GEORGE MILTON PATON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967
*Oct. 12
1968
Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Preventive detention—Whether conviction recorded before enactment of habitual criminal provisions to be considered—Whether conviction subsequent to commission of substantive offence to be considered—Whether sentence imposed must have been served—Criminal Code, 1953-54 (Can.), c. 51, s. 660(2)(a).

On December 12, 1956, the appellant was convicted of an offence, committed on July 15, 1956, of breaking and entering and theft and was sentenced on that same day to preventive detention. He had been arrested on July 15, 1956. The three prior convictions upon which that sentence was founded were: (a) on November 8, 1946, for breaking and entering; (b) on February 13, 1952, for breaking and entering and (c) on October 16, 1956, for breaking and entering committed on July 1, 1956. The Court of Appeal affirmed the sentence of preventive detention and an application for leave to appeal to this Court was dismissed in October 1957. On an appeal from the refusal of a writ of *habeas corpus*, the appellant was granted leave to appeal to this Court in June 1967. Three questions of law were raised by the appellant: (1) whether a conviction recorded prior to the enactment in 1947 of the habitual criminal provisions should be considered in the application of s. 660(2)(*a*) of the Code; (2) whether a conviction entered after the commission of the primary offence should be considered as one of the three convictions contemplated in s. 660(2)(*a*) of the Code; and (3) whether the sentence imposed on the previous convictions must have been served when the habitual criminal proceedings are brought.

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

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Held (Cartwright C.J. and Hall, Spence and Pigeon JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott, Martland, Judson and Ritchie JJ.: The Court was entitled to consider the conviction recorded in 1946. The word "previously" in s. 660(2)(*a*) of the Code takes in convictions before the enactment of legislation in relation to habitual criminals and that includes the conviction of 1946. The convictions which the Court may consider are convictions which have occurred since the accused reached the age of 18 years without regard to the date when the habitual criminal legislation was first passed.

The Court was entitled to consider the conviction dated October 16, 1956, as one of the three convictions. There is no basis for the contention that the three convictions must occur previous to the commission of the primary offence. It is sufficient for the Crown to prove that the accused has been convicted on three occasions previous to the conviction on the primary offence. The word "previously" must apply to any conviction which in point of time has occurred before the date of the hearing of the application and before the date of the conviction on the primary offence. The word does not mean "previously to committing the substantive offence" but "previously to being convicted of the substantive offence". All that the Crown has to prove is that at the time of the conviction on the primary offence, there are three previous convictions and that at the time of the commission of the substantive offence, he was leading a "persistently criminal life".

There is no requirement that the sentence imposed must have been served in whole or in part. The statute in clear language requires only proof of a conviction of a certain kind. This language cannot be converted into a requirement that a sentence passed pursuant to such conviction must have been served. The serving of the sentence is not one of the conditions that must be met in order to establish that a person is an habitual criminal.

Per Cartwright C.J. and Hall and Spence JJ., *dissenting*: The Court was not entitled to consider the conviction, dated October 16, 1956, which was entered after the commission of the primary offence. The word "previously" in s. 660(2)(*a*) means previously to committing the substantive offence and not previously to being convicted of the substantive offence. 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. The critical time contemplated by s. 660(2)(*a*) for the proof of the two matters required to be proved by the Crown must be the same for both. There is no evidence to suggest that after the date of the conviction for the third offence, he persistently led a criminal life as he had been in custody ever since. At the time the appellant committed the substantive offence he had been convicted of only two of the three offences set out in the notice given to him and consequently, the first of the conditions prescribed by s. 660(2)(*a*) had not been fulfilled.

Per Pigeon J., *dissenting*: In order to limit the effect of the word "previously" in s. 660, which by itself takes in all time past without any distinction, it would be necessary to introduce into the section something which is not there. On the proper construction of the

statute after consideration of the relevant authorities there was no reason in law for excluding from consideration the conviction recorded in 1946.

The trial judge was not entitled to consider the conviction entered after the commission of the primary offence. Grammatically the text of s. 660 does not support the contention that the word "previously" refers to the date of the commission of the primary offence. The word "occasions" means when an offender is apprehended, charged, convicted and sentenced. The word "persistently" implies "persistently after being convicted on the required three separate and independent occasions". Therefore, when the appellant was convicted of the primary offence, he could not be said to have been previously convicted "on at least three separate and independent occasions" when the last conviction was for an offence for which he was arrested and charged on the same occasion as the primary offence, and also because he could not be found to have been so convicted and to be leading persistently a criminal life when he had been convicted on the last occasion after being arrested for the primary offence.

Droit criminel—Repris de justice—Détention préventive—Doit-on considérer une déclaration de culpabilité enregistrée avant la promulgation des dispositions visant les repris de justice—Doit-on considérer une déclaration de culpabilité prononcée après la date de l'infraction sur laquelle la sentence est basée—Est-ce que la sentence imposée doit avoir été purgée—Code criminel, 1953-54 (Can.), c. 51, art. 660(2)(a).

Le 12 décembre 1956, l'appelant a été déclaré coupable d'une infraction, commise le 15 juillet 1956: entrée par effraction et vol. Une sentence de détention préventive lui a été imposée le même jour. Il avait été arrêté le 15 juillet 1956. Les trois déclarations antérieures de culpabilité sur lesquelles cette sentence est basée, sont: (a) le 8 novembre 1946: entrée par effraction; (b) le 13 février 1952: entrée par effraction et (c) le 16 octobre 1956: entrée par effraction le 1er juillet 1956. La Cour d'appel a confirmé la sentence de détention préventive et une requête pour permission d'en appeler à cette Cour a été rejetée au mois d'octobre 1957. Sur appel d'une décision refusant d'accorder un bref d'*habeas corpus,* cette Cour lui a accordé la permission d'appeler au mois de juin 1967. L'appelant a soulevé à l'audition trois questions de droit: (1) doit-on, dans l'application de l'art. 660(2)(*a*) du Code, considérer une déclaration de culpabilité enregistrée avant la promulgation en 1947 des dispositions visant les repris de justice; (2) doit-on considérer une déclaration de culpabilité enregistrée après la date de l'infraction sur laquelle la sentence est basée comme l'une des trois déclarations de culpabilité visées par l'art. 660(2)(*a*) du Code; et (3) la sentence imposée à la suite des déclarations antérieures de culpabilité doit-elle avoir été purgée avant que les procédures visant les repris de justice soient instituées contre l'accusé.

Arrêt: L'appel doit être rejeté, le Juge en Chef Cartwright et les Juges Hall, Spence et Pigeon étant dissidents.

Les Juges Fauteux, Abbott, Martland, Judson et Ritchie: La Cour était justifiée de considérer la déclaration de culpabilité enregistrée en 1946. Le mot «antérieurement» dans l'art. 660(2)(*a*) du Code englobe les déclarations de culpabilité antérieures à la promulgation de la législa-

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tion relative aux repris de justice et ceci inclut la déclaration de culpabilité de 1946. Les déclarations de culpabilité que la Cour peut considérer sont celles qui sont survenues depuis que l'accusé a atteint l'âge de 18 ans sans égard à la date de la promulgation de la première législation relative aux repris de justice.

La Cour était justifiée de considérer la déclaration de culpabilité du 16 octobre 1956, comme l'une des trois déclarations de culpabilité prévues par l'art. 660(2)(*a*). La prétention que les trois déclarations de culpabilité doivent survenir avant que l'accusé commette l'infraction sur laquelle la sentence est basée n'est pas fondée. Il suffit que la Couronne prouve que l'accusé a été déclaré coupable en trois occasions avant d'être déclaré coupable de cette infraction. Le mot «antérieurement» doit s'appliquer à toute déclaration de culpabilité qui au point de vue du temps est survenue avant la date de l'audition de la demande et avant la date de la déclaration de culpabilité de l'infraction base de la sentence. Ce mot ne veut pas dire «antérieurement à cette infraction» mais «antérieurement à la déclaration de culpabilité de cette infraction». Tout ce que la Couronne doit prouver est que lors de cette déclaration de culpabilité, il existait trois déclarations antérieures de culpabilité et que lorsque l'accusé a commis l'infraction, il menait avec persistance une vie criminelle.

Il n'est pas nécessaire que la sentence imposée ait été purgée en tout ou en partie. Dans un langage clair, le statut n'exige que la preuve d'une déclaration de culpabilité d'un certain genre. On ne peut pas transformer ce langage pour lui faire dire qu'une sentence prononcée en vertu d'une telle déclaration de culpabilité doit avoir été purgée. Le fait d'avoir purgé la sentence n'est pas une des conditions requises pour établir qu'une personne est un repris de justice.

Le Juge en Chef Cartwright et les Juges Hall et Spence, *dissidents*: La Cour n'était pas justifiée de considérer la déclaration de culpabilité du 16 octobre 1956, laquelle a été enregistrée après la date de l'infraction sur laquelle la sentence est basée. Le mot «antérieurement» dans l'art. 660(2)(*a*) signifie antérieurement à cette infraction et non pas antérieurement à la déclaration de culpabilité. Le moment auquel la Couronne doit démontrer que l'accusé mène avec persistance une vie criminelle est lorsque l'accusé commet cette infraction. Le moment critique prévu par l'art. 660(2)(*a*) où doit se faire la preuve des deux éléments que la Couronne doit établir, doit être le même pour les deux. Il n'y a aucune preuve suggérant qu'après la date de la déclaration de culpabilité pour la troisième infraction, il a mené avec persistance une vie criminelle puisqu'il était sous arrêt depuis ce jour-là. Au moment où l'appelant a commis l'infraction il avait été déclaré coupable de seulement deux des trois actes criminels mentionnés dans l'avis qui lui a été fourni et, en conséquence, la première des conditions prescrites par l'art. 660(2)(*a*) n'a pas été remplie.

Le Juge Pigeon, *dissident*: Pour qu'il soit permis de limiter l'effet du mot «antérieurement» dans l'art. 660, lequel englobe par lui-même tout le passé sans distinction, il serait nécessaire d'introduire dans l'article quelque chose qui n'y est pas. Donnant au statut l'interprétation appropriée et après examen de la jurisprudence, il n'y a aucune raison en droit de ne pas considérer la déclaration de culpabilité enregistrée en 1946.

Le juge au procès n'était pas justifié de considérer la déclaration de culpabilité enregistrée après l'infraction sur laquelle la sentence est basée.

Grammaticalement, le texte de l'art. 660 ne supporte pas la prétention que le mot «antérieurement» réfère à la date de cette infraction. Le mot «occasions» signifie le temps où le criminel est arrêté, inculpé, déclaré coupable et reçoit sa sentence. Le mot «persistently» signifie «avec persistance après avoir été déclaré coupable dans les trois occasions distinctives et indépendantes requises». En conséquence, lorsque l'appelant a été déclaré coupable de l'infraction, on ne pouvait pas dire qu'il avait été trouvé coupable antérieurement «dans au moins trois occasions distinctes et indépendantes» puisque la dernière déclaration de culpabilité était d'une infraction pour laquelle il avait été arrêté et inculpé en la même occasion, et aussi parce qu'on ne pouvait pas dire qu'il avait été ainsi déclaré coupable et menait ainsi une vie criminelle, dans un cas où la dernière des trois condamnations était subséquente à son arrestation.

APPEL d'un jugement de la Cour d'appel de la Colombie-Britannique, confirmant une sentence de détention préventive. Appel rejeté, le Juge en Chef Cartwright et les Juges Hall, Spence et Pigeon étant dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia, affirming a sentence of preventive detention. Appeal dismissed, Cartwright C.J. and Hall, Spence and Pigeon JJ. dissenting.

T. R. Berger, for the appellant.

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

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

THE CHIEF JUSTICE (*dissenting*):—This appeal is brought, pursuant to an order made by this Court on June 19, 1967, extending the time for appealing and granting leave to appeal, from a judgment of the Court of Appeal for British Columbia pronounced on September 20, 1957, dismissing an appeal from the imposition of a sentence of preventive detention upon the appellant by His Honour Judge Archibald on December 12, 1956.

The appeal comes before us under unusual circumstances.

On October 28, 1957, the appellant applied to this Court for leave to appeal from the judgment of the Court of Appeal mentioned above and his application was dismissed. The grounds of appeal on which counsel for the appellant chiefly relies in the appeal now before us were not raised

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before His Honour Judge Archibald or the Court of Appeal for British Columbia on the appeal to it in 1957 or on the application to this Court for leave to appeal in the same year.

On July 23, 1963, an application by the appellant for the issue of a writ of *habeas corpus* was refused by Judson J. and an appeal to the Court from such refusal was dismissed on November 12, 1963. On April 4, 1967, a further application by the appellant for the issue of a writ of *habeas corpus* was refused by Judson J. These refusals were clearly right as it is plain that the appellant is detained under a warrant of committal valid on its face, issued by a Court of competent jurisdiction.

The appellant appealed to this Court from the last mentioned refusal and was notified that his appeal would be heard on Monday, June 19, 1967. Prior to the hearing of the appeal a telegram was received by the Registrar of the Court from Mr. Thomas Berger stating that he had been asked to make representations to the Court on behalf of the appellant and requesting that no determination be made of the appeal until these reached the Court. Prior to the date of hearing a letter was received from Mr. Berger setting out grounds, to be referred to hereinafter, on which he submitted that the sentence of preventive detention had been unlawfully imposed.

On the appeal coming on to be heard, the Court informed counsel for the Attorney General that the decision of Judson J. refusing the issue of a writ of *habeas corpus* was clearly right and that the appeal therefrom must be dismissed but that Mr. Berger's letter appeared to raise a question of difficulty and importance which had not been placed before the Court of Appeal or this Court on any previous application by the appellant. After some discussion, and counsel for the Attorney General not objecting, the Court made the order granting leave to appeal and giving the necessary extensions of time as set out in the opening paragraph of these reasons.

On December 12, 1956, following trial without a jury which commenced on the previous day, the appellant was convicted on the charge that he

> ...on or about Sunday July 15th, A.D. 1956, at the City of Kelowna, County of Yale, Province of British Columbia, did unlawfully break and enter a place, to wit, the building of Gordon's Master Market Ltd.

situated at 555 Bernard Avenue, Kelowna, British Columbia, and therein steal the sum of approximately $14,452.28 in cash and cheques, the property of Gordon's Master Market Ltd., contrary to the form of Statute in such case made and provided.

On November 28, 1956, the appellant had been served with a notice dated November 28, 1956, in accordance with the provisions of s. 662 of the *Criminal Code* stating that if he should be convicted of the substantive charge an application would be made to the Court to impose a sentence of preventive detention upon the ground, *inter alia*, that

since attaining the age of eighteen years, on at least three separate and independent occasions previous to the conviction of the crime charged and hereinbefore recited, you have been convicted of an indictable offence for which you were liable to imprisonment for five years or more, namely:—

The three prior convictions are set out in complete detail; the particulars given may be summarized as follows:

(*a*) Charge, breaking and entering at Victoria, on May 30, 1946; conviction, November 8, 1946; sentenced, November 25, 1946, to five years in B.C. Penitentiary.

(*b*) Charge, breaking and entering at Haney, B.C., on February 26, 1951; conviction, February 13, 1952; sentenced to five years in B.C. Penitentiary.

(*c*) Charge, breaking and entering at Vancouver on July 1, 1956; conviction, October 16, 1956; sentenced October 23, 1956, to five years in B.C. Penitentiary.

The hearing of the application for the imposition of a sentence of preventive detention proceeded immediately following the conviction of the substantive offence. It was proved that the appellant had been convicted on the three occasions as stated in the notice. It appears from the evidence of Acting-Sergeant Nuttall given at the hearing of the application that the appellant was arrested at Vancouver on July 15, 1956.

The grounds of appeal relied on by the appellant are set out in the appellant's factum as follows:

1. The first conviction made against the appellant, in 1946, could not be used against him as one of three essential previous convictions, because there were no provisions in the Criminal Code for preventive detention of habitual criminals then, and the legislation should not be given retroactive application.

2. At the time of the commission of the primary offence, the appellant had not previously been convicted on three separate and independent occasions of an indictable offence for which he was liable for imprisonment for five years or more.

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3. There was no adequate legal foundation for a sentence of preventive detention, in view of the fact that although three previous convictions had been proved against the appellant, he had not served the sentence imposed on him on the third previous conviction when the proceedings were brought against him alleging that he was an habitual criminal and when the sentence of preventive detention was imposed on him.

I find it necessary to deal only with the second of these grounds. Both counsel advised us that they had been unable to find any reported decision in which the question raised in this ground had been considered.

On December 12, 1956, s. 660 of the *Criminal Code* read as follows:

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.

(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.

The solution of the question before us depends primarily upon the true construction of s. 660, subs. (2)(*a*) and particularly upon the meaning of the word "previously" in the first line of clause (*a*). Does it mean previously to committing the substantive offence or previously to being convicted of the substantive offence? In my opinion it means the former. It has been held in a unanimous judgment of this Court 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: see *Kirkland v. The Queen*[1].

It appears to me that the critical time contemplated by clause (*a*) for the proof of the two matters required to be proved by the Crown must be the same for both. I arrive at this conclusion from a consideration of the words of

[1] [1957] S.C.R. 3 at 8, 25 C.R. 101, 117 C.C.C. 1.

the section. If the construction were doubtful it seems to me that the view which I think should be taken is greatly strengthened by a consideration of the history of the section and the judicial pronouncements on it and on the statutory provisions in England upon which it is, with some variations, modelled.

In *R. v. Churchill*[2], Lord Goddard L.C.J. said at p. 110:

> The object of preventive detention is to protect the public from men or women who have shown by their previous history that they are a menace to society while they are at large. There comes a time when it is not a question of punishment, for that has been shown to be of no use, but of a necessity to put these offenders in confinement so that they can no longer prey upon the public.

and at p. 112:

> It is not a question of severity. As we have already said, when such sentences have to be passed the time for punishment has gone by, because it has had no effect.

These passages indicate the view, which I think to be the right one, that Parliament intended the extraordinary sentence of preventive detention to be imposed only after it appeared that convictions on three separate and independent occasions had failed to deter the accused from committing the substantive offence.

To the same effect are the following words in the judgment of Lord Goddard in *R. v. Rogers*[3]:

> The Criminal Justice Act was intended to deal with people who showed by their conduct that previous sentences had had no effect upon them and that, therefore, they were fit subjects for long detention for the protection of the public.

at p. 207:

> The principle is that if the prisoner shows that the sentences he has received at a particular court and also at two subsequent courts do not deter him from committing crime, then he is to be liable to preventive detention.

and also at p. 207:

> I think on the whole that is giving effect to the intention of the Act, because it will then have shown that the three previous appearances in court and the sentences imposed on him on three separate occasions have not done the prisoner any good, and therefore the time has come to try a long sentence.

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[2] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.
[3] (1952), 36 Cr. App. R. 203 at 206, 207.

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Reference may also be made to the words of Sheppard J.A. in *R. v. Channing*[4]:

> The Code does not expressly require that the accused lead persistently a criminal life of offences for which he is liable to imprisonment for 5 years or more. It is sufficient if he has been convicted on three occasions for three such offences and *thereafter* persistently led a criminal life, which may be of lesser crimes.

The most significant word in this passage is "thereafter" which I have italicized. In the case at bar at the time of his conviction for the third offence, the appellant had been in custody for some three months and has continued in custody ever since. There is no evidence in the record to suggest that after the date of that conviction he persistently led a criminal life.

It may be of use to consider the possible results of construing the section in accordance with the submission of counsel for the respondent by suggesting the following example. A person on separate days during the same month breaks into four different houses and steals some of the contents. He is apprehended on the fourth occasion. If separately indicted and convicted for each of the first three offences, he could following conviction on the fourth be sentenced to preventive detention. That such a situation is unlikely to arise may be conceded; but it appears to me to be even more unlikely that Parliament should have intended to render possible such a result. To so construe the section because the literal meaning of the words used would seem capable of bearing such a meaning would, in my opinion, be to disregard the well settled rule of construction which is succinctly stated in *Halsbury,* 3rd ed., vol. 36, p. 416:

> For a penalty to be enforced it must be quite clear that the case is within both the letter and the spirit of the statute.

This statement is supported by the authorities cited by the learned authors and there is nothing in the *Interpretation Act,* as in force at the time this case was dealt with in the Courts below (R.S.C. 1952, c. 158), which abrogates the rule. Section 15 of that Act does require every Act to be deemed remedial but concludes with the words:

> . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

[4] [1966] 1 C.C.C. 99 at 108, (1965), 52 W.W.R. 99, 51 D.L.R. (2d) 223.

It is the commission of the substantive offence that creates the possibility of an inquiry as to whether the accused is an habitual criminal. It is, of course, necessary that he be convicted of that offence before it can be said judicially that he has committed it; but it is the commission and not the conviction which indicates what manner of man he is. The number of previous convictions chosen by Parliament as a condition precedent to the holding of an inquiry as to whether a person is an habitual criminal is three. Those convictions bring home to the convicted person on three separate occasions the knowledge of guilt and the punishment which it entails. It is the fact that he thereafter, with such knowledge, commits yet another indictable offence that Parliament has declared shall be a condition precedent to the inquiry as to whether he should be sentenced to preventive detention.

At the time the appellant in the case at bar committed the substantive offence he had been convicted of only two of the three offences set out in the notice given to him and, in my opinion, the first of the conditions prescribed by clause (*a*) of s. 660(2) had not been fulfilled; it follows that it was not open to the learned judge to impose a sentence of preventive detention.

It is obvious that for the reasons given above I would allow the appeal, but there remains for consideration a point raised by some members of the Court. It has been suggested that because this Court had, on October 28, 1957, refused the appellant's application for leave to appeal it had no jurisdiction to make the order granting leave which it did make on June 19, 1967, and which was duly signed and entered.

As this point was not put to counsel during the argument, counsel were invited to submit written argument dealing with it and they have done so.

It now appears that the majority of the Court have reached the conclusion that the appeal fails on the merits. It therefore becomes unnecessary to deal with the question of jurisdiction. I am dealing with the appeal on the assumption that we have jurisdiction but, following the example of my brother Judson, I express no opinion on that question.

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

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

JUDSON J.:—On December 12, 1956, the appellant, George Milton Paton, was sentenced to preventive detention. His appeal from this sentence to the British Columbia Court of Appeal was dismissed on September 20, 1957, and an application for leave to appeal to this Court was dismissed on October 28, 1957. Notwithstanding this last dismissal, in June of this year, at the same time that an application by way of appeal from the refusal of a writ of *habeas corpus* was dismissed, the Court granted leave to appeal from the above mentioned judgment of the Court of Appeal of British Columbia, dated September 20, 1957. The question of the Court's jurisdiction to hear this appeal has been raised but also the appeal has been heard on the merits. I express no opinion on the question of jurisdiction because the appeal must fail on the merits.

The convictions upon which the sentence for preventive detention was founded are as follows:

Date of Offence	Date of Conviction	Offence	Sentence
1. Not stated	November 8, 1946	Breaking and entering	5 years
2. Not stated	February 13, 1952	Breaking and entering	5 years
3. July 1, 1956	October 16, 1956	Breaking and entering	5 years
4. July 15, 1956	December 12, 1956	Breaking and entering	8 years
5. December 12, 1956—sentence of preventive detention.			

I will deal now with the three points of law which were submitted to the Court on the argument of the appeal.

I. Whether, under the provisions of Section 660(2)(*a*), the Court was entitled to consider a conviction in 1946 before the enactment of the Habitual Criminal provisions of the Criminal Code.

The submission is that if the Court does consider the conviction of 1946, it is giving a retroactive operation to the habitual criminal provisions of the Code. I do not

think that this is correct. The purpose of the habitual criminal legislation is not to create a new offence nor to increase the penalties for offences with respect to which sentences have already been imposed. The purpose is crime prevention. The habitual criminal is not imprisoned for doing something, but rather for being something. The finding is simply a declaration of his status as an habitual criminal which is a matter determined in part by reference to his past record. This was decided in *Brusch v. The King*[5].

Legislation in relation to habitual criminals was first enacted in Canada in 1947. (Statutes of Canada, 1947, 11 Geo. VI, vol. 1, c. 55, Part X(A)). Section 575c. (1) enacted under that part read:

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.

On December 12, 1956, the date of Paton's sentence to preventive detention, s. 660 had taken the place of s. 575c. (1). Section 660 came in with the new *Criminal Code* enacted by 2-3 Eliz. II, c. 51, and came into force on April 1, 1955. It read:

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.

(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.

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[5] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

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In the original enactment of 1947, the words "whether any such previous conviction was before or after the commencement of this Part" make it clear that the Court was entitled to take into account the conviction in 1946, No. 1 on the above list.

On December 12, 1956, when the accused was found to be an habitual criminal, these words had been omitted and the arrangement of the words slightly altered. But there was no change in the meaning. "Previously" takes in convictions before the enactment of legislation in relation to habitual criminals. It includes the conviction of 1946. The convictions which the Court may consider are convictions which have occurred since the accused reached the age of eighteen years without regard to the date when the habitual criminal legislation was first passed.

The alternatives are the elimination of two classes of convictions

(*a*) those before April 1, 1955, when s. 660 came into force, or

(*b*) those before 1947, when s. 575c. (1) came into force.

In my opinion the use of the word "previously" shuts out these alternatives.

II. Whether the learned trial judge, in finding the appellant to be an habitual criminal, was entitled to consider the conviction dated October 16th, 1956, as one of the three convictions described in section 660(2)(*a*) of the *Criminal Code*.

On reference back to the above table, it will be seen that the conviction of October 16, 1956, based on the offence of July 1, 1956, was subsequent to the commission of the primary or substantive offence on July 15, 1956. The appellant's submission on this appeal is that the three convictions, in order to comply with s. 660, must occur previous to the commission of the primary or substantive offence. The Crown, on the other hand, submits that there is no basis for such a contention and that it is sufficient for the Crown to prove at the hearing of an application under s. 660 that the accused has been convicted on three occasions previous to the conviction on the primary or substantive offence. In this case, on December 12, 1956, when this accused was convicted of the primary or substantive offence which he had committed on July 15, 1956, there were three convictions against him: November 8,

1946, February 13, 1952, and October 16, 1956. When the application to have him sentenced to preventive detention was made on the same date, December 12, 1956, the Court was required to decide at that point of time whether previously, since attaining the age of eighteen years, on three separate and independent occasions, the appellant had been convicted. The word "previously" in such circumstances must apply to any conviction which in point of time has occurred before the date of the hearing of the application and before the date of the conviction on the primary or substantive offence.

To go back to s. 575c., the original enactment of 1947, the words read: "previously *to the conviction of the crime charged in the indictment*". In the present section, 660(2) (*a*), the words italicized in s. 575c. (1) have been omitted. The word "previously" is sufficient. The italicized words were redundant. The two sections mean exactly the same. It was a case of omitting in the revision redundant words. See: *C.P.R. v. The King*[6].

I cannot accept the conclusion of the Chief Justice that "previously" means "previously to committing the substantive offence" and not "previously to being convicted of the substantive offence". This is not what the section says. I do not think that it follows from *Kirkland v. The Queen*[7] that at the time of commission of the primary or substantive offence it must be shown that the accused had three previous convictions. One thing that *Kirkland v. The Queen* does decide is that it must be shown on the application to have the accused declared an habitual criminal that he is leading "persistently" a criminal life, and that on this branch of the case the date to be taken is the date of the commission of the primary or substantive offence.

I do not think that the history of the legislation in England or the dicta of Lord Goddard in *Rex v. Churchill*[8] and in *Rex v. Rogers*[9] have any bearing upon the interpretation of this section. In other words, all that the Crown has to prove is that at the time of the fourth conviction, i.e., on the primary or substantive offence, there are three previous convictions and that at the time of the commission of the

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[6] (1906), 38 S.C.R. 137 at 143.
[7] [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1.
[8] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.
[9] (1952), 36 Cr. App. R. 203.

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substantive offence, he was leading a "persistently criminal life". To prove the second point does not involve the necessity of holding that when he committed the third of these offences, it cannot be said that he was leading a persistently criminal life because he had not then been convicted.

Nor can I accept the illustration given in the reasons of the Chief Justice [ante p. 350] in the circumstances there outlined—four different offences on four consecutive days; four separate indictments and four convictions. An accused could not necessarily be found to be an habitual criminal after conviction on the fourth indictment. It would still have to be proved that he was leading a persistently criminal life and that terminology does not apply to the facts of the illustration. Without more, the illustration is one of a spasmodic outburst and not of a persistently criminal life.

Further, the *Interpretation Act,* which is appealed to in support of this view, cannot possibly apply when the meaning of the section to be interpreted is plain on its face. Our task is to give effect to the plain meaning of the section.

III. There was no adequate legal foundation for a sentence of preventive detention, in view of the fact that although three previous convictions had been proved against the appellant, he had not served the sentence imposed on him on the third previous conviction when the proceedings were brought against him alleging that he was an habitual criminal and when the sentence of preventive detention was imposed on him.

There is no merit in this submission. To repeat what I have already said, what must be proved is that at the time of the application there are three convictions against the accused "of an indictable offence for which he was liable to imprisonment of five years or more". The statute in clear language requires only proof of a conviction of a kind carrying a liability for a five-year sentence. This language cannot be converted into a requirement that a sentence passed pursuant to such conviction must have been served. The language is "convicted of an indictable offence for which he was liable to imprisonment for five years or more" and not "convicted of an indictable offence for which he was liable to imprisonment for five years or more *and which he has served*". The serving of the sentence is not one of the conditions that must be met in order to establish that a person is an habitual criminal.

The *King v. Robinson*[10] is against any such submission. See: Per Fauteux J. at p. 526:

> The offences are not identified by names or by references to sections describing them, but by the measure of punishment ... which the offender is exposed to suffer.

and per Cartwright J. at p. 534:

> The controversy is as to the proper construction of the words "been convicted of an offence for which he was liable to at least five years' imprisonment".
>
> * * *
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> The solution of the question depends upon the meaning to be given to the words "liable to". Their ordinary and natural meaning is, I think, "exposed to". The intention of Parliament as disclosed in the words of the section seems to me to be to describe a class of indictable offences, and to require as one of the conditions of a person being found to be a habitual criminal that he shall at least three times have been convicted of an offence comprised in such class. The offences of which the class is composed are described by reference to the penalty which the law permits to be inflicted on a person convicted thereof, that is to say, the penalty to which he is exposed, which he runs the risk of suffering, which he is subject to the possibility of undergoing, not the penalty which he must suffer.

It is the measure of punishment that is referred to in the section. Conviction satisfies the condition imposed without any requirement that the sentence imposed be served in whole or in part.

I would dismiss the appeal.

PIGEON J. (*dissenting*):—The facts of this case are stated by the Chief Justice. Because, in the opinion of the majority, the appeal fails on the merit I will, as he does, deal with it without expressing any opinion on the question of jurisdiction.

The first question of law raised by the appellant is whether a conviction recorded prior to the enactment of habitual criminal provisions, is to be considered in the application of this legislation. Appellant's first conviction was entered in 1946 while the original enactment dates from 1947. In that first text (*Criminal Code* s. 575c) the words "whether any such previous conviction was before or after the commencement of this Part" were inserted to dispel any doubt, but they do not appear in the corresponding provision of the revised *Criminal Code* enacted in 1954

[10] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.

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(2-3 Eliz. II, c. 51, in force April 1, 1955). The question is therefore whether those words were surplusage or, on the contrary, necessary to prevent the application of the presumption against retrospective operation.

It must be stressed that, in Canada, this presumption is not a rule of law but a rule of construction only. There is therefore no requirement that the intention to displace it be explicit. It is sufficient that the wording of the enactment be such as not to leave it open fairly to any other construction. In s. 660 of the present *Criminal Code*, the word "previously" by itself takes in all time past without any distinction. In order to limit its effect, it would be necessary to introduce into the enactment something which is not there.

When the cases in which the rule against retrospective operation are reviewed, it becomes apparent that, usually, the real basis for its application is the explicit or implicit provision fixing the date of the commencement of the Act. This date is an essential part of every statute. It is by reference to it that the courts must decide what are the situations governed by the new enactment and what are those that are not. For instance, when an enactment deals with a right of appeal, the situations affected are future cases only, pending cases are not taken in: *Taylor v. The Queen*[11]; *William v. Irvine*[12]; *Hyde v. Lindsay*[13]; *Flemming v. Atkinson*[14]; *Ville de Jacques-Cartier v. Lamarre*[15]. The offence of which the appellant was convicted and following the conviction for which he was sentenced to preventive detention, was committed after the coming into force of the present *Criminal Code* and, therefore, that offence, as well as the proceedings leading up to the conviction and to the sentence of preventive detention, was governed by its provisions.

Appellant says that when a person is accused of an offence created by an Act of Parliament, all the ingredients of such offence must have taken place after the date on which the Act came into operation and, in support of this proposition,

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[11] (1876), 1 S.C.R. 65.
[12] (1893), 22 S.C.R. 108.
[13] (1898), 29 S.C.R. 99.
[14] [1956] S.C.R. 761, 5 D.L.R. (2d) 650.
[15] [1958] S.C.R. 108.

a dictum of Lord Coleridge in *Regina v. Griffiths*[16] is cited. The legislation in that case had made certain acts misdemeanours if committed by a debtor "within four months next before the presentation of a bankruptcy petition by or against him" while previously such result obtained only in the case of a bankruptcy petition *against him.* It was held that if the acts had been committed before the new law it did not apply although the bankruptcy was subsequent. This principle cannot have any application in the present case because the situation is entirely different. The *Criminal Code* does not by s. 660 create an offence of which past crimes are an ingredient. It provides, as it read originally at the material time, for "a sentence of preventive detention in addition to any sentence that is imposed for the offence ..." In this respect, s. 660 does not materially differ from s. 575B of the old code under which a majority of this Court held that being an habitual criminal is not an offence but a state of circumstances which enables the court to pass a further sentence: *Brusch v. The Queen*[17].

It is contended that this has the effect of increasing the penalty for offences already committed but it is clear that such is not the result of the statute nor what was said in this Court in the case just referred to. On the contrary it is obvious that the sentence of preventive detention is imposed in respect of the offence concerning which the application is made. Previous offences as well as the conduct of the accused are nothing else than what Lord Reading termed "circumstances" in dealing with a determination under the *Prevention of Crime Act 1908: Rex v. Hunter*[18]. The principle applicable to such legislation is that which is set forth as follows by Maxwell, On Interpretation of Statutes, 11th ed., p. 211:

> Nor is a statute retrospective, in the sense under consideration, because a part of the requisites for its action is drawn from a time antecedent to its passing.

In *The Queen v. St. Mary Whitechapel*[19], the statute under consideration provided that "no woman residing in any parish with her husband at the time of his death shall

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[16] [1891] 2 Q.B. 145.
[17] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[18] (1920), 15 Cr. App. R. 69, [1921] 1 K.B. 555.
[19] (1848), 12 Q.B. 120, 116 E.R. 811.

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be removed ...". It was held applicable to a woman whose husband had died before the passing of the Act. Lord Denman said, at page 127:

> the statute is in its direct operation prospective, as it relates to future removals only, and ... it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing.

In *Ex parte Dawson*[20], the statute read:

> Any settlement of property made by a settlor shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of such settlement, ... be void ...

It was held applicable to a settlement made before the commencement of the Act.

In *Re. A Solicitor's Clerk*[21], the Act provided that an order might be made by the Disciplinary Committee directing that no solicitor shall take or retain in his employment a person who "has been convicted of larceny, embezzlement, fraudulent conversion or any other criminal offence in respect of any money or property belonging to or held or controlled by the solicitor by whom he is or was employed or any client ...". This was amended to provide that the order might be made when the clerk had been convicted of any larceny, embezzlement or fraudulent conversion. It was held that the order could then validly be made in respect of a clerk convicted of larceny of property which belonged neither to his employer nor to a client of his, although such conviction was many years prior to the amendment. Lord Goddard said:

> In my opinion this Act is not in truth retrospective. It enables an order to be made disqualifying a person from acting as a solicitor's clerk in the future and what happened in the past is the cause or reason for the making of the order, but the order has no retrospective effect. It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable, or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made. This Act simply enables a disqualification to be imposed for the future which in no way affects anything done by the appellant in the past.

Counsel for the appellant has referred us to some passages of the judgments in *Rex v. Chandra Dharma*[22], *Rex*

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[20] (1875) L.R. 19 Eq. 433.

[21] [1957] 1 W.L.R. 1219, 3 All E.R. 617.

[22] [1905] 2 K.B. 335, 92 L.T. 700.

v. Oliver[23] and *Buckman v. Button*[24]. In none of those cases does the decision lend any support to appellant's contention. In the first mentioned it was held that a statute extending the time for commencing a prosecution applied to an offence previously committed. In the other two it was held that a regulation increasing the penalties for some offences applied to offences previously committed.

On the proper construction of the statute after consideration of all relevant authorities it must be said that there was no reason in law for excluding from consideration in passing upon the application for preventive detention, the conviction recorded in 1946 prior to the enactment of habitual criminal legislation in Canada.

The second question of law arising in this case is whether the trial judge was, in finding the appellant to be an habitual criminal, entitled to consider a conviction entered against the appellant after the commission of the primary offence as one of the three previous convictions contemplated in s. 660 of the *Criminal Code*.

Before a court may find an accused to be an habitual criminal it must be shown (unless he has previously been sentenced to preventive detention) that "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". In s. 575c of the old Code, the wording was "previously to the conviction of the crime charged in the indictment". As on the first question it is now necessary to ascertain the result of the change in wording.

On behalf of the appellant, it is contended that "previously" refers to the date of the commission of the primary or substantive offence, that is the offence in respect of which the application for a sentence of preventive detention is made. Grammatically, the text does not support that contention. The section does not open by the words "Where a person has committed an indictable offence and a conviction is entered against him ..." but "Where an accused has been convicted..." Therefore, when in para. 2 it is enacted that "for the purposes of sub-section (1) an accused

[23] [1943] 2 All E.R. 800, [1944] K.B. 68.
[24] [1943] K.B. 405, 2 All E.R. 82.

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is an habitual criminal if he has previously . . ." the word "previously" has reference to the time when the accused has been convicted of the offence, or possibly to the time when the application is made. There is nothing that renders grammatically possible a construction referring back to the date of the commission of the primary offence.

As we have already seen, being an habitual criminal is not an offence but a state of circumstances and the finding that an accused is an habitual criminal is only one of the elements involved in passing the sentence of preventive detention. There can be no doubt that in passing an ordinary sentence the court is entitled to take into consideration the conduct of the accused subsequent to the commission of the offence; provision is made for suspended sentences for that very purpose. Thus, there is no principle suggesting a different construction.

Concerning the unanimous decision of this Court in *Kirkland v. The Queen*[25] this appears to be a case for the application of the rule enunciated by Lord Halsbury in *Quinn v. Leathem*[26] and often referred to in this Court *v.g. Regina v. Snider*[27]; *The Queen v. Harder*[28]; *Robert v. Marquis*[29] "that a case is only an authority for what it actually decides". In the *Kirkland* case the determination of the period of time to be considered in making a finding that an accused is an habitual criminal was not in issue. The only question considered was what evidence is necessary to prove that an accused is "leading persistently a criminal life". In the reasons for judgment it was said (at p. 7) that "the Crown had failed to satisfy the onus of proving that at the time of the commission of the substantive offence, the appellant was leading persistently a criminal life". In that case the accused had been apprehended immediately after the commission of the primary offence and undoubtedly was afterwards in custody until the sentence was passed. Therefore, it was obvious that the fact of leading persistently a criminal life was to be proved to have existed at the time of the commission of the primary offence and

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

[26] [1901] A.C. 495 at 506.

[27] [1954] S.C.R. 479 at 496, [1954] C.T.C. 255, 54 D.T.C. 1129, 109 C.C.C. 193.

[28] [1956] S.C.R. 489 at 509, 23 C.R. 295, 114 C.C.C. 129, 4 D.L.R. (2d) 150.

[29] [1958] S.C.R. 20 at 36.

not subsequently as must indeed be the case in practically every instance, seeing that accused with criminal records such as to render them apt to be declared habitual criminals are not usually let out on bail. Thus, it appears to me that what was said in *Kirkland v. The Queen* should be taken merely as a statement of what had to be proved in that case, not as an exposition of the meaning of the statute applicable to different circumstances.

It must also be pointed out that the case was decided under s. 575c of the old Code. As we have seen, that section expressly provided that the required three convictions had to be "previously to the conviction of the crime charged". There is nothing to indicate that any consideration was given to the question of whether the previous convictions and the persistently criminal life had to be proved to exist at the same time. Nothing indicates that there was any intention to decide against the clear words of the enactment that the three convictions had to be made previously to the commission of the crime, not previously to the conviction thereof. How then can this decision be considered as an authority on the construction to be given to a different enactment where the question is essentially whether the change in wording has effected any change in the substance of the enactment on this point. With the utmost deference for those who think otherwise, it does not appear to me that the judgment in the *Kirkland* case has any bearing on the question arising in the present case. In my view, it deals solely with the nature of the evidence required to prove that an accused is leading persistently a criminal life. It does not deal with the time during which this fact must be proved to exist, except that in that case it is said that this had to be shown to have existed at the time of the commission of the primary offence. The case has absolutely no reference to the time at which the previous convictions must have been made in order to be taken into account and it can have no application to the construction of a subsequent enactment that is differently worded in that respect.

This does not dispose of the second point because another change in wording between the old and the new *Criminal Code* remains to be considered. Under s. 575c it had to be proved that the accused had "at least three times previously . . . been convicted . . . ", while in s. 660 it is provided

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that "an accused is an habitual criminal if he has previously ... on at least three separate and independent occasions been convicted ...". It will be noted that the requirement in respect to previous convictions is changed from "at least three times" to "on at least three separate and independent occasions". Bearing in mind that this is coupled with the other element, "leading persistently a criminal life", the change is quite important. It is obvious that the new wording was inspired by consideration of the decision of the New Zealand Court of Appeal in *Rex v. Tier*[30] cited and applied in *Rex v. Cindler*[31], because the new wording is precisely that which Cooper J. used (at p. 437) when he held that in the New Zealand enactment "four occasions" meant "four separate and independent occasions".

After anxious consideration, I have come to the conclusion that the change from "three times" to "three separate and independent occasions" has more than a formal significance irrespective of what may have been said in the New Zealand decision about several counts in the same indictment constituting but one "occasion" with the implication that separate indictments would constitute as many "occasions". It should not be supposed that Parliament intended in effecting this change of wording that the number of "separate and independent occasions" should depend on whether the prosecutor chose to proceed by several indictments instead of by several counts in the same indictment. The legal requirement is not "three separate and independent convictions" but convictions on "three separate and independent occasions".

It is therefore necessary to consider the meaning of the word "occasion" and this must be done bearing in mind that words in statutes are generally to be construed in the popular or usual sense, not in any technical sense. In the Oxford dictionary, the first meaning of "occasion" is as follows:

> 1. A falling together or juncture of circumstances favourable or suitable to an end or purpose, or admitting of something being done or effected, an opportunity ...

Applying this definition to the enactment under consideration, must it not be said that in the usual sense, an

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[30] (1912), 32 N.Z.L.R. 428.

[31] [1950] 2 W.W.R. 1088, 11 C.R. 34, 98 C.C.C. 303.

"occasion" when a criminal is convicted, is when he is apprehended, charged and convicted of whatever number of crimes he is found to have committed before being brought to justice and usually given concurrent sentences.

In requiring convictions previously on at least three separate and independent occasions, Parliament cannot have intended that if a man had committed four offences he could be said to be an habitual criminal if the prosecutor chose to proceed by as many separate indictments on different dates. This would turn a substantive requirement into a merely formal requirement and it would not be in accordance with the usual meaning of the word "occasion" which is clearly not technical. Such an offender cannot be said to be a "repris de justice" when caught by the law for the first time. If the requirement cannot be satisfied by proceeding successively on four different charges after a single arrest it cannot be satisfied by so proceeding after two or three where the statute calls for three previous "occasions".

It must also be considered that the accused has to be shown to be leading persistently a criminal life. In the Oxford dictionary, the first sense of "persistent" is as follows:

> Persisting or continuing firmly in some action, course or pursuit, esp. against opposition or remonstrance, or in spite of failure.

In my view, because "persistent" implies continuing in some action against opposition or remonstrance, the word "persistently" in the enactment implies "persistently after being convicted on the required three separate and independent occasions".

I do not think that it can properly be said that in thus construing "occasions" and "persistently" one is going beyond the wording of the Code and adding requirements that are not spelled out. While it is frequently deemed desirable in legal drafting to go into a great deal of minute detail, nothing prevents Parliament from resorting to language requiring elaboration by judicial construction. In the present case, the words "occasions" and "persistently" have obviously been selected to prescribe conditions the exact nature of which is left to the judgment of the courts.

For those reasons, I am of the opinion that the accused was not properly found to be an habitual criminal because,

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when he was convicted of the primary offence, he could not be said to have been previously convicted "on at least three separate and independent occasions" when the last conviction was for an offence for which he was arrested and charged on the same occasion as the primary offence, and also because he could not be found to have been so convicted and to be leading persistently a criminal life when he had been convicted on the last occasion after being arrested for the primary offence.

The conclusion I have reached on the second question makes it unnecessary to consider the third question raised, namely that the appellant had not served the sentence imposed upon him on the third previous conviction.

Because in the opinion of the majority the appeal fails on the merit I do not deal with the question of jurisdiction but, assuming that we have jurisdiction, I would allow the appeal and quash the sentence of preventive detention imposed upon the appellant.

Appeal dismissed, CARTWRIGHT C.J. *and* HALL, SPENCE *and* PIGEON JJ. *dissenting.*

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

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