GO v R

Court of Criminal Appeal of the Northern Territory of Australia

Asche CJ, Gallop and Angel JJ

23, 24, 25 July and 26 November 1990 at Darwin

APPEAL - Criminal law - s.312 Criminal Code - nature and extent of Court's power to amend indictment

APPEAL - Criminal law - s.312 Criminal Code - amendment of indictment during trial - onus on Crown to establish no injustice caused by amendment

APPEAL - Criminal law - s.312 Criminal Code - amendment of indictment during trial - whether accused should be re-arraigned

APPEAL - Criminal law - s.211(1) Criminal Code - act of stealing and "before or at the time or immediately after" using violence - one count sufficient if acts alleged constitute a continuity

APPEAL - Criminal law - s.211 Criminal Code - robbery with circumstances of aggravation - desirability that circumstances of aggravation be designated separately and at end of substantive charge - special verdict required from jury

APPEAL - Criminal law - s.40 Criminal Code - duress - how raised - once raised, onus on Crown to negate s.40 and provisos thereto as well - form of directions to jury

APPEAL - Criminal law - s.196 Criminal Code - "confines or detains ... or otherwise deprives another of his personal liberty" - whether s.196 creates a number of different offences or only one offence

Cases followed:

Bowling v General Motors-Holdens Pty Ltd (1975) 8 ALR 197
Brennan v The Queen (1936) 55 CLR 253
Buckle v Josephs (1983) 47 ALR 787
O'Brien v Fraser (1990) 66 NTR 9
Ross v The Queen (1979) 141 CLR 432
The Queen v De Simoni (1981) 147 CLR 383

Cases applied:

Bank of England v Vagliano Bros [1891] AC 107
Bonnick (1977) 66 CAR 266
Higgan v O'Dea [1962] WAR 140
Johal v Ram (1972) 56 CAR 348
Mitchell v Myers [1955] WALR 49
Palmer v R [1971] AC 814
R v Williams (Roy) (1977) 1 All ER 874
Romeyko v Samuel (1972) 19 FLR 322
Woolmington v DPP [1935] AC 162

Cases referred to:

Audley (1907) 1 KB 383
Chong Wooi Sing & Toh Yuh Teng v The Queen
(1989) 40 A Crim R 22
Day & Riggs v Rugala (1978) 20 ACTR 3
Emery (1978) 18 ACR 49
Gamer's Motor Centre (Newcastle) Pty Ltd v
Natwest Wholesale Aust Pty Ltd (1987) 72 ALR 321
Kennett v Holt [1974] VR 644
Knight v Lambrick Contractors Ltd (1957) 1 QB 562
Linehan v Australian Public Service Assocation
(1982) 66 FLR 90
Martin (1961) 45 CAR 199
Oliver (1944) 1 KB 67
R v Barraclough (1906) 1 KB 201
R v Cox [1923] NZLR 596
R v Garner [1964] NSWR 1131
R v Gash (1881) 1 QLJ 54
R v Gill (1963) 2 All ER 688
R v Hally [1962] Qd R 214
R v Hare (1910) 29 NZLR 641
R v Knutsen [1963] Qd R 157
R v Kusu [1981] Qd R 136
R v Lane [1965] QWN 39
R v Scarth [1945] St R Qd 38
R v Smith [1949] St R Qd 126
Radley (1974) 58 CAR 394
Ward v R [1972] WAR 36
Robinson v Canadian Pacific Railway Co [1892] AC 481

Cases considered:

Bone (1968) 52 CAR 546
Harden (1962) 46 CAR 90
Giretti (1986) 24 ACR 112
Lynch v DPP (1975) 1 All ER 913
Meering v Graham White Aviation Co Ltd (1919) 122 LT 44
Smith v Desmond (1965) 1 All ER 976
Sungravure Pty Ltd v Middle East Airlines Airliban SAL (1975) 5 ALR 147
Vallance v The Queen (1961) 108 CLR 56

Case not followed:

Herring v Boyle (1834) 1 CM & R 377

Legislation:

Criminal Code Act (NT) 1983
Juries Act (NT) 1980
Indictments Act (UK) 1915
Criminal Code (WA) 1913
Criminal Code (Qld) 1899
Justices Act (WA) 1902

Counsel for the appellant:	D. Mildren QC with J. Tippett
Solicitor for the appellant:	Buckley & Stone
Counsel for the respondent:	S. Stretton
Solicitor for the respondent:	Solicitor for NT

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IN THE COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA

No. CA 15 of 1989

ON APPEAL FROM SUPREME COURT OF THE NORTHERN TERRITORY No. 55 OF 1989

BETWEEN:

ZENAIDA GO

Appellant

AND:

THE QUEEN

Respondent

CORAM: ASCHE CJ, GALLOP and ANGEL JJ.

REASONS FOR JUDGMENT

(Delivered the 26 day of November 1990)

ASCHE C.J: For the purposes of this appeal the facts alleged by the prosecution can be quite briefly set out. The appellant had been the wife of one Mr Robinson. They divorced and Mr Robinson married again. Nevertheless he kept in touch with the appellant. On the early morning of 9 August 1989 the appellant, on her own admission, and whilst in company with some other persons, entered the home of Mr Robinson and joined with the others in a series of assaults on the new wife of Mr Robinson. The victim, who was still in bed, was awakened by a hand being placed over

her face. She had her feet and legs tied, she was dragged to the floor, her hair was cut off and she was dragged into the toilet. Some cloth had been put round her eyes, although the evidence of the victim was that that cloth had slipped and for some time she could see at least one of her attackers. A hot electric iron was placed on one side of her face causing great pain and injury. The attackers then left and, after some time, the victim was able to extricate herself and call her husband and the police. At some time while the attackers were in the home they took some jewellery belonging to Mrs Robinson. That jewellery was subsequently found in Perth in circumstances indicating it had been and was still in the possession or control of the appellant.

Much of this account was admitted by the appellant herself. She agrees that she entered the premises on 9 August, and that she took part in the attack; but she denies that she was the person who applied the hot iron to the face of the victim. She admits that she took the jewellery. Her defence was that all her actions were done under the duress of Mr Robinson the husband who, she maintained, was present at the time of the attack. This account was denied by Mr Robinson who gave evidence for the Crown. Apart from the allegation by the accused that Mr Robinson was one of the attackers there is no evidence as to the identity of any of the other persons.

The appellant was charged and pleaded not guilty before a Judge and jury to three counts. I set out these counts in the form in which they were originally drafted, and in which they were put to the accused when she was arraigned.

Count 1

On 9 August 1989 at Alice Springs in the Northern Territory of Australia, whilst in company with one or more unknown persons, stole two diamond rings, a pair of gold earrings, a gold bracelet, a gold necklace and a gold ladies wristwatch, the property of Maria Fe Robinson, and immediately before at or immediately after the time of the robbery caused bodily harm to the said Maria Fe Robinson.

Section 211(1) and (2) of the Criminal Code.

Count 2

On 9 August 1989 at Alice Springs in the Northern Territory of Australia, unlawfully caused grievous harm to Maria Fe Robinson.

Section 181 of the Criminal Code.

Count 3

On 9 August 1989 at Alice Springs in the Northern Territory of Australia, deprived Maria Fe Robinson of her personal liberty in that the said Zenaida Go, in the company of one or more unknown persons, bound the wrists and feet of the said Maria Fe Robinson against her will and detained her in the toilet of the said Maria Fe Robinson's residence.

Section 196(1) of the Criminal Code.

On the sixth day of the trial the prosecutor applied and was given leave to amend Count 1. Such leave

was given over the objection of defence counsel. The amended charge reads as follows:-

> On 9 August 1989 at Alice Springs in the Northern Territory of Australia, stole three diamond rings, a pair of gold earrings, a gold bracelet, a gold necklace and a gold ladies wristwatch, the property of Maria Fe Robinson, and immediately before, or at the time or immediately after doing so used violence to the said Maria Fe Robinson in order to prevent or overcome resistance to the said items being stolen or to prevent or hinder her pursuit and immediately before, at or immediately after the time of the robbery was in company with one or more unknown persons.

After the learned trial Judge had granted the amendment he asked whether the accused should be re-arraigned. At that stage he asked defence counsel whether he had had an opportunity to consider that and the reply was:-

> "I have, more or less, your Honour. I, at this stage, don't request that she be re-arraigned. I think the jury just simply be apprised of the amendment."

His Honour then adjourned for a short time and on his return he handed to counsel the indictment as he had amended it in Count 1. Some discussion then ensued and his Honour again raised the question as to whether the accused should be arraigned. The following conversation then took place:-

"Mr Stretton: (Crown Prosecutor)	Well I indicate to my friend that I would consent to the charge being read again to the accused, obviously, if that's a matter he's concerned with.
His Honour:	To her being arraigned? I think I raised that with counsel before the adjournment.
Mr Stretton:	Neither of us wanted it.
His Honour:	Neither of you sought that.
Mr Stretton:	Yes.
His Honour:	Is that the situation still?
Mr Stretton:	Yes, that's still the situation.
His Honour:	Well, of course, I will formally read out the new Count 1. Explain that to the jury and to the accused. I treat it as an amendment as I say."

Counsel for the accused said nothing at this stage, but must, in the context of the prosecutor saying, "neither of us wanted it", be taken as having agreed to what the learned Crown prosecutor had said.

I would, with respect, have still considered it advisable to have arraigned the accused at this stage. However counsel clearly did not seek it. His Honour then read out to the jury, and of course in the presence of the accused and her counsel, the amended count, and also took the precaution of having the prosecutor then and there announce the particulars of the violence which the Crown alleged as having been offered to the victim by the accused.

Although it is not a ground of appeal, some comment was made on the hearing of the appeal of the fact that the appellant was not re-arraigned at this point. Mr Mildren QC, who appears for the appellant, obviously felt some diffidence in relying on a matter which had been conceded by defence counsel at the trial.

Nevertheless, had the procedure caused a miscarriage of justice, counsel's acquiescence or failure to object would not prevent an Appeal Court from dealing with it. R v Garner [1964] NSWR 1131: R v Lane [1965] QWN 39; though it might well affect the question as to whether any real prejudice to the accused had resulted: R v Hally [1962] Qd R 214.

In the circumstances of this case I am satisfied that no prejudice resulted to the accused, and no miscarriage of justice, real or potential, occurred as a result of the failure to re-arraign the appellant.

S.312 of the Criminal Code, which is modelled on s.5(1) of the English Indictments Act 1915 gives wide powers of amendment and, inter alia, permits the amendment of defective indictments "at any stage of the trial". The power to amend is very wide: Johal v Ram (1972) 56 CAR 348.

In Radley (1974) 58 CAR 394 the Court of Appeal (Criminal Division) was of the opinion that it was "highly desirable" that, if an amendment of a substantial character had been made after the trial had begun, the arraignment be repeated (p.404). However, I do not read those comments as ruling that it is imperative to do so.

In R v Williams (Roy) (1977) 1 All ER 874 the accused had never pleaded at all. It was mistakenly thought that he had entered a plea of not guilty on an earlier occasion. But the indictment was read out to the jury and the jury were informed that the accused had pleaded not guilty and the trial proceeded. On appeal, the Court took the view that waiver of the arraignment could be implied where the accused and his counsel were present at the trial, were aware of the charge and proceeded to trial without objection as if the accused had been duly arraigned. The Court considered that such a proposition was "consonant with the law of England as well as with good sense for no detriment can enure to a defendant from the application of these principles." (p.879). One would think that such an observation would apply a fortiori to the present case; where the accused was originally arraigned, but when it was thought necessary to amend the indictment, the terms of such amendment, and the reason for such amendment, were discussed with counsel in the presence of the accused. Neither the accused nor his counsel could have been under any misapprehension as to the real nature of the charge.

The ultimate test is whether there was any injustice to the appellant from any failure to re-arraign her. Because she and her counsel and the jury were fully aware of the terms of the amended charge, and the prosecution had not been and was not thereafter conducted in any different way, I can find no injustice to the appellant or any basis on which it could be said that a miscarriage of justice had occurred from the failure to re-arraign the appellant.

The trial then proceeded and ultimately the appellant was found guilty of Counts 1 and 3 but acquitted on Count 2.

Two comments can be made of those verdicts. The first is that the jury must have found that at the time of the assault upon the victim, the appellant was physically present and taking an active part in the stealing, and at least in the earlier parts of the assault. The second is that the jury did not accept the positive identification by the victim that it was the appellant who held the hot iron to her face. One cannot, of course, speculate as to whether the jury disbelieved the victim on this matter or whether they considered that the Crown had not proved beyond reasonable doubt that it was the appellant who had done this. For the purposes of this appeal it must be accepted that the jury's verdict involved the appellant participating

in various acts of violence against the victim but not of the assault with the iron, and that the jury accepted that at some time while she was in the victim's house the appellant actively participated in the stealing of the victim's property.

The learned trial Judge imposed a sentence of 4 years imprisonment on the first count and 6 months imprisonment on the third count to be served concurrently and a non-parole period of 2 years.

THE APPEAL ON FORM & AMENDMENT OF THE FIRST COUNT

(Grounds of Appeal 2, 3 and 3A)

At the commencement of the appeal, Mr Mildren Q.C. for the appellant, sought and was granted leave to file and rely upon an amended Notice of Appeal. Subsequently, and during the course of Mr Mildren's submissions, the appellant was given leave to argue a further ground which appears as ground 3A of the amended Notice of Appeal.

Paragraph 1 of the grounds of appeal is a recital and not a ground. The first three grounds of appeal, paragraphs 2, 3 & 3A relate to the form of Count 1 and whether or not it could be properly amended by the learned trial Judge.

The first two of these grounds (grounds 2 and 3 of the amended Notice) can be dealt with together. Ground 2 is "that the learned trial Judge erred in law in acceding to an application by the Crown to amend Count 1 in the indictment". Ground 3 is really a particular of Ground 2 insofar as it alleges:-

> "The amendment to Count 1 of the Indictment was such as to introduce a different offence upon which the accused was not arraigned."

I have already set out the original terms of Count 1 and the amendment granted by the learned trial Judge.

Count 1 leaves out one element of the charge of robbery under s.211(1) of the Code which is an essential element to be proved before the offence is made out. It does not allege the use of violence to prevent or overcome resistance. This was pointed out by the learned trial Judge on the second day of the trial, but it was not until the sixth day of the trial that the amendment was finally made. The learned Crown Prosecutor very properly concedes that he was at fault in not seeking the amendment earlier.

Mr Mildren submits that the learned trial Judge had no power to order an amendment which not only alleged a different offence from that of stealing, but also alleged an

offence for which the maximum penalty was considerably greater. Mr Mildren has referred us to a number of cases which he concedes do not speak with one voice on this matter. I do not think it necessary to analyse in detail all these cases because it is plain that the provisions of the Northern Territory Criminal Code as to amendment of indictments are wider than the provisions discussed in many of the cases to which Mr Mildren has referred us.

I think the best illustration of this is to examine the case of Mitchell v Myers [1955] WALR 49, a decision of the Chief Justice of Western Australia, which was followed in Higgan v O'Dea [1962] WAR 140, a decision of the Full Court of Western Australia. In Mitchell v Myers (supra) the learned Chief Justice examined the power of amendment given to a Magistrate under ss.46, 47 and 48 of the Justices Act of Western Australia. The precise terms are set out (at 50) in the report but it is sufficient to say that s.46 provides:-

> "S.46 No objection shall be taken or allowed to any complaint ... for any variance between the complaint and the evidence in support ... .".

In dealing with this section his Honour also referred to s.594 of the Criminal Code of Western Australia which reads:-

"S.594 On indictment charging a person with an offence he may be convicted of any offence which is established by the evidence and which is an element or would be involved in the commission of the offence charged in the indictment".

His Honour said (at 52):-

"I think s.46 should be interpreted in much the same way as s.594 of the Code prescribes; that is the real meaning of s.46. It does not mean that some new offence unrelated to that charged in the complaint can be assumed, can be laid, or can be the subject of amendment: it would be something more than a variance if an offence of a different nature and character could be substituted for that which is set out in the complaint or is the subject of the charge before the justices; but it does extend to alleging what I might call a cognate offence which is established by the evidence, that is one similar in some way to that charged, or one which would be a constituent of the actual complaint which has been made; and by a constituent I mean what the Code calls an element or something of the sort, an ingredient involved in the complaint laid and in that respect almost necessarily a complaint of a lesser gravity than that charged."

In Higgan v O'Dea (supra) Hale J., with whom the other members of the Court agreed on this point, said (at 143), after referring to ss.46, 47 and 48 of the Justices Act:-

"These sections were considered by Dwyer C.J. in Mitchell v Myers (1955) 57 W.A.L.R. 49, and it appears to me that the conclusion there reached is correct namely, that s.46 does not permit an amendment which would result in a charge of some new offence of a different nature but that it does relate to a cognate offence or an offence constituted by facts which would themselves be part and parcel of the offence originally charged."

The remarks of Dwyer C.J. in Mitchell v Myers (supra) were quoted with approval by Pape J. in Kennett v Holt [1974] VR 644 at 648.

Mr Mildren, not surprisingly, suggests that we should follow where two other States have led. But it is plain that their Honours in the cases referred to by Mr Mildren were dealing with a much narrower provision than that in the Northern Territory. I would not presume to differ from their Honours on the interpretation of statutes which allowed amendment only for variance between complaint or indictment and the evidence in support. I would point further to the provisions of s.591 of the Western Australian Criminal Code which, so far as relevant, read as follows:-

> "If, on the trial of a person charged with an indictable offence there appears to be a variance between the indictment and the evidence, or it appears that any words that ought to have been inserted in the indictment have been omitted, or that any words that ought to have been omitted have been inserted, the Court shall, unless it can consider that the variance, omission or insertion, is material to the merits of the case, and that the accused person will be prejudiced thereby in his defence on the merits, order the indictment to be amended ... ".

Very similar wording appears in s.572 of the Queensland Criminal Code.

Compare those powers of amendment with the terms of s.312 of the Northern Territory Criminal Code which reads, again so far as is relevant:-

> "(1) Where, before trial or at any stage of a trial, it appears to the Court that the indictment is defective or that there appears to be a variance between the indictment and the evidence, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case if it is shown that the required amendment can be made without injustice.".

This section appears to have been drawn with the object of making the Court's power of amendment as wide as possible, consistent with justice and common sense, but always with the rider that the accused should not thereby be prejudiced. It has obviously imported the terms of the English Indictments Act (1915) s.5. That section provides that:-

> " Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless ... the required amendments cannot be made without injustice.".

In my view the word "defective" is much wider than the term "variance".

Two comments on the English section are made by Archbold, 42nd Edition at 1-63, and they are of some significance. The first comment is:-

" The tendency in the past 10 years had been to relax the technicalities of criminal pleading.".

Subsequently at 1-66 the learned editors comment:-

" Since the passing of the Indictments Act (1915) there have been a number of decisions as to the circumstances in which it is proper for the judge to order an amendment of the indictment. The appellate Courts have shown an increasing willingness to allow amendments of substance to be made, and the latest decisions cannot be reconciled with certain of the earlier ones.".

No doubt the learned editors had in mind the case of Johal v Ram (1972) 56 CAR 348 where the Court of Appeal (Criminal Division) commented on a head note which appeared in relation to the case of Harden (1962) 46 CAR 90: (1963) 1 QB 8. Their Honours say (at 353):-

" In the head note to the report of this case (i.e. Harden's case) in the Criminal Appeal Reports it is stated at p.91:-

'An amendment of a count of an indictment may not be made after arraignment if the result is to substitute another offence for that originally charged.'.

As a statement of principle to be applied generally, this is, in the judgment of this Court, too wide. No doubt in many cases in which, after arraignment, an amendment is sought for the purpose of substituting another offence for that originally charged, or for the purpose of adding a further charge, injustice would be caused to the accused by granting the amendment, but in some cases (of which the present case is an example) no such injustice would be caused and the amendment may properly be allowed."

See also Martin (1961) 45 CAR 199 and Radley (1973) 58 CAR 394. In the latter case Widgery LCJ, delivering the judgment of the Court of Appeal (Criminal Division) said (at 402):-

> " The tendency in the last 10 years has been to relax the technicalities of criminal pleading, bearing in mind that injustice to the defendant from any proposed amendment must be refuted. With those matters in mind I cite Martin's case (supra) as a good example of the width of meaning of 'defective' in s.5."

In my view the terms of s.312 of the Code are sufficiently wide to allow an amendment of the sort permitted by the learned trial Judge, provided that it could be made without injustice.

I refer, also, to s.305(3) and (4). Those subsections establish that the omission of an element from the indictment is not fatal to it. The original indictment complies with s.305(3) and (4) in that it describes the offence, it states the section defining the offence and includes the circumstances of aggravation. The appellant might have been convicted of robbery under the original indictment which specifically uses the word "robbery" and expressly refers to s.211(1) and 212(2) of the Code. That is not to say that Count 1 in its original form is satisfactory. It is defective in the sense that it is confusing as wanting in clarity. The amendment was needed and the court had the power to make it.

The next submission, therefore, made by Mr Mildren was that if there was, in fact, power to amend, it was not a power that should have been exercised in the circumstances. He must, I think, concede that, if the power is there (and I am satisfied it is), then the plain words of the section permit it to be exercised "at any stage of a trial". But Mr Mildren naturally draws our attention to the proviso to s.312(1) which allows the amendment only "if it is shown that the required amendment can be made without injustice". That is something upon which almost without exception the cases dealing with the question of amendment have emphasized.

Mr Mildren again draws our attention to the fact that the amendment was not made until the sixth day of the trial and that it then appeared to disclose a different and more serious offence than that with which the count was, apparently, originally concerned. These are cogent and weighty matters to be considered; but I think they are successfully met by the submissions of the learned Crown Prosecutor.

I agree with him that the appellant, from the commencement of the trial, could have been in no doubt as to what was in fact alleged against her. That is plain from what was said by the Crown in opening to the jury. The learned Crown Prosecutor illustrates this further by a

rather remarkable example at the very beginning of the trial, indeed, at the time when the jury was being empanelled. It appears in the transcript (at 4) that, obviously to the surprise of both his Honour and the learned Crown Prosecutor, counsel for the defence claimed a right to twelve challenges rather than the usual six permitted under the Juries Act. He based that claim on the fact, as he submitted, that his client was charged with a capital offence within the definition of the Juries Act. "Capital offence" is defined in that Act as an offence "the penalty for which ... is prescribed to be life imprisonment". S.44 of the Juries Act gives an accused twelve peremptory challenges in such a case. Obviously, therefore, counsel for the defence was accepting that his client was charged with robbery and with circumstances of aggravation, for which the penalty under s.211(2) was imprisonment for life.

His Honour acceded to the submission of counsel for the defence. I would, with great respect, consider that his Honour was in error; for the definition of "capital offence" in the Juries Act goes on to state that it is an offence "in respect of which the Court imposing the sentence may not vary or mitigate the sentence". This would not include robbery since it is clear that the sentence of life imprisonment is the maximum but not the only sentence which can be imposed. See s.390(1). However that is not germane to the point here, which is that counsel for the accused

clearly accepted that his client was being charged with an offence for which the maximum penalty was imprisonment for life and both his Honour and the prosecution accepted that situation.

As appears from pp.50-52 of the transcript, the learned Crown Prosecutor, in opening to the jury, explained Count 1 to them as meaning that the accused was being charged with robbing the victim, and in fact he read s.211(1) to them and he explained to them the difference between robbery and stealing. He then called evidence which, if accepted, plainly covered all the elements required under s.211(1). Counsel for the defence did not initially take any objection to the form of the indictment; although it is true that he opposed the amendment when it was eventually formally sought by the Crown. He pointed out that the amendment charged a different offence and he remarked that there was "always injustice where an indictment is amended sometime after the accused has been arraigned". That may have been too sweeping a statement, but it is certainly correct that, in seeking the amendment, the onus was on the Crown to prove that the amendment could be made without injustice. In my view however, and on the material before his Honour, the Crown clearly established that no injustice was done to the accused by the amendment. It took no-one by surprise and the evidence upon which the Crown relied had been foreshadowed and then called by the learned Crown Prosecutor.

However that raises another submission by Mr Mildren. He submits that the learned trial Judge did not properly consider whether the amendment could be made without injustice and did not appreciate that the onus of establishing that was upon the Crown. I agree with Mr Mildren that his Honour did not deliver himself of a detailed ruling; but it was not, in my view, necessary to do that. I think his Honour made his point of view sufficiently clear at 580 of the transcript where his Honour says to defence counsel:-

His Honour:	"The time to take an objection to an indictment if you have some problem about it, is at the outset. It cannot be seriously contested in the light of what I have heard, that your client was under the impression she was being charged with stealing.
Mr Tippett:	Well that was effectively the charge, Your Honour.
His Honour:	That was the form of the charge, clearly it was a defective charge, yes, in form. In point of reality it is abundantly clear that the Crown intended to charge robbery and that's the way the case has proceeded from the outset. If you wish to - of course you are at liberty, you don't have to say anything in response to that, Mr Tippett, you may say at another place at another time, whatever you wish to say, but I certainly want to put that on record. I don't regard it as a new indictment, no, I think it's an amendment, regrettably late.

Mr Tippett:	May it please Your Honour.
His Honour:	Yes, I permit the amendment, you may seek to present an amended document.

I do not think that any person reading that exchange would have been in doubt as to what his Honour's reasons were. I consider also, that, although his Honour did not remind himself of what I am satisfied is the case, namely, that the onus was on the Crown to establish that no injustice was caused by the amendment, his Honour's remarks are sufficiently positive to leave no doubt that, in his Honour's view, the Crown had discharged that onus.

I should here deal with the point made by Mr Mildren that there was necessarily injustice where the amendment appears to take the charge "up" rather than "down", i.e., permits a more serious charge to be substituted for one less serious. I think there are two answers to this. Firstly s.312 makes no such distinction. Secondly, as I have pointed out, neither the accused nor her counsel was ever under any deception as to what the real allegations were. In many cases it may well be a very important matter bearing on the question of injustice if the charge is amended upwards. But I do not think it applies here.

The next ground of appeal is Ground 3A:-

> "That Count 1 of the indictment as amended alleged that 'immediately before, at, or immediately after the robbery' the accused was in company with one or more unknown persons and consequently the conviction thereon is bad for uncertainty or alternatively is a conviction for an offence not known to the law."

There is some confusion here because the phrase "immediately before, at, or immediately after" is employed twice in the amended count. The second time it is employed is clearly a reference to one of the aggravating circumstances mentioned in s.211(2), and equally clearly is unnecessarily inserted because it is not used as part of the description of the aggravating circumstance of "being in company with one or more person or persons".

For clarity I set out again the full terms of the amended count:-

> "On 9 August 1989 at Alice Springs in the Northern Territory of Australia, stole three diamond rings, a pair of gold earrings, a gold bracelet, a gold necklace and a gold ladies wristwatch, the property of Maria Fe Robinson, and immediately before or at the time or immediately after doing so used violence to the said Maria Fe Robinson in order to prevent or overcome resistance to the said items

being stolen or to prevent or hinder her pursuit and immediately before, at or immediately after the time of the robbery was in company with one or more unknown persons." (Emphasis added).

I deal with the latter of the two phrases first. It seems clearly to relate to an aggravating circumstances set out in s.211(2):-

> "S.211(2) If the offender is armed with a firearm or any other dangerous or offensive weapon or is in company with one or more person or persons, or if, immediately before, at or immediately after the time of the robbery he causes bodily harm to any person, he is liable to imprisonment for life."

I have underlined the words "or if", because that makes it perfectly clear that the phrase "immediately before, at or immediately after the time of the robbery" governs the expression "causes bodily harm" and has nothing to do with the expression "is in company with one or more person or persons".

The phrase should not have been in this part of the count at all. It relates to a circumstance of aggravation where bodily harm was caused and that is not alleged in the amended count. It is therefore mere surplusage. R v Barraclough (1906) 1 KB 201 at 210: R v Gash (1881) 1 QLJ 54.

I note also that his Honour (correctly if I may say so) separated out the appropriate circumstance of aggravation alleged in count 1, namely that at the time of the robbery the appellant was in company with one or more person or persons. Both in his directions and in his aide memoire he asked for a separate finding on that issue, and only if the jury were satisfied on the substantive charge of robbery. When verdict was delivered the jury, having convicted the accused of the substantive charge in count 1, were then asked whether they found the accused guilty or not guilty of the aggravating circumstance of being in company with one or more persons and they found specifically that she was. (Transcript p.1030).

That was, in my view, the correct procedure. It is unfortunate that the count itself did not separate out the aggravating circumstance relied on. I have previously had occasion to remark on the desirability of removing from the substantive charge any aggravating circumstances relied on, and designating that separately at the end of the substantive charge: O'Brien v Fraser (1990) 66 NTR 9. A circumstance of aggravation is not a separate offence. Buckle v Josephs (1983) 47 ALR 787: Ross v The Queen (1979) 141 CLR 432 at 439 (per Gibbs J.): The Queen v De Simoni (1981) 147 CLR 383 at 386 (per Wilson J.). If proved, it increases the maximum penalty. (c.f. s.211(2)). As a matter of clarity, therefore, the jury should first be asked

whether they find the accused guilty or not guilty of the substantive offence. Only if they are satisfied that he is guilty of the substantive offence should the jury then proceed to determine whether that offence was committed with circumstances of aggravation. They should then make a separate finding on every circumstance of aggravation so alleged. S.369 of the Code provides, inter alia, that the jury may be required to find a special verdict where the proper punishment to be imposed "may depend upon some specific fact".

This can and should be made clear in the framing of any count in an indictment where circumstances of aggravation are alleged. The first part should contain only the substantive offence. The second part (still in the same count) should then proceed with words such as these (and I do not purport to say that these are the only words that should be used) "and that the said (offence) involved the following circumstances of aggravation namely ..."(then set out separately each circumstance alleged). I have given an example in O'Brien v Fraser (supra).

Such a procedure involves the jury (or the court if there is no jury) in following the logical steps of first finding whether the substantive offence has been proved, for that is the basis of what follows; and only if that basis is established, proceeding to the next step of considering each

aggravating circumstance separately, and finding on each. To mix up these matters is a recipe for confusion. As with recipes of a different sort the advice of Mrs Beeton holds good.

In this case however, the grammatical sequence of the charge, though inept, was not such as to divert the jury from the task they were directed to by the learned trial Judge to consider whether the Crown had proved a stealing accompanied with violence. The second phrase was surplusage, although it may have had the effect of directing the jury's attention again to the time element, although I would have thought that had been sufficiently achieved by the words in s.211(2) "If the offender is in company with one or more person or persons". The word "if" in itself denotes a time element connected with the offence.

Turning then to the first time the phrase is used in the count, it obviously must be included there, since it is an element of the substantive charge described in s.211(1). The question is, therefore, whether the use of the words "immediately before or at the time or immediately after doing so used violence" renders the charge duplicitous or uncertain. In the circumstances of this case I am quite satisfied it does not. On the whole of the evidence, including that of the appellant herself, the stealing was part of a continuing offence during which violence was being

employed on the victim. It would in these circumstances be quite ridiculous to ask the prosecution to elect the precise sequence of the stealing vis a vis the violence; and it would be still more confusing to the jury and unfair to the accused to charge her with three separate counts of stealing before, at the time of, and after the violence.

In Smith v Desmond (1965) 1 All ER 976 the respondents had been indicted under s.23(1)(b) of the Larceny Act which provided that every person who "robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person" shall be guilty etc (see p.985). Two employees in charge of the premises from which money was stolen had been overpowered and locked in a lavatory in a nearby building about fifteen yards away. They remained there during the four hours which it took the assailants to break open a window into the cash office, burn open a locked safe and take the money. The House of Lords held that the assailants had been rightly convicted of robbery with violence. Although the argument turned primarily on whether the asportation had been carried out "in the presence" of the two employees, their Lordships do not seem to have found any difficulty with the question as to whether that asportation had taken place before, at or after the imprisonment of the employees. Lord Morris of Borth-y-Gest said at 984:-

"In the present case there can be no doubt that the violence and theft were essentially linked. Scott and Lai (the employees) were in the building to give care and protection to its contents. In a central part of the building there was money which could only be reached if they were made powerless - powerless to resist, powerless to defend, powerless to gain help. They were made powerless when force was first applied. They continued to be powerless during the time that the marauders were opening the safe and while its contents were being removed. The application of force was continuous."

Lord Hodson, after citing various authorities, observed (at 986):

"These citations support the view that commends itself to me, namely that the whole of the robbery including the violence (or putting in fear) and the asportation must be taken as one transaction and not divided into component parts".

Their Lordships conceded that there might be cases where the violence and the theft might not be part of one continuous transaction. Lord Morris, at 984, adverted to this:

"There might, however, be cases in which some act of violence was designed to facilitate some stealing which was planned to be a later and separate episode. Questions of degree may, therefore, arise as to whether violence and theft are or are not joint features of one crime."

Clearly His Lordship did not regard this particular case as such an example.

So, also, Lord Pearce remarked (at 992):

> "Where the sequence of events is not planned, but there is an assault which happens to be followed by a theft there may be room for niceties of argument. Where, however, the whole sequence appears to be one planned transaction one must regard the events as a whole to see if they amount to robbery."

In Giretti (1986) 24 ACR 112 at 118 Crockett J., after reviewing the authorities said:-

> "Where in the single count one 'activity' or 'transaction' or 'criminal enterprise' is charged it is, of course, the one offence."

In the present case there is no reason - as there might be in certain other cases - for departing from or separating the words used in s.211(1) "immediately before or at the time of his doing so or immediately after doing so". In the context of this case the words are apt to describe a continuous process of theft accompanied by violence which is what is alleged took place.

I would therefore reject grounds 2, 3 and 3A.

DURESS

The next three grounds deal with the question of duress. I set out these grounds.

"4. That the Learned Trial Judge erred in law in directing the Jury that duress was a defence which the accused (Appellant) had to make out.

5. That the Learned Trial Judge erred in law by directing the Jury in the form of an Aide Memoire for the Jury that if the Jury was satisfied beyond reasonable doubt about all four of the matters (a) (b) (c) and (d) contained in paragraph 3 of the Aide Memoire, the excuse of duress had not been excluded, and the duty of the Jury was to find the accused (Appellant) not guilty upon Counts 1 and 3 in the Indictment.

6. Alternatively to (4) and (5) above, that the learned Trial Judge's directions to the Jury as to the burden and standard of proof relating to duress were so flawed as to have the potential to mislead and confuse the Jury."

The first of these grounds must be examined carefully. The complaint is that the learned trial Judge, on occasions, used the expression "defence" when referring to duress, and used other expressions such as "plead duress" which indicated to the jury that the onus was on the accused to establish duress. It is true that sometimes his Honour did make use of these expressions. It is very difficult to avoid doing this. Mr Stretton has referred us to various cases in which the expression "defence of duress" is widely applied. It is only necessary to cite a few instances. In Lynch v DPP (1975) 1 All ER 913 at 917 Lord Morris of Borth-y-Gest says:-

> "In a series of decisions and over a period of time courts have recognised that there can be circumstances in which duress is a defence." (See also pp.918-919 passim.).

At 925 in the same case Lord Wilberforce says:-

> "Thus the appellant has been denied the opportunity of having a defence based on duress considered by the jury."

See also p.941 (Lord Simon of Glaisdale): p.948 (Lord Edmund-Davies - who also, at 951, uses the term "plea of duress").

In Emery (1978) 18 ACR 49 at 55 the Victorian Court of Criminal Appeal discusses the circumstances in which "the defence of duress" will be available to an accused person.

Archbold - 42nd Edition at para 17-54 speaks of "the defence of duress".

The habit seems almost universal and there is no need to pile Pelion on Ossa with further examples.

The Code lists duress under the classification "Excuse" (Part II, Division 4, s.40). His Honour employs that term "the excuse of duress" several times. So far as the ground of appeal is concerned I would doubt if that improved the situation. Use of either term carries an inference that there is something to be defended or excused.

No doubt in a perfect summing up such terms are to be avoided; though the verbal gymnastics involved might carry its own dangers.

Ultimately the test must be whether the learned trial Judge had properly impressed on the jury that if they felt that duress was reasonably possible then the onus lay on the Crown to prove beyond reasonable doubt that it did not exist. In my view his Honour made this quite clear both in his summing up and in his aide memoire.

In his summing up he reminded them that they must first consider whether duress was "reasonably possible". He strengthened that in the aide memoire by posing the question whether they were satisfied beyond reasonable doubt that the appellant's husband had not threatened to kill her. If they were not so satisfied they did not need to consider the question further.

That in my respectful view was the correct first step. It carries its own logical conundrum because what I would call a "situation of duress" or what his Honour refers to as a "reasonable possibility" of duress must, somehow, first be raised; for duress need not be negated where nothing of that nature appears. "The Crown are not called upon to anticipate such a defence and destroy it in advance" (Edmund-Davies J. in R v Gill (1963) 2 All ER, 688 at 691).

Almost invariably duress will be raised by the defence. Does that mean that the onus is on the defence to raise it? In the evidential sense, yes. It must get there somehow. In Gill (supra) at 691 Edmund-Davies J. approved as a correct statement of the law, a passage in Glanville Williams Criminal Law (2nd Edn) p.762, para 247:

> "... although it is convenient to call duress a 'defence', this does not mean that the ultimate (persuasive) burden of proving it is on the accused. But the accused must raise the defence by sufficient evidence to go to the jury; in other words, the evidential burden is on him."

In Bone (1968) 52 CAR at 546 Lord Parker LCJ said:

> "Duress, like self-defence and drunkenness, is something which must, in the first instance, be raised by the defence; but at the end of the day it is always for the prosecution to prove their case, which involves negativing the defence which has been set up."

Some discussion took place on this appeal as to the function of the Judge when the question of duress is raised. I would not myself have any difficulty with the question. The principle is stated by Lord Morris of Borth-y-Gest in Palmer v R [1971] AC 814 at 823:

> "It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."

Duress is to be treated as any other issue alleged or appearing on the evidence, such as self-defence or provocation. It is for the Judge to determine whether it is properly an issue. How he does that is dealt with in Bonnick (1977) 66 CAR 266. Stephenson LJ delivering the judgment of the Court of Appeal said this (at 269) about the issue of self-defence:

> "When is evidence sufficient to raise an issue, for example, self-defence, fit to be left to a jury? The question is one for the trial judge to answer by applying common sense to the evidence in the particular case. We do not think it right to go further in this case than to state our view that self-defence should be left to the jury when there is evidence sufficiently strong to raise a prima facie case of self-defence if it is accepted. To invite the jury to consider self-defence upon evidence which does not reach this standard would be to invite speculation."

Exactly the same principles, in my view apply to duress or any other issue which is not an element of the offence charged.

In the present case the threat which the appellant wished introduced as amounting to duress seems a threat by Mr Robinson to do her harm if she went back to another man, the father of her children, rather than a threat to do her harm unless she assisted in the robbery (pp.380-1 of the Appeal Book). The appellant's case, however, seemed, by inference, to be that, because of that threat and because of some violence he had previously inflicted on her, she was

frightened of Mr Robinson, her former husband, and therefore participated in the robbery but under duress.

Although the situation alleged by the appellant seems to involve some sort of "transferred" duress I would not, with respect, disagree with the view his Honour took that there was sufficient on that evidence to allow the question of duress to go to the jury.

Once left to the jury, be it a cloud no thicker than a man's hand, the Crown must negate. That does not, however, prevent the jury from completely rejecting it if they are satisfied beyond reasonable doubt that what is said to be a situation of duress is not that at all, has no resemblance to it, and is such stuff as dreams are made of.

Hence the first question his Honour asks in the aide memoire is, in my respectful view, the correct one.

The second paragraph of the aide memoire is not a question but a statement:-

> "2. If you are satisfied that there is a reasonable possibility that (the husband) was in his car with the accused and threatened to kill the accused and that the accused committed the crimes in Counts 1 and 3 because of that threat, the excuse of duress is open and you must consider whether the requirements of the excuse of duress have been met. (See 3 below)."

This may be subjected to certain recondite objections, such as would have delighted the sophists, but I doubt would confuse an Australian jury. The opening phrase may suggest an onus on the accused again to prove the "reasonable possibility" rather than the Crown to negate it and it may have been better to commence with the words, "If your answer to question 1 is yes ...". But question 1, answered affirmatively, is sufficiently positive to dispel that idea. Then his Honour uses the phrase "the excuse of duress". What else could he use?

The paragraph, in my view, properly leads the jury into the questions they must next ask because of s.40(1)(a)-(d). His Honour had said to the jury (at 553 of the Appeal Book):-

> " Therefore if you consider her account is reasonably possible, you have to consider the legal qualifications upon that account because duress is not a complete defence, it has to go through certain barriers. You have to be satisfied about certain matters."

Even allowing for the phrase "not a complete defence", I do not consider this passage suggests any onus on the accused. His Honour is correct in pointing to what he calls "barriers" because they are placed there by s.40(1). But his Honour has so worded paragraph 3 of the aide memoire that these become barriers within which the Crown must confine the accused, and not barriers which the accused must remove.

It must be said that without the aid of the "golden thread" of Woolmington's case a reading of s.40(1) would lead one to believe that there was an onus on the accused. The subsection reads:-

> "DURESS
>
> (1) A person is excused from criminal responsibility for an act, omission or event if it was done, made or caused because of duress provided -
>
> (a) he believed the person making the threat was in a position to execute the threat;
>
> (b) he believed there was no other way he could ensure the threat was not executed;
>
> (c) a reasonable person similarly circumstanced would have acted in the same or a similar way; and
>
> (d) he reported the threat to a police officer as soon as was reasonably practicable, unless the nature of the threat was such that a reasonable person similarly circumstanced would not have reported that threat.

The use of the word "provided" would normally involve the person seeking to rely upon the excuse to prove that he was within the prescribed boundaries. In James (1902) 1 KB 540 at 545 Lord Alverstone CJ states the general rule (ante Woolmington) that "it is not necessary for the prosecution to negative a proviso". See also Audley (1907) 1 KB 383 and c.f. Oliver (1944) 1 KB 67 (which equates an "exception" in an Act with a proviso). And see, generally Bennion - Statutory Interpretation - pp.570-2.

Nevertheless, under the guidance of s.5 of the Code, and with the authority of Woolmington's case, it has been accepted that once an excuse is available (save for insanity and diminished responsibility) it is for the Crown, not only to negate the excuse beyond reasonable doubt, but, in provocation (s.34) and duress (s.40), to negate the proviso as well; and negate it beyond reasonable doubt.

To negate a proviso to an excuse, which itself must be negated, requires no small degree of syntactical dexterity. The spectre of double or triple negatives looms large. The problem has been caused by the necessity of grafting Woolmington on to the terminology of "excuse" and "justification" employed by the Code, - as His Honour Nader J. points out in a paper to which both counsel have referred, and which, if I may say so with respect, provides a very careful and illuminating analysis of the problem. (Nader J. - the Criminal Code in the Northern Territory - Address to Australian Bar Association - 9/7/90).

The learned trial Judge was aware of these problems and paragraph 3 of the aide memoire directs the jury that they must find beyond reasonable doubt the negative of any one of the four provisos contained in s.40 before they can convict the accused. The complaint however is that he again speaks in that paragraph of the accused being "excused from criminal responsibility on the ground of duress". Again

however, in the context, that does not in my view suggest that there is any onus on the accused or that the onus is not on the Crown to prove the elements of the charge beyond reasonable doubt. His Honour uses the term "gateways" to get over the problem posed by the provisos. "You have to pass through all those gateways before the excuse of duress is open." (p.595 - Appeal Book). But paragraph 3 of the aide memoire makes it clear that it is the Crown that must shut the gates on the accused, not the accused who must open them.

I set out paragraph 3 of the aide memoire:-

> "3. The accused is excused from criminal responsibility on Counts 1 and 3 by reason of duress, unless you are satisfied beyond reasonable doubt about ANY ONE of the following four matters:
>
> (a) That she did not believe that William Robinson was in a position to execute the threat he made to her in the car; or
>
> (b) That she did not believe that there was no other way she could ensure that William Robinson did not execute his threat; or
>
> (c) That a reasonable person, similarly circumstanced, would not have acted in the same or a similar way to the way she acted; or
>
> (d) That she did not report William Robinson's threat to a police officer as soon as was reasonably practicable, unless you consider that the nature of William Robinson's threat was such that a reasonable person similarly circumstanced, would not have reported that threat.
>
> If you are satisfied beyond reasonable doubt about ANY ONE of (a), (b), (c) or (d) the excuse of duress is not open to the accused and should be excluded from your consideration of whether she is guilty or not guilty on Counts 1 and 3."

It is true that his Honour in the next paragraph of his summing up on p.595 does make use of what I consider, with respect, the somewhat unfortunate phrase "if she manages to pass through these gateways". That must, however, be contrasted with paragraph 3 of the aide memoire which, allowing for the use of the word "excuse", can only mean "unless the Crown negatives the four provisos beyond reasonable doubt the excuse of duress is open". In the context that can only mean, "she must be acquitted".

The next ground depends upon what seems clearly to be a mistake in the last sentence of the aide memoire regarding duress. It reads:-

> "If you are satisfied beyond reasonable doubt about ALL FOUR of (a), (b), (c) and (d), then the excuse of duress has not been excluded and your duty is to find the accused 'Not Guilty' upon Counts 2 and 3."

It is obvious that the word "not" has been left out in the opening words which should read "If you are not satisfied" etc. It is significant that neither the prosecutor nor defence counsel noticed the error at the time. My own view is that the context of his Honour's directions and the rest of the aide memoire made clear enough what was intended. Even if it did not, then, as Mr Stretton points out, the test was plainly more favourable to the accused than against her. It was directing the jury

that even if they came to the conclusion that all four of those circumstances had been proved beyond reasonable doubt by the Crown the accused must still be acquitted. Indeed the inference is that even if one or two of them were proved she must still be acquitted. That is about the best situation she could possibly be in, and far more advantageous than the real one. So no detriment to her flows from that sentence.

The final ground of appeal relating to duress is that the directions of the learned trial Judge were so flawed as to have the potential to mislead and confuse the jury. For the reasons given above I am not so persuaded.

Insofar as certain phrases out of context may have had that effect I would certainly apply the proviso in s.411(2), as I would to the misstatement in the last paragraph of the aide memoire on duress, on the basis that the summing up of the learned trial Judge was eminently fair and no substantial miscarriage of justice can be said to have occurred.

THE APPEAL ON THE THIRD COUNT

I turn therefore to the two grounds of appeal which relate to count 3. They are as follows:-

"7. That the indictment and the conviction on Count 3 is duplicitous or uncertain.

8. That the Learned Trial Judge's directions to the Jury on Count 3 of the Indictment left to the Jury a substantially different charge than that upon which the accused (appellant) had been arraigned."

The section under which this charge arises is s.196 which commences with the heading "Deprivation of Liberty", and subsection (1) then states:-

> "(1) Any person who confines or detains another in any place against his will or otherwise deprives another of his personal liberty is guilty of a crime and is liable to imprisonment for 7 years."

The count reads:-

> " On 9 August 1989 at Alice Springs in the Northern Territory of Australia deprived Maria Fe Robinson of her personal liberty in that the said Zenaida Go, in the company of one or more unknown persons, bound the wrists and feet of the said Maria Fe Robinson against her will and detained her in the toilet of the said Maria Fe's residence."

The argument on duplicity is that there are two or possibly three offences contained in the subsection, yet all have been charged in one count. The two separate offences are said to be:-

(a) Confining or detaining another person in any place against his will.

(b) Otherwise depriving a person of his personal liberty.

It was argued, somewhat faintly, that there could in fact be two separate offences in the first example, namely "confining" or "detaining", but I am not so persuaded; because if a person is held against his will in any place I think he could be described as both "confined" and "detained". The former word may connote a somewhat more severe detention but it remains a detention.

Although the subsection is not free from doubt I consider that the expression "confines or detains another in any place against his will" and the expression "or otherwise" are both subordinate to the phrase "deprives another of his personal liberty". That is the mischief which the act is designed to prevent. "Every unlawful restraint on the liberty of a person, by confining him in custody, is a false imprisonment and a common law crime." (Brett & Waller - Criminal Law - 1983 - 5th Ed. - 3.41).

Blackstone - Book III Ch. 8 II commences his discussion on the crime of false imprisonment in this way:-

> "We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment ...".

Although the Code does not describe the offence as false imprisonment the subsection, in my view, is clearly based on the common law position, the gravamen being deprivation of liberty.

If there is any doubt about this I think one may properly look at the heading. See Knight v Lambrick Contractors Ltd (1957) 1 QB 562 at 566 per Parker LJ. The heading is "Deprivation of Liberty".

The distinction therefore is not to be sought in the words "confines or detains ... or otherwise". That is, one does not look for some expression other than "confines" or "detains" to read with "or otherwise". The distinction is in the words "against his will or otherwise deprives another of his personal liberty". The words "or otherwise" are there to cover cases where the Code recognises, as the common law recognised, that there can be unlawful detentions of personal liberty even if it cannot be shown that such detention was against the will of the victim. Such cases can be easily imagined. Insane or very ill persons or very young children may not possess the capacity to consent. A drunken or drugged person may have temporarily lost the capacity to give consent or give a consent which is a real consent. Consent may be obtained by fraud or a trick. A person may be unlawfully deprived of his liberty without his knowledge; for example, if he is locked in while asleep;

for, even though the door be unlocked before he wakes, that period between locking and unlocking could still constitute a deprivation of personal liberty. Many of these examples are considered by Atkin LJ (as he then was) in Meering v Graham White Aviation Company Limited (1919) 122 LT 44 at 53-4. His Lordship said:-

> " It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious and while he is a lunatic. ... So a man might in fact, to my mind, be imprisoned by having the key of a door turned against him so that he is imprisoned in a room in fact although he does not know that the key has been turned."

I do not think that the older case of Herring v Boyle (1834) 1 C.M. & R 377: 149 ER 1126 would be consistent with any present day approach. It does not appear to have been cited in Meering (supra). It was a case where a schoolmaster had held a child in his school for seventeen days because the child's mother had not been able to pay the quarterly fees demanded. There was no evidence that the child himself was, to use the words of Bolland B., "cognizant of any restraint". The Court of Exchequer Chamber held that an action for trespass and false imprisonment was not maintainable. This case is not consistent with the principles stated in Meering (supra) and I do not think it would need statutory intervention to remove it. However, S.196(2) of the Code would now permit a

teacher to deprive a child of personal liberty only "by way of correction" and only if such deprivation was "reasonable under the circumstances".

If, therefore, the basis of the offence is deprivation of personal liberty, absent the excuses permitted in s.196(2) and (3), then s.196(1) establishes a single offence with examples of how that can occur.

I concede that the position would be clearer if the subsection commenced with the words "Any person who, by confining or detaining without consent or otherwise depriving a person of his personal liberty ...". I concede also that, even then, the words "or otherwise" are unfortunately placed to look as if they are to be read ejusdem generis with "confines or detains". But it seems to me that the only sensible interpretation and one which gives effect to cases where consent is vitiated by fraud or lack of capacity or lack of knowledge is the interpretation I have suggested.

It follows that the offence charged against the appellant in this case is not duplicitous or uncertain; since it alleges the deprivation of personal liberty and then gives particulars of how that deprivation was accomplished, and alleges that these things were done to the victim against her will.

In Romeyko v Samuel (1972) 19 FLR 322 at 345 Bray CJ says:-

> "The true distinction, broadly speaking, it seems to me is between a statute which penalizes one or more acts, in which case two or more offences are created, and a statute which penalizes one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course there will always be borderline cases ...".

These remarks were cited with approval by Woodward J. in Bowling v General Motors-Holdens Pty Ltd (1975) 8 ALR 197 at 218. His Honour there said:-

> "The contrast with cases in which a particular act is made unlawful by reason of any one of a number of surrounding circumstances, is even clearer. Provided only a single act is charged, alternative or cumulative allegations as to circumstances making it unlawful will not render it bad for uncertainty or duplicity."
>
> See also Linehan v Australian Public Service Association (1982) 66 FLR 90 at 110.

The single act charged here is deprivation of personal liberty.

The aide memoire directed the jury clearly to this issue by asking them if they were satisfied beyond reasonable doubt

"that the appellant, in the company of one or more unknown persons

(a) bound Maria Fe Robinson's hands and feet; and then

(b) detained her against her will;

(c) in the toilet of her residence."

While there may be room for some difference of wording, there is no doubt that, if the jury found all those matters beyond reasonable doubt, the offence of deprivation of liberty was established.

In my view, Ground 7 of the Notice of Appeal is not made out.

Nor can I find any basis for Ground 8 which alleges that the directions of the learned trial Judge on this count left a substantially different charge to the jury than that on which the appellant had been arraigned. I cannot see this in his Honour's directions and the aide memoire clearly follows the particulars given in the count.

I deal, however, with one other submission which might be included in this ground. That is that the learned trial Judge did not direct the jury as to the meaning of the expression "deprived Maria Fe Robinson of her personal liberty". His Honour does speak of the "deprivation of personal liberty charge" (at 601 of the Appeal Book) and he

repeats that on the same page by referring to the terms of the indictment. He does not explain it further.

While I would, with respect, have thought that something further may have assisted, I am not satisfied that the jury were left in any confusion or uncertainty by this omission. As the learned Crown Prosecutor points out, the words are plain enough, and the circumstances alleged, to which his Honour did advert both in his summing up and in his aide memoire, would, if proved, leave no doubt in the mind of any reasonable person that this was a case of deprivation of personal liberty.

I do not consider that the omission to go further than the learned trial Judge did in dealing with the expression constituted anything like a miscarriage of justice. The allegations as to the binding and confining of the victim were clearly made and the jury obviously accepted the account of the victim on these matters. Once the jury accepted that account, a very strong case of deprivation of personal liberty was made out; and made out in circumstances which rendered the offence particularly heinous. To invade the home of a defenceless woman left alone with her baby and to tie her up and imprison her in her own home argues a considerable degree of callousness and cruelty in the appellant even if she was not the person who submitted the victim to the severe assault then inflicted on her. In my

view the appellant received an eminently fair trial and was convicted on the clearest evidence and nothing appears to substantiate the grounds of appeal.

I would dismiss the appeal and confirm the conviction.

GALLOP J: I have read the respective judgments of the Chief Justice and Angel J. in this appeal. I agree that the appeal must be dismissed and the convictions confirmed.

I desire to add only a few comments of my own in relation to the grounds of appeal directed to the third count in the indictment. Those grounds were grounds 7 and 8 in the following terms:

> "7. That the indictment and conviction on Count 3 is duplicitous or uncertain.
>
> 8. That the Learned Trial Judge's directions to the Jury on Count 3 of the Indictment left to the Jury a substantially different charge than that upon which the accused (appellant) had been arraigned."

Count 3 purported to charge an offence against s.196(1) of the Criminal Code and was in the following terms:

> Count 3
>
> "On 9 August 1989 at Alice Springs in the Northern Territory of Australia, deprived Maria Fe Robinson of her personal liberty in that the said Zenaida Go, in the company of one or more unknown persons, bound the wrists and feet of the said Maria Fe Robinson against her will and detained her in the toilet of the said Maria Fe Robinson's residence."

Section 196(1) of the Code is in the following terms:

> "(1) Any person who confines or detains another in any place against his will or otherwise

> deprives another of his personal liberty is guilty of a crime and is liable to imprisonment for 7 years."

The appellant's argument in support of grounds 7 and 8 was that a number of offences are created by s.196(1) and all those offences have been charged in count 3.

It is necessary to dissect s.196(1) and ascertain whether it does in fact create a number of different offences or only one offence. The exercise was identified by Bray CJ in Romeyko v Samuels (1972) 19 FLR 322 at 345:

> "The true distinction ... is between a statute which penalizes one or more acts, in which case two or more offences are created, and a statute which penalizes one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics."

In my opinion s.196(1) creates three disparate offences. The first is an offence of confining another in any place against his will; the second is detaining another in any place against his will; and the third is otherwise depriving another of his personal liberty.

The offences of confining and detaining another in any place against his will are quite specific offences which attract the criminal sanction of up to 7 years' imprisonment according to which specific act has been committed. The

offence of otherwise depriving another of his personal liberty emphasises an indeterminate category of conduct whereby a person is deprived of his personal liberty otherwise than by being confined in any place against his will, or detained in any place against his will. This third category of offence "has a penumbra of imprecision, the legislative intention being to strike at morally reprehensible conduct but conveniently to refrain from specifying precisely what conduct is to be criminal (Day and Riggs v Rugala (1978) 20 ACTR 3 per Blackburn CJ at p.7). For those reasons I disagree with the other members of the Court that s.196(1) creates one offence and one offence only of deprivation of personal liberty.

Count 3 of the indictment charges the appellant with having committed the third category of offence created by s.196(1), namely of depriving Maria Fe Robinson of her personal liberty, and gives particulars of the way in which that deprivation of personal liberty was achieved. So interpreted, the count charges one offence and one offence only.

I do not find it necessary to resort to the earlier law to determine the correct construction of s.196(1). Indeed some authorities dictate that courts should not go outside the Code to construe its true meaning.

In Bank of England v Vagliano Brothers [1891] AC 107 at 120, Lord Halsbury L.C. said:

> "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed."

Lord Herschell said at 144:

> "My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view."

Lord Herschell made it plain that resort to the previous state of the law might be proper, for example, in aiding in the construction of provisions of doubtful import, or in ascertaining the meaning of words which have acquired a technical meaning or which are used in the code in other than their ordinary meaning. He said at p.145:

> "What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

He later said:

> "... I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment."

See also Robinson v Canadian Pacific Railway Co [1892] AC 481 at 487.

In Brennan v The Queen (1936) 55 CLR 253, the High Court was concerned with the application of ss.7 and 8 of the Criminal Code 1913 (WA). Dixon and Evatt JJ. said of s.8, at 263:

> "... it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered (Cf., per Lord Herschell, Bank of England v Vagliano Brothers (1891) AC 107, at pp.144, 145)."

That approach was adopted in construing the Singapore Penal Code in its application to the Territory of Christmas Island (Chong Wooi Sing and Toh Yuh Teng v The Queen (1989) 40 A Crim R 22).

A similar approach was adopted to the New Zealand Criminal Code in R v Hare (1910) 29 NZLR 641, and In R v Cox [1923] NZLR 596 at 598.

This approach to the construction of a code is well settled. R v Scarth [1945] St. R. Qd. 38 at 43-4, 47-9; R v Smith [1949] St. R. Qd. 126 at 129-130; R v Knutsen [1963] Qd. R 157 at 170-1; Ward v R [1972] WAR 36; R v Kusu [1981] Qd. R. 136. But it is not always followed. Despite what the High Court said in Brennan v The Queen, supra, Windeyer J. adopted an alternative approach in Vallance v The Queen (1961) 108 CLR 56 at 74. Referring to the Tasmanian Criminal Code, he pointed out that in some places the Code stated common law principles in words that had long been familiar; other parts of it were an assembly of old statute law enacted in such a way as to fit in with the language of the Code; other parts modified the former statute law. He summarised his observations in the following passage:

> "The Code is to be read without any preconception that any particular provision has or has not altered the law. It is to be read as an enactment of the Tasmanian Parliament. And interesting though it is to compare it with other codes, such as that of Queensland from which it is derived, or with projected codes such as Stephen's Code, they cannot govern its interpretation. But it was enacted when it could be said of the criminal law that it was 'governed by established principles of criminal responsibility'. And for that reason we cannot interpret its general provisions concerning such basic principles as if they were written on a tabula rasa, with all that used to be there removed and forgotten. Rather is ch. iv of the Code

written on a palimpsest, with the old writing still discernible behind."

A middle course was adopted by Mason J (as he then was) in Sungravure Pty Ltd v Middle East Airlines Airliban Sal (1975) 5 ALR 147 at 164. In respect of the code under consideration he said:

> "Its meaning, therefore, is to be ascertained in the first instance from its language and the natural meaning of that language is not to be qualified by considerations deriving from the antecedent law (Bank of England v Vagliano Bros [1891] AC 107 at 144-5; [1891-4] All ER Rep 93). An appeal to earlier decisions can only be justified if the language of the statue is itself doubtful or if some other special ground is made out, eg if words used have previously acquired a technical meaning. Here the ordinary meaning of the words is clear and it is not suggested that they previously acquired a technical meaning. Accordingly, it is not to be presumed that the section was intended to reiterate the antecedent law or to conform as closely as possible to that law."

Mason CJ repeated those observations in Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd (1987) 72 ALR 321 at 325.

In this matter the reason that an appeal to earlier decisions is not necessary is that the language of s.196(1) of the Criminal Code is not doubtful, nor have its words previously acquired a technical meaning.

I would dismiss the appeal and confirm the convictions.

ANGEL J: I respectfully agree with the reasons and conclusions of the learned Chief Justice. Because this appeal raises some questions of importance I add some comments.

I agree with the learned Chief Justice that s.312 of the Criminal Code is not, as was submitted, to be read down by reference to other sections of the Criminal Code, in particular s.326(2), but rather is to be read as conferring a wide power of amendment exercisable at any time during the trial, subject always, of course, to there being no injustice as a consequence. I think the word "defective" in s.312 is to be given its ordinary meaning, that is, faulty or wanting. Some defects will render an indictment a nullity, some will not. Here an element of the offence of robbery - which had to be proved in order to secure a conviction - was omitted from the indictment, but that did not render the indictment a nullity; so much is made clear by s.305(3) of the Criminal Code, and Particulars of that element might have been sought pursuant to s.313 of the Criminal Code. Be that as it may, s.312 of the Criminal Code may be employed to cure any defect, whether it be such as to render the indictment a nullity or not. An error in a date or description or something that merely confuses or has the potential for confusion, though not rendering the indictment a nullity, nevertheless may be corrected by amendment. The power to amend may be resorted to, it seems to me, however wanting the indictment.

The original indictment was defective or wanting in that it failed to properly discriminate between the offence itself and the circumstances in aggravation thereof. While pleading requirements in the criminal jurisdiction are not as stringent as in former times, it still behoves the Crown to comply with s.305 of the Criminal Code and to discretely allege the offence itself and the circumstances of aggravation; not only is this to avoid confusion or unfairness to the accused, but in order to enable the trial judge to direct a jury in the manner discussed in O'Brien v Fraser (1990) 66 NTR 9, a decision with which I respectfully agree. In the present case the indictment in its original form, although complying with s.305 of the Criminal Code, called for amendment.

In this case the amendment was made without injustice to the accused. The accused was never under any misapprehension that she was facing a charge of robbery. The indictment as originally drawn, and upon which the accused was arraigned and to which she pleaded not guilty, used the word "robbery" and specifically referred to s.211(1) and (2) of the Criminal Code. The Crown prosecutor opened the Crown case as that of robbery and the evidence called was directed to proof of robbery.

Mr Mildren QC for the applicant submitted that s.312 did not permit an amendment whereby a more serious offence was

substituted for a lesser offence. He argued that the indictment in its original form alleged the offence of stealing simpliciter and that the amendment allowed by the learned trial judge impermissibly substituted the more serious offence of robbery. I have already said that I think the indictment as originally drawn charged robbery, but even if the charge had been stealing as contended, there is nothing, injustice to the accused apart, which prohibits such an amendment; in my view, such an amendment is enabled by the wide terms of s.312 of the Criminal Code.

In respect of the third count, I respectfully agree with the learned Chief Justice that s.196(1) of the Criminal Code prescribes only one offence, that of deprivation of personal liberty. I do not think the third count is duplicitous.

I, too, would dismiss the appeal and confirm the convictions.