FRANK KIRKLAND.....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

1956

*Nov. 20

Dec. 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Criminal law—Habitual criminals—Matters to be proved by prosecution—Proof that accused "is leading persistently a criminal life" at time of primary offence—The Criminal Code, now 1953-54 (Can.), c. 51, s. 660(2)(a).*

Before a person can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must satisfy the onus of proving beyond a reasonable doubt that at the time of committing the primary offence the accused was "leading persistently a criminal life". This onus is not satisfied by showing that since his release from imprisonment he has done no work and has no visible means of earning an honest livelihood, and on the other hand the fact that he has done some honest work since his last release is far from conclusive proof that he is not an habitual criminal, although it is an important consideration. *Rex v. Stewart* (1910), 4 Cr. App. R. 175 at 178; *Rex v. Baggott* (1910), 4 Cr. App. R. 67 at 70; *Rex v. Lavender* (1927), 20 Cr. App. R. 10, quoted or referred to.

There are cases in which an accused's criminal record, coupled with the conviction for the substantive offence, may form a sufficient basis for the finding that he is an habitual criminal. But Parliament did not intend that a man should be found to be an habitual criminal merely because he has a number of previous convictions against him. *Rex v. Jones* (1920), 15 Cr. App. R. 20 at 21, agreed with. In all the cases in which this has been held sufficient the substantive offence has been of such a nature as to show premeditation and careful preparation, and in this way to constitute in itself evidence of leading persistently a criminal life. *Rex v. Keane and Watson* (1912), 8 Cr. App. R. 12 at 14; *Rex v. Heard* (1911), 7 Cr. App. R. 80 at 83, quoted. If the circumstances of the primary offence are consistent with the view that the accused yielded to a sudden temptation, and do not establish premeditation or a plan, the fact of that offence, even when coupled with a lengthy criminal record, does not constitute sufficient evidence to support a finding that the accused is an habitual criminal.

APPEAL from a judgment of the Court of Appeal for Ontario, dismissing an appeal from a sentence of preventive detention imposed on the appellant as an habitual criminal. Appeal allowed.

*J. W. Brooke,* for the accused, appellant.

*W. B. Common, Q.C.,* for the respondent.

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.



82258—1½

1956

KIRKLAND
v.
THE QUEEN

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by this Court, from an order of the Court of Appeal for Ontario, dated May 26, 1953, affirming the finding of His Honour Judge Lovering dated February 26, 1953, that the appellant was an habitual criminal.

On February 26, 1953, the appellant was tried before His Honour Judge Lovering, without a jury, on the charge of having, on October 4, 1952, stolen from the person of Hugh McCulloch a wallet containing $107 in money and personal papers. The learned judge convicted the appellant on this charge and then proceeded with the hearing to determine whether or not he was an habitual criminal, with the result indicated above.

In view of the dates of the proceedings the questions raised on this appeal are to be determined under the provisions of Part X (A) of the *Criminal Code,* R.S.C. 1927, c. 36, as enacted by 1947, c. 55, s. 18.

The notice required by s. 575C(4)(*b*) was given to the appellant. In it the grounds upon which it was intended "to found the charge of being an habitual criminal" were specified as follows:

1. That since attaining the age of eighteen years you have been convicted of the following indictable offences for which you were liable to at least five years imprisonment, that is to say,

(a) On the 18th day of January, 1936, in the Magistrate's Court for the City of Toronto in the County of York, you were convicted for that you did on the 30th day of December, 1935, at the City of Toronto in the County of York, unlawfully did steal one carton containing thirty pounds of tea the property of the Toronto St. Catharines Transport, value under $25.00, contrary to the Criminal Code, and that you were sentenced to imprisonment for 60 days.

(b) On the 11th day of May in the year 1936, in the County of York Magistrate's Court, you were convicted for that on the 28th day of April in the year 1936, at the Township of Scarboro in the County of York, you unlawfully did steal four cases of beer, the property of the Brewery Corporation, value under $25.00, contrary to Section 386 of the Criminal Code, and you were sentenced to a definite term of 6 months.

(c) On the 15th day of May in the year 1936, in the Magistrate's Court for the City of Toronto in the County of York, you were convicted for that in the month of April in the year 1936, at the City of Toronto in the County of York, you unlawfully did receive in your possession eighteen cartons of beer, the property of Reinhardt Brewery and theretofore stolen, then well knowing the same to have been so stolen, value over $25.00, contrary to the Criminal Code, section 399, and you were sentenced to a definite term of 6 months in the Ontario Reformatory.

(d) On the 27th day of October A.D., 1937, in the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York on or about the 27th day of September in the year 1937, you unlawfully stole a diamond ring, two watches, a set of dress studs, a silver ring, a silver brooch, a silver ring box and the sum of forty-five dollars ($45.00) in money, the property of Henrietta Dunn, contrary to the Criminal Code, and you were sentenced on the 2nd day of November, 1937, to serve a term of one year in jail.

(e) On the 5th day of November, A.D., 1937, in the County of York Magistrate's Court, you were convicted for that you did on the 4th day of October, A.D., 1937, at the Township of North York, in the County of York, unlawfully have, receive, or retain in your possession one cuff link, the property of W. G. Richards, 9 Brook Street, before then stolen, well knowing the same to have been stolen, contrary to Section 399 of the Criminal Code, and you were sentenced to imprisonment for a term of 12 months.

(f) On the 15th day of November, A.D., 1938, in the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York, on or about the 1st day of October in the year 1938, you broke and entered the shop, warehouse, store or storehouse of Dominion Stores Ltd., situate and known as number 497 Parliament Street, in the said city, and stole therein a quantity of cigarettes and other articles, the property of Dominion Stores Ltd., contrary to the Criminal Code;

(g) And further at the time and place last above mentioned, you were also convicted for that at the City of Toronto on or about the 1st day of October in the year 1938, you robbed Benjamin Pearson of a revolver, and at the time of or immediately before or immediately after such robbery, wounded, beat, struck or used personal violence to the said Benjamin Pearson, contrary to the Criminal Code;

(h) And further at the time and place last above mentioned, you were also convicted for that at the said City of Toronto, on or about the 9th day of October in the year 1938, you robbed one Alex Thompson of the sum of two hundred and eight dollars, ($208.00) in money, a wrist watch and a fountain pen, and at the time of or immediately before or immediately after such robbery, wounded, beat, struck or used personal violence to the said Alex Thompson, contrary to the Criminal Code.

(i) On the 21st day of November, 1938, you were sentenced to imprisonment in Kingston Penitentiary for three years for each of the offences mentioned in paragraphs f, g, and h above, the sentences to run concurrent.

(j) On the 4th day of June, A.D., 1946, at the sittings of the County Court Judge's Criminal Court of the County of York, you were convicted for that at the City of Toronto in the County of York, on or about the 9th day of June in the year 1945, you unlawfully did steal the sum of three hundred and eighteen dollars ($318.00), the property of Kenneth Adair, contrary to the Criminal Code and that you were sentenced to imprisonment in Kingston Penitentiary for two years.

(k) On the 20th day of June, A.D., 1946, at sittings of the County Court Judge's Criminal Court of the County of York, held at the City of Toronto, you were convicted for that at the City of Toronto in the County of York, in or about the month of May in the year 1946, you unlawfully did steal three suitcases and two week-end bags and contents,

1956

KIRKLAND
v.
THE QUEEN

Cartwright J.

the property of Albert Catalone, Irma Wolfe, Margaret L. Clark and Eli Van Dirlin, contrary to the Criminal Code and that you were sentenced to serve a term of three years in Kingston Penitentiary.

(l) On the 15th day of December, A.D., 1949, at a sittings of the County Court Judge's Criminal Court of the County of York, held at the City of Toronto you were convicted for that at the City of Toronto in the County of York, in the month of October in the year 1949, you broke and entered the dwelling house of Wilfred Deschamp, situate and known as number 338 Bloor Street East, in the said City, by night, with intent to commit an indictable offence therein, to wit, theft, contrary to the Criminal Code, and that you were sentenced to imprisonment in Kingston Penitentiary for three years.

2. That since the expiration of your last term of imprisonment you have been doing no work and you have no visible means by which to earn an honest livelihood.

3. You are charged with being a persistent criminal because shortly after your release from Kingston Penitentiary, you committed the fresh offence that you are now charged with.

The convictions as set out in items (*a*) to (*l*) of para. 1 of this notice were proved at the hearing. It appears from the certificates of conviction, which were filed as exhibits, that the sentences imposed under items (*b*) and (*c*) were to run concurrently as was also the case in regard to those imposed under items (*d*) and (*e*), those imposed under items (*f*), (*g*) and (*h*) and those imposed under items (*j*) and (*k*).

There was evidence that in November 1937 the appellant had stated his age to be 19 and that in September 1945 he had stated it to be 27.

We were informed by counsel that the appellant was released from the penitentiary on April 4, 1952, so that exactly six months elapsed between the date of his release and that of the commission of the substantive offence of which he was convicted by His Honour Judge Lovering. The only evidence given for the prosecution as to the activities of the appellant during this period was that in July and August 1952 he was seen in the village of Belle Ewart assisting from time to time in a booth operated by his sister in which refreshments were sold.

The defence called William Dineen, a nephew of the appellant, who testified that the latter had helped the mother of the witness in the operation of the booth at Belle Ewart; that the appellant had tried to get employment at the Canadian National Exhibition in August 1952 but could not do so as he was not a union member; that

the witness and his wife then took the appellant into their home and that he helped with digging the cellar and with some reconditioning and decorating of their house; that the appellant got some odd jobs as a stevedore; that the appellant was "living for free at home" and getting some money from his sister, the mother of the witness; and that during the war years the appellant had worked at war-work but that the witness knew of this only by hearsay as he was in the armed services at that time.

The learned County Judge gave no reason for his finding that the appellant was an habitual criminal and the Court of Appeal gave no reasons for their decision that the appeal from that finding should be dismissed.

While the grounds of appeal were expressed in varying terms in the memorandum filed on behalf of the appellant, the main ground argued before us was that on the evidence the Crown had failed to satisfy the onus of proving that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life. We were informed by counsel that this ground was not urged in the Court of Appeal. It must be borne in mind that, leave to appeal having been granted under s. 41(1) of the *Supreme Court Act,* R.S.C. 1952, c. 259, our jurisdiction is not restricted to questions of law alone: *vide* the judgment of this Court granting leave to appeal in *Parkes v. The Queen* (1).

Section 575C(1) so far as relevant to the question now before us read as follows:

> (1) A person shall not be found to be a habitual criminal unless the judge . . . finds on evidence,
>
> (*a*) that since attaining the age of eighteen years he has at least three times previously to the conviction of the crime charged in the indictment, been convicted of an indictable offence for which he was liable to at least five years' imprisonment, whether any such previous conviction was before or after the commencement of this Part, and that he is leading persistently a criminal life;

Part X(A) of the *Criminal Code,* first enacted in 1947, is in its wording similar to, although not identical with, Part II of the *Prevention of Crime Act,* 1908, 8 Edw. VII, c. 59, and counsel in the course of their full and helpful

(1) [1956] S.C.R. 134.

1956

KIRKLAND v. THE QUEEN

Cartwright J.

arguments discussed a number of the decisions of the Court of Criminal Appeal in cases arising under the last-mentioned statute.

In my opinion it is established by these decisions, and I would so hold on the wording of s. 575C(1) if the matter were devoid of authority, that before an accused can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must satisfy the onus of proving beyond a reasonable doubt that at the time when he committed the indictable offence referred to in s. 575B the accused was leading persistently a criminal life. It is true that a finding that a person is an habitual criminal is not a conviction of a crime: *vide Brusch v. The Queen* (1) and *Parkes v. The Queen* (2); but, as was said by Rand J. in *Parkes v. The Queen* (3) when the finding that Parkes was an habitual criminal was quashed:

> Under such a determination 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 . . .

and, in my opinion, the rule requiring proof beyond a reasonable doubt applies to such an adjudication as fully as in the case of any criminal charge.

In the case at bar there is no evidence that during the six months following his release from the penitentiary in April 1952 the appellant had done anything unlawful or dishonest. Such evidence as there is goes to show that he was trying to obtain work, albeit without much success, and was doing such work as he was able to get. Ground no. 2 set out in the notice required under s. 575C(4)(*b*) and quoted above is not made out on the evidence but if it had been it would not have required a finding adverse to the appellant. It was said by Jelf J., giving the judgment of the Court of Criminal Appeal in *Rex v. Stewart* (4),

> It does not follow, because he is not getting an honest living, that it must be a dishonest one—he may be doing nothing.

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

(2) [1956] S.C.R. 134.

(3) [1956] S.C.R. 768 at 773-4, 116 C.C.C. 86, 24 C.R. 279.

(4) (1910), 4 Cr. App. R. 175 at 178.

and by Pickford J. giving the judgment of the Court in *Rex v. Baggott* (1):

> He refused the work of stone-breaking that had been offered him by the guardians. It is said that you can infer criminality from this. But the evidence was that the appellant was living on the charity of his relations. Therefore the choice was not stone-breaking or stealing, but stone-breaking or charity. He chose the latter.

I agree with the view expressed in a number of cases in the Court of Criminal Appeal that the mere fact that the prisoner has done some honest work since his last release is by no means conclusive proof that he is not an habitual criminal: see, for example, *Rex v. Lavender* (2); although the fact of his having done such work is an important consideration.

It was argued on behalf of the respondent that the appellant's criminal record coupled with the conviction of the substantive offence formed a sufficient basis for the finding that he was an habitual criminal. As to this I agree with the view expressed by Lord Reading L.C.J. giving the judgment of the Court of Criminal Appeal in *Rex v. Jones* (3):

> The legislature never intended that a man should be convicted of being a habitual criminal merely because he had a number of previous convictions against him.

There have however been cases in which the Court of Criminal Appeal has upheld a finding that a prisoner was an habitual criminal on the ground that the nature of the substantive offence viewed in the light of his previous record was in itself evidence that he was leading persistently a criminal life. For example in *Rex v. Keane and Watson* (4), Channell J. in giving the judgment of the Court said:

> The point is whether, at the time when he commits the offence then being dealt with, he *is* leading persistently a dishonest or criminal life. The verb is in the present tense. If he has done some honest work but has given it up and committed another crime, it may well be that he has returned to a life of crime and is then a habitual criminal, and the nature of the most recent crime may itself be evidence that at the time he commits it he is persistently leading a dishonest or criminal life. In *Baggott's* case, which was relied on for the appellants but is really an authority against them, the offence of coining was given as an illustration of such a crime. But the present case is another illustration which will do equally well. The appellants, who must have planned the crime

(1) (1910), 4 Cr. App. R. 67 at 70.
(2) (1927), 20 Cr. App. R. 10.
(3) (1920), 15 Cr. App. R. 20 at 21.
(4) (1912), 8 Cr. App. R. 12 at 14.

1956

KIRKLAND
v.
THE QUEEN

Cartwright J.

together, broke into this dwelling-house by means of a jemmy and stole bracelets and rings and other property from the bedrooms. We think that when they were committing this offence, they must then have been leading persistently a dishonest and criminal life. In our opinion, therefore, there was sufficient evidence to support the verdicts of the jury . . .

I have examined all the cases of this class to which we were referred by counsel and find that in each of them the substantive offence was of such a nature as to show premeditation and careful preparation. I shall refer to only one example. In *Rex v. Heard* (1), Hamilton J., speaking for the Court, said:

> Where the interval between the last known fact against the prisoner and the commission of the substantive crime is considerable—and six or nine months are a considerable interval—there should be additional evidence. In this case there was such evidence, for the crime was carefully planned, was committed in association with another habitual criminal, and was carried out with skill, so the jury, with the facts before them, were justified in convicting . . .

In the case at bar the transcript of the evidence given at the trial on the charge of the substantive offence was not before the Court of Appeal nor was it before us at the argument. In considering the matter, after judgment had been reserved, this Court was unanimously of the opinion that this transcript should have formed part of the material in the Court of Appeal, and requested the Attorney-General to furnish it to us unless counsel should desire to make any submission that it should not be before us. No objection was made and we have now received the transcript.

The evidence of McCulloch whose wallet was stolen is uncontradicted. He was walking north on Jarvis Street about midnight after watching television in a hotel. There had been a collision and an argument was in progress as a result. McCulloch had stopped to observe this and was having a conversation with the appellant during the course of which he offered the appellant a cigarette. He does not say who started the conversation. He says in part:

> Anyway, we talked for about a minute or two and he said, "All right sir, you are a good sport", and gave me a pat on the shoulder and walked off across the street.

A moment later, on putting his hand in his pocket to get his handkerchief, McCulloch noticed that his wallet which had been in his left hip pocket was gone. He ran after

(1) (1911), 7 Cr. App. R. 80 at 83.

the appellant calling for the police and the appellant was seen to drop the wallet. The appellant did not give evidence.

In my opinion, the offence thus committed by the appellant is not of such a nature as to warrant the inference that he was leading persistently a criminal life. The circumstances are consistent with the view that, yielding to a sudden temptation, he availed himself of the opportunity afforded by his chance meeting with McCulloch following the collision. It may be said that the circumstances are not inconsistent with the view that the appellant had gone out that night for the express purpose of picking someone's pocket if the opportunity offered, but so to hold would be mere speculation. Bearing in mind that the appellant is entitled to the benefit of every reasonable doubt it is my opinion that there is not sufficient evidence to support the finding of the learned County Court Judge that the appellant was an habitual criminal. As pointed out above we are not restricted to a consideration of the question of law whether there was any evidence on which such a finding could have been made and I express no final opinion upon it although it is my present view that there was no such evidence.

I do not intend in anything I have said above to minimize the seriousness of the substantive offence of which the appellant was convicted, and for which he has been punished by two years' imprisonment; but that offence was not, in my opinion, of such a nature as, without more, to furnish evidence that he was leading persistently a criminal life.

I would quash the finding that the appellant was an habitual criminal and the direction that he be held in preventive detention.

*Appeal allowed.*

*Solicitor for the appellant: John W. Brooke, Toronto.*