WESLEY GOLDBORN HARNISH .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1961

*Feb. 13, 14
Apr. 25

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA

In Banco

Criminal law—Habitual criminal—Application for preventive detention of accused as an habitual criminal—7 clear days notice to be given accused—Time when notice to be given—Evidence of persistent criminal life—Whether trial judge entitled to look at evidence leading to conviction on substantive offence—Criminal Code, 1953-54 (Can.), c. 51, ss. 660, 662.

The accused was convicted on the charge of breaking and entering and committing theft. On the day of his conviction, but before the time set for the sentencing, notice was given by the Crown that an application would be made 10 days later to impose upon him a sentence of preventive detention on the ground that he was an habitual criminal. The notice set out prior convictions and alleged that the accused was leading persistently a criminal life. A period of 25 months had elapsed since the accused was released from imprisonment for the last of these offences and his commission of the substantive offence in the present case. The trial judge found the accused to be an habitual criminal and took into consideration the nature and circumstances surrounding the commission of the substantive offence. This judgment was affirmed by the Supreme Court of Nova Scotia *in banco*. The accused appealed to this Court.

*PRESENT: Taschereau, Locke, Fauteux, Abbott, Martland, Judson and Ritchie JJ.

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Held: The appeal should be dismissed.

1. Notice of the application required by s. 662(1)(*a*)(ii) of the *Criminal Code* may be given at any time that allows 7 clear days before the application and is also before the day of sentence on the substantive offence. There is nothing in the present *Criminal Code* to preclude such notice being initiated, as it was in the present case, by the giving of 7 days notice after conviction but before sentencing, although notice given 7 days before the trial, as was done under the provisions of the former Code, would still be valid as this would necessarily be 7 days before the conviction and therefore before the time of making the application. *R. v. Stepanoff*, 33 C.R. 273, overruled.

2. The object of the notice is to prevent the accused from being taken by surprise as to the circumstances upon which the Crown intends to rely, but as the statute makes consideration of the substantive conviction a prerequisite to the hearing of the application, the Court is entitled to treat it as a material circumstance in reaching its conclusion on the merit of the application, whether such conviction is specifically mentioned in the notice or not. The trial judge, in reaching his conclusion, was fully justified in considering the conviction for the substantive offence and the circumstances surrounding it in light of the accused's past record. The finding of the trial judge should not be disturbed, as the nature of the substantive offence which was not only carefully planned but was similar in nature to four other crimes for which the accused had been previously convicted, was in itself evidence that he was leading persistently a criminal life.

3. The fact that a conviction which had not been specified in the notice of application and which had occurred before the appellant was 18 years of age, was wrongly admitted together with evidence of an acquittal, did not influence or prejudice the trial judge against the accused.

APPEAL from a judgment of the Supreme Court of Nova Scotia *in banco*[1], affirming a judgment of Ilsley C.J. Appeal dismissed.

L. L. Pace and *Chas. W. MacIntosh,* for the appellant.

Malachi C. Jones, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Supreme Court of Nova Scotia en banc[1] affirming the finding of Ilsley C.J. that the appellant was an habitual criminal and the consequent imposition of a sentence of preventive detention pursuant to the provisions of s. 660 of the *Criminal Code.*

[1] (1961), 45 M.P.R. 141, 34 C.R. 21, 129 C.C.C. 188.

On February 5, 1960, the appellant was convicted on an indictment charging that he did

> . . . on or about the 6th day of December, 1959, unlawfully break and enter the store of H. G. Guild Limited, situate at Musquodoboit and did there and then commit the indictable offence of theft contrary to Section 292 of the Criminal Code.

On the day of the conviction but before the time had arrived for considering the question of sentence thereon, the appellant was served by the prosecutor with notice that an application would be made to the Court on the 15th of February to impose upon him a sentence of preventive detention on the ground that he was an habitual criminal. This notice specified seven separate and independent occasions on which the appellant, since attaining eighteen years of age, had been convicted of an indictable offence for which he was liable to imprisonment for five years or more and proceeded to allege that the appellant practised no trade or profession, lived without employment on the proceeds of crime and was leading persistently a criminal life.

At the hearing held before the Chief Justice pursuant to this notice, the Crown produced the very considerable criminal record of the appellant, and in the course of so doing inadvertently introduced evidence of a conviction and an acquittal which had not been mentioned in the notice. At this hearing evidence was given by police officers that the appellant had been under police surveillance since his last release from prison in October 1957, that he had no regular employment, and that his general reputation in the community where he lived was not good, but there was no suggestion that he had been convicted or even arrested between the time of his last release and the time when he committed the substantive offence and it appeared that he had made some money by selling beer bottles to the Nova Scotia Liquor Commission.

In determining that the appellant was an habitual criminal and sentencing him accordingly, the learned Chief Justice undoubtedly took into account the nature and circumstances of the offence of which he had just been convicted which is hereinafter referred to as "the substantive offence".

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In dismissing the appellant's appeal from this determination, the Supreme Court of Nova Scotia en banc held that, having regard to the nature of the substantive offence and the circumstances of preparation, planning and deliberation which accompanied it, the evidence as a whole supported the conclusion that the accused was leading persistently a criminal life and found that the Chief Justice had not been influenced by the fact that the evidence of an acquittal and a conviction referred to above had been admitted at the hearing.

In holding that the notice of the application required by s. 662(1)(*a*)(ii) of the *Criminal Code* "may be given at any time that allows seven clear days before the application and is also before the day of sentence on the substantive offence", Mr. Justice Doull had occasion to state:

> I am quite clear that it (the notice) is sufficient and I am of opinion that *R. v. Stepanoff* (32 C.R. 362) was wrongly decided by following words of the former Act which have now been carefully omitted and by reading Section 662(*a*)(ii) as if it were the same as former Section 575C(4)(*b*).

The case of *R. v. Stepanoff*[1] to which the learned judge referred was a decision of Lazure J. of the Quebec Court of Queen's Bench, Crown Side, which was subsequently affirmed by the Court of Appeal[2], holding that "the notice called for in s. 662 must be given before the trial on the primary charge commences". In the course of his reasons for judgment on appeal Mr. Justice Hyde said at p. 276:

> There is nothing in the terms of these sections of the new Code indicating any reason for a change in the practice followed under the old one. Furthermore, as the learned trial judge points out in his notes, the economy of our criminal law requires that an accused shall know before he makes his plea the exact nature of the charge with which he is faced and the consequences thereof.

As a conflict plainly exists between the Appellate Courts of Nova Scotia and Quebec respecting the very important question of the time at which notice of application for imposition of the sentence of preventive detention is to be initiated and as the difference of opinion turns in some degree on the wording of both the present *Criminal Code*

[1] (1960), 32 C.R. 362. [2] (1960), 33 C.R. 273, 128 C.C.C. 48.

and that of c. 55 of the Statutes of Canada, 1947, it will perhaps be convenient to consider the relevant provisions of these two statutes together:

THE PRESENT CRIMINAL CODE

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

(*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.

660. (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.

CHAPTER 55, STATUTES OF CANADA, 1947

575B. Where a person is convicted of an indictable offence committed after the commencement of this Part and subsequently the offender admits that he is or is found by a jury or a judge to be a habitual criminal, and the court passes a sentence upon the said offender, the court, if it is of the opinion that, by reason of his criminal habits and mode of life, it is expedient for the protection of the public, may pass a further sentence ordering that he be detained in a prison for an indeterminate period and such detention is hereinafter referred to as preventive detention and the person on whom such a sentence is passed shall be deemed for the purpose of this Part to be a habitual criminal.

575C. (1) A person shall not be found to be a habitual criminal unless the judge or jury as the case may be, 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; or

(*b*) that he has on a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

575C. (2) In any indictment under this section it shall be sufficient, after charging the crime, to state that the offender is a habitual criminal.

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662.(1) 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,

662. (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.

662. (3) For the purposes of section 660, where the accused admits the allegations contained in the notice referred to in paragraph (a) of subsection (1), no proof of those allegations is required.

575C. (3) In the proceedings on the indictment the offender shall in the first instance be arraigned only on so much of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the judge or jury, as the case may be, unless he thereafter pleads guilty to being a habitual criminal, the judge or jury shall be charged to enquire whether or not he is a habitual criminal and in that case it shall not be necessary to swear the jury again.

575C. (4) A person shall not be tried on a charge of being a habitual criminal unless

(a) the Attorney General of the province in which the accused is to be tried consents thereto; and

(b) not less than seven days' notice has been given by the proper officer of the court by which the offender is to be tried and the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge.

In the 1947 statute these sections are grouped under the heading "PART X(A) HABITUAL CRIMINALS" whereas the sections of the present Code appear in Part XXI under the heading "PREVENTIVE DETENTION". That these headings reflect a basic difference in approach to the question with which both enactments are concerned can be seen from the fact that the 1947 statute provides for a *trial* "on a charge of being a habitual criminal" whereas the proceeding for which provision is made in the present *Criminal Code* is the hearing and determination of an

application to impose a sentence of preventive detention. The following differences between these two enactments are at once apparent:

1. Under the 1947 statute the method of bringing the matter before the Court was to include in the indictment for the substantive offence a statement that "the offender is a habitual criminal" (s. 575C(2)) whereas under the present Code the matter is to be raised by an application to impose a sentence of preventive detention (s. 660(1)).
2. Under the 1947 statute the decision as to whether or not a sentence of preventive detention was to be imposed was not to be made until after sentence had been passed for the substantive offence (s. 575B) whereas under the present Code the application for imposition of such sentence is to be heard and determined before sentence is passed on the substantive offence (s. 662(2)).
3. Under the 1947 statute the issue of whether or not the accused is an habitual criminal may be tried by a jury (s. 575C(3)) whereas under the present Code the application to impose preventive detention is to be heard by the Court without a jury (s. 662(2)).

The case of *Brusch v. The Queen*[1] clearly establishes that "the charge of being a habitual criminal" referred to in s. 575C(4) was not a criminal offence and it is noteworthy, as has been indicated, that the new Code omits all reference to such "a charge" and the relevant sections do not purport to make provision for its trial but are carefully restricted to the hearing and determination of an application to impose sentence of preventive detention.

The fact that the 1947 statute, like that in force in England, (*Prevention of Crime Act,* (1908), c. 59) provided for the inclusion of the allegation of being an habitual criminal in the indictment charging the substantive offence (s. 575C(2)) has a significant bearing on the question of the time when notice was required to be given. It has been held under the equivalent provisions of the English statute that

> . . . when a prisoner is found guilty of the first charge, the charge as to being a habitual criminal must be tried at the same sessions, and cannot be postponed. You cannot split an indictment. . . .

(per Phillimore J. in *The King v. George Jennings*[2]).

It follows that as the substantive offence and the habitual criminal charge were required to be disposed of at the same sessions, the seven days' notice required under the old

[1] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[2] (1910), 4 Cr. App. R. 120.

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s. 575C(4)(*b*) was necessarily referable to seven clear days before the trial of the indictment which contained both allegations.

As was said by Mr. Justice Estey in *Brusch v. The Queen, supra,* at p. 381:

> What is more significant is that even in the indictment it is sufficient "to state that the offender is a habitual criminal" (575C(2)) and this statement can be added only after "not less than seven days' notice" (575C(4)(b)).

It can be seen, therefore, that whereas under the 1947 statute notice that the offender was to "be tried on a charge of being a habitual criminal" had to be given seven days before the trial of the substantive offence with which it was linked in the indictment, there is nothing in the present *Criminal Code* to preclude the notice of an application for preventive detention being initiated as it was in the present case by the giving of seven days' notice after conviction but before sentence, although notice given seven days before the trial as heretofore would still be valid as this would necessarily be seven days before the conviction and therefore before the time of making the application.

In the case of *Regina v. Stepanoff, supra,* both the trial judge and the judges of appeal appear to have placed reliance on the decision of this Court in *Parkes v. Regina*[1], as holding that the preventive detention application contemplated by s. 660 must be heard "immediately after conviction of the substantive offence".

In the course of his decision, Lazure J. says:

> From the various reasons for judgment given in the *Parkes* case, it is evident that this notice must be given at least seven days before the trial of the accused and that immediately after the verdict, the Crown must request the judge to defer sentence and forthwith hear the evidence supporting the allegations contained in the notice.

With all respect, I am unable to find support for such a contention in the reasons of this Court in *Parkes v. The Queen, supra,* and I can only think that the learned judge fell into the error of attributing the meaning of "forthwith" to the word "immediately" as used in that case.

[1] [1956] S.C.R. 768, 24 C.R. 279, 116 C.C.C. 86.

In the course of his reasons in *Parkes v. The Queen, supra,* Mr. Justice Rand traces the history of the use of the word "immediately" in this connection and at p. 773 refers to the meaning attributed to it by Branson J. in *Rex v. Vale*[1], where he said at p. 356:

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

Parkes v. The Queen, supra, is certainly authority for the proposition that statements concerning the character or past life of an accused person are not to be interposed before the court between the time of his conviction and the opening of the hearing on the application to sentence him to preventive detention, but the fact that no such step is to be taken between the entering of the conviction and the opening of the hearing does not mean that the one must follow the other immediately in point of time. It is true that in *Parkes v. The Queen, supra,* this Court approved of the notice of application which in that case was given before the trial of the substantive charge, but as Mr. Justice Doull has said in the course of his reasons in the present case, ". . . it does not follow that a notice at any time that is seven clear days before the 'application' is not sufficient."

In support of the contention that our criminal law requires that an accused shall know before he makes his plea the exact consequences of conviction of the offence with which he is charged, counsel for the appellant cited the provisions of s. 572(1) of the present *Criminal Code* which are as follows:

> Where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed upon him by reason thereof unless the prosecutor satisfies the court that the accused, before making his plea, was notified that a greater punishment would be sought by reason thereof.

In my view this section has no application to the imposition of a sentence of preventive detention. There is no valid analogy between the imposition of punishment "by reason of previous convictions" and the imposition of a sentence of preventive detention; in the former case "previous convictions" automatically expose the offender to greater punishment, whereas in the latter the separate and distinct

[1] [1938] 3 All E.R. 355.

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issue of whether or not he is an habitual criminal must be determined against him before the sentence of preventive detention can be imposed.

With the greatest respect for the views expressed by the courts of the Province of Quebec in the case of *Regina v. Stepanoff, supra,* I share the opinion expressed by Mr. Justice Doull that the notice of an application for imposition of a sentence of preventive detention may be given at any time that allows seven clear days before the application and is also before the day of sentence on the substantive offence. There can, accordingly, be no valid objection to the notice given in the present case.

It was, however, strongly contended before this Court that this appeal should be allowed on the ground that the evidence leading to the conviction on the substantive offence should not have been taken into consideration by the learned trial judge in making his determination under s. 660 of the Code. This contention was supported on the ground that the conviction for the substantive offence was not set out in the notice of application as one of the "previous convictions and other circumstances upon which it is intended to found the application" which are required to be specified in such notice under the terms of s. 662(1)(*a*)(ii). It is to be remembered, however, that an accused must have been convicted of the substantive offence before the Court can hear the application to which the notice relates (see s. 660(1)). Such conviction is, therefore, not one of *"the previous convictions"* referred to in s. 662(1)(*a*)(ii) *but the conviction* upon which the jurisdiction of the Court to hear the application is founded. The object of the notice is to prevent the accused from being taken by surprise as to the circumstances upon which the prosecution intends to rely, but as the statute itself makes consideration of the substantive conviction a prerequisite to the hearing of the application, the Court is also entitled to treat it as a material circumstance in reaching its conclusion on the merits of the application whether such conviction is specifically mentioned in the notice or not.

In the present case, however, the conviction of the substantive offence was recited in the first paragraph of the notice in the following terms:

TAKE NOTICE that, whereas you have been convicted for that you did at or near Musquodoboit Harbour in the County of Halifax on or about

the 6th day of December, A.D. 1959, unlawfully break and enter the store of H. G. Guild Limited, situate at Musquodoboit Harbour and did then therein commit the indictable offence of theft contrary to Section 292 of the Criminal Code.

There can be no doubt that the learned trial judge was fully justified in considering the conviction for the substantive offence and the circumstances surrounding it in light of the appellant's past record in reaching his conclusion.

Although the evidence taken at the trial for the substantive offence was not before this Court, I accept Mr. Justice Currie's statement that it shows

a system, a deliberate planning, a careful preliminary examination of the premises where the safe was blown open at night and money stolen therefrom.

As Mr. Justice Doull says, "This was no crime on the spur of the moment, but a carefully planned crime."

Consideration must, of course, be given to the fact that the appellant had not been convicted of any offence since his release from prison in October 1957, that there is some evidence of his having made a little money selling beer bottles and that the police evidence as to his criminal character and reputation was largely based on past experience, but these circumstances which were primarily for the consideration of the learned trial judge are not sufficient in my view to counteract the effect of the substantive crime which was not only carefully planned but was similar in nature to four other crimes for which the appellant had been previously convicted.

In the case of *Kirkland v. The Queen*[1], the accused had been out of prison for six months before the commission of the substantive offence, the circumstances of which were consistent with the view that he yielded to a sudden temptation, and in the course of his decision allowing the appeal from a sentence of preventive detention Mr. Justice Cartwright said:

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* (1920) 15 Cr. App. R. 20 at 21:

> "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."

[1] [1957] S.C.R. 3, (1956), 25 C.R. 101, 117 C.C.C. 1.

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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.

In my view the present case comes within the latter category and the evidence of the appellant selling beer bottles and perhaps doing other odd jobs between convictions is subject to the consideration referred to by Darling J. (as he then was) in *Rex v. George Jennings, supra,* at p. 122, when he said:

> If a man occupies a day or two of his time in doing work, that does not prevent him from being a habitual criminal. The word "habitual" is used in other collocations than in the phrase "habitual criminal". For instance, it is applied to drunkards, but a habitual drunkard does not mean a person who is never sober. Drunkenness is not continuous, nor are the acts of committing crimes.

I am accordingly of opinion that the finding and the sentence imposed by Chief Justice Ilsley should not be disturbed on this ground.

It was also contended on behalf of the appellant that evidence of a conviction which had not been specified in the notice of application and which had occurred before the appellant was eighteen years of age was wrongly admitted together with evidence of an acquittal.

Apparently these items were inadvertently not deleted when the appellant's record was put in evidence but no objection was taken to their admissibility, and I agree with Currie J. that

> It is seriously to be doubted if the learned Chief Justice did more than glance at the matters to which objection is now taken. It is inconceivable that such an experienced judge would be influenced or prejudiced against the accused to even the slightest extent even if he did look at them.

I would dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: L. L. Pace, Halifax.

Solicitor for the respondent: M. C. Jones, Halifax.