1967

*May 18
Nov. 7

EVERETT GEORGE KLIPPERT .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE NORTHWEST TERRITORIES

Criminal law—Dangerous sexual offender—Homosexual—Preventive detention—Whether a dangerous sexual offender—Criminal Code, 1953-54 (Can.), c. 51, ss. 149, 659(b) [as enacted by 1960-61 (Can.), c. 43, s. 32], 661.

The appellant pleaded guilty to four charges of gross indecency under s. 149 of the *Criminal Code*. Following the imposition of a sentence, an application was made under s. 661 of the *Criminal Code* to have him declared a dangerous sexual offender within the meaning of s. 659(*b*) of the Code. The appellant's previous record showed a conviction some five years before on eighteen charges for similar offences. The evidence of the two psychiatrists was to the effect that the appellant was likely to commit further sexual offences of the same kind with other consenting adult males, that he had never caused injury, pain or other evil to any person and was not likely to do so in the future. The judge imposed a sentence of preventive detention. His appeal to the Court of Appeal for the Northwest Territories was dismissed. He was granted leave to appeal to this Court on the following questions of law: (i) whether there was evidence that he was a person who had shown a failure to control his sexual impulses, and (ii) whether the evidence could support the conclusion that he had shown such a failure and was likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or was likely to commit a further sexual offence.

Held (Cartwright and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Judson and Spence JJ.: Under the new definition of "dangerous sexual offender", as enacted by 1960-61 (Can.), c. 43, s. 32,

*PRESENT: Cartwright, Fauteux, Judson, Hall and Spence JJ.

the likelihood of the commission of a further sexual offence has been added and made an alternative element to that of the danger of injury to others. Applied to this case, this new definition justified the concurrent findings of the Courts below that the appellant, having shown a failure to control his sexual impulses and that he was likely to commit further sexual offences of the same kind, was a dangerous sexual offender within the meaning which Parliament ascribed to this expression. The intent and object of the provisions dealing with dangerous sexual offenders is not solely to protect persons from becoming the victims of those whose failure to control their sexual impulses rendered them a source of danger.

Per Cartwright and Hall JJ., *dissenting*: The intent and object of the sections of the Code dealing with dangerous sexual offenders is to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger. The words "a further sexual offence" are general words wide enough to embrace every type of offence containing a sexual element. Applying the maxim *verba generalia restringuntur ad habilitatem rei vel personae* to s. 659(*b*) of the Code, the concluding words of the section should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person". On this view of s. 659(*b*), it was clear that the finding that the appellant was a dangerous sexual offender could not stand as it would be directly contrary to the evidence.

Droit criminel—Délinquant sexuel dangereux—Homosexuel—Détention préventive—Est-il un délinquant sexuel dangereux—Code Criminel, 1953-54 (Can.), c. 51, arts. 149, 659(b) [tel que décrété par 1960-61 (Can.), c. 43, art. 32], 661.

L'appelant a admis sa culpabilité sur quatre chefs d'accusation de grossière indécence sous l'art. 149 du *Code Criminel*. Une fois la sentence imposée, une demande a été présentée en vertu de l'art. 661 du *Code Criminel* pour qu'il soit déclaré que l'appelant était un délinquant sexuel dangereux dans le sens de l'art. 659(*b*) du Code. Le dossier antérieur de l'appelant montrait une condamnation, quelque cinq ans plus tôt, sur dix-huit chefs d'accusation pour des infractions semblables. Le témoignage des deux psychiatres fut à l'effet que l'appelant commettrait vraisemblablement d'autres infractions sexuelles de la même nature avec d'autres adultes mâles consentants, qu'il n'avait jamais causé de lésions corporelles, douleurs ou autre mal à quelqu'un et que vraisemblablement il n'en causerait pas à l'avenir. Le juge a imposé une sentence de détention préventive. L'appel à la Cour d'Appel des Territoires du Nord-Ouest a été rejeté. Il a obtenu la permission d'en appeler devant cette Cour sur les questions de droit suivantes: (i) Existait-il une preuve à l'effet que l'appelant était une personne ayant manifesté une impuissance à maîtriser ses impulsions sexuelles? (ii) Existait-il une preuve pouvant supporter la conclusion qu'il avait démontré une telle impuissance et qu'il causerait vraisemblablement des lésions corporelles, des douleurs ou autre mal à quelqu'un, à cause de son impuissance à l'avenir à maîtriser ses impulsions sexuelles ou qu'il commetrait vraisemblablement une autre infraction sexuelle?

Arrêt: L'appel doit être rejeté, les Juges Cartwright et Hall étant dissidents.

1967

KLIPPERT
v.
THE QUEEN

Les Juges Fauteux, Judson et Spence: Dans la nouvelle définition de l'expression «délinquant sexuel dangereux» telle que décrétée par 1960-61 (Can.), c. 43, art. 32, on a ajouté comme élément alternatif à la probabilité de lésions corporelles à d'autres personnes, la probabilité de la commission d'une autre infraction sexuelle. L'application de cette nouvelle définition au cas présent justifie les conclusions concordantes des Cours inférieures à l'effet que l'appelant, ayant démontré son impuissance à maîtriser ses impulsions sexuelles et que vraisemblablement il commettrait d'autres infractions sexuelles de la même nature, était un délinquant sexuel dangereux dans le sens que le Parlement a attribué à cette expression. L'intention et le but des dispositions se rapportant aux délinquants sexuels dangereux n'est pas seulement d'empêcher les autres de devenir les victimes de ceux dont l'impuissance à maîtriser leurs impulsions sexuelles en fait une source de danger.

Les Juges Cartwright et Hall, *dissidents*: L'intention et le but des articles du Code se rapportant aux délinquants sexuels dangereux est d'empêcher les autres de devenir les victimes de ceux dont l'impuissance à maîtriser leurs impulsions sexuelles en fait une source de danger. Les mots «une autre infraction sexuelle» sont des mots au sens général et ayant une portée assez grande pour englober toute offense ayant un élément sexuel. Appliquant la maxime *verba generalia restringuntur ad habilitatem rei vel personae* à l'art. 659(*b*) du Code, on doit donner aux derniers mots de l'article la signification «ou qui commettrait vraisemblablement une autre infraction sexuelle comportant un élément de danger pour une autre personne». Si l'on interprète l'art. 659(*b*) de cette manière, il est clair que la conclusion que l'appellant était un délinquant sexuel dangereux ne peut pas être maintenue puisqu'elle serait directement en conflit avec la preuve.

APPEL d'un jugement de la Cour d'Appel des Territoires du Nord-Ouest, confirmant une sentence de détention préventive. Appel rejeté, les Juges Cartwright et Hall étant dissidents.

APPEAL from a judgment of the Court of Appeal for the Northwest Territories, affirming a sentence of preventive detention. Appeal dismissed, Cartwright and Hall JJ. dissenting.

B. A. Crane, for the appellant.

John A. Scollin, for the respondent.

The judgment of Cartwright and Hall JJ. was delivered by

CARTWRIGHT J. (*dissenting*):—This is an appeal from a judgment of the Court of Appeal for the Northwest Territories pronounced on October 26, 1966, dismissing an appeal from a judgment of Sissons J. pronounced on March 9, 1966, finding that the appellant was a dangerous sexual offender within the meaning of the *Criminal Code*

and imposing a sentence of preventive detention upon him in lieu of the sentences imposed by Magistrate Parker to be mentioned hereafter.

The appeal to this Court was by leave granted on March 22, 1967, under the provisions of s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259. The order of this Court granted leave to appeal on the following questions of law:

(1) Whether there was evidence before Mr. Justice Sissons that Klippert was a person who had shown a failure to control his sexual impulses.

(2) Whether the evidence before Mr. Justice Sissons can support the conclusion that the accused "has shown a failure to control his sexual impulses and is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence".

The facts are not in dispute and may be stated briefly.

On the morning of August 16, 1965, the appellant was arrested by the R.C.M.P. at Pine Point, N.W.T., as a result of an investigation with respect to a charge of arson (in which he was not involved). In the evening of August 16 he was taken to Hay River after he had given the police a statement. On August 17 the accused was arraigned before Magistrate Parker on four charges of gross indecency under s. 149 of the *Criminal Code* as follows:

1. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 21st day of December, 1964 and the 6th day of August 1965 at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with William Gordon Mellett, another male person, contrary to Section 149 of the *Criminal Code*.

2. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 1st day of May, 1965 and the 15th day of July, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with Patrick Betty, another male person, contrary to Section 149 of the *Criminal Code*.

3. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 10th day of July, 1965, and the 31st day of July, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with David Frank L'Heureux, another male person, contrary to Section 149 of the *Criminal Code*.

4. That Everett George Klippert, mechanic's helper of Pine Point, Northwest Territories, between the 1st day of July, 1965 and the 10th day of August, 1965, at or near the settlement of Pine Point in the Northwest Territories, being a male person, did unlawfully commit an act of gross indecency with Christopher Logan Wolff, another male person, contrary to Section 149 of the *Criminal Code*.

1967

KLIPPERT v. THE QUEEN

Cartwright J.

Pleas of guilty were entered to each charge and the appellant was remanded in custody until August 24, 1965, at Fort Smith, at which time Magistrate Parker imposed a sentence of three years concurrent with respect to each charge.

Following such conviction and sentence a notice of application under s. 661 of the *Criminal Code* to have the appellant declared a dangerous sexual offender was served on him. The appellant was examined by two psychiatrists on behalf of the Crown, Dr. Donald Griffith McKerracher, nominated by the Attorney General pursuant to s. 661(2) of the *Criminal Code*, and Dr. Ian McLaren McDonald.

The application was heard before Sissons J. The Crown proved the four convictions before Magistrate Parker. Corporal Armstrong of the R.C.M.P., who had laid the information and had been present at the trial before the Magistrate, identified the appellant as the person convicted but was not asked by either counsel for the Crown or for the defence for any particulars of the offences to which the appellant had pleaded guilty. Corporal Armstrong produced the fingerprints and fingerprint certificates of the appellant which included a record of his conviction on May 4, 1960, on eighteen charges of gross indecency contrary to s. 149 of the *Criminal Code* on which he was sentenced to four years imprisonment on each charge, the sentences to run concurrently.

No evidence was adduced as to the nature of the acts committed by the appellant in respect of either the four substantive charges to which he had pleaded guilty before Magistrate Parker or the eighteen other charges upon which he had been convicted in 1960.

The Crown called the evidence of the two psychiatrists mentioned above, each of whom gave evidence as to, *inter alia*, statements made to him by the appellant during his examination.

It was held by this Court in *Wilband v. The Queen*[1], that a psychiatrist acting pursuant to s. 661(2) of the *Criminal Code* is not a person in authority to whom the rule as to proof by the Crown of the voluntary nature of a statement applies and no question is raised as to the admissibility of any of the evidence which these two witnesses gave.

[1] [1967] S.C.R. 14.

The effect of their evidence is shown by the following extracts.

Dr. Donald Griffith McKerracher testified:

He (the appellant) did say that he had had homosexual activities at the age of 15 for the first time;...

* * *

Further that he had not married; that sexual behaviour, homosexual behaviour had existed since the age of 15; that to him homosexual activity provided his only satisfactory method of the release of sexual tensions. It was his only satisfactory sexual outlet. He found the thought of heterosexual conduct abhorrent. He told me he never had had heterosexual relations, that during 24 years of fairly active homosexual practice he had many partners whose ages varied from the middle teens to 30 or 35. He obtained his sexual partners through previous contacts through some, what I would judge, was discreet soliciting because others in the same pattern of behaviour would, one would judge, be tending to make contacts too. There was no suggestion whatsoever of any violence at any time; that he was most co-operative throughout the interview, restrained in manner, courteous, coherent, relevant and frank.

* * *

Q. What are your conclusions from those observations?

A. Well in the first place my opinion is that Mr. Klippert is not inhibited, let us put it this way, his sexual drive is not inhibited and it is my opinion based on my experience with others with similar patterns of conduct that he would have difficulty in inhibiting them in the future.

* * *

DR. McKERRACHER: Yes. My conclusion was in terms of this pattern of sexual behaviour that he would have the same drive—a drive toward homosexual relations in the future that he had had in the past. I also concluded that in my opinion there was no danger, this is strictly my opinion, of him doing physical violence or injury to anyone. He did not fit that pattern. If I might put it the same way, if I might make an analogy with the heterosexual activity of a man with heterosexual drives he will continue to seek heterosexual outlets for those drives, some men would do it violently, some would not. I did not feel the accused showed any evidence that he would behave in a violent fashion.

* * *

Q. On the question of his sexual conduct in the past what are you able to conclude from that?

A. I conclude—it is based on a homosexual pattern and has been since he was sexually active.

Q. Has he been able to control this?

A. No—I would put it inhibit. He has not inhibited these drives.

Q. Now as to...

THE COURT: Just to make it clear what do you mean by "not inhibited"? A. The drive is a desire, to inhibit it is to refuse to follow the desire. It is like a heterosexual drive—most people do not inhibit their heterosexual drives, they follow their drives, the impulse is a drive to seek heterosexual relief.

Dr. Ian McLaren McDonald testified:

Q. And what information did you receive on those points? A. He informed me that he had pleaded guilty to four charges of

1967

KLIPPERT v. THE QUEEN

Cartwright J.

having engaged in homosexual activity; that he was sentenced in August of 1965. He told me that this was the second sentence for similar behaviour. He told me that he had engaged in homosexual activity since the age of 14 or 15. He told me that the people with whom he engaged in these activities ranged in age from 15 to the mid or late 30's. The 15 year old, he said, took part in an incident when he was 17 or 18. He had little or no heterosexual experience, certainly no complete heterosexual experience never having completed a sexual act with a female. He said that he had no desire to partake in heterosexual activity. He said this filled him with revulsion, as I believe his words were "some people are revolted at the idea of having homosexual relations while I am revolted at the idea of having heterosexual relations". He stated that he had engaged in homosexual activity actively when he started work in the dairy in Calgary which would be about the age of 16 or 17; that he had continued this up until his being confined to the penitentiary I believe in 1960. Having been discharged from the penitentiary he was aware of the need to refrain from engaging in this behaviour again. He stated that some attempt, some contacts had been made with him by ex-friends and for this reason, as well as the feeling of his continued presence bringing shame on his family, he decided to leave Calgary and head North.

He acknowledged that he had been warned, or at least a discussion had taken place between himself and a member of the Mounted Police Force at Pine Point some time in the summer of 1964, the implication being that his record was known and that he should more or less watch his behaviour. He said he was able to do this until these events transpired of which he was charged and sentenced.

In describing his behaviour, his homosexual behaviour, he said first of all that he was very careful of the person whom he approached, he was very careful to ascertain whether or not they preferred heterosexual outlets and if they did then he didn't make an overture. If they were ambivalent, that is they had no strong feelings one way or the other then he would make some overtures, generally conversationally. He denied ever having physically assaulted or coerced any of these people he engaged in these pursuits. He acknowledged that in the past he had a good number of short term affairs. These were not lasting relationships.

Q. Short term affairs with whom? A. The men. He also stated that he denied having any preference for young men, his preference was for people who were responsive, that is people who shared his enthusiasm about the endeavour. As a result of this information that he told me, and based on past experience with people who have presented this kind of sexual behaviour pattern I came to the conclusion that Mr. Klippert was (*a*) primarily and essentially a homosexual, that this was the prime outlet for sexual drives (*b*) I thought it unlikely that he could refrain from indulging in this behaviour again without assistance, that is assistance from other people, trained people. I felt that this man was not the type who would physically injure or coerce people to take part in these activities.

Q. Dr. McDonald then on the point of past sexual conduct and the question of control, briefly what can you tell us about his control from his past conduct? Does he have control, I mean can

> he stop, as indicated from his past conduct? A. He obviously cannot stop for long periods of time on past performance, on his own.

I have perhaps quoted at unnecessary length from the evidence of these witnesses as it is clear from reading their testimony as a whole that in the opinion of each of them there was no danger of the appellant using violence of any sort or attempting coercion of anyone. They do not suggest that he sought out youthful partners for his misconduct. What they did foresee was the likelihood of the appellant committing further acts of gross indecency with other consenting adult males.

The question before us is whether on this state of facts the finding that the appellant is a dangerous sexual offender can be sustained in law.

In the case of an application under s. 661 of the *Criminal Code* the onus lies upon the Crown to establish beyond a reasonable doubt that the accused is a dangerous sexual offender. In the case at bar not only is there no evidence that the accused if at liberty would constitute a danger to any person but the evidence of the two psychiatrists, quoted from and summarized above, expressly negatives the existence of any such danger. This would be an end of the matter if it were not for the definition of the phrase "dangerous sexual offender" contained in s. 659 which reads as follows:

> 659. In this Part,...
>
> (*b*) "dangerous sexual offender" means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.

For the purposes of this appeal I will assume that the evidence in the record was sufficient to support a finding that the accused has shown a failure to control his sexual impulses and that, if at liberty, he is likely to commit a further sexual offence of the same sort as those to which he pleaded guilty; there is not a tittle of evidence to suggest that he is likely to commit any other type of sexual offence.

In construing the definition of "dangerous sexual offender" it must be borne in mind that by the combined effect of s. 2(2), s. 2(3) and s. 2(1)(*a*)(i) and (ii) of the *Interpretation Act*, R.S.C. 1952, c. 158, s. 659(*b*) of the

1967

KLIPPERT v. THE QUEEN

Cartwright J.

Criminal Code must be read as if it concluded with the words "except in so far as this definition is inconsistent with the intent or object of this Part or would give to the expression 'dangerous sexual offender' an interpretation inconsistent with the context".

The intent and object of those sections in the *Criminal Code* which deal with dangerous sexual offenders is to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger. To construe the definition as compelling the Court to impose a sentence of preventive detention on a person shown by the evidence led by the Crown not to be a source of danger would be to give it an effect inconsistent with the intent or object of the Part.

The words "a further sexual offence" are general words wide enough to embrace every type of offence containing a sexual element and in construing them resort may properly be had to the maxim *verba generalia restringuntur ad habilitatem rei vel personae* (Bac. Max. reg. 10). The following statement, now found in Maxwell on Interpretation of Statutes, 11th ed., at pages 58 and 59, is supported by the authorities cited and has often been quoted with approval:

> It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the legislature intended, they frequently express more in their literal meaning and natural force; and it is necessary to give them the meaning which best suits the scope and object of the statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed as particular if the intention be particular; that is, they must be understood as used with reference to the subject-matter in the mind of the legislature, and limited to it.

A case often referred to on this point is *Cox v. Hakes*[1], in which it was held by the House of Lords that the following words in s. 19 of the *Judicature Act*, 36 & 37 Vict., c. 66: "The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order of Her Majesty's High Court of Justice or any Judges or Judge thereof" did not confer jurisdiction to hear an appeal from an order discharging a prisoner

[1] (1890), 15 App. Cas. 506.

under a *habeas corpus* although such an order fell plainly within the literal meaning of the words of the enactment.

Applying this principle to s. 659(*b*) it is my opinion that the concluding words "or is likely to commit a further sexual offence" should be given the meaning "or is likely to commit a further sexual offence involving an element of danger to another person".

If this is the right construction of s. 659(*b*), as I think it is, it is clear that the finding that the appellant is a dangerous sexual offender cannot stand; it would be directly contrary to the evidence.

I am glad to arrive at this result. It would be with reluctance and regret that I would have found myself compelled by the words used to impute to Parliament the intention of enacting that the words "dangerous sexual offender" shall include in their meaning "a sexual offender who is not dangerous".

Before parting with the matter I wish to mention a further consideration which is not, I think, irrelevant in seeking to ascertain the intention of Parliament. It is not wholesome that the existing criminal law should not be enforced. A law which ought not to be enforced should be repealed. If the law on this subject matter is as interpreted by the Courts below, it means that every man in Canada who indulges in sexual misconduct of the sort forbidden by s. 149 of the *Criminal Code* with another consenting adult male and who appears likely, if at liberty, to continue such misconduct should be sentenced to preventive detention, that is to incarceration for life. However loathsome conduct of the sort mentioned may appear to all normal persons, I think it improbable that Parliament should have intended such a result. It may be that we cannot take judicial notice of the probable effect which such an interpretation would have on the numbers of those confined to penitentiaries; no one, I think, would quarrel with the suggestion that it would bring about serious overcrowding.

I would allow the appeal and quash the sentence of preventive detention.

The judgment of Fauteux, Judson and Spence JJ. was delivered by

FAUTEUX J.:—The circumstances giving rise to this appeal can be briefly stated. In August 1965, the appellant

1967

KLIPPERT v. THE QUEEN

Fauteux J.

pleaded guilty before Magistrate Parker on four charges under s. 149 of the *Criminal Code,* namely gross indecency, and on August 24, he was sentenced to three years concurrent with respect to each charge. On an application, subsequently made under s. 661 Cr. C., before Sissons J., he was declared a *dangerous sexual offender* within the meaning of s. 659(*b*) of the *Criminal Code.* Being of the view that a penitentiary term would be harmful rather than beneficial to the appellant, the learned judge sentenced him to preventive detention,—a detention for an indeterminate period —cf. 659(*c*), in lieu of the sentence of three years in penitentiary imposed by Magistrate Parker, and recommended to the Minister of Justice to review the case of the appellant, at the earliest possible moment, and that he be released on licence on condition that he submit himself to such treatment which, in the opinion of psychiatrists, could be helpful to him.

An appeal from the decision of Mr. Justice Sissons was launched and was, ultimately, unanimously dismissed by the Court of Appeal for the North West Territories.

Leave to appeal to this Court was thereafter sought and granted on the two following questions of law:

> (i) Whether there was evidence before Mr. Justice Sissons that Klippert was a person who had shown a failure to control his sexual impulses.
>
> (ii) Whether the evidence before Mr. Justice Sissons can support the conclusion that the accused has shown a failure to control his sexual impulses and is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence.

The evidence before Sissons J. consists of the four convictions before Magistrate Parker, a conviction in 1960 on eighteen charges for similar offences—for which appellant was sentenced to four years' imprisonment with respect to each charge, sentences to run concurrently,—and, as required by s. 661(2), the evidence of two qualified psychiatrists, namely Dr. Donald Griffith McKerracher and Dr. Ian McLaren McDonald. The substance of the evidence of these doctors appears in the excerpts from their testimony, quoted in the reasons for judgment of my brother Cartwright. Considered as a whole, the evidence reasonably indicates that the appellant is a person who, by his conduct in sexual matters, has shown a failure to control

his sexual impulses and that he is likely to commit further sexual offences of the same kind, though, he never did cause injury, pain or other evil to any person and is not likely to do so in the future through his failure to control his sexual impulses.

On this state of facts, the determination of the questions of law mentioned above, depends on the meaning given by Parliament to the expression *dangerous sexual offender.*

Part XXI of the *Criminal Code,* which deals with Preventive Detention, contains its own interpretation provisions in s. 659. Section 659(*b*) defines *dangerous sexual offender* as follows:

> 659. In this Part,
> (*a*) . . .
> (*b*) "dangerous sexual offender" means a person who, (i) by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and (ii) who (*a*) is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or (*b*) is likely to commit a further sexual offence, and
> (*c*) . . .

Underlining, numerals and letters have been added to point out the necessary or alternative constituent elements in the definition.

This is a new definition. It was enacted by Parliament in 1961, by 9-10 Elizabeth II, c. 43, s. 32, of which the opening words are:

> 32. Paragraph (*b*) of section 659 of the said Act is repealed and the following substituted therefor:

Prior to this change, s. 659(*b*) read:

> 659. In this Part,
> (*a*) . . .
> (*b*) "criminal sexual psychopath" means a person who, (i) by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who (ii) as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Underlining and numerals have been added to point out the necessary constituent elements in this former definition.

Thus, it appears that, under the new definition, (i) the element of psychological ability to control has been replaced by that of a straight factual investigation and (ii) the likelihood of the commission of a further sexual offence, has been added and made an alternative element to that of the danger of injury to others.

1967

KLIPPERT v. THE QUEEN

Fauteux J.

Applied to this case, the new definition justifies the concurrent finding of the Courts below, that the appellant who, on the evidence, (i) has shown a failure to control his sexual impulses and (ii) is likely to commit further sexual offences of the same kind, is a *dangerous sexual offender* within the meaning which Parliament itself ascribed to this expression.

During the hearing of this appeal, reference was made to a certain part of the French version of the former and of the new definition and some reliance appears to have been placed, by counsel for the appellant, on a lack of difference between the two texts to support the contention that the psychological ability to control has not been replaced by a straight factual investigation and is still a constituent element in the definition. The part of the definition to which we were referred reads as follows:

in the former definition:

> "...qui, d'après son inconduite en matière sexuelle, a manifesté une impuissance à maîtriser ses impulsions sexuelles ..."

and in the new definition:

> "...qui, d'après sa conduite en matière sexuelle, a manifesté une impuissance à maîtriser ses impulsions sexuelles ..."

Both texts are obviously identical in substance. In my opinion, this, in no way, supports the proposition contended for by the appellant. We are not dealing here with a situation where each of the English and of the French text is capable of assisting the other, in a matter of interpretation, but with a situation where one has to elect between either the English text, which manifests the actual intervention of Parliament to change the existing law with respect to one of the constituent elements in the definition, or the French text, which is indicative of no change at all. In *Blachford v. McBain*[1], Taschereau J., as he then was, disposed of a similar question by ignoring the version which left the law in the state in which it was, prior to the Act adopted to change it, cf. p. 275. Indeed, to give priority to the French version would, in this case, render the change made in the English version meaningless and the actual intervention of Parliament, to make this change, futile.

With deference, I cannot either agree with the view that the intent and object of the provisions dealing with *dan-*

[1] (1892), 20 S.C.R. 269.

gerous sexual offenders, is solely to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger and that to apply the definition to a person, who is not to be a source of danger, would give the definition an effect inconsistent with the intent or object of these provisions. Obviously, the intent and object of an Act is to be found in its provisions and, in the case of this particular legislation, the provisions which are relevant in this respect are those of s. 659—the interpretation section—and those of s. 661—the operative section. Section 659(*b*), as above indicated, clearly added, as an alternative element in the definition to the danger of injury to others, that of the likelihood of the commission of a further sexual offence, and a consideration of s. 661 shows that the operative provisions are only consistent with this view of the matter. Section 661 reads as follows:

> 661. (1) Where an accused has been convicted of
>
> (*a*) an offence under
>
> (i) section 136,
>
> (ii) section 138,
>
> (iii) section 141,
>
> (iv) section 147,
>
> (v) section 148, or
>
> (vi) section 149; or
>
> (*b*) an attempt to commit an offence under a provision mentioned in paragraph (*a*),
>
> the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.
>
> (2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.
>
> (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.
>
> (4) At the hearing of an application under subsection (1), the accused is entitled to be present.

In some of the offences referred to in s. 661(1)(*a*), such as *rape, indecent assault on female, indecent assault on male,* violence is involved to a variable degree as an element of the offence. In others, such as *sexual intercourse with a female under 14, sexual intercourse with a female between*

1967

KLIPPERT v. THE QUEEN

Fauteux J.

14 and 16, buggery and *gross indecency,* violence is not an element of the offence. Particularly, the offence of gross indecency, in which appellant has indulged, is one which necessarily implies consent of the person which must participate with the accused for its commission and one which excludes danger of injury to the participants. With respect to the offences of the first category, it may well be said that the object and intent of Parliament is, as indicated by my brother Cartwright, *to protect persons from becoming the victims of those whose failure to control their sexual impulses renders them a source of danger,* but, in my respectful view, the same thing cannot be said with respect to the offences of the second category which also includes the offence of *bestiality.* The language of s. 661 is clear; if an accused is convicted of one of the offences mentioned in the section, be that one of the first or of the second category, the Court shall, upon application, hear evidence and decide whether the accused is a person who, (i) by his conduct, has shown a failure to control his sexual impulses, and (ii) who (*a*) is either likely to cause injury, pain or other evil to any person through his failure in the future to control his sexual impulses or (*b*) is likely to commit a further sexual offence. The general words *further sexual offence* are clearly embracing the offences mentioned in s. 661(1) of which, as above indicated, many exclude, as being one of their constituent elements, a source of danger of injury to other persons.

I would, therefore, affirmatively answer the two questions of law upon which leave to appeal was granted.

Whether the criminal law, with respect to sexual misconduct of the sort in which appellant has indulged for nearly twenty-five years, should be changed to the extent to which it has been recently in England, by the *Sexual Offences Act* 1967, c. 60, is obviously not for us to say; our jurisdiction is to interpret and apply laws validly enacted.

I would dismiss the appeal.

Appeal dismissed, CARTWRIGHT *and* HALL JJ. *dissenting.*

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Solicitor for the respondent: D. S. Maxwell, Ottawa.