BOOK REVIEWS

THE BEAMISH CASE. By Peter Brett. Melbourne University Press. 1966. Pp. 57. 75c.

In this pamphlet Peter Brett, who is Professor of Jurisprudence in the University of Melbourne, argues that Darryl Raymond Beamish, who was convicted on 15th August 1961 of the wilful murder of Jillian Brewer, has been the victim of a miscarriage of justice. Beamish was sentenced to death for the murder, but the jury made a strong recommendation to mercy and the death sentence was commuted to imprisonment for life. Beamish is now serving this sentence.

Jillian Brewer was murdered on the night of 19th/20th December 1959 in the bedroom of her ground floor flat in Brookwood Flats, Stirling Highway, Cottesloe, W.A. Her mother occupied the flat next door. Miss Brewer spent the evening of 19th December, which was a Saturday, in the flat with her fiancé, a Mr. Dinnie. At about 11.30 p.m. the couple retired to the bedroom. At midnight Dinnie left. When he returned at 9 a.m. the next morning to collect Miss Brewer for a game of golf, Dinnie found her dead body on the bed where he had left her. She was lying on her back and appeared to have been attacked in her sleep. There was no sign of any struggle. She had been struck several blows on the head, throat and lower body with a tomahawk, which was later found lying between a boundary fence of the flats and a shed on the adjoining block. She had also been stabbed several times in the breast and stomach with a pair of dress-making scissors, which were found on the divider between the living room of the flat and the kitchen. The stab wounds had bled very little, which suggested that the tomahawk wounds had been inflicted first and that some interval may have elapsed between the two sets of blows. The medical evidence was that the death had occurred between 2 a.m. and 6 a.m., between half an hour and two hours after her windpipe had been severed by one of the blows with the tomahawk. The tomahawk had been taken from the open garage of a house a few blocks away. It was ordinarily kept hanging on a nail,

and the owner thought that he had last seen it there about two weeks before the murder.

The police found no finger prints in the flat other than those of Miss Brewer and Dinnie, and there was nothing to indicate how the murderer had got into the flat. Dinnie had let himself out of the flat by the front door, which had a Yale type of lock. His evidence was that the back door of the flat, which was found locked after the murder, was always locked even in the daytime, with the key left on the inside of the lock. The only indication of when the murder was committed was a neighbour's statement that she heard Miss Brewer's poodle, which was under the bed when Dinnie left, bark three or four times at about 1 a.m. and then break off in the middle of a bark.

No progress was made in solving the crime until 7th April 1961, sixteen months later, when Beamish, a deaf mute then twenty years of age, pleaded guilty at the Perth Police Court to four charges of aggravated assault on young girls. In each case Beamish had enticed a girl of four or five years of age into his car, driven her to a secluded place, removed part of her clothing and masturbated himself while handling the girl's vagina.

Beamish was remanded in custody until the afternoon to await sentence. During this period he was taken by Detective-Sergeant Leitch, who was in charge of inquiries into the Brewer murder, down to the flat where Miss Brewer was killed. Beamish and Leitch were accompanied by another detective named Deering and by Mrs. Myatt, a public relations officer and interpreter for the Adult Deaf and Dumb Society, who had known Beamish for some time and had previously befriended him. Beamish communicated with others through sign language and finger spelling, which he had learnt at a school for the deaf and dumb, supplemented by lip reading and gesture. He could utter only a few words and could hear only shrill noises, such as a whistle. Though his vocabulary was limited, his intelligence was not below normal and his handwriting was quite fluent. He had held a driving licence for some years and he worked for his living.

At the flat Leitch asked Beamish through Mrs. Myatt whether he knew anything about Miss Brewer's murder. Beamish at first denied any knowledge of it, but on the way back to Perth in the police car he said that he wanted to tell the truth and that he had killed Miss Brewer. Later, at the C.I.B. office and at the flat, Beamish gave a

circumstantial account of the way he had got into the flat and attacked her with an "axe" and a pair of scissors. He led the police to the house from which he had taken the tomahawk.

The morning of the following day, April 8th 1961, Leitch, again accompanied by Mrs. Myatt and Deering, put a series of written questions to Beamish. To make sure that he understood each question, Mrs. Myatt also translated it into deaf and dumb signs. Beamish's written answers to these questions substantially confirmed his oral statement of the previous day. Later the same day, Beamish was seen to write something on the bitumen floor of the exercise yard of the police station, which included the words "Cottesloe" and, on another line, "I killed lady". Two months later, on 12th June 1961, Leitch again interviewed Beamish in Fremantle Prison, where he was serving a sentence of seven months imprisonment for the assaults of which he had been convicted on 7th April 1961. On this occasion, Leitch was accompanied by the Rev. Chetwynd, Chaplain to the Missions to Seamen, Dr. Thompson, the visiting psychiatrist to Fremantle Prison and the former Inspector General of the Insane, and Mrs. Myatt. The Rev. Chetwynd, who had long experience of dealing with the deaf and dumb, acted as interpreter. Leitch took Beamish through each question and answer of the written statement of 8th April 1961, and Beamish admitted that his answers were true. The Rev. Chetwynd was satisfied that Beamish understood the questions. According to the evidence of Dr. Thompson, Beamish was composed and answered the questions without mental stress. Only at the end of the questioning did he weep for a few moments. Four days later, on 16th June 1961, Beamish was charged with the wilful murder of Miss Brewer.

At his trial before Wolff C.J. and a jury, in August 1961, the evidence against Beamish consisted of these four confessions. His defence was that they were untrue and that Leitch had threatened and teased him into making them, with the assistance of Mrs. Myatt and the Rev. Chetwynd. He denied any knowledge of the murder until he was told of it by Mrs. Myatt on 7th April 1961. Apart from denying that he had admitted killing Miss Brewer in what he wrote on the floor of the exercise yard on 8th April 1961, Beamish did not deny that he made the statements attributed to him. His explanation of the details of the crime which he gave in these statements was that he had either guessed them or Mrs. Myatt had suggested them to him.

The jury found him guilty of wilful murder with a strong recommendation to mercy, and he was sentenced to death. An appeal against the conviction was dismissed by the W.A. Court of Criminal Appeal on 20th October 1961.[1] The main ground of appeal was that the trial judge should not have admitted Beamish's confessions of 7th April 1961 and 8th April 1961 because they were not shown to be voluntary. But the Court held that confessions had been properly admitted. An application was later made to the High Court of Australia for special leave to appeal from the decision of the Court of Criminal Appeal, but this too was refused. The death sentence was then commuted to imprisonment for life.

Two years later, on 1st September 1963, a man named Eric Edgar Cooke was arrested, and subsequently charged with five murders. Four of these murders were committed in 1963 and the other several years earlier, on 30th January 1959. Cooke confessed to these five murders and the police, after inquiry, entertained no doubt about his responsibility for them. The first of his victims, a woman, had been stabbed, the second and third were shot at different places on the same night, the fourth, another woman, was strangled, and the fifth, a young girl, was shot. Cooke was tried for one of these murders in November 1963, found guilty and sentenced to death. The jury rejected his plea of compulsive insanity.

On 5th September 1963, after Cooke had confessed to these five murders and to various wounding and housebreaking offences, a Detective-Sergeant named Dunne remarked to Cooke that it was a wonder that no-one had been "taken in" for one of his crimes. Cooke replied: "You can be assured, Mr. Dunne, that no-one has been charged or is doing time for any job I've done."[2] Five days later, however, on 10th September 1963, Cooke told Detective-Sergeant Neilson and two other police officers that he was also responsible for two further killings, for which two other men were then serving sentences of imprisonment. One of these was the Brewer murder; the other was the killing of a girl named Rosemary Anderson on 9th

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1 [1962] W.A.R. 85.

2 The details of the Beamish case in this review are taken from the Appeal Book prepared for the purpose of Beamish's appeal to the High Court of Australia in 1964 from the decision of the W.A. Court of Criminal Appeal dismissing his application for a new trial. The Appeal Book contains a transcript of the evidence at Beamish's trial before Wolff C.J. in August 1961, a transcript of the evidence before the W.A. Court of Criminal Appeal in Beamish's application for a new trial in February and March 1964, and the judgments of the Court in May 1964.

February 1963, for which a young man named Button was then serving a sentence of ten years imprisonment. Rosemary Anderson had been run down in the street by a car.

The next day the police took Cooke to the area where Miss Anderson had been killed and asked him to explain how and where he had run her down. Cooke supplied details, and these were later incorporated in a written statement. The police then pointed out to Cooke a number of discrepancies between his account of the crime and the known facts, whereupon he said that he could not have been the person responsible, and wrote out a retraction. In explanation, he said that he sometimes got so engrossed in the newspaper account of a crime that he believed he had taken part in it.

On the following day, 13th September 1963, the police asked Cooke to explain how he had killed Miss Brewer in 1959. He then gave a fairly detailed account of the crime, in which he described how he got into and out of the flat, the furnishings of the flat, the weapons he used and the blows he inflicted on Miss Brewer. The sequel was the same as on the previous day. The police pointed out a number of discrepancies between his account of the crime and the known facts, whereupon he retracted his confession, giving the same explanation: "I read something and then I seem to live the part in the story. I can see now I couldn't have done it, but I had to have it proved to me one way or another. It seems so real to me sometimes but I see now I couldn't have done it." He then confirmed to a senior officer, Inspector Lamb, that he was sure that he had not killed Miss Anderson and Miss Brewer, and apologised for causing trouble.

About a week later, Cooke told his solicitor that the police had shown him that he could not have killed Miss Anderson and Miss Brewer, and he again said that he sometimes became so engrossed in what he read that he became part of it. He told his solicitor that he had read in the newspaper where Miss Brewer was hit. But after further conversations with his solicitor, he again insisted that he had killed Miss Brewer and Miss Anderson. On 9th October 1963, in talking to a detective who escorted him to Fremantle Courthouse, Cooke said that he had killed Miss Brewer and that he had been in both Miss Brewer's and her mother's flat next door on several occasions. He said that, on the night he killed Miss Brewer, he entered the flat by the front door, which was open, and left by crawling through a flap in the bottom of the back door.

On 31st October 1963 Cooke affirmed to the Rev. Sullivan, who was visiting him in prison, that he had killed Miss Anderson and Miss Brewer, and gave a detailed account of how he had killed Miss Brewer. Cooke told the Rev. Sullivan that he had retracted his earlier confessions because he was ashamed of the nature of the two killings. Cooke's renewed claim to have killed Miss Brewer came to the notice of Beamish's legal advisers, and on 4th December 1963, after he had been convicted of one of the five murders referred to earlier, and sentenced to death, Cooke swore an affidavit confirming a written statement made to Beamish's solicitor in which he claimed to have killed Miss Brewer. On 6th December 1963, Beamish's solicitors petitioned the Governor for mercy on behalf of Beamish, on the ground that Cooke had confessed to killing Miss Brewer. On 4th February 1964, the Minister for Justice referred the conviction of Beamish to the Court of Criminal Appeal under section 21 of the Criminal Code. The effect of this section is to enable the Court to treat the reference as an appeal from conviction, with the ordinary power to set aside a conviction and order a new trial. The Criminal Code does not refer explicitly to the discovery of fresh evidence, but it is well established that the general power to set aside a conviction and order a new trial on the ground that there was a miscarriage of justice enables the court to take proper account of the discovery of fresh evidence since trial.

At the hearing of the reference, in February and March 1964, the Court, consisting of Wolff C.J., Jackson J. and Virtue J., had before it affidavits filed in support of the application from Cooke, the Rev. Sullivan and a private inquiry agent, Mr. Blight, who had been employed by Beamish's solicitors to check certain details of Cooke's confession. Against the application, the Crown filed affidavits from the police officers to whom Cooke had made statements, Cooke's solicitor and various other people whose testimony conflicted with details of Cooke's account of the crime. Cooke was brought from Fremantle Prison and was cross-examined at length by the Crown Prosecutor, and three of the Crown witnesses were briefly cross-examined by Beamish's counsel.

On 22nd May 1964 the Court delivered judgment dismissing Beamish's appeal. In a long judgment, of about 20,000 words, the Chief Justice, after stating the principles governing applications for a new trial on the ground of fresh evidence, analysed the nature of the case against Beamish at his trial, and came to the conclusion that it

was of great probative strength. He then subjected Cooke's various statements and his evidence in cross-examination to a close analysis and concluded that his claim to have killed Miss Brewer was so obviously fabricated that no court could conscientiously disturb the verdict against Beamish and order a new trial. Jackson J. and Virtue J., in shorter judgments, concurred in these views. In the following September the High Court of Australia refused an application for leave to appeal from the Court of Criminal Appeal's decision, and in April 1965 a further application to the Privy Council was also refused. Meanwhile, on 26th October 1964, Cooke was executed.

In his pamphlet, Brett expresses strong criticism of the judges of the W.A. Court of Criminal Appeal for dismissing Beamish's application for a new trial. He criticises the composition of the Court and claims that two of the judges had strong preconceptions about Beamish's guilt from the outset. He claims that the Court went wrong in law in respect of the standard which fresh evidence has to satisfy in order to entitle an applicant to a new trial, and that the Chief Justice completely misunderstood the law governing the question whether evidence of Cooke's other killings was admissible as tending to show that he killed Miss Brewer. He criticises the Court for failing to account adequately for certain features of Cooke's confession which, in Brett's opinion, suggest that he was in Miss Brewer's flat on the night she was killed. He charges the Chief Justice with inconsistency in dealing with the confessions of Beamish and Cooke to the same crime, on the ground that the discrepancies in Beamish's confession were ignored while the discrepancies in Cooke's statements were highlighted in order to discredit him. Brett devotes a good deal of space to an exposure of the weakness, in his opinion, of the evidence against Beamish at his trial and to a criticism of the Chief Justice's analysis of the case against him. He purports to show 'the complete and utter weakness of the case against Beamish'. Finally, he is extremely critical of the Crown for failing to put before the Court or disclose to Beamish's solicitors certain medical opinions which the Crown had obtained on the possibility of Miss Brewer having spoken a few words, as Cooke in his statement said she did, at a time when her windpipe had been severed by a hatchet blow across the throat. Since Cooke is now dead and his statements would, under the rule in

the *Sussex Peerage Case,*[3] not be admissible in any retrial of Beamish, Brett urges that Beamish should be pardoned and set free.

It is proposed in this review, without canvassing the question of Beamish's guilt, to draw attention to features of Brett's pamphlet which may be thought to throw doubt on the value of his opinions.

A preliminary matter is that Brett does not reveal in the pamphlet his own personal association with the case. At the end of 1964, after the failure of Beamish's appeal to the High Court, the Law Society of Western Australia, which had appointed a solicitor to act for Beamish, asked Professor Zelman Cowen, then Dean of the Faculty of Law of Melbourne University, to examine the Appeal Book and other materials and advise the Law Society on the question of an appeal by Beamish to the Privy Council. The Government had offered to finance an appeal if the Law Society recommended it. Cowen asked Brett to assist him in the matter, and the opinion sent to the Law Society was signed by both Cowen and Brett. They treated the matter as a poor person's application and made no charge for their services. It is strange that Brett should criticise the composition of the W.A. Court of Criminal Appeal on the ground of the judges' previous association with the case and yet not realise that his own association with the case may disqualify him from discussing it objectively. His pamphlet is far from being the 'dispassionate and objective discussion' which it is held out to be.

The question whether the West Australian Court of Criminal Appeal had applied the correct standard in evaluating the fresh evidence was argued in Beamish's appeals to the High Court and Privy Council. In view of the fact that both appeal courts unanimously refused leave to appeal, one approaches with some scepticism Brett's assertion that the W.A. Court of Criminal Appeal went wrong in this matter, and set far too high a standard for Beamish to attain.

The leading Australian case on the role of an appeal court in an application for a new trial because of fresh evidence is the decision of the High Court of Australia in *Craig v. The King.*[4] In that case,

[3] (1844) 11 Cl. & Fin. 85.
[4] (1933) 49 C.L.R. 429.

as in Beamish's case, a new trial was sought on the ground that fresh evidence had been discovered since the trial which tended to show that some other person had committed the murder of which the applicant had been convicted. As in Beamish's case again, there was no doubt about the relevance and importance of the fresh evidence if it could be believed. The objection made to it by the Crown was that the evidence put forward, apart from its inherent improbability, came from a person with a criminal record who had previously given false information to the police and who was therefore completely lacking in credibility. In a joint judgment, Rich J. and Dixon J. said:

> It is evident that the exercise of a power to direct a new trial because fresh evidence is forthcoming must be attended both with danger and difficulty. It is the function of the jury to determine questions of fact in a criminal trial. When they have found a verdict they have performed that duty. If after a verdict of guilty the mere fact that a prisoner produced further relevant evidence required the Court to vacate the conviction and submit the question of the prisoner's guilt to another jury, then in a jurisdiction where perjury is rife great abuses would ensue. A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated to remove the certainty of the prisoner's guilt which the former evidence produced.[5]

Though Evatt J. and McTiernan J. differed in *Craig's* case from Rich J., Dixon J. and Starke J. in thinking that a new trial should be ordered, they did not dissent from this statement of the function of the court. The statement makes clear that it is the duty of the court to satisfy itself of the credibility of the new evidence put forward.

In Beamish's case the Chief Justice cited *Craig v. The King* in support of the proposition that 'the confession must have a cogent, that is to say, a compelling force, before the Court is entitled to take the serious step of setting aside a jury's verdict of guilt against Beamish and ordering a new trial'. Brett professes to detect in this exegesis of what was said by Rich J. and Dixon J. in *Craig's* case a crucial alteration in the principles which the High Court laid down.

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[5] Id. at 439.

It is difficult to take this criticism seriously. It is quite plain from the judgments of the Court in Beamish's case that the Chief Justice did not intend to qualify the principles laid down in *Craig's* case and was not understood by the other members of the Court to be doing so. In any event, the objection to Cooke's evidence was levelled not at its relevance or at its cogency, if it could be believed, but at its plausibility, and it was for this reason that Beamish's application for a new trial failed.

Neither is there any substance in Brett's suggestion that the Court trespassed upon the function of the jury in allowing the Crown to file affidavits in rebuttal of Cooke's affidavit and in allowing the Crown to cross-examine Cooke. He refers to the decision of the English Court of Criminal Appeal in *R. v. Jordan*[6] as showing that the English practice is to refuse to hear rebutting evidence. Brett is mistaken in his interpretation of the English cases. In *Jordan,* which was decided at a time when the English Court of Criminal Appeal had no power to order a new trial but could only quash a conviction, the new evidence brought forward after a conviction for murder was the opinion of two well-known medical men that the death had been caused, not by stabbing, but by the introduction of terramycin after the deceased had shown that he was intolerant of it. There was no question of the credibility of the two medical men, and it was in these circumstances that the Court refused to hear rebutting evidence from the Crown. Later English cases, not mentioned by Brett, show that where, as in *Craig v. The King* and Beamish's case, the probative value of the fresh evidence depends on whether it is credible, the English Court of Criminal Appeal assumes the same critical function as the Australian courts. Thus in *R. v. Flower,*[7] a recent English decision, the fresh evidence put forward was an affidavit sworn by a woman who was a prosecution witness at the trial in which she said that her evidence of identification at the trial was false and made under police pressure. The Crown was allowed to call three witnesses in rebuttal, and in the result the Court rejected the witness's new evidence where it conflicted with the evidence she gave at the trial.

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6 (1956) 40 Cr.A.R. 152.
7 [1966] 1 Q.B. 146.

Brett's assertion that Wolff C.J. completely misunderstood the law governing the question whether evidence of Cooke's other killings was admissible is also misconceived. This can be shown without attempting to add to the large literature on the admissibility of similar fact evidence.

The Chief Justice dealt with this matter in a brief appendix to his judgment. Though he concluded there that evidence of Cooke's other killings was not admissible as tending to show that he killed Miss Brewer, he and the other members of the Court did assume Cooke's responsibility for the other killings in discussing his claim to have killed her. The point of law has no bearing therefore on the outcome of Beamish's application.

After remarking on the fact that the law parts company with logic in sometimes excluding evidence of probative value, the Chief Justice referred to a number of articles dealing with the admissibility of similar fact evidence against accused persons and distinguished the case before the Court as one where the evidence was offered, not against an accused person, but in a self-serving way, with Cooke's active assistance. Counsel for Beamish had argued that though the evidence would not have been admissible against Cooke if he had been tried for the murder of Miss Brewer, it should nevertheless be admitted in Beamish's case as tending to show that Cooke, and not Beamish, killed Miss Brewer. The Chief Justice rejected this contention. He thought that no rule had yet been formulated for a case where an accused person seeks to introduce similar fact evidence to inculpate some other person and so exculpate himself. But he was of the opinion that it should certainly be rejected where, as in Beamish's case, Cooke's claim to have killed Miss Brewer was plainly false.

In his criticism of the Chief Justice, Brett asserts that similar fact evidence, if it has probative value, is always receivable unless it is offered as part of the case against an accused person, and that it would therefore be open to Beamish, if he were being tried for the murder of Miss Brewer, to adduce evidence of Cooke's other crimes as part of his defence that he, Beamish, did not commit the murder. The fallacy of this criticism is Brett's assumption that the exclusion of similar fact evidence is confined to evidence offered against an accused person. Like the related rule concerning exclusion of character evidence, the exclusion of similar fact evidence is a general one. Dealing with civil, as opposed to criminal, proceedings, Phipson says:

> Evidence of facts relevant merely from their similarity to the main fact or transaction is, as in criminal cases, inadmissible

> whether proved by direct admissions of the party himself or by independent witnesses . . . . Such facts though logically relevant are rejected as in criminal cases on grounds of fairness, since they tend to waste time, embarrass the inquiry with collateral issues, prejudice the parties with the jury (if there be one) and encourage attacks without notice.[8]

In civil, as in criminal, cases, the ordinary rule of exclusion is, of course, subject to important exceptions.[9] There seems to be no authority exactly in point on the particular problem in Beamish's case, that is, whether an accused person can introduce similar fact evidence in a self-serving way to inculpate another person. Since an accused person, as an exception to the general rule, is allowed to introduce evidence of his good character, it may be argued that he should, by an analogous indulgence, be permitted to introduce similar fact evidence as part of his defence to the charge. But even if one is disposed to question the particular conclusion Wolff C.J. came to in Beamish's case, this would not provide any support for Brett's intemperate criticism of the Chief Justice.

It is difficult also to accept his contention that the Court was inconsistent in its treatment of the confessions of Beamish and Cooke. The situation was not one where a trial court is faced with conflicting testimony and is obliged for this reason to enter into a comparative assessment of credibility. Beamish had already been convicted of murder on the verdict of a jury, and the Court of Criminal Appeal and High Court had refused to disturb the conviction. The problem facing the Court was whether Cooke's claim to have killed Miss Brewer was sufficiently credible to justify setting aside the conviction and ordering a new trial. It was proper and natural therefore for the Court to devote most of its attention to the credibility of Cooke's evidence and to exploring its weaknesses. In his discussion of this aspect of the case, Brett fails to recognise that, whereas Beamish's confession was an admission against interest, Cooke's "confession" was a self-serving statement which exposed him to no further penalty and by which he hoped to delay his execution. Though the Court refused to order a new trial, Cooke's execution was in fact delayed for nearly a year. One would therefore expect Cooke's claim to have killed Miss

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8 PHIPSON, EVIDENCE 217 (10th ed. 1963).

9 Id. at 217-228.

Brewer (and Miss Anderson) to be approached in rather a different manner from Beamish's confession. In the one case there would be a natural disposition to disbelieve the claim, coming from such a source, unless it was sufficiently corroborated, whereas in the other the natural tendency would be to accept the confession unless the discrepancies threw doubt on its general credibility. In any case, Brett's assertion that the Court ignored the discrepancies in Beamish's confessions is untrue. Wolff C.J. devoted twenty-three pages of his judgment to an analysis of the case against Beamish at his trial, in the course of which he dealt with nine criticisms made by Beamish's counsel of that case.

Though Brett devotes a good deal of his pamphlet to a review of the weaknesses, in his opinion, of the case against Beamish at his trial, he does not give an account of the evidence from which the reader might form his own opinion of the strength of the case against him. He asserts falsely that Beamish's first confession, on 7th April 1961, was elicited from him 'only as a result of leading questions'. The following exchange between Detective-Sergeant Leitch and Beamish occurred in the police car on the way back from Miss Brewer's flat, after Leitch had told Beamish through Mrs. Myatt that he wanted to know the truth and that the police had lots of things, like scientific aids and photographs, to help them:

LEITCH. Did you hurt the lady?
BEAMISH. Yes—finish—I want to tell the truth.
LEITCH. What did you hurt the lady with?
BEAMISH. An axe.
LEITCH. Did the lady die?
BEAMISH. Yes, after I hit her with the axe.
LEITCH. What was the lady doing when you hit her with the axe?
BEAMISH. Asleep on bed.
LEITCH. When was this?
BEAMISH. A long time ago.
LEITCH. What time of night was it?
BEAMISH. I haven't got a watch.
LEITCH. After lights out?
BEAMISH. Not sure—late.
LEITCH. How big was the axe?
Beamish here indicated with his hands the length of a hatchet or tomahawk.

LEITCH. That is a tomahawk or a hatchet.
BEAMISH. Axe.

Beamish wept a little while this conversation was taking place. The party then went to the C.I.B. in Perth, where, after cautioning, Beamish was further questioned:

LEITCH. What was the lady doing when you first saw her?
BEAMISH. Standing up in bedroom with no clothes on.
LEITCH. What were you doing?
BEAMISH. Outside looking through window.

Beamish then identified Miss Brewer's bedroom window on a photograph and pointed out where he stood to look through the window.

LEITCH. How did you get in?
BEAMISH. Back door.
LEITCH. Then what happened?
BEAMISH. Hit lady on head with axe.

Beamish made two motions with his hand.

LEITCH. Did the lady die? Did the lady get off the bed?
BEAMISH. No, lady die.
LEITCH. Where did you hit the lady?

Beamish drew a figure on a piece of paper and put two marks on the top of the head.

LEITCH. Why did you kill the lady?
BEAMISH. Head mixed up.
LEITCH. Was there anyone else in the room?
BEAMISH. No.
LEITCH. Are you sure?
BEAMISH. Nobody else.
LEITCH. Were there any animals, a cat or a dog or anything?
BEAMISH. A dog.
LEITCH. How big and what colour?

Beamish, after indicating a small dog—'Black, brown, dark, not sure'—was shown a photograph of Miss Brewer's poodle and said 'Yes, like that.'

LEITCH. Did the dog do anything?
BEAMISH. Dog bark.

Beamish was able to hear a high pitched noise such as a dog barking. He explained that he had quietened the dog by throwing it against a wall and jamming the door on its stomach.

LEITCH. Did you hit the lady with anything else?
BEAMISH. More axe.

In order to elicit information about the stabbing, Beamish was prompted at this point by Deering holding up a pocket knife.

Beamish's response to this was to nod vigorously and make stabbing movements towards his stomach.

LEITCH. What did you use?

Beamish made a cutting movement with his index and middle finger and Leitch said 'Scissors?'

BEAMISH. Yes.

In reply to further questions, Beamish said that he had stabbed Miss Brewer three or four times in the stomach. He could not remember whether he had stabbed her anywhere else.

Beamish was then taken back to the flat and asked to show how he got into it. He demonstrated how he had pushed the key out of the back door with a piece of wire so that it fell on the rubber tiles inside the door. He was then able to reach the key through a small hinged flap at the bottom of the door through which the milkman delivered the milk. Beamish led the party into the bedroom of the flat, where he remarked at once that two single beds had taken the place of the double bed on which Miss Brewer was killed. After some prompting he said that in addition to the blows on the head he had hit her several blows with the axe on the body and one heavy blow in the vagina and that he had put one of the pillows over her face while he tried to have intercourse with her. Beamish had earlier used the word "fuck" to describe his masturbating himself while handling the vaginas of the little girls he was convicted of assaulting. It is possible that this is what he meant when he said to Leitch: "Yes' I fuck with lady".

LEITCH. What happened then?

BEAMISH. Stabbed lady with scissors.

When Leitch held up a small pair of scissors, Beamish indicated that the blades had been larger and the handles different. When he was asked what he had done with the scissors, he pointed to the place on the divider between the living room and the kitchen where the scissors were found after the murder.

LEITCH. Did you wipe them?

BEAMISH. Yes (making a motion of wiping the outsides of the blades on a sheet).

The scissors, when found, had been wiped on the outsides of the blades, but not on the insides.

Beamish was then asked what he had done with the "axe". He at first said that he had thrown it on the inside of the fence around the flats, but on being asked by Leitch whether he was sure of this said, "Over fence." At this point Beamish began to show signs of boredom at the questioning and twice asked when he would be taken to the Court. When asked where he had got the axe, he said "Off the

woodheap." Leitch queried this by asking, "Now, is that right?" whereupon Beamish faced in the direction of the house from which the tomahawk had been taken and made motions of his hand indicating that it was over three or four fences. He started to climb the fence, but as a concession to Mrs. Myatt the party went out into the road. Beamish at first led the party into the yard of the wrong house and pointed to the floor of the garage. When Leitch queried this, Beamish led them out into the road again and into yard of the house from which the tomahawk had been taken and again pointed to the floor of the garage, saying "There." Leitch queried this, since the owner of the tomahawk had said that he left it hanging on a nail, but Beamish insisted that it was on the floor. He said that he had reached Miss Brewer's flat from the house over the intermediate fences.

It will be seen that leading questions played no significant part in eliciting the details of Beamish's confession.

Most of the criticisms which Brett makes of the evidence against Beamish at his trial merely repeat points made by Beamish's counsel in the application for a new trial. The Chief Justice dealt with these in reviewing the case against Beamish at his trial. Some of Brett's independent criticisms are quite trivial. Thus, he criticises the Chief Justice for mistakenly saying at the opening of his judgment, which was not revised for publication, that Beamish was arrested and charged with the murder on 7th April 1961, though his judgment a few pages later makes it quite clear that he was fully aware that Beamish was charged on 16th June 1961 when he was in Fremantle Prison. Again, he singles out for adverse comment the fact that Leitch, after he had taken Beamish's oral and written confessions of 7th April 1961 and 8th April 1961, did not bother to have the writing on the floor of the exercise yard photographed until part of it had been obliterated by traffic. Yet the existence of the writing was vouched for by three witnesses for the prosecution. Brett also comments adversely on Leitch's failure to preserve the slip of paper on which Beamish made a rough sketch showing where he had hit Miss Brewer, though Beamish at the trial admitted that he had drawn the sketch and did not suggest that Leitch had misrepresented its contents.

Any discrepancies between Beamish's confession and the known or probable facts need to be balanced against the knowledge of the

crime which his confessions revealed. Faulty observation or recollection will often account for some discrepancy. Correct knowledge of some particular detail of a crime, such as where the scissors were found in Miss Brewer's flat, may be difficult to explain except on a supposition of guilt. The jury, who heard Beamish and the other witnesses give evidence, found him guilty of murdering Miss Brewer, and this verdict was upheld on appeal. One may well question Brett's competence, after reading a transcript of the evidence in a professional capacity, to speak of 'the complete and utter weakness' of the case against Beamish at his trial.

Just as he gives no account of Beamish's confession from which the reader might form his own opinion of the strength of the case against him, so Brett gives no account of Cooke's statements from which one might judge whether the Court was right in thinking that his claim to have killed Miss Brewer was obviously fabricated. Since few people will have the opportunity to read a transcript of the evidence before the Court, it may be useful to give a brief account of Cooke's statements.

Apart from being a multiple murderer, Cooke was also a skilled thief, who had operated, often in the district where Miss Brewer lived, for about six years before his arrest without being caught. He operated mainly at weekends, and often stole a car during the course of an evening. He took a great interest in crime and the work of the police, and had a retentive memory. The trial of Beamish in August 1961 was fully reported in The West Australian.

Cooke's original story, as told to the police on 13th September 1963 after he had retracted his claim to have killed Miss Anderson, was that he had broken into the flat next door to Miss Brewer's, which belonged to her mother, some weeks before the murder, stolen some money from the flat and hidden a key of the flat which he found there outside the flat so that he could get into it again. He said that, on the night of the murder, he took a car from a street in Nedlands, about two miles from Brookwood Flats, drove it to Cottesloe and parked it near the flats. He went to the flats, and found both Miss Brewer's and her mother's flats open. Finding no money in the mother's flat, he entered the unlocked back door of Miss Brewer's flat, pushing aside a small bottle or carton of milk in doing so. It was then, he thought, about 2.45 a.m. After looking for money in the flat,

which had dark, period type furniture, he quietly opened the bedroom door and with his torch saw Miss Brewer lying on the bed. He closed the bedroom door again and went outside to fetch a hatchet which he had taken earlier from the garage of a house nearby. He could not remember the name of the street but could point it out on a map. He propped open the back door of the flat, returned to the bedroom and hit Miss Brewer with it twice on the head, once across the throat, and once in the pubis. While he was doing this, the handle of the hatchet cracked. He then took some scissors, which were on the sink, and stabbed her once through the breast and once in the ribs up near the chest. He wiped the scissors on a towel in the bathroom and put them back where he found them. He left Miss Brewer with the sheet lying at her feet. Her dog, which was on the bed, got under the bed when he hit her, but he had a way with dogs and it did not bark. He left by the back door, putting the milk bottle back in position and closing the door quietly. He threw the hatchet over the back fence, returned to where he had left the car and went home.

As we have seen, later the same day Cooke retracted his claim to have killed Miss Brewer after the police had pointed out a number of discrepancies between his account of the killings and the known facts. The chief of these were that the back door of the flat was locked both before and after the murder, that the flat was furnished, apart from the bedroom itself, in modern wrought iron furniture painted white, that the hall light was left burning by Dinnie and found burning after the murder, that the bedroom door was not closed, that the scissors were left on the room divider and not on the sink, that there was no trace of the scissors having been wiped on a towel in the bathroom, and that the blows with the hatchet and scissors described by Cooke did not tally with the blows actually inflicted on Miss Brewer.

When Cooke, in conversations with his solicitor, some days later, returned again to his claim that he killed Miss Brewer, he altered his account of the killing and said that the back door of the flat was closed but unlocked, that the dog had barked, that he hit Miss Brewer six times with the hatchet and that he had left by the front door of the flat after locking the back door. Still further changes were made in the long written statement which Cooke made to Beamish's solicitor and which was the basis of Beamish's application for a new trial.

In this written statement Cooke said that he had been prowling around the area of Brookwood Flats for several consecutive weekends

in November and December 1959. During this period, he had entered the flat belonging to Miss Brewer's mother on three occasions, the first time through a window and subsequently by means of a key which he found in the flat on the first occasion. On the night of the murder, he arrived at Brookwood Flats at about 11.30 p.m. after prowling in the vicinity for several hours. He did not try to enter the mother's flat, because he had had no luck there on the last occasion. He saw a light burning in Miss Brewer's flat and could hear male and female voices talking. Through a chink in the curtains, he saw two pairs of legs, one pair hairy and the other smooth, and heard the creaking of bed springs, from which he concluded that a man and a woman were having intercourse. After a few minutes the bed stopped creaking and a woman's voice said: "Excuse my back as I can't stand lying facing someone." He then left the flat and after some more prowling caught a bus in Stirling Highway which was going towards Perth. He got off the bus about two miles away, meaning to "knock off" a few houses in that area of Nedlands. Next to the Carmelite Convent, about a mile from where he got off the bus, he was seen by a young man trying to look through a bedroom window and had to run away when the man shouted out. He took a Holden car from the driveway of a house in the street behind the Convent, and returned in it to the area of Brookwood Flats. At this point, he did not know why he had returned to the area. He parked the car and made his way to a house in Renown Street, near to the flats, which was known to him from previous prowling. From the garage of this house, where a yacht and set of sails were stored, he took a hatchet which was hanging on a nail on a wall. He had no particular plan in mind when he took the hatchet. He said that he then walked to Brookwood Flats, hiding on the way from two milkmen delivering milk, and went straight up to the back door of Miss Brewer's flat. It was then about 3 a.m. The back door was unlocked. When he started to open the door, he heard something scrape on the floor inside, and moved out of the way a small bottle of milk which had been delivered through the flap in the bottom of the door. In the kitchenette of the flat, he noticed an electric frying pan on the draining section of the sink. He found a purse containing a few coins and a cheque payable to "J. Brewer", but he did not take them. He opened the bedroom door, and saw with his torch a woman asleep on a bed with a sheet over her. A black French poodle was lying on a floor rug at the foot of the bed, but it did not stir. He took the hatchet from between his belt and pants, where he had put it on entering the flat, and struck

Miss Brewer two quick blows on the head. The noise woke the dog, and it scampered under the bed barking, but he made soothing noises and managed to quieten it. He then hit Miss Brewer again with the hatchet, once on the head, twice across the throat, once or twice in the ribs, once in the vagina and then again on the head with the side of the hatchet. The handle of the hatchet split while he was using it. He went outside the flat and dropped it between the boundary fence of the flats and a shed in the next garden. He then returned to the flat and picked up a pair of scissors from the draining board of the sink. As he entered the bedroom, Miss Brewer was making a rattling noise in her throat and she said slowly, "Who is it?". He stabbed her several times with the scissors in the body and probably, he thought, in the buttocks as well. After he had stabbed her, he tossed the sheet back over her and walked out of the bedroom, shutting the door behind him. He wiped the scissors on some towelling on a rotary hoist outside the flat and put them on the room divider. After locking the back door and replacing the bottle of milk where he found it, he went out through the front door, slamming it sharply as he left. This caused the dog to bark again.

Cooke's written statement, which I have just summarised, contained remarkably detailed descriptions of some of the events of the evening. Describing the incidents of a night four years earlier, he purported to remember, for example, that the purse which he said he found in Miss Brewer's flat contained a two-shilling piece, two single shillings and 7d. He also said that he had recognised the driver of the bus he boarded as someone by the name of Bob.

Inquiries made by Mr. Blight, the private inquiry agent employed by Beamish's solicitors, revealed that a Holden car had in fact been taken from a street in Nedlands behind the Carmelite Convent on the night of the murder. He discovered that the man whom Cooke had claimed to recognise as the driver of the bus he boarded in Stirling Highway had driven buses on that route for thirteen years, and the records of the bus company indicated that he was on duty late that evening. The milkman who delivered Miss Brewer's milk that night told Mr. Blight that he remembered delivering a one-third pint bottle of milk through the flap in her door between 2 a.m. and 2.15 a.m., though his usual practice was to deliver milk to the flats between 4 a.m. and 5 a.m. Mr. Blight also discovered that the son of the owner of the house from which the tomahawk was taken did at the time own a Gwen 12 yacht. An affidavit sworn by Mr. Blight

giving the results of his inquiries was filed in support of Beamish's application.

In an affidavit filed by the Crown, Dinnie denied that Miss Brewer had ever made the remark which Cooke attributed to her. In another affidavit filed by the Crown, the son of the owner of the house from which the tomahawk was taken said that, though he did own a Gwen 12 yacht at the time Miss Brewer was murdered, it was kept at a yacht club and was never taken to the house until after November 1962, nearly two years after Miss Brewer was killed. This suggests that Cooke was drawing on his general knowledge of the area, gleaned from his prowling both before and after the murder, in purporting to recollect the events of the evening Miss Brewer was killed.

Cooke's claim to have killed Miss Brewer would have been more plausible if he had stuck to his original story and if he had not interlarded his later accounts with so much detail. The degree of detail, after an interval of four years, not only suggested in itself that his story was fabricated. It also exposed him, as in the cases of the words he attributed to Miss Brewer when she was in bed with Dinnie, and the yacht which he claimed to have seen that night at the house from which the hatchet was taken, to the risk of being shown that the detail was untrue.

The account in his written statement of how he looked through a chink in the curtain and saw two pairs of legs and heard the bed creaking is particularly revealing. There was no mention of this in his first statement to the police. It was put to Cooke in cross-examination that if this part of his story was true he must have expected to find a man in bed with Miss Brewer when he returned to the flat at about 3 a.m. Cooke admitted that he had no reason to think that she would be alone. This part of his story was made even more difficult to accept by the fact that he said in cross-examination, in contradiction of his written statement, that he formed the intention to kill Miss Brewer while he was travelling towards Perth in the bus he boarded in Cottesloe. With characteristic precision, he said that he made the decision to go back and kill Miss Brewer as the bus was passing Claremont Police Station in Stirling Highway. It is instructive to compare this aspect of Cooke's story with the statement in Beamish's confession that he saw Miss Brewer alone in the flat at a time when Dinnie had left.

When he was asked why he had omitted to mention in his detailed written statement that he formed the intention to kill Miss Brewer while travelling on the bus, Cooke said that he was 'playing it shrewd

in certain respects' and that he hoped, by leaving things out of his statement, to stay alive longer.

Another point where Cooke weakened his story by revising it when he was cross-examined was his evidence of what he saw at the house from which the hatchet was taken. We have already seen that he was two years premature in seeing a yacht there on the night of the murder. Apart from this point, Cooke, in his written statement, said that between 11 p.m. and midnight he went to the rear of the house, where he knew from previous prowling that a young lass slept in a room with louvred windows. He said that he shone a torch in the window and all he could see was her legs. This was in fact consistent with Mr. Blight's discovery that the back bedroom of the house was occupied at the time by a girl then eighteen years of age who was alone in the house until the parents returned home from a party at 1 a.m. In cross-examination, however, Cooke said that he saw, not a young girl, but an elderly lady in the back bedroom of the house. He said that she was reading a book and spoke to a man in the next room.

In cross-examination Cooke justified deviations from his written statement on the ground that the statement, though supported by his affidavit, was not sworn on the Bible, and therefore had not the same sanctity as the oral evidence he gave in court after being sworn. He said that he was never asked to hold up his hand in swearing the affidavit, and that this made a difference and allowed him to tell untruths.

It is difficult to believe that any person who has read the full account of Cooke's various statements could dissent from the Judges' conclusion that his confession was fabricated. Indeed it seems doubtful whether Brett himself believes that Cooke killed Miss Brewer. His discussion of Cooke's evidence is directed mainly to showing that he was at least in the area that night, and possibly even in Miss Brewer's flat. His reasoning seems to be that, whatever the weaknesses of Cooke's evidence, the jury at Beamish's trial would never have convicted him if they had known that Cooke, a multiple murderer, was in the area that night and had confessed to the killing. The flaw in this reasoning is, of course, that if the Court was right in thinking that Cooke's confession was fabricated from newspaper accounts of Beamish's trial, then it could not have been available at Beamish's trial.

Brett attaches a great deal of importance to Cooke's evidence about the milk bottle as indicating that he was in Miss Brewer's flat that evening. He thinks that if Cooke did not in fact see the bottle of milk behind Miss Brewer's back door, he was taking 'a fantastic chance' in saying that he did. This is strange language. Cooke, as a nocturnal prowler, must often have hidden from milkmen and have come across newly delivered milk bottles in entering flats. His description of how he found a milk bottle behind the back door of the flat (in his first statement it was 'a small bottle of milk or a carton or something') is the kind of inconsequential embellishment found throughout his written statement. He took no greater chance of having it proved false than he did when he attributed certain words to Miss Brewer when she was in bed with Dinnie, or when he said that he saw a yacht at the house from which the hatchet was taken, or when he said he saw an elderly woman in the back bedroom of the same house. In each of these other three cases the Crown was able to show that the embroidery was untrue and that Cooke was lying. The most likely explanation of Cooke's reference to the milk bottle is that it was a piece of pure invention which happened by chance to be consistent with the time the milk was delivered that night.

Cooke may have been telling the truth when he told Detective Reed on 9th October 1963 that he had been in Miss Brewer's flat on several occasions to steal money, just as he undoubtedly had been in her mother's flat next door three months before the murder. It is significant that though Miss Brewer's mother, in an affidavit filed by the Crown, confirmed that a key had been stolen at that time from her flat, she said that she had the lock replaced within three days. Cooke must therefore have been lying when he said that he used the key which he took from the flat to gain access to the flat on later occasions. It is not easy to see why Cooke should have bothered to lie about this, unless he thought that it would in some way support his denial in his written statement that he had ever been in Miss Brewer's flat before the night she was killed. If Cooke had been in the flat on some previous occasion, this would explain why he said that the electric frypan was on the draining section of the sink, whereas it was in fact found on the bench top of some cupboards between the refrigerator and the end of the sink unit. Even if we accept that he recognised the bus driver that Saturday night, rather than some other Saturday night when he was operating in the area, this would only confirm that he was somewhere along Stirling Highway that evening.

Brett also makes too much of the Crown's failure in Beamish's application for a new trial to put before the Court or to disclose to Beamish's solicitors the medical opinion which the Crown obtained on whether Miss Brewer would have been able to speak the words which Cooke attributed to her at a time when her windpipe had been severed. The opinion, from three doctors, initially was that speech was impossible in such circumstances, but after further consideration that it was 'highly improbable but not impossible'. The existence of this opinion was revealed by the Premier of Western Australia on 21st October 1964 in reply to a question asked in the Legislative Assembly.[10] The Premier said that the opinion had been sought by the Crown in order to test Cooke's veracity on this point, and that it had not been put before the Court because it was equivocal.

Though it is unfortunate that it was not left to Beamish's legal advisers to judge whether the opinion obtained lent any support to Cooke's statement, there can be no question that Brett misrepresents the importance of this incident, which he describes as 'an almost unbelievable episode'. In his written statement, which was the basis of Beamish's application for a new trial, Cooke said that the handle of the hatchet split after he had struck Miss Brewer eight or more severe blows with it and that he went out of the flat to dispose of it. According to the statement, he then returned to the flat, drank a bottle of lemonade from the refrigerator, picked up a pair of scissors from the draining board of the sink and walked back into the bedroom. According to his statement, as he re-entered the room 'every breath she took she made a rattling noise in her throat and she spoke and said "Who is it?" in a very slow manner. I then raised the scissors and struck her several times on the body near the breasts and I also have a recollection of stabbing her in both buttocks.'

In his written statement, Cooke was quite certain about the sequence of events at this point, and this explains why the Crown sought an opinion on whether Miss Brewer would have been capable of speech after her windpipe had been severed. At the hearing, however, Cooke in cross-examination was far less confident about the order of events. Since the passage is representative of Cooke's style of response in cross-examination, it may be worth reproducing:

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WILSON. (Crown Prosecutor) Then you got back into the kitchen and what happened then—this is after you struck several blows on the woman with the hatchet and you had dropped the hatchet over the fence? Why didn't you shoot through then—why didn't you leave?
COOKE. I do not know.
WILSON. Your sense of purpose was satisfied, wasn't it? You had killed the woman with the weapon you had chosen to use?
COOKE. Yes. I do not know why I went back in there. I know I rummaged around looking for money after.
WILSON. On other occasions you have been conscious of safety first, haven't you, and you have made quick getaways when the job has been done?
COOKE. Yes.
WILSON. But not on this occasion?
COOKE. I had the means of running away and everything, but I just didn't want to leave at that moment.
WILSON. You just didn't want to leave at that moment. This is unusual when measured by your normal behaviour after . . . . what you usually do after you have committed an offence or attacked someone, isn't it?
COOKE. When I attack someone, yes.
WILSON. When you have attacked someone before you haven't messed about—you shoot through?
COOKE. I shoot through, but when I know a person is helpless like she was that's a different matter.
WILSON. So what did you do?
COOKE. Went back into the kitchen and got this pair of shears or scissors and went into the bedroom again.
WILSON. And where did you get the scissors from?
COOKE. I think . . . either on the drain board or on the room divider. I know they were there . . . .
WILSON. Why did you pick up the scissors?
COOKE. To use on that woman.
WILSON. When did you get that idea?
COOKE. When I got rid of the hatchet.
WILSON. What made you take the scissors and attack the woman with the scissors?
COOKE. Because of her helplessness.
WILSON. But you would expect her to be either dead or dying, wouldn't you, after the blows you had struck?
COOKE. She was in a pretty bad way.
WILSON. She was in a pretty bad way. So anyway you came back in and did you straight away pick up the scissors and go back to the bedroom?
COOKE. No, I had a free drink of lemonade.
WILSON. A free what kind of drink?

COOKE. A free one.
WILSON. I see?
COOKE. I stole it.
WILSON. Where did you get this drink?
COOKE. From the refrigerator.
WILSON. So there was the woman lying in the bed with the hatchet wounds and you were drinking lemonade in the kitchen?
COOKE. Lemonade.
WILSON. After you had drunk the lemonade what did you do with the bottle?
COOKE. I put the cap on the bottle and put it down in the laundry area. There were some more bottles there, and I put it alongside them.
WILSON. Then you took the scissors, I think, and where did you go?
COOKE. Into the bedroom.
WILSON. And what did you do?
COOKE. I started looking around for money.
WILSON. So, you took the scissors, went back into the bedroom, and didn't use the scissors straight away? You started looking around for money? Is that right?
COOKE. Yes.
WILSON. And how long did you spend looking for money?
COOKE. Two or three minutes.
WILSON. And during this time what of the dog?
COOKE. The dog was still under the bed and quiet.
WILSON. Not even interested enough to sniff around with you?
COOKE. No, he never moved out from under that bed while I was in that room.
WILSON. And never barked again whilst you were there—after those initial barks?
COOKE. No. After the first few seconds, he never barked afterwards.
WILSON. And then what did you do?
COOKE. After rummaging around for money?
WILSON. Yes.
COOKE. I was there and I heard the woman making a few noises, which was her gasping for breath, and I started stabbing her with the scissors then.
WILSON. She made a few gasping noises, did she?
COOKE. Once she spoke—not clearly. I heard it clearly, but a disjointed sound. Now, it wasn't then, it was during the time that I attacked her she mentioned the proper words—"Who is it?" That was all she said.
WILSON. And she said "Who is it?" during the time you attacked her? . . .
WOLFF C.J. I want to get this clearly. You had better rephrase that.

WILSON. Yes, sir.
(to Cooke) Which part of the attack are you speaking of?
COOKE. That was before I struck her across the throat.
WILSON. After you had struck her on the head with the hatchet?
COOKE. Yes.
WILSON. And before you had struck her with the hatchet across the throat?
COOKE. That is right.
WILSON. She got out these words, enough for you to recognise her saying "Who is it?"?
COOKE. Yes, sir. She was in a semi-conscious state then.
WILSON. Well, let us just see if I have got it right. That would mean that she had first received a blow with the flat of the hatchet—the first blow—against the left side of the face, between the left eye and the ear, and she had also received two or three chopping blows on the forehead?
COOKE. Yes.
WILSON. And you say then that she tried to speak and you detected those words, and was it immediately after that, that you struck her twice in the throat?
COOKE. Very close to it.
WILSON. Are you sure about that? In your recollection of the events now?
COOKE. I wouldn't have mentioned it otherwise.
WILSON. That is the truth is it?
COOKE. Unless it happened.
WILSON. I know, but that is when it happened?
COOKE. Yes.
WILSON. You are quite sure?
COOKE. No let us be sure—let us say it happened while I was there at the bed, but I cannot recall really—really sure—that it was at that particular moment, but I know that she uttered a couple of words.
WILSON. But a moment ago you felt fairly sure that it was before you hit her on the throat with the hatchet?
COOKE. Yes, because a person who has been hit across the throat with a hatchet isn't very interested in talking afterwards . . . .
WILSON. In your statement, which you swore to be true, you made reference to her speaking, and that was after you had finished with the hatchet; dropped the hatchet over the fence; come back and had a bottle of lemonade, and then walked into the bedroom?
COOKE. As I mentioned to you, Mr. Wilson, just a few moments ago—it was during that time that she did say those few words and I am not entirely sure just whether it was before—but she mentioned those words.

> WILSON. You are not sure, then, if what you have said in this statement is true as to the time at which she said it?
> COOKE. Of the time at which she said it I am not sure but as to what she said I am very sure.

It will be seen that Cooke, in the above passage, clearly abandoned his earlier statement that Miss Brewer spoke the words after being struck across the throat with the hatchet. The medical opinion obtained by the Crown had no bearing at all therefore on the credibility of Cooke's final version of the killing. Brett's suggestion that the High Court of Australia might be persuaded, if the failure to disclose the opinion were brought to its attention, to reopen Beamish's application for special leave to appeal and quash the decision of the Court of Criminal Appeal is absurd.

His criticism of the composition of the W.A. Court is based on the fact that the Chief Justice presided at Beamish's trial, while Jackson J. and Virtue J. had been members of the earlier Court which dismissed his appeal from his conviction. Brett argues that the three judges were, because of their earlier association with the case, 'inescapably involved' in any miscarriage of justice which may have occurred and would therefore be unconsciously disinclined to admit that they had been 'party to such a tragic error'. He suggests that the composition of the Court contravened the principle that a judge should not participate in an appeal from his own decision.

This is extravagant criticism once again. Though the Criminal Code expressly provides that the fact that a judge presided at the trial is no objection to his taking part in an appeal, it has long been accepted that a trial judge should not take part in an appeal from conviction or sentence. Beamish's application for a new trial was not an appeal from conviction in the ordinary sense of the term. To apply for a new trial on the ground that fresh evidence has been discovered is not to impeach the propriety of the conviction on the evidence available at the trial. It implies no censure of the judge who presided at the trial or of the judges who dismissed an appeal from conviction. It is difficult therefore to accept Brett's contention that the judges' previous association with the case would tend to make them more reluctant to order a new trial because of fresh evidence. It is equally plausible, and more charitable, to suppose that it would make them

particularly anxious to correct any miscarriage of justice which may have occurred.[11]

Brett makes only a brief reference in his pamphlet to Cooke's other claim to have killed Rosemary Anderson. A young man called Button confessed to this other killing, for which he is now serving a term of imprisonment. In view of his opinions on the Beamish case, Brett is understandably reluctant to admit that this other claim of Cooke's was a pure fabrication. Brett does not appear to realise that Cooke, by claiming to have killed Miss Anderson as well as Miss Brewer, made it very much more difficult to accept that he killed either, since it would mean that he was in fact responsible for two quite distinct killings, to each of which another man had confessed his guilt.

Brett concludes his pamphlet with the statement that 'the judges, Crown Law officers, and police who participated in the sorry proceedings which I have described can be left to live with their own consciences.' The intemperate nature of much of his criticism has been indicated in this review. The pamphlet reveals a disposition not to accept the ordinary processes of the law which is reminiscent of the Tait and Orr cases. Without advancing any new evidence, Brett sets up his own, not disinterested, judgment against the outcome of a constitutional process in which a jury and twenty judges have taken part, not one of whom has expressed any doubt about the propriety of Beamish's conviction.

DOUGLAS PAYNE

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11 In Craig v. The King, (1933) 49 C.L.R. 429, the application for a new trial on the ground of fresh evidence was heard by the N.S.W. Court of Criminal Appeal consisting of the judges who had presided at the three trials of Craig. In the first two trials the jury was unable to agree on a verdict.

FREEDOM IN AUSTRALIA. By Enid Campbell and Harry Whitmore. Sydney University Press. 1966. Pp. xiii, 298. $7.00.

For the most part, the Australian, like the English, method of supplying shape and content to individual freedom is to rely on the pressure of politics and publicity to ensure that imprecise laws are not applied in a tyrannical way. The theme of this book can fairly be said to be that, in some areas at least, it is time that freedom was defined and protected by the letter of the law, for already there have been many 'unnecessary invasions of human rights' in Australia. The sanctions of politics and publicity are breaking down, or perhaps never really worked, partly because of the low standard of politicians and partly because of apathy amongst the public. One form this apathy takes is the indifference with which grants of wide discretionary powers to Governments are met; there seems to be a general willingness in Australia to accept that if officials say a thing is for the best, then by and large it is. Whether one finds the explanation of this conformism to lie in laziness or servility or anything else doesn't really matter; it is a factor which exists and which affects the texture of Australian society.

Censorship is a good example of this. In so far as literature has to be imported into Australia, the Minister of Customs can, if he so wishes, exercise a legally unchallengeable power to prohibit importation of 'literature, which by words or pictures, or partly by words and partly by pictures, *in the opinion of the Minister:* (a) unduly emphasises matters of sex, horror, violence or crime; or (b) is likely to encourage depravity.'[1] Again, the Commonwealth Broadcasting and Television Act, conferring complete control of all broadcasting and television in Australia upon the Postmaster-General and the Australian Broadcasting Control Board, makes no attempt to control the standards which may be imposed or the bases upon which programmes may be prohibited. As the authors illustrate in the chapters concerned with these matters, the officials concerned are often very much more "protective" of the Australian public than are the comparable officials of comparable countries.

If the sanctions to secure freedom are to be substantially extra-legal, it is crucial that adequate information should be available to society. The authors show that this is often not the case. The most obvious

1 Customs (Prohibited Imports) Regulation, discussed by CAMPBELL & WHITMORE at 151.