1955

*Dec. 12
*Dec. 22

JOSEPH WILFRED PARKES .....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeal—Jurisdiction—Whether finding by judge accused an habitual criminal a "judgment" and decision of Court of Appeal affirming a "final judgment"—The Supreme Court Act, R.S.C. 1952, c. 259, ss. 2 (b), 41 (1)—Criminal Code, s. 660.

The "charge" of being an habitual criminal is not a charge of an offence or crime but the assertion of the existence of a status or condition in an accused. *Brusch* v. *The Queen*, 1953, 1 S.C.R. 373. The decision of a judge that an accused is an habitual criminal is however a "judgment" and the decision of the Court of Appeal of a Province affirming such judgment is a "final judgment" within the meaning of s. 41 (1) of the *Supreme Court Act* and this Court has jurisdiction to grant leave to appeal therefrom.

MOTION by appellant under s. 41 of the *Supreme Court* Act, for leave to appeal from a judgment of the Court of Appeal for Ontario which dismissed the appeal of the appellant against the finding of Grosch J., County Court Judge, sentencing the appellant as an habitual criminal to an indeterminate term in the penitentiary.

E. P. Hartt for the motion.

W. B. Common, Q.C., contra.

The judgment of the Court was delivered by:—

CARTWRIGHT J.:—This is a motion for leave to appeal from a judgment of the Court of Appeal for Ontario pronounced on the 23rd of November, 1955, dismissing the

*PRESENT: Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.
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appeal of the applicant from the decision of His Honour Judge Grosch finding that the applicant was an habitual criminal and sentencing him to an indeterminate term in the penitentiary under the provisions of s. 660 of the *Criminal Code*.

The motion is brought pursuant to s. 41 of the *Supreme Court Act*. Mr. Hartt submits that the judgment of the Court of Appeal falls within the terms of s. 41 (1) as being a final judgment of the highest court of final resort in the province in which judgment can be had in the particular case, and that it is not a judgment affirming a conviction of an indictable offence, or indeed of any offence, and therefore does not fall within the terms of s. 41 (3).

It appears to me that the majority of this Court decided in *Brusch* v. *The Queen* (1), that the "charge" of being an habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which, if established, enables the Court to deal with the accused in a certain manner. In so deciding the majority followed the reasoning of the English courts in *Rex* v. *Hunter* (2) approved by a court of thirteen judges presided over by Lord Hewart L.C.J. in *Rex* v. *Norman* (3).

It follows from this that when His Honour Judge Grosch decided that the applicant was an habitual criminal he was not convicting him of an indictable offence but was deciding that his status or condition was that of an habitual criminal. It was this decision which was affirmed by the Court of Appeal. That such a decision is a "judgment" within the meaning of that word in s. 41 (1) does not appear to me to admit of doubt. It is indeed a "final judgment" under the definition contained in s. 2 (*b*). It is a "decision which determines in whole...a substantive right...in controversy in a judicial proceeding"—i.e., the right of an accused to his liberty at the conclusion of whatever sentence might be imposed for the substantive offence of theft of which he was convicted prior to the trial and adjudication of the question whether his status

(1) [1953] 1 S.C.R. 373. (2) [1921] 1 K.B. 555.
(3) [1924] 18 Cr. App. R. 81.

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was that of an habitual criminal, or, alternatively, the right of the Crown to ask that he be sentenced to preventive detention.

Mr. Common's argument that for the purpose of determining whether or not a right of appeal is given the adjudication that the applicant is an habitual criminal should be treated as a conviction of an indictable offence cannot in my view be reconciled with the decision in *Brusch* v. *The Queen.* I conclude that we have jurisdiction to grant leave under s. 41 (1).

As to the merits, it was intimated at the hearing that it was the view of the Court that leave should be granted if we have jurisdiction to grant it and accordingly counsel for the applicant was directed to confine his reply to the question of jurisdiction.

I would accordingly grant leave to appeal, pursuant to the terms of s. 41 (1) of the *Supreme Court Act,* from the affirmation by the Court of Appeal of the decision of His Honour Judge Grosch that the applicant is an habitual criminal.

Motion granted.