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*Jun. 6, 7
*Oct. 2

JOSEPH WILFRED PARKES .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Habitual criminals—Procedure—Impropriety of judge hearing evidence as to previous record before commencing enquiry—The Criminal Code, 1953-54 (Can.), c. 51, ss. 660, 662.

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The appellant was convicted by a jury of theft. Notice had been served on him, pursuant to s. 662(1) of the *Criminal Code,* that the prosecutor would ask to have him found to be an habitual criminal. Immediately after the jury's verdict the trial judge heard representations as to sentence, and had before him a probation officer's report setting out the appellant's previous history, including numerous convictions. Before actually sentencing the appellant on the theft charge, the trial judge held an enquiry in respect of the allegation that the appellant was an habitual criminal, and at the end of that enquiry, having found the allegation proved, he sentenced the appellant to preventive detention, as well as to two years' imprisonment on the conviction for theft. The accused appealed against the finding that he was an habitual criminal, and the sentence of preventive detention.

Held: The appeal should be allowed and the sentence of preventive detention should be quashed.

The provision in s. 662(2) that an application under Part XXI shall be heard and determined before sentence is passed for the primary offence, requires that that hearing be opened immediately after the accused is found guilty, which enables the trial judge to enter upon the enquiry without previous knowledge of the accused's past conduct. By considering the probation officer's report before commencing the enquiry, and then relying upon it in finding that the accused was an habitual criminal, although it was not proved on that hearing, the trial judge had acted contrary to the provisions of the *Code,* and the proceedings on the enquiry were a nullity. In the circumstances the appeal could not be dismissed under s. 592(1)(*b*)(iii) of the *Code.*

APPEAL from a judgment of the Court of Appeal for Ontario (1), dismissing an appeal against a sentence of preventive detention. Appeal allowed.

E. P. Hartt, for the appellant.

W. B. Common, Q.C., for the Attorney-General for Ontario, respondent.

TASCHEREAU J.:—The appellant was convicted on June 7, 1955, at St. Thomas, Ontario, by His Honour Judge Grosch and a jury, upon the following charge:—

That Joseph Wilfred Parkes, at the Township of Bayham, in the County of Elgin, on or about the 8th day of February in the year 1955, unlawfully did steal one automobile the property of Basil Nevill, contrary to the Criminal Code of Canada.

Previous to that conviction, an application, with the consent of the Attorney-General, had been made by the Crown prosecutor pursuant to s. 660 of the *Criminal Code,* to have the accused declared a habitual criminal. This section reads as follows:—

660. (1) Where an accused is convicted of an indictable offence the court may, upon application, impose a sentence of *preventive detention* in addition to any sentence that is imposed for the offence of which he is convicted if

(1) [1956] O.W.N. 10, 113 C.C.C. 283, 22 C.R. 393.

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(a) the accused is found to be an *habitual criminal,* and

(b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.

(2) For the purposes of subsection (1), an accused is an habitual criminal if

(a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or

(b) he has been previously sentenced to preventive detention.

Section 662 enacts certain provisions which apply to applications of this kind, and s-s. (2) says:—

(2) An application under this Part *shall be heard and determined before sentence is passed for* the offence of which the accused is convicted and shall be heard by the court without a jury.

(The italics are mine.)

It is clear from the record, that before hearing this application His Honour Judge Grosch, instead of hearing it *immediately* as required by law (*vide Rex v. Triffitt* (1)), considered a detailed probation report on the accused, obviously for the purpose of determining the sentence to be imposed on the theft charge. He then proceeded to hear the application under s. 660, found the accused to be a habitual criminal as defined by s-s. (2). He ordered him to be confined to a penitentiary for an indeterminate period and sentenced him to two years on the charge of theft. The Court of Appeal confirmed the order of preventive detention, and we are concerned only with that particular appeal.

I am of the opinion that the learned trial judge did not follow the proper procedure in considering the probation report before hearing and determining the application made under s. 660. I entertain no doubt that this report, covering a period of twenty-five years, influenced him considerably in reaching the conclusion that the appellant was a habitual criminal and was leading persistently a criminal life. The latter suffered a prejudice such that I cannot see the possibility of applying s. 592(1)(*b*)(iii) of the *Criminal Code.* I am not satisfied that the judgment on the application would have necessarily been the same if the provisions of the law had been followed.

(1) [1938] 2 All E.R. 818, 26 Cr. App. R. 169.

I would allow the appeal and quash the order for preventive detention.

RAND J.:—This is an appeal from the affirmance by the Court of Appeal for Ontario of a determination by a county court judge that the appellant was an habitual criminal.

The *Criminal Code* deals with this matter in s. 662, the relevant provisions of which are as follows:

662. (1) Notice of application. The following provisions apply with respect to applications under this Part, namely,

(*a*) an application under subsection (1) of section 660 shall not be heard unless

(i) the Attorney General of the province in which the accused is to be tried consents,

(ii) seven clear days' notice has been given to the accused by the prosecutor specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and

(iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and

(*b*) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

(2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

Several grounds were raised which were said to go to the invalidity of the conviction, among them the following: that the trial judge had heard evidence of a police record of the accused for the purposes of the sentence on the primary conviction before entering upon the subsidiary charge; that the proof of the prior convictions by way of certificate was defective because they had not been signed by the authorized officer of the court of conviction and that the description of the conviction was insufficient in omitting in each case the name of the court and the sentence given; that in the notice to the accused there was a similar failure to specify the court and the sentence imposed; that the notice failed to set forth the particulars of conduct to be adduced to show that the accused was "leading persistently a criminal life". The question also of the powers of the Court of Appeal in such an appeal was raised, that is

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whether the appeal given by s. 667 and the reference in s-s. (3) to the provisions of Part XVIII "with respect to procedure on appeals" enables the court to deal with the appeal as fully as in the case of an appeal from a conviction for an indictable offence.

I do not find it necessary to examine more than the first ground. Section 660(2) expressly requires that the application shall be heard and determined before sentence is passed for the main offence. The reference to sentence means before any step is taken toward the pronouncement of sentence and it embraces what has come to be a practice of submitting to the court a record or information showing the conduct, character, reputation, events, and circumstances of the life of the accused. What is the consideration behind this requirement of the subsection?

The question has been raised in England in a number of cases. In *Rex v. Turner* (1), Channell J., delivering the judgment of the court, at p. 363 says:—

> The facts which are to be proved on the charge of being a habitual criminal are the same as those with reference to which the Court at a trial always desires information before passing sentence, and it is therefore impossible that the Legislature could have intended that sentence must be passed before those facts are inquired into.

This was followed in *Rex v. Coney* (2). At p. 129 the Lord Chief Justice said:—

> Counsel for the prosecution then called witnesses with reference to appellant's previous convictions and character, and counsel for the appellant addressed the Court, putting forward reasons why he should not be sent to penal servitude. If that procedure is followed, the jury, and other jurors waiting in Court, may hear all that is relevant about a prisoner's antecedents given to enable the Court to decide whether a sentence of penal servitude should be imposed. All kinds of statements adverse to the prisoner and relevant to his punishment may be given in evidence in the presence of those who, on different and more limited grounds, may afterwards be called upon to decide whether he is a habitual criminal. . . . It was never intended that the persons who, upon the particular grounds set out in the statute, might have to decide whether a prisoner was a habitual criminal, should have in their minds all the material necessary to enable a Court to decide whether a sentence of penal servitude should be imposed.

(1) [1910] 1 K.B. 346, 3 Cr. App. R. 103.

(2) (1923), 17 Cr. App. R. 128.

In *Rex v. Triffitt* (1), in which the conviction and sentence on the main charge were made and pronounced by one court and the subsequent application dealt with by another, Humphreys J., speaking of the ground now being considered and referring to *Rex v. Jennings* (2), quotes the headnote of that case with approval:—

> An indictment for being a habitual criminal under the Prevention of Crime Act, 1908, must be tried immediately after the primary charge.

Finally, in *Rex v. Vale* (3), a case somewhat similar to *Triffitt* in which, however, only the plea of guilty had been received by the first court, Branson J. at p. 356, dealing with language of Humphreys J. in *Triffitt*, observes:—

> "Follow immediately" means dealing with the case without hearing the man's previous history and before sentencing him.

In the proceeding before us the police record of the accused was handed to the judge immediately after he had found the accused guilty of the principal offence, and the latter was questioned on it as a preliminary to the sentence. This brought into the mind of the judge the very information the subsection was aimed to keep out. It goes to the substance of the proceeding and is fatal to the subsequent determination.

On the other questions I should add generally that there is no reason why a complete description of each conviction with particulars should not be set forth both in the notice given to the accused and in the certificate which likewise should be signed by the appropriate officer of the court of conviction. The grounds of conduct, evidence of which it is intended to adduce to show the criminal life being persistently followed by the accused to the time of the notice, should be furnished by at least general description such as persistence in petty offences, association with disreputable characters and other characteristics of criminal habit, sufficient to enable the accused reasonably to know what he is to meet.

There seems to be a tendency to treat a proceeding under the section as one in which strict compliance with the express requirements of the Code is not to be insisted on. That is altogether a mistake. Under such a determination

(1) [1938] 2 All E.R. 818, 26 Cr. App. R. 169.

(2) (1910), 4 Cr. App. R. 120.

(3) [1938] 3 All E.R. 355, 26 Cr. App. R. 187.

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a person can be detained in prison for the rest of his life with his liberty dependent on the favourable discretion of a minister of the Crown. The adjudication is a most serious step in the administration of the criminal law in relation to which it is well to recall the words of the Lord Chief Justice of England in *Martin v. Mackonochie* (1), quoted by Meredith C.J.C.P. in *Rex v. Roach* (2):—

> It seems to me, I must say, a strange argument in a court of justice, to say that when, as the law stands, formal proceedings are in strict law required, yet if no substantial injustice has been done by dealing summarily with a defendant, the proceeding should be upheld. In a court of law such an argument à convenienti is surely inadmissible. In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in pœnam are, it need scarcely be observed, strictissimi juris; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist upon them as a matter of right, of which he cannot be deprived against his will; and the judge must see that they are followed. He cannot set himself above the law which he has to administer, or make or mould it to suit the exigencies of a particular occasion. Though a murderer should be taken red-handed in the act, if there is a flaw in the indictment the criminal must have the benefit of it. If the law is imperfect, it is for the legislature to amend. The judge must administer it as he finds it. And the procedure by which an offender is to be tried, though but ancillary to the application of the substantive law and to the ends of justice, is as much part of the law as the substantive law itself.

Mr. Common, with his customary fairness, conceded the importance of some of these omissions but took the position that, in view of all that had taken place before the judge, including admissions drawn out, some by the judge in questioning the accused on his police record for the purpose of the first sentence, there could not by any possibility be a miscarriage of justice, the ground on which the Court of Appeal acted. For the reasons given, that submission cannot be accepted. In such a case form is substance and if the loose practice followed in the present proceedings were tolerated, the clear intention of Parliament to surround this new and extreme power over the individual with specific safeguards would be nullified.

I would, therefore, allow the appeal and quash the conviction.

(1) (1878), 3 Q.B.D. 730 at 775-6.

(2) (1914), 6 O.W.N. 630 at 631-2, 26 O.W.R. 564, 23 C.C.C. 28 at 30, 19 D.L.R. 362.

LOCKE J.:—The appellant was on June 7, 1955 found guilty of stealing an automobile, by a jury in the Court of General Sessions at St. Thomas.

In advance of this hearing the Crown had caused a written notice to be served on the appellant, which appears to me to comply with the requirements of s. 662 of the *Criminal Code,* informing him that, if he should be convicted of the charge of theft referred to, an application would be made under s. 660(1) for a sentence of preventive detention, in addition to any sentence that should be imposed for the offence of which he was then convicted. The grounds for the proposed application as stated in the notice were that, since the age of eighteen years on at least three separate and independent occasions, the appellant had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and that he was leading persistently a criminal life.

Section 662(2) of the *Code* requires that an application under Part XXI for preventive detention shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

Upon the jury returning its verdict, before proceeding with the Crown's application a discussion took place between the presiding judge and counsel for the Crown and for the prisoner, which was relevant only to the consideration of the sentence to be imposed for the theft, in the course of which a document entitled "Probation Office Pre-Sentence Report", signed by a probation officer, was handed to the judge by the Crown prosecutor. This report, apparently prepared under the provisions of s. 2 of *The Probation Act,* R.S.O. 1950, c. 291, contained an extensive review of the previous career of the convicted person including information as to the criminal record of one of his brothers, the fact that he had some 22 years earlier abandoned his wife and four children, information as to his general habits and a detailed history of his criminal record said to have been taken from reports of the Royal Canadian Mounted Police and covering a period from 1929 to 1954. In addition to convictions for some comparatively minor offences, this report showed that during the previous period

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of 25 years the appellant had been convicted and imprisoned for not less than 12 indictable offences for which he might have been imprisoned for periods of five years or more. During the discussion that took place, counsel acting for the appellant appears to have admitted three of the four convictions mentioned in the notice served upon the appellant in advance of his trial.

After the appellant's long and unfavourable criminal record had been discussed, the learned judge proceeded to hear the Crown's application under s. 660(1). Counsel for the prisoner was asked if he had admitted three of the four convictions mentioned in the notice given to the prisoner and, referring to what had taken place during the discussion regarding sentence on the theft charge, counsel said that he had. Proof which appears to me to be in satisfactory form was then given of the fourth of these convictions which had been made at St. Thomas on July 15, 1952, on a charge of theft preferred under s. 377 of the *Code,* for which a penalty of two years' imprisonment had been imposed. Other than the evidence afforded by these four convictions during the past ten years, the only evidence given on behalf of the Crown in support of the contention that the appellant was "leading persistently a criminal life" within the meaning of s. 660(2)(*a*) was that of a police constable who had first seen the accused when he was tried in 1952 on the offence above mentioned and who, when asked as to his general reputation in the community in which he lived, said that it was bad.

The appellant gave evidence on his own behalf, saying that he had been trying to straighten up but that whenever he got a job he lost it as soon as his criminal record became known. He was asked as to whether he was convicted of forgery at Whitby in 1929 but declined to admit the fact. He was not cross-examined as to the other convictions which had been referred to in the probation officer's report, other than in regard to the offence of breaking and entering for which he had been given five years' suspended sentence in January of 1955.

Part X(A) of the *Criminal Code,* R.S.C. 1927, c. 36, dealing with habitual criminals, was first enacted in 1947, by c. 55, s. 18. Sections 575A to 575D were taken almost *verbatim* from s. 10 of the *Prevention of Crime Act, 1908,*

8 Edw. VII (Imp.), c. 59. If the person sought to be declared an habitual criminal was first tried for an indictable offence and found guilty by a jury, the issue as to whether or not he was an habitual criminal was tried by a jury. When these subsections were re-enacted in the new *Code*, this procedure was changed. Section 662(2), in addition to requiring that the application should be heard before sentence was passed for the offence of which the accused had then been convicted, directed that it should be heard by the court without a jury. There was no change in the requirement that upon the application, unless the accused person had previously been sentenced to preventive detention, it was necessary to show that since attaining the age of eighteen years, on at least three separate and independent occasions he had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and was leading persistently a criminal life.

As pointed out by Channell J. in delivering the judgment of the Court of Criminal Appeal in *Rex v. Turner* (1), dealing with the requirement of s. 10(2)(*a*) of the *Prevention of Crime Act, 1908*, that if it is to be found that he is "leading persistently a dishonest or criminal life":—

> . . . the evidence against him must be brought down to date—that is the important thing and that is necessary. . . .

This applies with equal force to the language of s. 660(2)(*a*).

In the case of *Brusch v. The Queen* (2), decided under the sections of the *Code* applicable at that time, it will be noted that the Crown did not content itself with proving the three convictions but asserted that the accused had been "leading a persistently criminal life in that you have been an associate of criminals, prostitutes, drug addicts and have had no regular employment or occupation", and called evidence in support of these statements. The sufficiency of the evidence in the present matter to justify a finding that

(1) (1910), 3 Cr. App. R. 103 at 160.

(2) [1953] 1 S.C.R. 373, 105 C.C.C. 340, 16 C.R. 316, [1953] 2 D.L.R. 707.

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the present appellant should be found to be an habitual criminal is, in my opinion, a matter of grave doubt. I, however, do not consider that the present appeal should be disposed of on that ground.

The judgment delivered by the learned judge upon the application showed clearly that, in arriving at his conclusion that the appellant was an habitual criminal, he had considered the statements made in the probation officer's report purporting to cover a period of 25 years prior to the trial. None of this was evidence that was properly before him. Evidence of this long previous criminal record was doubtless admissible on the application but it was not given and, in basing his decision at least partly upon it, the learned judge acted upon matters outside the record.

In these circumstances there is, in my opinion, no justification for applying the provisions of s. 592(1)(*b*)(iii). As to this, I refer to what was said by Sir Charles Fitzpatrick C.J., with whom Duff J. (as he then was) agreed, in *Allen v. The King* (1):—

> It was argued that the section of our Code, upon which the Chief Justice in the Court of Appeal relied, specially provides that the appeal shall be dismissed even where illegal evidence has been admitted, if there is otherwise sufficient legal evidence of guilt. I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only where the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it. If there is any doubt as to this the prisoner must get the benefit of that doubt *propter favorem vitae*.

While the trial referred to in *Allen's Case* was before a jury, these remarks, in my opinion, apply with equal force to a hearing such as this before a single judge where the reasons delivered indicate that he relied, at least in part, upon evidence which was not properly before him.

Following the finding made, the learned judge sentenced the appellant to a term of imprisonment on the charge of theft and, accordingly, nothing further can be done under the application for preventive detention. I would quash the finding that the appellant was an habitual criminal and the direction that he be held in preventive detention.

The judgment of Fauteux and Nolan JJ. was delivered by

(1) (1911), 44 S.C.R. 331 at 339, 18 C.C.C. 1.

FAUTEUX J.:—Whether or not an accused is a habitual criminal and by reason of this fact should, for the protection of the public, be sentenced to detention in a penitentiary for an indeterminate period, involves an important issue of fact which must be heard and determined according to law. Under the imperative provisions of s. 662(2) of the *Criminal Code,* the hearing and determination of this issue must take place before sentence is passed for the offence of which the accused is convicted. The reason for this order of precedence established in the procedure is to assure the effective operation of all the safeguards which, both by the method of inquiry and by the rules of evidence, attend the trial of any issue and, more particularly, to exclude definitely any possibility that the judge entrusted with the matter be, until it is finally determined, adversely influenced in any degree by facts or representations of which, once an accused is convicted, he may, without the same safeguards, be apprised for passing a sentence.

In the present instance, the sentence for the offence of which the appellant was convicted was actually pronounced after the hearing and determination of the issue related to preventive detention. However, prior to such hearing, the judge, for the purpose of determining what sentence he should impose, received from the prosecution and exacted from the defence, in a most exhaustive manner, information of a character highly damaging to the accused. In the result, when the subsequent hearing of the issue related to preventive detention commenced, his mind was no longer free, in the measure it should have been, had the provisions of s. 662(2) been complied with, and the effective exercise of the right which the appellant had, on the hearing of such issue, to remain silent and hold the prosecution strictly to its obligation to prove its case according to rules of procedure and rules of evidence, was thenceforward jeopardized.

Counsel for the respondent admitted the violation of s. 662(2), attempting however, but in my view unsuccessfully, to show that "no substantial wrong or miscarriage of justice has occurred". The trial of the issue conducted in violation of the imperative provisions was wholly invalid and such defect is not one contemplated under the curative provisions of s. 592(1)(*b*)(iii).

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The appeal should be allowed; the finding that the appellant was a habitual criminal and the direction that he be held in preventive detention should be quashed.

Appeal allowed.

Solicitor for the appellant: E. P. Hartt, Toronto.

Solicitor for the respondent: C. P. Hope, Toronto.

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Cartwright and Abbott JJ.