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*June 8, 9
June 9

FRANK DUDLEY WILBAND .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Dangerous sexual offender—Sentence of preventive detention—Evidence of psychiatrists—Whether admissible—Whether rule of hearsay evidence offended—Whether rule of confession evidence offended—Criminal Code, 1953-54 (Can.), c. 51, ss. 659, 660, 661.

The appellant was found by the trial judge to be a dangerous sexual offender and was sentenced to preventive detention. The evidence relied on by the Crown showed that the accused had been twice convicted of sexual offences against young girls, and included the opinion of two psychiatrists, whose opinion rested, in part, on material found in prison files and dealing with the accused's background and also on the accused's admissions to the psychiatrists. The appellant submitted that since the material in the prison files had not been proven in open Court and that the admissions made to the psychiatrists had not been proven to have been made voluntarily, both rules governing hearsay and confession evidence had been offended, with the result that the evidence of the two psychiatrists was inadmissible.

* PRESENT: Taschereau C.J., and Fauteux, Abbott, Judson and Spence JJ.

The Court of Appeal affirmed the finding made by the trial judge as well as the sentence of preventive detention. The appellant was granted leave to appeal to this Court.

Held: The appeal should be dismissed.

As to the confession rule. The rule of evidence governing the admissibility of statements made by a person charged with an offence has no application in the case of statements made by a sexual offender to psychiatrists conducting examinations in accordance with recognized normal psychiatric procedures, in order to assist the Court in proceedings under s. 661 of the *Criminal Code*. These proceedings do not involve the conviction of an offence, but the determination of the sentence which may be pronounced after conviction. The rule has not been established for proceedings related to the determination of a sentence. Furthermore, the position of the psychiatrists during the examination of an accused pursuant to s. 661(2) of the Code is not that of persons in authority but is that of free and independent medical experts.

As to the hearsay rule. In order to form an opinion according to recognized normal psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate. In the present case, the evidence indicated that the information gathered from the prison files was not considered by the two psychiatrists as having any real significance in the formation of their opinion which was grounded ultimately on the examinations of the appellant and on evidence given at the hearing of the application. In any event, the trial judge found that the relevant evidence before him, exclusive of that of the psychiatrists, was conclusive, and this finding was upheld by the Court of Appeal.

Droit criminel—Délinquant sexuel dangereux—Sentence de détention préventive—Témoignage de psychiatres—Admissibilité—Règle concernant la preuve par ouï-dire a-t-elle été violée—Règle concernant la preuve d'aveux a-t-elle été violée—Code criminel, 1953-54 (Can.), c. 51, arts. 659, 660, 661.

La Cour de première instance a jugé que l'appelant était un délinquant sexuel dangereux et l'a condamné à une sentence de détention préventive. La preuve sur laquelle la Couronne s'est appuyée montre que l'accusé, à deux occasions, avait été trouvé coupable d'offenses sexuelles contre des fillettes, et comporte aussi l'opinion de deux psychiatres reposant, en partie, sur des documents provenant des dossiers de prison et portant sur les antécédents de l'appelant et aussi sur des aveux faits par l'appelant aux psychiatres. L'appelant soutient que puisque les documents provenant des dossiers de la prison n'avaient pas été prouvés en Cour et que les aveux faits aux psychiatres n'avaient pas été prouvés avoir été faits volontairement, les règles concernant la preuve par ouï-dire et la preuve par aveux avaient toutes deux été violées, avec le résultat que le témoignage des deux psychiatres n'était pas admissible. La Cour d'appel a confirmé le verdict du juge au procès ainsi que la sentence de détention préventive. L'appelant a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté.

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En ce qui regarde la règle concernant les aveux. La règle de preuve gouvernant l'admissibilité de déclarations faites par une personne accusée d'une offense ne s'applique pas dans le cas de déclarations faites par un délinquant sexuel aux psychiatres à l'occasion d'examens que ces derniers lui font subir selon les procédures psychiatriques normales et reconnues, en vue d'aider la Cour dans les procédures en vertu de l'art. 661 du *Code criminel*. Ces procédures n'entraînent pas la condamnation pour une offense, mais la détermination de la sentence qui doit être prononcée après la condamnation. La règle n'a pas été établie pour des procédures concernant la détermination d'une sentence. De plus, la position des psychiatres durant l'examen d'un accusé en vertu de l'art. 661(2) du Code n'est pas celle de personnes représentant l'autorité mais celle d'experts médicaux libres et indépendants.

En ce qui regarde la règle concernant la preuve par ouï-dire. Pour se former une opinion selon les procédures psychiatriques normales et reconnues, le psychiatre doit prendre en considération toute source possible d'information, y compris une source de seconde main. Ses activités professionnelles, son art et son entraînement lui permettent d'évaluer la véracité, l'exactitude et la signification de ces informations. Dans le cas présent, la preuve indique que les deux psychiatres n'ont pas considéré que les renseignements obtenus des dossiers de la prison avaient contribué d'une façon significative à la formation de leur opinion qui, en définitive, était basée sur l'examen de l'appelant et sur la preuve entendue lors de l'audition de la demande en vertu de l'art. 661 du Code. A tout événement, le juge au procès a été d'opinion que la preuve pertinente devant lui, à l'exclusion de celle des psychiatres, était concluante, et cette opinion a été partagée par la Cour d'appel.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique[1], confirmant un verdict que l'appelant était un délinquant sexuel dangereux. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a finding that the appellant was a dangerous sexual offender. Appeal dismissed.

T. G. Ison, for the appellant.

W. G. Burke-Robertson, Q.C., for the respondent.

The judgment of the Court was delivered by

FAUTEUX J.:—This is an appeal, brought by leave from a unanimous judgment of the Court of Appeal for British Columbia[1], affirming (i) a finding made by Munroe J., that the appellant is a dangerous sexual offender and (ii) the sentence imposed upon him as a sequence.

[1] (1965), 51 W.W.R. 251, 45 C.R. 385, 3 C.C.C. 98.

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At the conclusion of the hearing before us, the Court, indicating that reasons would be delivered later, dismissed the appeal.

The grounds of appeal which were raised, are related to the evidence which, so far as relevant to the principal and, indeed, only ground that needs to be dealt with, can be briefly stated. As indicated in the reasons for judgment of the trial Judge, the evidence relied on by the Crown at trial, shows that:—on November 26, 1960, the appellant was convicted by a jury of an indecent assault committed the preceding month, upon a 12 year old girl and was sentenced to 2 years' imprisonment; on November 16, 1963, he was convicted by a jury of having had sexual intercourse, in May of the same year, again with a 12 year old girl, and was sentenced to 8 years' imprisonment; the appellant, a stranger to the victim of the last mentioned attack, forced her into his car and on the floor thereof, on the threat of killing her, and drove her to a secluded area where, by force, he removed her clothing and had sexual relations without her consent. The evidence relied on by the Crown also includes the opinion of two experienced and well-qualified psychiatrists, namely Dr. J. C. Thomas and Dr. R. C. Whitman. Both called by the Crown, they testified, in chief, that, as a result of their personal and separately conducted examination of the appellant at the B.C. Penitentiary and of the evidence they heard at trial, they formed the opinion that the appellant was a person who, by his conduct, in any sexual matter, has shown his failure to control his sexual impulses, that he is likely to cause injury, pain or other evil to any person through failure in the future to control his sexual impulses, and that he is likely to commit further sexual offences. Counsel for the appellant, having then asked for and obtained permission to cross-examine the psychiatrists as to their conversations with the appellant, thereby elicited that the latter had thought of killing the victim of the last mentioned offence in order to destroy her evidence and that he had had similar, though undetected, experiences with other young girls, his nieces. Appellant's counsel also elicited from the doctors that, for the purpose of obtaining background information upon the appellant and his family, they had examined prison files containing, amongst other material, a psychiatric report made earlier by another psychiatrist, the results

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of a psychological test, a classification report, an Alberta hospital report and that such material was taken into account in reaching their conclusion which, in essence, however, was based on their examination of the appellant and the evidence given at the hearing.

The appellant did not testify, nor was any defence evidence called on his behalf.

Appellant's counsel submitted, at trial, that since the opinion of the psychiatrists rested, in part, on the above material found in prison files and not proved in open court and also on appellant's admissions or confessions to the psychiatrists, not proved to have been made voluntarily, both rules governing hearsay and confession evidence were offended with the consequence that the evidence of the two doctors was not only worthless but wholly inadmissible.

The trial Judge did not find it necessary to decide whether the hearsay rule had been offended. He noted that Dr. Thomas had stated that such reports were used to save time, were of no significance and merely confirmed his own finding reached independently thereof and that Dr. Whitman had testified that while such reports were helpful, his opinion, based only on his interview with the appellant and the evidence he had heard in court, would nevertheless be the same. Finally, the trial Judge found that the relevant evidence before him, exclusive of that of the psychiatrists, was conclusive.

The contention that there had been a breach of the rule governing confession, was rejected. The trial Judge referred to *Regina v. Leggo*[1] and quoted the following part of a statement made by Norris J.A., at page 407:

> ...the psychiatrists were entitled to rely on statements made by the appellant to them, in forming their opinions...

In the Court of Appeal[2], the appellant's submission with respect to the admissibility of the psychiatrists' evidence was also, and unanimously, rejected. The Court decided that there was no obligation for the Crown to prove the voluntariness of the admissions or confessions made by the appellant to the doctors, for the reason that the proceedings under s. 661 of the *Criminal Code* do not involve the conviction of a crime, but are held for the purpose of

[1] (1962), 39 W.W.R. 385, 38 C.R. 290, 133 C.C.C. 149.
[2] (1965), 51 W.W.R. 251, 45 C.R. 385, 3 C.C.C. 98.

deciding whether a sentence of preventive detention should be substituted for the sentence pronounced on the substantive offence.

The Court of Appeal, like the trial Judge, did not find it necessary to decide whether the examination of the material found in the prison files offended the hearsay rule. The Court was satisfied from the evidence that this examination did not greatly influence either doctors who based their opinion mainly on the examination of the appellant and the evidence given at the hearing. Finally, the Court relied on the fact that the trial Judge had expressly stated, in his reasons for judgment, that, exclusive of such material, he would have reached the same view. Hence, the dismissal of the appeal.

Dealing at first with the applicability of the confession rule:— There are cogent reasons to hold, as did the Court of Appeal for British Columbia, in this case, and the Courts of Appeal for Manitoba and Alberta, respectively, in *Regina v. Johnston*[1] and *Regina v. McKenzie*[2], that the rule of evidence governing the admissibility of statements made by a person charged with an offence has no application in the case of statements made by a sexual offender to psychiatrists conducting examinations in accordance with recognized normal psychiatric procedures, in order to assist the Court in proceedings under s. 661 of the *Criminal Code*.

One of the reasons flows from the very nature of the issue involved in these proceedings. The issue, in these proceedings which can only be resorted to if the accused has been convicted of a sexual offence, is not whether he should be convicted of another offence, but solely whether he is afflicted by a state or condition that makes him a dangerous sexual offender within the meaning of s. 659(*b*) of the *Criminal Code*. To be so afflicted is not an offence. As to this aspect of the matter, the line of reasoning adopted by the Court of Criminal Appeal in the *King v. Hunter*[3] and this Court in *Brusch v. The Queen*[4], holding that a charge of being a habitual criminal is not a charge of an offence but merely the assertion of a status or condition, applies here on a charge of being a dangerous sexual offender.

[1] (1965), 51 W.W.R. 280, 3 C.C.C. 42.
[2] (1965), 51 W.W.R. 641, 46 C.R. 153, 3 C.C.C. 6.
[3] [1921] 1 K.B. 555.
[4] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

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Indeed, a reference to subs. 3 of s. 661 of the *Criminal Code* makes it clear that the object sought by Parliament, in enacting these special provisions, is not to create an offence but to enable the Court, in cases where a sexual offender is found to be a dangerous sexual offender, to pass upon him a further sentence in lieu of or in addition to the sentence passed or which could have been passed for the sexual offence of which he was convicted. These proceedings do not involve the conviction of an offence, but the determination of the sentence which may be pronounced after conviction. The confession rule, which excludes incriminatory statements not affirmatively proved to have been made voluntarily, is a rule which has been designed for proceedings where, broadly speaking, the guilt or innocence of a person charged with an offence is the matter in issue. The rule has not been established for proceedings related to the determination of a sentence. I know of no binding authority holding that its application extends, and can think of no valid reason why it should be held to extend to examinations conducted by psychiatrists, in compliance with subs. 2 of s. 661 of the *Criminal Code*, in order that they could form and subsequently convey to the Court an opinion as to the mental state or condition of a sexual offender.

Another reason why the confession rule does not obtain to exclude statements made by a sexual offender to psychiatrists examining him pursuant to subs. 2 of s. 661 of the Code, is that the latter are not, as it has been decided particularly by the Court of Appeal for Alberta in *Regina v. McKenzie, supra,* persons in authority. Indeed, the nature of their position, in relation to the proceedings under s. 661 of the Code, does not enable them to control or influence the course of such proceedings in the sense and the manner in which the course of proceedings may be controlled or influenced by persons who have a concern with the apprehension, prosecution or examination of prisoners conducted to collect evidence leading to the conviction of an offence. On the contrary, and as the purpose to be inferred from subs. 2 of s. 661 of the Code indicates, the position of the psychiatrists, in relation to the proceedings under s. 661, is that of free and independent medical experts, specialists in mental health, whose only part and concern in the proceedings is to give to the Court the assistance, which the latter

is required by subs. 2 to seek from them, for the assessment of the mental state or condition of a sexual offender and the determination of the application made under the section. Except in rare cases, where indications to the contrary might possibly appear,—and none have been shown in this case—psychiatrists called to assist the Court in these proceedings cannot be considered as being persons in authority. In this respect, their position, in relation to proceedings under s. 661 of the Code, does not differ from their position in relation to proceedings where insanity is raised as an issue, and never, as far as I know, was it suggested that, in the latter case, they have the status of persons in authority.

Dealing with hearsay:— The evidence, in this case, indicates that to form an opinion according to recognized normal psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate. Hence, while ultimately his conclusion may rest, in part, on second-hand source material, it is nonetheless an opinion formed according to recognized normal psychiatric procedures. It is not to be assumed that Parliament contemplated that the opinion, which the psychiatrists would form and give to assist the Court, would be formed by methods other than those recognized in normal psychiatric procedures. The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion, which opinion is no evidence of the truth of the information but evidence of the opinion formed on the basis of that information. I find it unnecessary, in this case, to pursue these considerations which, I think, would generally obtain in proceedings under s. 661 of the Code, where the hearing and determination of the application are entrusted to a judge alone. In the present case, the information gathered from prison files was not considered by the two psychiatrists as having any real significance in the formation of their opinion which was grounded ultimately on the examinations of the appellant and the evidence given at the hearing of the application. And, in any event, the trial Judge found, as he was entitled

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to after considering all the evidence, that, exclusive of the evidence of the psychiatrists, the relevant evidence before him was conclusive.

In these circumstances, the present appeal could not be allowed and was, as above indicated, dismissed.

Appeal dismissed.

Solicitor for the appellant: T. G. Ison, Vancouver.

Solicitors for the respondent: Ewart, Kelley, Burke-Robertson, Urie & Butler, Ottawa.