1967
*Nov. 20, 21
1968
Feb. 8

JOHN BRUCE HADDEN .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Whether accused leading consistently a criminal life—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(a).

Following his conviction on a charge of theft of one can-opener, of a value not in excess of $50, committed on July 31, 1963, the appellant was found to be an habitual criminal and sentenced to preventive detention. The report of the magistrate to the Court of Appeal showed that of the 14 offences of which he found the appellant had been convicted previously, the first two were for vagrancy and the third, in 1947, was for breaking and entering and theft. All subsequent convictions were either for having possession of drugs (4 offences) or for petty theft (7 offences). The last conviction was in December 1962 and the punishment was a term of 6 months imprisonment. There had been a period of less than three months between the date of his release from prison, on May 5, 1963, and the commission of the substantive offence on July 31, 1963. The Court of Appeal found that it had not been shown that the magistrate had erred in principle in finding that the appellant was an habitual criminal. The appellant was granted leave to appeal to this Court.

Held (Fauteux, Abbott, Martland and Ritchie JJ. dissenting): The appeal should be allowed and the sentence of preventive detention quashed.

Per Cartwright C.J. and Judson, Hall, Spence and Pigeon JJ.: There was no evidence that since his release early in May 1963, the appellant was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963. This was not a case where the commission of the substantive offence could in itself furnish sufficient evidence that the appellant was leading persistently a criminal life.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: It has been established that the appellant was leading persistently a criminal life as required by s. 660(2)(*a*) of the *Criminal Code*. It is open to the Court to conclude that the accused is leading persistently a criminal life if he repeatedly commits the same kind of offence and if the time elapsing between the commission of the offence prior to the substantive offence and the commission of the substantive offence is short, without necessarily having to have evidence of criminal acts or associations during that short period. The pattern of conduct which has been established of the commission of thefts shortly after release from

*PRESENT: Cartwright C.J. and Fauteux, Abbott, Martland, Judson, Ritchie, Hall, Spence and Pigeon JJ.

custody, coupled with the short lapse of time after release and prior to the commission of the substantive offence, was good evidence of persistence in leading a criminal life.

Droit criminel—Repris de justice—L'accusé menait-il continûment une vie criminelle—Code criminel, 1953-54 (Can.), c. 51, art. 660(2)(a).

Ayant été trouvé coupable du vol, commis le 31 juillet 1963, d'un ouvre-boîtes d'une valeur n'excédant pas $50, l'appelant a été déclaré repris de justice et une sentence de détention préventive lui a été imposée. Le rapport fourni à la Cour d'Appel par le magistrat fait voir que des 14 infractions pour lesquelles le magistrat a trouvé que l'appelant avait été déclaré coupable antérieurement, les deux premières sont pour vagabondage et la troisième, en 1947, pour entrée par effraction et vol. Toutes les autres déclarations subséquentes de culpabilité sont soit pour possession de stupéfiants (4 infractions) ou pour larcin (7 infractions). La dernière déclaration de culpabilité a été enregistrée en décembre 1962 et l'appelant a été condamné à 6 mois d'emprisonnement. Il s'est écoulé moins de 3 mois entre la date de sa mise en liberté le 5 mai 1963 et celle de l'infraction dont il s'agit, le 31 juillet 1963. La Cour d'Appel a statué qu'il n'avait pas été démontré que le magistrat avait erré en principe en déclarant que l'appelant était un repris de justice. L'appelant a obtenu la permission d'en appeler à cette Cour.

Arrêt: L'appel doit être accueilli et la sentence de détention préventive doit être annulée, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson, Hall, Spence et Pigeon: Sauf le fait d'avoir commis l'infraction du 31 juillet 1963, il n'y a aucune preuve que depuis sa mise en liberté au début du mois de mai 1963, l'appelant avait mené une vie criminelle, avec persistance ou autrement. Il ne s'agit pas ici d'un cas où l'infraction de l'offense substantive est en elle-même une preuve suffisante que l'appelant menait avec persistance une vie criminelle.

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Il a été établi que l'appelant menait avec persistance une vie criminelle au sens de l'art. 660(2)(*a*) du *Code Criminel*. La Cour peut conclure que l'accusé mène avec persistance une vie criminelle s'il a commis à maintes reprises le même genre d'infractions et si le temps écoulé entre la dernière infraction et celle qui donne lieu à la sentence, est de courte durée. La preuve d'actes criminels ou d'associations criminelles durant cette courte période n'est pas nécessaire. Le genre de vie révélé par une série de vols commis peu de temps après la remise en liberté suivis d'un bref intervalle de liberté avant l'infraction, est une bonne preuve de la persistance à mener une vie criminelle.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique[1], confirmant une sentence de détention préventive. Appel maintenu, les juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

---

[1] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

1968

HADDEN v. THE QUEEN

APPEAL from a judgment of the Court of Appeal for British Columbia[1], affirming a sentence of preventive detention. Appeal allowed, Fauteux, Abbott, Martland and Ritchie JJ. dissenting.

T. R. Berger, for the appellant.

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

The judgment of Cartwright C.J. and Judson, Hall and Spence JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal, brought pursuant to leave granted by this Court on October 10, 1967, from a judgment of the Court of Appeal for British Columbia[1] pronounced on April 20, 1965, dismissing an appeal against a sentence to preventive detention imposed on the appellant by His Worship Magistrate D. D. Hume at Vancouver on March 16, 1964, in lieu of the sentence of seven months imprisonment imposed on him by His Worship Magistrate Lorne H. Jackson on August 1, 1963, upon his conviction on that date on a charge that at the City of Vancouver on July 31, 1963, he committed theft of one can-opener, of a value not in excess of fifty dollars, the property of F. W. Woolworth Company Limited.

On October 23, 1963, while the appellant was in custody in Oakalla Prison Farm, he was served with a notice, pursuant to s. 662 of the *Criminal Code,* that an application to find him to be an habitual criminal and that it was therefore expedient for the protection of the public to sentence him to preventive detention would be made on Friday, November 8, 1963, to a magistrate other than Magistrate Lorne H. Jackson. This notice specified twenty-four convictions previous to the conviction on August 1, 1963, mentioned above and hereinafter referred to as "the substantive offence", and concluded as follows:

B. Other Circumstances

26) That you are an habitual associate of criminals.

27) That you are a drug addict and an habitual associate of drug addicts.

28) That during your periods of freedom you have not had regular gainful employment.

29) That after brief periods of freedom you have consistently returned to your criminal way of life.

[1] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

The hearing before Magistrate Hume did not commence until March 13, 1964; by that time the appellant had been released from custody. It appeared that the appellant had received notice that the hearing would proceed on March 13, 1964, but he did not appear; counsel who had been representing him was given permission to withdraw and the hearing proceeded *ex parte*.

At the conclusion of the hearing the learned Magistrate gave a brief oral judgment as follows:

> I find the accused is a habitual criminal and I sentence him to preventive detention. Issue a warrant for his arrest.

An appeal having been taken, the Magistrate furnished a report to the Court of Appeal. In paragraph 10 of this report it was stated that convictions of the three indictable offences for which the accused was liable to a term of five years or more were proved, that they were on charges of having possession of drugs and were those specified in paras. 15, 16 and 19 of the notice of application. On reference to that notice it appears that those convictions were as follows:

(a) At Vancouver, on April 21, 1953; sentence, imprisonment for 3 years and a fine of $200.00 or a further term of 2 months;

(b) At Vancouver, On October 2, 1956; sentence, imprisonment for 2 years and 6 months;

(c) At Vancouver, on July 22, 1959; sentence, imprisonment for 2 years.

Paragraphs 11, 12 and 13 of the Magistrate's report are as follows:

> 11. The convictions which were proved against the accused since 1945 are as follows:—
>
> 1947 Vagrancy A
> 1947 Vagrancy A
> 1947 Breaking and entering and theft
> 1950 Drugs in possession
> 1953 Drugs in possession
> 1956 Drugs in possession
> 1958 Theft under fifty dollars
> 1959 Theft under fifty dollars
> 1959 Drugs in possession
> July 1961 Theft under $50.00—2 months
> September 1961 Theft under $50.00—2 months
> December 1961 Theft under $50.00—4 months
> May 1962 Theft under $50.00—6 months
> December 1962 Theft under $50.00—6 months

1968

HADDEN v. THE QUEEN

Cartwright C.J.

12. Evidence presented by the Crown to substantiate paragraph 'B' of the Notice of Application, that is other circumstances, was given as follows:—

June 1959	Seen with Charles Codd, George Harrop, known drug addicts, at which time the accused admitted he was unemployed and had no funds.
March 1961	Seen by Constable Monk with Violet Young and Papenak, known drug addicts, at which time the accused admitted six drug convictions.
June 1961	Seen by Constable Aitchison with Joseph Rawley, who admitted a criminal record.
September 16, 1961	He admitted to Constable Hoyle that he was at that time a drug addict.
November 1961	Seen by Constable Watt with Charles Allan, a person who admitted a criminal record and being a drug addict.
March 1963	Seen by Corporal Forgopa (RCMP) with Gordon Kravenia and Vance Lawson, known addicts.

(It appears from the transcript, and was agreed by counsel before us, that this last item is an error. The date should read March 1953, not March 1963.)

13. In view of the accused's lengthy record for drugs and his most recent convictions since 1961 for theft, I found that he was leading persistently a criminal life and was hence an habitual criminal, and that it was expedient for the protection of the public to sentence him to preventive detention; and as he was not present in court I instructed the prosecutor to issue and have exercised a warrant for his arrest.

In the Court of Appeal the question which is now before us was dealt with in one sentence as follows:

In our view it has not been shown that the learned magistrate in the court below erred in principle which had been applied by him and approved in this court in many cases, either in the matter of the finding that the appellant is a habitual criminal, nor the conclusion drawn by the Magistrate that it is expedient in the interests of the public that this appellant be sentenced to preventive detention.

The remainder of the reasons given by the Court of Appeal deals with the question, which was not raised before us, whether the learned magistrate had the right to proceed with the hearing and give his decision in the absence of the accused.

The report of the learned magistrate shows that of the fourteen offences of which he found the appellant had been convicted the first two were for vagrancy and the third, in 1947, was for breaking and entering and theft (of two

electric clippers and a quantity of cigarettes). All subsequent convictions were either for having possession of drugs (four offences) or for petty theft (seven offences). The last conviction was in December 1962 and the punishment was a term of 6 months imprisonment. According to the evidence of P. C. Needham the appellant was released about May 5, 1963. This witness testified that he "checked" the appellant on May 12, 1963. He says:

> I have here 5:35 p.m. on May the 12th which is Sunday, May 12, 1963, I checked this man in the 100 East Hastings. At this time he told me he was living at Room 15 at the Colonial Hotel by himself. He was on Social Assistance. He had Fifty Cents in his pockets. He said he had been on Social Assistance for three or more years and at this time he admitted having been released from prison one week earlier having served a six months sentence.

It will be observed from paragraph 12 of the magistrate's report, quoted above, that the evidence of circumstances other than previous convictions upon which the magistrate relied related to occasions the latest of which was November 1961.

It has been held in a unanimous judgment of this Court in *Kirkland v. The Queen*[2] that the time at which the Crown must show that an accused is leading persistently a criminal life is the time of the commission of the substantive offence.

In the case at bar there is no evidence that since his release early in May 1963 the appellant was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963. In some circumstances the commission of the substantive offence may in itself furnish sufficient evidence that the accused is leading persistently a criminal life, but this is not one of such cases.

P. C. Needham gave evidence in regard to the substantive offence. He told of going to the Manager's Office at F. W. Woolworth Company's store on West Hastings Street, at 5.10 p.m. on July 31, 1963, in response to a radio call and finding the accused there. The Manager charged the appellant with having stolen a can-opener of the value of

---

[2] [1957] S.C.R. 3 at 8, 117 C.C.C. 1, (1956), 25 C.R. 101.

1968

HADDEN v. THE QUEEN

Cartwright C.J.

two dollars and ninety-nine cents and the following day the appellant pleaded guilty to this charge. P. C. Needham testified as follows:

> At the time of this arrest, he had a appearance of being mildly intoxicated but there was no smell of liquor on his breath and when questioned about this he admitted being—having had goof balls earlier.
>
> * * *
>
> MR. MORRISON: Now, you said something about a goof ball, Constable, what do you mean by that?
>
> A. Well, this is the term that—well, we asked him if he had been drinking and—
>
> THE COURT: Who asked him?
>
> A. I did, your Worship, during the normal course of the primary investigation and he denied drinking and I suggested that—by way of suggestion on my part that he had taken goof balls and he agreed.
>
> MR. MORRISON: What do you understand by the term, goof balls?
>
> A. It is some chemical preparation taken by persons addicted to drugs which they can obtain more easily and a lot less expense and the effect is similar. This is what I am made to understand.

The picture is of a man "mildly intoxicated" by "goof balls" stealing a can-opener worth $2.99 rather than of one persisting in leading a criminal life. The facts are even more consistent with yielding to a sudden impulse than were those in *Kirkland's* case, *supra.*

No doubt the record shows that the appellant has for years been addicted to the use of drugs and from time to time commits petty thefts. In my opinion, the evidence accepted by the learned magistrate fails to establish that the appellant was, at the time of committing the substantive offence, leading persistently a criminal life and this is sufficient to dispose of the appeal.

As is pointed out in the reasons of my brother Martland, it was also contended on behalf of the appellant that even if he could properly be found to be an habitual criminal, it was not proper to impose a sentence of preventive detention upon him but it is unnecessary to deal with that submission in these reasons.

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

The judgment of Fauteux, Abbott, Martland and Ritchie JJ. was delivered by

MARTLAND J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[3], which dis-

[3] (1965), 51 W.W.R. 693, [1966] 1 C.C.C. 133.

missed the appellant's appeal against a sentence for preventive detention which had been imposed upon him. The facts giving rise to this appeal are stated in the reasons of the Chief Justice. The Court of Appeal found that it had not been shown that the learned magistrate in the court below erred in principle in the matter of finding that the appellant was an habitual criminal.

On this issue, the main argument of the appellant was that it had not been established that he was "leading persistently a criminal life", as required by s. 660(2)(*a*) of the *Criminal Code*, which is one of the necessary elements contained in the definition of an habitual criminal.

The evidence at trial established the following:

1. A series of fifteen convictions (including that for the substantive offence on August 1, 1963) since the year 1945.
2. He had been convicted in 1950, 1953, 1956 and 1959 of having drugs in his possession.
3. Between 1958 and 1962 the appellant had been convicted seven times for theft of an article of a value of less than fifty dollars. The substantive offence, for which he was convicted on August 1, 1963, was of a similar nature.
4. There had been a period of less than three months between the date of his release from prison, about May 5, 1963, and the commission of the substantive offence. When interviewed by a police officer about a week after that release from detention the appellant said that he was on Social Assistance and had been on such assistance for three or more years.
5. Detective Devries, of the Vancouver City Police Force, who had observed the appellant, when he committed the last offence, prior to the substantive offence, on December 6, 1962, testified that he had known the appellant for ten years and that the appellant is a user of narcotics. Asked as to his character and reputation in the community, he said:

> Well, in my opinion, as far as he is concerned, he always hangs down around the 100 Block East Hastings and Skid Road and I have never known him to make any advance to employment or get out of the rut he is in.

1968

HADDEN
v.
THE QUEEN

Martland J.

In answer to another question, he said:

> Yes, I have been on the Drug Squad for a period of three years or more and also walk the beat in that area for a number of years and the 100 Block East Hastings is the main hangout for drug addicts and criminals.

The appellant contends that there was no evidence that the appellant was engaged in crime between the date of his release from custody and the commission of the substantive offence and submits that, without this, the appellant cannot be found to be an habitual criminal within the requirements of s. 660(2)(*a*).

In *Kirkland v. The Queen*[4], this Court agreed with the statement of Lord Reading L.C.J. in *R. v. Jones*[5], that:

> 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.

That statement was made in a case which involved the adequacy of a summation to the jury by the Chairman of a Quarter Sessions, which contained the statement:

> If you think his record justifies this charge of being a habitual criminal it is your duty to find that he is a habitual criminal.

While it is true that a criminal record alone does not necessarily involve a finding that at the time the substantive offence was committed, the accused is leading persistently a criminal life, if the accused repeatedly commits the same kind of offence, and if the time elapsing between the commission of the offence prior to the substantive offence and the commission of the substantive offence is short, in my opinion it is open to the court, considering the matter, to conclude that the accused is leading persistently a criminal life, without necessarily having to have evidence of criminal acts or associations during that short period.

The evidence in the present case establishes a clear pattern of conduct. In each case noted below the charge involved was theft.

Date of Conviction	*Sentence*
July, 1961	2 months
September, 1961	4 months
May, 1962	6 months
December, 1962	6 months

[4] [1957] S.C.R. 3, 117 C.C.C. 1, (1956), 25 C.R. 101.
[5] (1920), 15 Cr. App. R. 20.

Within three months of his release after the last of the above sentences, the appellant committed theft once again.

In the *Kirkland* case, it was said that there had been cases in the Court of Criminal Appeal in which the nature of the substantive offence viewed in the light of the previous record of the accused was in itself evidence that he was leading a persistently criminal life, but that the cases of this kind cited by counsel were all cases in which the substantive offence was of a nature which showed premeditation and careful preparation.

The fact of premeditation and careful preparation in relation to the substantive offence may certainly be evidence of persistence in leading a criminal life. In my opinion it is not the only kind of evidence, in cases of this kind, which can establish such persistence, and I do not regard the *Kirkland* case as laying this down as a matter of law. That case was decided upon its own facts, as this one must be. In my view the pattern of conduct which has been established of the commission of thefts shortly after release from custody, coupled with the short lapse of time after release and prior to the commission of the substantive offence, is equally good evidence of persistence in leading a criminal life. The case of *R. v. Yates*[6] is an example of this kind.

Counsel for the appellant contended that Part XXI of the *Criminal Code* was not intended to apply in respect of the commission of the sort of crimes committed by the appellant in this case, which involved no violence and were not of a serious nature. In my opinion, if the application of Part XXI is to be restricted in this way, that is a matter for Parliament and not to be achieved by judicial decision. Section 660, in requiring, as a prerequisite of a person being found to be an habitual criminal, the commission of three indictable offences for which there is a liability to imprisonment for five years or more, has defined the nature of the crimes in respect of which Part XXI can apply.

[6] (1910), 5 Cr. App. R. 222.

1968

HADDEN
v.
THE QUEEN

Martland J.

It was also contended, on behalf of the appellant, in the alternative, that, even if he could properly be found to be an habitual criminal, it was not proper to impose a sentence of preventive detention upon him. In view of the fact that the majority of this Court have decided that the evidence in this case fails to establish that the appellant was persistently leading a criminal life, a necessary requirement to his being found to be an habitual criminal within para. (*a*) of subs. (2) of s. 660 of the *Criminal Code*, it is unnecessary for me to deal with those submissions in these reasons.

In my opinion the appeal should be dismissed.

PIGEON J.:—I have had the opportunity of reading the reasons for judgment of the Chief Justice in this appeal. I concur in his view that there is no evidence that the appellant, since his release early in May 1963, was leading a criminal life, persistently or otherwise, except the commission of the substantive offence on July 31, 1963, and that this is not of itself sufficient evidence in the circumstances of this case. Therefore, I would allow the appeal and quash the sentence of preventive detention.

Appeal allowed, FAUTEUX, ABBOTT, MARTLAND *and* RITCHIE JJ. *dissenting.*

Solicitor for the appellant: T. R. Berger, Vancouver.

Solicitor for the respondent: W. G. Burke-Robertson, Ottawa.