the charges at one trial and not remain in fear of a second or possibly a third trial.

D.B.

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[25] [1966] 2 Q.B. 249, 262; followed in Palmer, [1969] 2 N.S.W.R. 13 where separate trials were refused in complex proceedings involving 200 prosecution witnesses and a number of different charges under the Crimes Act and the Companies Act.