45/79

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

R v DIXON

Fox J

20, 30 June 1975 — 22 ACTR 13

CRIMINAL LAW – SEXUAL OFFENCES – RAPE – INDECENT ASSAULT – SENTENCING PRINCIPLES TO BE APPLIED – NON-PAROLE PERIOD – SETTING OF – SENTENCING PRINCIPLES OF SEXUAL OFFENCES – RAPE – INDECENT ASSAULT – PURPOSES OF PUNISHMENT FOR CRIME – DETERRENT EFFECT OF PUNISHMENT – STATISTICS AND RESEARCH AS TO – IMPORTANCE OF THE VIEWS OF THE GENERAL PUBLIC IN SENTENCES IMPOSED IN PARTICULAR CLASSES OF CRIME – SIGNIFICANCE OF THE FACT THAT MOST CRIME IS COMMITTED BY YOUNG PEOPLE – QUESTION OF GAOL FOR YOUNG PEOPLE – NON-PAROLE PERIODS – SETTING OF.

The accused pleaded to a charge of assault occasioning actual bodily harm and not guilty to charges of rape and of indecent assault which offences all occurred on the one occasion, at night time in an isolated bush setting, where the accused and the young woman whom he assaulted and raped were alone. The jury found the accused guilty on both counts; and he was present before the court to be sentenced on all three offences.

HELD: In sentencing the accused in respect of the conviction for rape, to six and a half years' imprisonment with a non-parole period of three years, in respect of indecent assault to the rising of the court, and in respect of assault occasioning actual bodily harm to one year's imprisonment with a non-parole period of six months, that term to be concurrent with the first term; that:—
The jury had been directed that they were to examine the case dispassionately, and were not to allow feelings of distaste or abhorrence to cloud their judgment; and a similar caution must be applied to the sentencing judge; his duty is to do justice to the Crown, as representing the community, and also, at the same time, to the guilty person. Particular care must be taken not to assume too readily that particular types of sexual conduct, as for example, oral genital contacts, are regarded by the community as indecent or abhorrent. One does not know whether there is any community consensus on such matters and, if so, what it is. It seems that sexual behaviour varies enormously and what in one place, among some people, is regarded as wrong, or distasteful, is regarded by others as quite normal. If sexual behaviour forced by one on another, as when accompanying an act of rape, the situation is quite different, and an adverse community view can be assumed. The critical matter then is that one partner was unwilling, and what was done is to be judged in the light of that factor, and not simply by reference to some assumed wrongfulness, even between consenting people, of the particular type of conduct.

HELD also, that: The effect of determining a non-parole period is to fix a period "during which the person so sentenced is not to be eligible to be released on parole...". In so doing the judge is not making any decision as to when the prisoner is to be released. This remains a matter entirely for the executive government. It cannot release on parole until the period has elapsed, and it cannot keep the prisoner in gaol beyond the period of the sentence (less remissions provided for by law): But it has complete discretion as to when, within those limits, the particular prisoner is to be released. A large part of the sentencing power is therefore in its hands. What factors it takes into account are a matter for it; they are not made public. The period of the parole is the balance remaining of the sentence of imprisonment imposed. In fixing a non-parole period the court has in mind that remissions to which a prisoner might become entitled could amount to almost 30 per cent of his sentence. Quite often the non-parole period is about one third of the sentence imposed, although it is sometimes one half, or more, and in rare cases the period fixed is in effect the whole term of the sentence. Of the 45 persons convicted of rape in New South Wales in 1973 (of whom 41 were sent to prison), 22 were given non-parole periods of under two years and a further ten were given periods of under three years. Only one was given a period of five years or over. These figures may be lower than otherwise would have been the case, because of a view of the law respecting non-parole periods which was current for part of the period but which has since been overruled. In the present case an appropriate non-parole period, in respect to the charge of rape, was three years.

Observations by Fox J on the purposes of punishment for crime, the deterrent effect of punishment, the importance of the views of the general public on sentences imposed in particular classes of crime, the significance of the fact that most crime is committed by young people, the question of gaol for young people.

TRIAL

The accused was charged with assault and sexual offences. The following reasons of the trial judge Fox J set out the reasons for the sentences imposed and explain in some detail the principles to be applied to the sentencing of sexual offenders.

FOX J: In this case, for reasons I gave at the time, I reserved my decision on the question of sentence.

Lyall Michael Dixon was charged with three offences; (a) rape; (b) assault occasioning bodily injury; (c) indecent assault. He pleaded guilty to the charge of assault occasioning bodily injury and not guilty to the others. The jury found him guilty of those two, and he is now to be sentenced in respect of all three. They all occurred on the one occasion, at night time in an isolated bush setting some miles from Canberra, where he and the young woman whom he assaulted and raped were alone.

I shall deal first with the offence of rape. What that crime involves is sexual intercourse without the consent of the woman. Sexual intercourse for this purpose does not mean a completed act of intercourse. It is sufficient that the penis enter the vagina, even to the smallest extent, or for the briefest period. It is not an essential ingredient of the crime that force be used, although commonly there is some force or threat of force. There is a general requirement of the law that a person is not be convicted of a crime unless at the relevant time he intended to do what he did, and had knowledge of the facts that made his acts a crime. In cases of rape, that means that the Crown must prove, and prove beyond reasonable doubt, either that the accused knew at the time of intercourse that the woman was not consenting or that he knew that she might not be consenting and nevertheless had intercourse, not caring whether she was consenting or not. If a woman consents, but only because of threats of violence, she is not to be regarded as having consented. Very difficult questions of fact are often involved in coming to a confident conclusion on these issues.

In the present case, both offender and victim are 18 years of age and total strangers to each other. He had earlier on the same evening been jilted by his girl friend, and had turned his attention to finding other female company. He had a motor cycle and he seems to me to have had an excessive confidence, amounting to arrogance, in his ability to entice young women on to his motor cycle and later seduce them. The young woman was a student, intelligent and well educated. She was boarding at a home near Civic Centre. She had a part-time job in the evenings as a cleaner, and was returning on the night in question, about 9.00pm, from her place of work to the house in which she lived. The young man saw her, thought her attractive and invited her to accompany him on a bike ride. She refused and walked on. He persisted, and on one or two occasions partly blocked her path. After several unsuccessful attempts at persuasion, he left her and went some distance ahead. He parked his motor cycle behind a tennis court, off the road, and waited to see if the route the young woman was taking could bring her near to where he was. It did so, and in a garden area near the tennis court he again intercepted her. When she protested he grabbed her arm and said not to do anything as he had a knife. She struggled and he pinned her arm behind her back saying; "Don't worry, I'm not going to rape you. I just want you to come with me." He did not produce a knife and the young woman soon came to doubt whether he had one. He then took her firmly by the hand and led her to where his bike was. When she screamed, he bent her thumb back and threatened that he would break it if she screamed again. She then said that if he didn't hurt her, she would go with him for a ride. She put on a crash helmet and got on the bike. It is possible that, had she been sufficiently composed and rational, she could have escaped from him at this stage. The accused made much of this circumstance when in his statement to the jury he said that he thought, and had grounds for believing, that she was willing to go with him. With the young woman on the pillion seat of his bike, he drove through the outskirts of the city. He had to stop two or three times at traffic lights, and again it is possible that she could have escaped. Once out of the city, he drove at speed past the airport to the secluded spot where the offence took place.

After they had dismounted from the bike, the victim managed to kick the young man in the groin, apparently when he was partly turned away from her. He swung around and hit her a hard blow over the left eye. This was the assault to which he pleaded guilty. She fell to the ground, and soon her eyelid closed up, and bleeding commenced in that area. He said he was sorry, but threatened to hit her again "if she tried anything more". Soon afterwards, despite her pleas that he not do

anything, he undressed her. She assisted in the removal of one or two garments in order to avoid buttons being torn off or clothes ripped. He then caressed her. She was a virgin, and in answer to his question told him so. He attempted to carry out his own visual inspection, and said he did not believe her. He told her to insert her own fingers in her vagina, which she did to a limited extent. He then inserted two of his fingers in her vagina. This was the indecent assault charge. He says he did this in order to stimulate her, he being of the view, so he said, that despite her earlier protests and the kick in the groin, she would acquiesce as soon as she was fully stimulated. At his direction, she took his penis into her month. She was hopeful that by doing these things she would satisfy him and avoid being raped. Although she repeatedly asked him to stop she did not at this stage oppose him with force, scratch or kick him, or twist or turn. He then, without the use of more force than the act itself required, had intercourse with her, ejaculation taking place. For her the intercourse was very painful and she screamed. He said that if she didn't stop he would bash her. They dressed, and he asked her where she wanted to go to, home or hospital. She said to the hospital, and he drove her to the Casualty Department of the Canberra Hospital, He was arrested the following day. I imagine that once she made a complaint to the police this was inevitable, because she had noted the number of the motor cycle, and it was registered in his name. He first came to trial in March this year, but the jury disagreed on the counts of rape and indecent assault, and he was remanded for re-trial.

Until 1968, the only punishment for rape in this Territory was death. In that year, an Ordinance was made which provided a maximum penalty of imprisonment for life. A similar penalty is found in other jurisdictions, for example New South Wales. In fact, the punishment imposed is usually much less than life imprisonment, although, when speaking of life imprisonment it is to be borne in mind that in some places, such as England, this will only involve ten or so years of imprisonment before release on licence.

Rape is a crime which comprehends an immensely wide variety of circumstances, and as many degrees of culpability. The authors of a recent research article ("The Offence of Rape in Victoria", by Hodgens, McFadyen, Failla and Daly, *Australian and New Zealand Journal of Criminology*, vol 5, p225) say that rape is an over-generalized category. The fact that the one offence, called rape, relates to so many different situations creates problems for all, and can readily lead to public misunderstanding. Although the motivation of the offender is simply sexual gratification in most cases, it is thought in some eases at least to be related to an aggressive desire to humiliate and debase the woman. A significant number of offenders seem to find little morally wrong with obtaining sexual gratification without consent, provided the woman is not knocked around. The offender very often has had extensive and frequent sexual experience from an early age.

In some cases, persons convicted of rape are released on a bond. In 1973, in New South Wales, this was the case with five out of 46 convicted persons. In England and Wales, there is a much wider range of sentences available than is the case here, or in New South Wales. In 1971 (the latest figures available to me) of 254 people convicted in the higher courts of England and Wales six were conditionally discharged, 11 were released on probation, two were fined and 18 were given suspended sentences. Only 178 were given immediate imprisonment, although an additional 23, being juveniles, were sent to Borstal training.

In New South Wales in 1973, 12 persons were sentenced to less than five years' imprisonment, and a further 26 received sentences of between five and ten years. In England and Wales, sentences of imprisonment are lighter. In 1971, for example, of the 178 persons sent to imprisonment, 145 received sentences of five years or less, and 91 were sentenced to three years or less. Only six were sentenced to more than ten years. I understand that this pattern still continues.

Most serious crime whether against the person or against property is committed by persons under 25. In the case of rape, 16 out of 46 offenders previously referred to were under 20; a further 22 were under 25. In England and Wales, in 1971, 24 rape offenders were under 17. Of the 254 previously referred to, a total of 107 were under 21 and a further 48 were under 25. In dealing with all these figures, however, it is to be remembered that they are total figures, and do not necessarily represent the position with regard to any particular category of offender. It is also to be borne in mind that, as a person who aids and abets may be committed for rape, the figures may include some who did not themselves have intercourse.

As to the incidence of the crime, the only reliable statistics relate to convictions, and I have already referred to the convictions in England and Wales and in New South Wales. In Victoria, in 1971, there were 31 convictions. In this Territory, there were in the six years 1969-1974, six convictions.

Many attempts have been made to state the purposes of punishment for crime. Expressed in the most general form, the fundamental purpose is the protection of society. Within the broad concept, five more particular purposes are commonly referred to. These are (a) the deterrence of the particular offender; (b) the deterrence of others who might be inclined to commit similar offences; (c) the reformation of the particular offender; (d) the exaction of retribution, or the manifesting of denunciation, on behalf of society, and (e) the securing of society from further harm by the detention of the offender. In considering what punishment to impose, courts give their main attention to these factors, but sometimes others intrude, which do not readily fit under any of the five heads. In their application some of the objects stated will be in a greater or less degree of conflict with others. In any event they are not mutually exclusive. A function of the judge is to decide which of them should predominate in the particular case. The particular case takes account of the circumstances and personality of the particular offender. Degrees of moral blameworthiness differ. Punishment has not only to fit the crime, but be appropriate for the particular individual. The result is that persons who commit crimes similar in nature may nevertheless be punished differently. This problem becomes acute when different people have to be sentenced at the one time for the same offence. The punishment must, in justice, be the minimum consistent with a reasonable attempt to attain the objects mentioned.

It is an assumption the legislature makes when providing for gaol sentences, that the threat of such a sentence will act as a deterrent. Undoubtedly this has been the general belief. Until very recently no attempt had been made to examine carefully the accuracy of the assumption, or correctness of, the belief. Results to date have not been very helpful, one way or the other. There is some evidence that crime can be controlled satisfactorily without gaol sentences at all, although custodial arrangements have still to be made for some people. There is some evidence that the deterrent effect is strong in relation to people whom it is assumed are not in the least likely to commit crime anyway, and weak to the point of being non-existent in relation to people prone to commit crime. The deterrent effect in any event will vary according to the type of crime and even with the one type of crime will vary according to the predisposing conditions. History has shown that the harshest penalties will not reduce crimes against property or even crimes of violence where the culprit is driven by sheer need. Crimes of passion may not be seriously impeded, even by threats of the death penalty. In a survey carried out in Queensland not long ago, relative to the death penalty, the researchers felt unable to conclude that it operated effectively as a deterrent (Barber and Wilson, *Deterrent Aspects of Capital Punishment and its Effect on Conviction Rates*, Australian and New Zealand Journal of Criminology, vol 1, p100). They did say, however, and this is another aspect of the matter, that there was evidence that if death was likely to follow, juries were less likely to convict. I do not wish to express any view on the desirability of having a death penalty; this remains a matter of public controversy into which I do not wish to enter. However, it is not irrelevant to a court's considerations when sentencing that if a sentence is considered as harsh by a significant number of the public it may be counter-productive, by leading to fewer convictions.

In a more recent survey, relating specifically to rape, one of the authors just mentioned (RN Barber), expressed the view that the materials he examined lent some support to the view that heavy sentences act as a deterrent, at least to "pack" rapists, whom he distinguished from "solo" rapists (*Australian and New Zealand Journal of Criminology*, vol 6, p230). Another view which finds support is that harsh penalties are apt to lead to greater violence in the commission of crime, and the experience of the last century or two is referred to. In general, a belief in the deterrent effect of punishment, and in particular heavy punishment, remains at the heart of current sentencing Practice. Perhaps the greatest danger in this connection is that too many people may come to believe that an increase in penalties will have a dramatic effect in reducing the crime rate. This is contrary to all experience. Heavier sentences may, in relation to some crimes in some situations, help to reduce the incidence of that crime, but the main answers to the problem have to be found elsewhere. One factor which it is established does help to reduce crime, and to do so more than any increase in penalties, is a high degree of certainty of arrest and conviction. This is a matter for law enforcement agencies and procedures.

The views of the general public are important in a number of ways, public confidence in the administration of justice is important, indeed vital, and if sentences do not have a general acceptance, that confidence will flag. From the court's point of view it is not easy to determine how the ordinary member of the public thinks on such natters. And, of course it is not possible to put him in possession of all relevant facts about a particular case or all relevant knowledge as it bears on the subject in hand. The court not infrequently learns of the view of particular people, and of the more vocal sections of the community, but these may not be representative and may be ill-informed.

In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. One bears in mind in this connection what the statistics show, namely that most crime is committed by young people. In my experience, most of, but by no means all, young people who are convicted of crime have had an unsatisfactory or seriously disadvantaged upbringing. Most have left school at a relatively early age, often without obtaining any school qualifications such as the School Certificate. This leaves them at a serious disadvantage in a competitive society. Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long.

The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are found to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self improvement. The irony is that prison authorities are among the strongest advocates of reform.

One avenue of reform, already developed in some countries, is to reduce the emphasis on prison by providing a variety of custodial and semi-custodial alternatives. At present there are in this Territory but two alternatives, gaol and complete freedom, the latter limited only by the requirements of a bond. A man sent to gaol is, of course, one less person in the workforce. The taxpayer not only has to support his dependants, but also to pay the cost of maintaining him in gaol. At present I understand that this is in excess of $60 per week.

When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.

In a case such as the present, there can be no question of the release of the convicted person on a bond. This would, I think, offend the community sense of what is fit and proper. Negatively, such a course could be interpreted as depreciatory of the seriousness of the crime. It could be regarded almost as an invitation to others to commit like crimes. Doubtless this latter aspect is but an unproved assertion; it is the other face of the unproved assertion about general deterrence. Nevertheless, it remains the general belief, of those closely concerned with criminal justice system as with the public generally. Moreover, and for similar reasons, the gaol sentence must be a substantial one. The objects of deterring others, and of exacting retribution and denouncing the crime, must predominate, while the object of reforming the offender must become secondary. A sentence which might reasonably be regarded as sufficient to deter the particular offender will, in the circumstances, be less than that which is necessary to satisfy the other objects mentioned.

I have already stated the facts of the offence, and some matters concerning the particular offender.

At the time of the offence he was living with his family. I am told that they are a close-knit family showing real concern for each other. Lyall Dixon, I am told, has "caused concern for some time". He left school in 1972, having reached fourth form, without gaining any educational certificates. He then had a number of jobs seven in all in none of which he remained for any length of time. I am told by the welfare officer that for reasons arising within the family circle he suffers from "an inferiority complex which he has sought to overcome by any and every means at his disposal". He is a young man who is "desperately trying to make an impression". The Police report that he is not known to be an associate of criminals or "the local hoodlum element". He said in court that he had frequently had sexual intercourse, and had quite often experienced a degree of opposition, or reluctance. When 15½ years old he committed in this Territory over a period of about a month, nine offences of breaking into premises and stealing, five offences of breaking into premises with the intention of stealing and one of maliciously damaging property. He was brought before the Canberra Children's Court and committed to an institution in New South Wales. The order for committal was suspended, however, on his entering into a recognizance to be of good behaviour for two years, and to accept the supervision of a Child Welfare officer during that period. Six months later, while his recognizance was in force, he had unlawful intercourse with a girl under 16 years of age. On 5 December 1972 he was dealt with for this offence by the Children's Court, being released on probation for two years from that date. The terms of the recognizance then entered into included one that he "not be on premises such as Phillip Amusement Centre", that he remain in regular employment and that he not associate with persons not approved by a welfare officer, or his parents. So far as appears, no action was then taken in respect of the breach of the earlier recognizance.

The present offence constitutes a breach of the recognizance entered into in December 1972. This court does not have jurisdiction to deal with the breach, and in view of the fact that he will now be sentenced to a substantial period of imprisonment it is unlikely that any action will be taken in respect of it. The fact that he has committed these offences is relevant when considering the sentence now to be imposed, but care must be taken that he is not in effect punished twice for them. It is also relevant that at the time he committed the present offence he was on probation; but as I have said, it is not for this court to punish him for the breach involved.

I directed the jury that they were to examine the case dispassionately, and were not to allow feelings of distaste or abhorrence to cloud their judgment. A similar caution must, I think, be applied to the sentencing judge; his duty is to do justice to the Crown, as representing the community, and also, at the same time, to the guilty person. Particular care must be taken not to assume too readily that particular types of sexual conduct, as, for example, oral genital contacts, are regarded by the community as indecent or abhorrent. One does not know whether there is any community consensus on such matters, and, if so, what it is. It seems to be the result of investigation carried out by Kinsey, Masters and Johnson, and others, that sexual behaviour varies enormously and what in one place, among some people, is regarded as wrong, or distasteful, is regarded by others as quite normal. If sexual behaviour is forced by one on another, as when accompanying an act of rape, the situation is quite different, and an adverse community view can be assumed. The critical matter then is that one partner is unwilling, and what was done is to be judged in the light of that factor, and not simply by reference to some assumed wrongfulness, even between consenting people, of the particular type of conduct.

As I have set out the facts, it adds little to attempt to characterize the conduct involved. Undoubtedly the young woman underwent a horrible experience. It was none of her choosing, nor did she contribute to it in any way. She cannot be criticized for not having managed to get away. The fact that she might have had an opportunity to do so is only relevant to the state of mind, or belief of the offender when she did not do so. The long term consequences for her cannot be assessed. In my estimation of her, she seems to have been mature and well adjusted, as well as intelligent, and the ill consequences in her case may well be minimal. Certainly she gave her evidence competently and with composure, and no evidence was given of any enduring harm. Nevertheless, the awful memories of the night must remain with her for a very long time.

Lyall Dixon was arrogant and brutal. In his favour it can be said that he did not proceed with a fixed determination to use violence. His hope, if not his expectation, was that very little, if any, force would be necessary. A degree of coercion was to him a quite normal concomitant of seduction. He recognized that threats of force, and some force might at some time be necessary but he believed

that with his experience he could eventually persuade his victim to acquiesce, or at least be so close to acquiescence that she would not complain afterwards. The blow to his victim's eye was a spontaneous reaction and not any part of his plan for coerced seduction. It was an immediate reaction to the kick he received.

There is no formula for converting all these considerations into a number of years of imprisonment. In order to be reasonably sure that Lyall Dixon will not offend again, it is not necessary to send him to gaol for more than, say, three or four years. The fact that he has prior convictions, has twice committed breaches of recognizance, and has failed to take advantage of probation, suggests that this period needs to be longer than would otherwise be the case, but I do not, think it need be longer than the period mentioned. The statistics show that, overall, persons sentenced for rape do not repeat the offence. A notable exception is the person with a serious psychiatric disturbance, and such a condition has not been suggested in the present case. Lyall Dixon is young, he turned 18 only a few days, before the present offence. It is nevertheless difficult to give much weight to this factor because of the seriousness of the crime and because, as I have said, most offences of rape are committed by young people. The purposes of punishment which have a predominant place in a case such as the present are the deterrence of others, and denunciation of the crime. At the same time, it is necessary to take into account mitigating circumstances which go to lessen what might otherwise be thought to be a term appropriate to satisfy those purposes.

In all the circumstances I think that the appropriate punishment is imprisonment for six and a half years. I can only hope that in his case the prison authorities will do what they can to minimize the socially undesirable consequences of imprisonment to which I have referred, and to assist the rehabilitation of the prisoner. With this in mind I recommend that consideration be given to his serving his sentence in a light security establishment, away from hardened criminals.

It is necessary to fix a non-parole period. In this Territory, the power to release on parole is vested in the Governor-General, acting with the advice of the Attorney-General. There is no parole board, or independent parole authority, and the time of release on parole and the conditions of the parole order are not matters over which a judge or magistrate has any control, or about which, in the ordinary course, they receive any information. This is a bad system, and I understand that steps are being taken to change it.

The effect of determining a non-parole period is to fix a period "during which the person so sentenced is not to be eligible to be released on parole ..." In so doing the judge is not making any decision as to when the prisoner is to be released. This remains a matter entirely for the executive government. It cannot release on parole until the period has elapsed, and it cannot keep the prisoner in gaol beyond the period of the sentence (less remissions provided for by law). But it has complete discretion as to when, within those limits, the particular prisoner is to be released. A large part of the sentencing power is therefore in its hands. What factors it takes into account are a matter for it; they are not made public. The period of the parole is the balance remaining of the sentence of imprisonment imposed.

In fixing a non-parole period the court has in mind that remissions to which a prisoner might become entitled could amount to almost 30 per cent of his sentence. Quite often the non-parole period is about one third of the sentence imposed, although it is sometimes one half or more, and in rare cases the period fixed is in effect the whole term of the sentence. Of the 45 persons convicted of rape in New South Wales in 1973 (of whom 41 were sent to prison) 22 were given non-parole periods of under two years, and a further ten were given periods of under three years. Only one was given a period of five years or over. These figures may be lower than otherwise would have been the case, because of a view of the law respecting non-parole periods which was current for part of the period, but which has since been overruled.

In the present case I am of the view that an appropriate non-parole period is three years. It is not necessary to say much more about the conviction for the blow to the eye. I have already said what happened, and discussed the surrounding facts. It was a severe blow. Before the jury the accused said it was a reflex action, after he had been kicked in the groin. The evidence does show, I think, that it was a swinging hit not deliberately aimed at the eye of the victim.

In respect of this charge I sentence the accused to imprisonment for 12 months, to be served

concurrently with the sentence for rape. I fix a non-parole period of six months in respect of this offence. The indecent assault was in my view an incident of the rape. I allowed this charge to go to the jury, additionally to, and not simply as an alternative to, the charge of rape, but in my opinion it would be wrong to sentence the accused to anything more than a nominal punishment in respect of it, because it has inevitably been necessary to take it into account when dealing with the sentence for the more serious offence. It is, however, necessary to impose some sentence, and I order that, in respect of this charge, Lyall Dixon be sentenced to the rising of the court.

APPEARANCES: JK Bowen, counsel for the Crown. Crown Solicitor. JJA Kelly, counsel for the accused. Australian Legal Aid.
