GERALD WILLIAM POOLE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1967
*Dec. 11
1968
Mar. 13

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Jurisdiction—Sentence of preventive detention—Finding that accused an habitual criminal not disturbed—Whether expedient to impose sentence of preventive detention—Whether jurisdiction in Supreme Court of Canada to entertain appeal from imposition of such sentence—Supreme Court Act, R.S.C. 1952, c. 259 s. 41—Criminal Code, 1953-54 (Can.), c. 51, ss. 660(1), 667(1).

The appellant, who was then 34 years of age, was convicted on August 10, 1965, of two offences of obtaining goods by false pretences and two offences of attempting to obtain goods by false pretences. This was done by drawing cheques on non-existent bank accounts. The amount involved in each offence was under $100. He was subsequently found to be an habitual criminal and sentenced to preventive detention. His record of convictions commenced at age 16 and all but one included an element of theft. On June 25, 1965, the day of the expiration of a four-year sentence for theft of an automobile, he was given money to take him from New Brunswick to Vancouver. On his arrival in Vancouver the same day, he at once obtained a job as a labourer and appeared to have been continuously so employed until his conviction on August 10 of the substantive offences. The Court of Appeal, by a majority judgment, affirmed the sentence of preventive detention. The appellant was granted leave to appeal to this Court, where his appeal was dismissed on June 26, 1967. In this Court, [1967] S.C.R. 554, the majority came to the conclusion that the magistrate and the majority in the Court of Appeal had rightly found him to be an habitual criminal, and that this Court had no jurisdiction to substitute its opinion on the question as to whether or not it was expedient for the protection of the public to impose a sentence of preventive detention. The judgment rendered by the minority concluded that it was not expedient for the protection of the public to impose such a sentence. As the question of jurisdiction on which the decision of the majority was founded had not been argued at the hearing of that appeal, an application for a re-hearing was granted. At this re-hearing, which was argued on the assumption that the appellant had rightly been found to be an habitual criminal, counsel for the appellant and for the respondent both contended that this Court had jurisdiction to deal with the question whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention.

Held (Fauteux, Abbott, Martland and Ritchie JJ. dissenting): The appeal should be allowed, the sentence of preventive detention quashed and the sentences imposed on the convictions of the substantive offences restored.

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

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Per Cartwright C.J. and Judson and Hall JJ.: It has not been shown that it was expedient for the protection of the public to sentence the appellant to preventive detention. Section 660(1) of the Code, giving jurisdiction to impose a sentence of preventive detention, is worded permissively and is not mandatory. Since his convictions in 1959, the appellant had not been found guilty of any violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, he has been sentenced to severe punishment. There is some evidence of his trying to live a normal life. It has not been satisfactorily shown that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody.

The judgment in *The Queen v. MacDonald,* [1965] S.C.R. 831, does not bind this Court to hold that, unless it can say that the finding of the Courts below that the appellant was an habitual criminal should be set aside, this Court is without jurisdiction to interfere with the imposition of the sentence of preventive detention. On the plain meaning of the words of s. 41 of the *Supreme Court Act,* it seems clear that this Court has jurisdiction to deal with the appeal on the merits. This is an appeal for which leave was granted under s. 41 and which is not barred by subs. (3) thereof. The appeal given by s. 667(1) raises only one question for decision, that is whether the sentence of preventive detention is to be sustained or set aside. The answer to the question whether this Court has jurisdiction to hear and determine an appeal sought to be brought before it depends on the subject matter of the appeal and on the terms of the statute conferring jurisdiction.

Per Spence J.: Accepting the view that it was not expedient for the protection of the public to sentence the accused to preventive detention, an appeal lies to this Court from that finding.

This is an appeal from a decision which has resulted in the appellant being sentenced to preventive detention. The matters considered are not the matters considered in an ordinary appeal from sentence but resemble the consideration of an appeal from conviction. Under s. 667 of the Code, the provincial Court of Appeal must find affirmatively as to three elements before it may affirm the sentence of preventive detention. These elements are: (1) conviction on the substantive offence; (ii) that the accused is an habitual criminal; (iii) that it is expedient to sentence him to preventive detention. The leave to appeal to this Court, which was properly granted under s. 41 of the *Supreme Court Act,* brings forward for consideration the same three elements and it is the right and the duty of this Court acting within its jurisdiction to consider all three elements. In doing so, this Court would not be going beyond its jurisdiction.

Per Pigeon J.: It has not been shown that it was expedient for the protection of the public to sentence the appellant to preventive detention.

This Court has jurisdiction under s. 41 of the *Supreme Court Act* to hear appeals by leave in the case of persons sentenced to preventive detention, and this jurisdiction is not restricted to a review of the finding that the accused is an habitual criminal.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: Once the finding as to the status of the accused as an habitual criminal is not in issue, this Court has no jurisdiction to entertain an appeal against the sentence of preventive detention. There is a clear line of authority which establishes that this Court has no jurisdiction to entertain an appeal with respect to sentences for an indictable offence. No appeal lies to this Court from the determination that it is expedient for the protection of the public to sentence the accused to preventive detention. *Parkes v. The Queen*, [1955] S.C.R. 134, is not an authority for the submission that this Court has jurisdiction to entertain an appeal from the sentence of preventive detention in isolation from the finding as to status. The only reported case in this Court in which an appeal has been taken from a sentence of preventive detention when the finding as to status of the accused was not in issue is the case of *The Queen v. MacDonald*, [1965] S.C.R. 831. In that case the majority of the Court decided that there was no jurisdiction under s. 41 to entertain an appeal from a sentence of preventive detention alone. There is no distinction between the present case and the case of *The Queen v. MacDonald* in so far as the question of jurisdiction is concerned.

Droit criminel—Repris de justice—Juridiction—Sentence de détention préventive—Déclaration que l'accusé est un repris de justice—Opportunité de la condamnation à la détention préventive—La Cour suprême du Canada a-t-elle juridiction pour entendre un appel d'une telle sentence—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41—Code criminel, 1953-54 (Can.), c. 51, arts. 660(1), 667(1).

L'appelant, alors âgé de 34 ans, a été déclaré coupable le 10 août 1965, de deux infractions d'obtention de biens par faux semblant et de deux infractions de tentative de pareille obtention. Il s'agissait de chèques tirés sur un compte de banque qui n'existait pas. Le montant en jeu dans chaque infraction était de moins de $100. L'appelant a été subséquemment déclaré repris de justice et condamné à la détention préventive. Son dossier de condamnations commence à l'âge de 16 ans et toutes, sauf une, contiennent un élément de vol. Le 25 juin 1965, le jour de l'expiration d'une sentence de quatre ans pour vol d'automobile, il a reçu une somme d'argent pour se rendre du Nouveau-Brunswick à Vancouver. A son arrivée à Vancouver le même jour, il a immédiatement obtenu un emploi comme manœuvre et il paraît avoir été continuellement employé de la sorte jusqu'au jour de sa condamnation le 10 août pour les infractions sur lesquelles la sentence de détention préventive est basée. La Cour d'appel, par un jugement majoritaire, a confirmé cette sentence. L'appelant a obtenu permission d'appeler devant cette Cour, mais son appel a été rejeté le 26 juin 1967 par un jugement majoritaire statuant, [1967] R.C.S. 554, que le magistrat et les juges majoritaires en Cour d'appel avaient eu raison de déclarer qu'il était un repris de justice, et que cette Cour n'avait pas juridiction pour substituer son opinion sur la question de savoir s'il était opportun pour la protection du public de lui imposer une sentence de détention préventive. L'opinion de la minorité dans cette Cour était qu'il n'y avait pas lieu de juger opportun pour la protection du public d'imposer une telle sentence. Vu que la question de juridiction sur laquelle la décision majoritaire était basée n'avait

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pas été discutée lors de l'audition de l'appel, une requête pour nouvelle audition a été accordée. Lors de cette nouvelle audition, on a pris pour acquis que l'appelant avait été à bon droit déclaré repris de justice, et les avocats de l'appelant et de l'intimée ont tous deux soutenu que cette Cour avait juridiction pour considérer s'il était opportun pour la protection du public d'imposer à l'appelant une sentence de détention préventive.

Arrêt: L'appel doit être accueilli, la sentence de détention préventive doit être annulée et les sentences imposées pour les infractions sur lesquelles elle est basée doivent être rétablies, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson et Hall: Il n'a pas été démontré qu'il était opportun pour la protection du public de condamner l'appelant à la détention préventive. Le texte de l'art. 660(1) du Code, qui confère la juridiction pour imposer une sentence de détention préventive, est permissif et non pas obligatoire. Depuis ses condamnations en 1959, l'appelant n'a été trouvé coupable d'aucun crime de violence. Pour le vol d'une automobile en 1962 et pour les quatre infractions en 1965 sur lesquelles la sentence est basée, il a reçu des punitions sévères. Il y a une certaine preuve qu'il essaie de vivre une vie normale. Il n'a pas été démontré d'une façon satisfaisante que sa mise en liberté à l'expiration de l'emprisonnement auquel il a été condamné pour les infractions dont il s'agit aurait pour effet de constituer une menace à la société ou que pour la protection du public il serait opportun qu'il passe le reste de sa vie en détention.

Le jugement dans *The Queen v. MacDonald,* [1965] R.C.S. 831, n'oblige pas cette Cour à décider que, à moins qu'elle puisse dire que la déclaration des Cours inférieures à l'effet que l'appelant est un repris de justice doit être mise de côté, elle n'a pas juridiction pour intervenir dans l'imposition de la sentence de détention préventive. Les mots de l'art. 41 de la *Loi sur la Cour suprême,* dans leur sens ordinaire, semblent indiquer clairement que cette Cour a juridiction pour juger l'appel sur le fond. Il s'agit d'un appel admis par permission sous l'art. 41 et qui n'est pas prohibé par l'alinéa (3) de cet article. L'appel visé par l'art. 667(1) requiert la solution d'une seule question, savoir si la sentence de détention préventive doit être confirmée ou mise de côté. La juridiction de cette Cour pour entendre et juger un appel que l'on tente de lui faire entendre dépend de la matière de l'appel et des termes du statut donnant la juridiction.

Le Juge Spence: S'il n'était pas opportun pour la protection du public de condamner l'appelant à la détention préventive, cette Cour a juridiction pour entendre un appel de cette décision.

Il s'agit d'un appel d'une décision qui a eu pour résultat d'imposer à l'appelant une sentence de détention préventive. Les questions à étudier ne sont pas les questions à considérer dans un appel ordinaire d'une sentence mais ressemblent à un appel d'une déclaration de culpabilité. Avant qu'elle puisse confirmer la sentence de détention préventive sous l'art. 667 du Code, la Cour provinciale d'appel doit en venir à une conclusion affirmative sur trois éléments qui sont: (i) la déclaration de culpabilité; (ii) le fait que l'accusé est un repris de

justice; (iii) l'opportunité de lui imposer une sentence de détention préventive. La permission d'appeler devant cette Cour, qui a été à bon droit accordée sous l'art. 41 de la *Loi sur la Cour suprême,* requiert la considération de ces mêmes trois éléments, et c'est le droit et le devoir de cette Cour agissant selon sa juridiction de considérer chacun d'eux. En ce faisant, cette Cour n'agit pas au-delà de sa juridiction.

Le Juge Pigeon: Il n'a pas été démontré qu'il était opportun pour la protection du public d'imposer à l'appelant une sentence de détention préventive.

Cette Cour a juridiction, en vertu de l'art. 41 de la *Loi sur la Cour suprême,* pour entendre, avec permission, un appel dans le cas de personnes condamnées à la détention préventive, et cette juridiction n'est pas limitée à des questions touchant la déclaration que l'accusé est un repris de justice.

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Lorsqu'il n'est pas question de l'état de l'accusé comme repris de justice, cette Cour n'a pas la juridiction pour entendre un appel de la sentence de détention préventive. Il est clairement établi par la jurisprudence que cette Cour n'a pas juridiction pour entendre un appel d'une sentence imposée pour un acte criminel. Aucun appel ne peut être entendu par cette Cour concernant la décision qu'il est opportun pour la protection du public d'imposer une sentence de détention préventive. La cause de *Parkes v. The Queen,* [1955] R.C.S. 134, ne démontre pas que cette Cour a juridiction pour entendre un appel d'une sentence de détention préventive autrement que sur la déclaration que l'accusé est un repris de justice. La cause de *The Queen v. MacDonald,* [1965] R.C.S. 831, est la seule décision rapportée où un appel d'une sentence de détention préventive a été porté devant cette Cour alors que la déclaration sur l'état de l'accusé n'était pas en litige. La majorité de la Cour a alors décidé qu'elle n'avait pas juridiction sous l'art. 41 pour entendre un appel d'une sentence de détention préventive. Il n'y a aucune distinction à faire entre le cas présent et la cause de *The Queen v. MacDonald* en autant que la question de juridiction est concernée.

AUDITION nouvelle d'un appel, rapporté à [1967] R.C.S. 554, 60 W.W.R. 641 [1968] 1 C.C.C. 242, d'un jugement de la Cour d'appel de la Colombie-Britannique confirmant une sentence de détention préventive. Appel accueilli, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

RE-HEARING of an appeal, reported at [1967] S.C.R. 554, 60 W.W.R. 641, [1968] 1 C.C.C. 242, from a judgment of the Court of Appeal for British Columbia affirming a sentence of preventive detention. Appeal allowed, Fauteux, Abbott, Martland and Ritchie JJ. dissenting.

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Bryan H. Kershaw, for the appellant.

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

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

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia affirming, by a majority, a sentence of preventive detention imposed on the appellant by His Worship Magistrate G. L. Levey at Vancouver on June 14, 1966. Bull J.A., dissenting, would have allowed the appeal, quashed the sentence of preventive detention and restored the sentences imposed in respect of convictions of four substantive offences in lieu of which the sentence appealed against had been imposed.

The appeal was first argued on June 5, 1967, before a Court of five judges and on June 26, 1967, the appeal[1] was dismissed by a majority. My brothers Fauteux, Martland and Ritchie were of opinion (i) that the learned magistrate and the majority in the Court of Appeal were right in finding the appellant to be an habitual criminal and (ii) that this Court had no jurisdiction to substitute its opinion for that of the Court of Appeal on the question as to whether or not it was expedient for the protection of the public to sentence the appellant to preventive detention. My brother Judson and I were of opinion that it was unnecessary to decide whether the appellant was rightly found to be an habitual criminal because, on the assumption that he was, it was not expedient for the protection of the public to sentence him to preventive detention.

As the question of jurisdiction on which the decision of the majority was founded had not been raised by counsel or the Court at the hearing of the appeal, an application for a re-hearing was granted and the appeal was argued before the full Court on December 11, 1967. At this time counsel for the appellant and for the respondent both contended that, on the assumption that the appellant was rightly found to be an habitual criminal, this Court has jurisdiction to deal with the question whether or not it was expedient for the protection of the public to sentence the

[1] [1967] S.C.R. 554, 60 W.W.R. 641, [1968] 1 C.C.C. 242.

appellant to preventive detention; counsel for the respondent submitted that on the merits this question should be answered in the affirmative and the appeal dismissed.

The appellant was born on March 3, 1932.

The evidence as to his past record is accurately summarized by Bull J.A. as follows:

> Just after reaching 16 years of age, the appellant was convicted of a charge of taking an automobile without consent and stealing four pairs of shoes a day or so earlier, and was fined $20.00 and given a suspended sentence, respectively. Three years later, at the age of 19 years, he was convicted of breaking and entering a drug store and was sentenced to two years in the penitentiary. Upon being released from this imprisonment about 19 months later, he joined the Canadian Army and served with it in Canada and Korea for about 2 years until he was dishonourably discharged shortly after having been convicted in Montreal of two charges of robbery and sentenced to five years on each to run concurrently. On his release at expiration of sentence the appellant had odd jobs in and around his home area in New Brunswick for about five months, when he again fell foul of the law. This time he was convicted on four charges of breaking and entering business premises within the space of a few days, and was awarded various sentences to run concurrently, of which the longest was three years in the penitentiary. The appellant was released from imprisonment on November 19, 1961, and worked fairly steadily with some success and employer approval at labouring work for about ten months when he was convicted of theft of a U-Drive automobile which he had rented. For this offence he was sentenced to four years in the penitentiary. On his release from this sentence in June, 1965, the somewhat unusual events occurred which led to his commission of, and convictions on, the substantive offences. On the day of release and provided with funds and an airline ticket by his mother in the Maritimes, he flew to Vancouver claiming to be filled with the admirable resolution to there start a new honest life away from the associations which he claimed had always led him into trouble. Although there were many inconsistencies in his evidence as to exactly what the appellant did for the next few weeks, it does appear quite clear and uncontradicted that promptly after arrival he did get a job with a wrecking company, which lasted about two weeks, followed by a job with a salvage company commencing on July 12, 1965. On July 9, 1965, however, he purchased $41.85, and attempted to purchase a further $91.37, worth of goods from a department store with cheques signed in his own name but drawn on a non-existent account in a local bank. The appellant said the account number used was that of an account that he had in the same bank in Fredericton, N.B., but quite properly little credence was given to this excuse. It is clear that some at least of the goods in question were working clothes and gear needed by the appellant in the new job he was just starting. On the same day, allegedly to replace one stolen from his room, the appellant attempted to buy a watch from a jeweller with a cheque for $83.99 drawn on the same non-existent account. The appellant was released on bail, went back to work and about ten days later obtained a pipe and some tobacco from a tobacconist with a cheque for $12.74 drawn on a fictitious account. The appellant was convicted of these four depredations on August 10, 1965, and given concurrent sentences aggregating 3 years. Apparently, notwithstanding these shopping sprees, the appellant did have gainful employment for substantially the whole time from his release on June 25, 1965,

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to his conviction on August 10, 1965. There was no evidence adduced that during this last period of freedom the appellant associated with criminals or undesirable characters.

I do not find it necessary to choose between the conflicting views of Bull J.A. and of the majority in the Court of Appeal as to whether on the evidence the finding that the appellant is an habitual criminal can safely be upheld; for the purpose of these reasons I will assume that it can.

On the assumption that the finding that the appellant is an habitual criminal should not be disturbed, I have reached the conclusion that it has not been shewn that it is expedient for the protection of the public to sentence him to preventive detention.

Whether or not in any particular case it is expedient to so sentence a person found to be an habitual criminal is a question of fact or perhaps a question of mixed law and fact; it is certainly not a question of law alone. But, leave to appeal to this Court having been granted, it is clear that we have jurisdiction to deal with questions of fact.

In *Mulcahy v. The Queen*[2], this Court in a unanimous judgment expressly adopted the reasons of MacQuarrie J. who had dissented from the judgment of the majority in the Supreme Court of Nova Scotia (in banco) and set aside the sentence of preventive detention which had been imposed upon the appellant. The dissenting judgment of MacQuarrie J. is reported in 42 C.R. at page 1.

In that case the record shewed that, prior to being convicted of the substantive offence, the appellant had been convicted between 1941 and 1961 on nineteen occasions of offences, for which he had been sentenced to a total of fifteen years and six months in the penitentiary and twenty-six months in prison. None of his convictions were for crimes of violence; six were for breaking and entering and the remainder for theft or having possession of stolen goods.

MacQuarrie J. based his judgment on two distinct grounds. The first of these was that there was no evidence to support a finding that the appellant was leading persistently a criminal life. The second ground was expressed as follows:

> While I do not attempt to minimize the record of the appellant, a perusal of it (apart from the lack of evidence to justify finding him to be

[2] (1963), 42 C.R. 8.

leading persistently a criminal life) indicates that he is not the type of person of whom it can properly be said "it is expedient for the protection of the public to sentence him to preventive detention". In my opinion the Crown has failed to prove that (even although the accused was leading persistently a criminal life) a sentence of preventive detention was expedient for the protection of the public.

In the case at bar no exception can be taken to the terms in which the learned Magistrate instructed himself as to the applicable principles of law. Following the judgment of the Court of Appeal for British Columbia in *Regina v. Channing*[3], he expressed the view that in order to impose a sentence of preventive detention he must be satisfied beyond a reasonable doubt that the appellant was leading persistently a criminal life, that the decision of each case must depend on its own particular facts, (i) as to whether the finding that a person is an habitual criminal should be made and, (ii) as to whether that finding having been made, a sentence of preventive detention should be imposed. It is, I think, implicit in the last sentence of his reasons, read in the light of his reference to *Regina v. Channing*, that he held it necessary that he should be satisfied beyond a reasonable doubt on the second of these points as well as on the first. The sentence to which I refer reads as follows:

> I find that the Crown has proved beyond all reasonable doubt, in my mind, that it is expedient for the protection of the public to sentence you to preventive detention, and I so do.

In the Court of Appeal Lord J.A., with whom McFarlane J.A. expressed substantial agreement, dealt with this branch of the matter as follows:

> Nor can I say that he reached the wrong opinion in finding it expedient for the protection of the public that the appellant be sentenced to preventive detention.

Bull J.A., having held that the finding that the appellant was an habitual criminal could not safely be upheld, did not find it necessary to deal with this question.

In *Regina v. Channing, supra*, Sheppard J.A., with whom Norris, Lord and MacLean JJ.A. agreed and Davey J.A. agreed "in general", said at page 110:

> In the case at bar, the crown must assume the onus of proving that it is expedient for the protection of the public that the accused be

[3] (1965), 52 W.W.R. 99, [1966] 1 C.C.C. 97, 51 D.L.R. (2d) 223.

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sentenced beyond that imprisonment for the substantive offence: *Mulcahy v. Reg.*, and that must be proven beyond a reasonable doubt: *Parkes v. Reg.* and *Kirkland v. Reg.*

In the same case at page 101, Davey J.A. said:

> Likewise it is undesirable for us to lay down detailed tests of the sufficiency of evidence to prove either that an accused is a habitual criminal or that it is expedient for the protection of the public that he be sentenced to preventive detention. All that is required is that the evidence be sufficient to prove both these essential matters beyond a reasonable doubt to the satisfaction of the magistrate or trial judge.

As already indicated, I am dealing with this appeal on the assumption that the finding that the appellant is an habitual criminal should not be disturbed and the question to be answered is therefore whether it can properly be said "that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention".

The answer to this question depends upon the application to the facts of the case of the words of s. 660(1) of the *Criminal Code* which reads as follows:

> 660.(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose 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, 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.

It will be observed that the section is worded permissively. Even if both conditions (*a*) and (*b*) are fulfilled the Court is not bound to impose the sentence of preventive detention. The wording may be contrasted with that used by Parliament in s. 661(3):

> (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 . . .

The wording of s. 660 may also be compared with that of the corresponding sub-section in the *Criminal Justice Act*, 1948, of the United Kingdom, 11 and 12 George VI, c. 58, s. 21(2) of which reads as follows:

> (2) Where a person who is not less than thirty years of age—
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> (*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and

(*b*) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training;

then, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of preventive detention for such term of not less than five or more than fourteen years as the court may determine.

I do not consider that the use of the words "The court is of the opinion" in s. 660(1)(*b*) of the *Criminal Code* prevents the Court of Appeal or this Court from substituting its opinon for that of the learned Magistrate. That course has been followed in *Mulcahy v. The Queen, supra.*

In *Regina v. Channing, supra,* after stating that what is expedient for the protection of the public is a question of fact in each case, Sheppard J.A. continued at page 109:

Moreover, as the sentence for the substantive offence will have considered the protection of the public as one of the elements, it would follow that preventive detention should not be imposed unless the crown has proven that the protection of the public is not sufficiently safeguarded by sentence for the substantive offence, but does require some additional protection involved in a sentence of preventive detention: *Mulcahy v. Reg.,* supra; *Reg. v. Rose,* supra, to the extent of making that sentence expedient for the protection of the public.

and at page 110 he quoted with approval the following passage in the reasons of Currie J.A. in *Harnish v. The Queen*[4]:

The real, essential principle of the preventive detention provisions of the *Criminal Code,* s. 660, and of the *Prevention of Crime Act,* 1908, 8 Edw. VII, ch. 59, is the protection of the public. It is not enough that the accused is merely anti-social, or is a nuisance, or that it is a convenience to the police to have a person removed to a penitentiary.

In *R. v. Churchill*[5], Lord Goddard, giving the judgment of the Court of Criminal Appeal, said at page 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.

and at page 112:

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. It has become a matter of putting a man where he can no longer prey upon society even though his depredations may be of a comparatively small character, as in the case of habitual sneak thieves.

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[4] (1960), 129 C.C.C. 188 at 197, 34 C.R. 21, 45 M.P.R. 141.
[5] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.

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In considering the decisions in England it must always be borne in mind that the maximum sentence of preventive detention which can be imposed there is fourteen years and that, as stated by Lord Goddard on the page last referred to, in the great majority of cases which had come before that Court the sentence passed had been one of eight years. In Canada if the sentence is passed at all it must decree imprisonment for the remainder of the prisoner's life subject to the possibility of his being allowed out on licence if so determined by the parole authorities, a licence which may be revoked without the intervention of any judicial tribunal.

Since his convictions in 1959, the appellant has been guilty of no violent crime. For the crime of theft of an automobile in 1962 and the four substantive offences in 1965, which involved comparatively trifling sums, he has been sentenced to severe punishment; there is some evidence of his trying to live a normal life; he is now 35 years of age. While I cannot say, in the words used by Currie J.A., that he is merely a nuisance I am not satisfied that his release at the expiration of the terms of imprisonment to which he has been sentenced for the substantive offences will, to use the words of Lord Goddard, constitute a menace to society or that the protection of the public renders it expedient that he should spend the rest of his life in custody. Any doubt that I feel in this case arises from the fact that I am differing from the learned Magistrate and the majority in the Court of Appeal. In a case in which the consequences of an adverse decision are so final and so disastrous for the man concerned I think that doubts should be resolved in his favour.

For the above reasons I have reached the conclusion that I would dispose of the appeal as Bull J.A. would have done unless the view suggested by some members of the Court, although neither put forward nor supported by either counsel, compels us to hold that we are without jurisdiction.

The suggestion, as I understand it, is that the reasons of Ritchie J. speaking for a majority of the Court in *The Queen v. MacDonald*[6], bind us to hold that, unless we can

[6] [1965] S.C.R. 831, 46 C.R. 399, [1966] 2 C.C.C. 1, 52 D.L.R. (2d) 701.

say that the finding of the Courts below that the appellant is an habitual criminal should be set aside, we are without jurisdiction to interfere with the imposition of the sentence of preventive detention.

When a question is raised as to the jurisdiction of this Court it is well to look first at the provisions of the Statute which confer the jurisdiction which the parties seek to invoke; in the case at bar these are contained in s. 41 of the *Supreme Court Act* which reads:

41.(1) Subject to subsection (3), an appeal lies to the Supreme Court with leave of that Court from any final or other judgment of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court, whether or not leave to appeal to the Supreme Court has been refused by any other court.

(2) Leave to appeal under this section may be granted during the period fixed by section 64 or within thirty days thereafter or within such further extended time as the Supreme Court or a judge may either before or after the expiry of the said thirty days fix or allow.

(3) No appeal to the Supreme Court lies under this section from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or, except in respect of a question of law or jurisdiction, of an offence other than an indictable offence.

(4) Whenever the Supreme Court has granted leave to appeal the Supreme Court or a judge may, notwithstanding anything in this Act, extend the time within which the appeal may be allowed.

On the plain meaning of the words of this section it seems clear that the Court has jurisdiction. The appeal is brought, pursuant to leave duly granted by this Court, from the judgment of the Court of Appeal for British Columbia affirming the imposition by the learned magistrate of a sentence of preventive detention. This is a final judgment of the highest court of final resort in the province in which judgment can be had in this particular case. This Court is not deprived of jurisdiction by the terms of subs. 3 of s. 41 for the judgment of the Court of Appeal is not one acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or of an offence other than an indictable offence. The jurisprudence in this Court on this point is settled and has been applied consistently since the decisions in *Brusch v. The Queen*[7] and *Parkes v. The Queen*[8].

[7] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.
[8] [1956] S.C.R. 134.

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The contrary view is said to be founded, as mentioned above, on the reasons of my brother Ritchie, concurred in by a majority of the Court in *The Queen v. MacDonald, supra.* In approaching a consideration of that decision it is well to bear in mind the rule, often stated, that a case is only an authority for what it actually decides; vide *Quinn v. Leatham*[9], per Lord Halsbury at 506.

While in *The Queen v. MacDonald, supra,* I agreed with the conclusion of the majority that the appeal should be quashed it was for reasons differently expressed. The sole question relating to our jurisdiction which was raised for decision in that appeal was whether the Attorney-General had a right of appeal to this Court from the order of a Court of Appeal expressly affirming a finding that an accused was an habitual criminal but deciding that the sentence of preventive detention imposed upon him should be set aside. No question arose as to the nature or extent of an accused's right of appeal.

The formal order of the Court of Appeal in that case read as follows:

> THIS COURT DOTH ORDER AND ADJUDGE that the appeal of the above-named Appellant from the finding that the Appellant is an habitual criminal be and the same is hereby dismissed, the Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby allowed, the sentence of preventive detention imposed on him as aforesaid be and the same is hereby set aside, and pursuant to section 667 of the Criminal Code, a sentence of imprisonment in Oakalla Prison Farm, Burnaby, British Columbia, for a term of one year be and the same is hereby imposed in respect of the said conviction by Magistrate L. H. Jackson entered on the 20th day of May 1964 on the above-described charge, such sentence to run from the 20th day of May, 1964.

This may be contrasted with the order of the Court of Appeal in the case at bar, the operative part of which reads:

> THIS COURT DOTH ORDER AND ADJUDGE THAT the said Appeal of the above-named Appellant from the sentence of preventive detention imposed on him be and the same is hereby dismissed;

With respect, I think that the formal order of the Court of Appeal in *The Queen v. MacDonald, supra,* was improperly drawn. The *Criminal Code* gives no right of appeal from the finding that the appellant is an habitual criminal.

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[9] [1901] A.C. 495.

Such a finding unless followed by the imposition of a sentence of preventive detention is *brutum fulmen*. This is made plain by the reasons of Bird C.J.B.C. speaking for the Unanimous Court of Appeal in *Regina v. MacNeill*.[10] It is a misconception to regard the appeal given by s. 667(1) as raising two matters for decision. There is only one question to be answered, that is whether the sentence of preventive detention is to be sustained or set aside. It may be set aside for various reasons, for example (i) because the Crown has not satisfied the onus of proving that the appellant is an habitual criminal or (ii) because it has not satisfied the onus of proving that it is expedient for the protection of the public that a sentence of preventive detention be imposed or (iii) for both of these reasons or (iv) because of some technical defect or illegality in the proceedings; this list is not necessarily exhaustive. It appears to me to be a novel proposition that the answer to the question whether the Court has jurisdiction to entertain and decide an appeal may depend on the reasons which it assigns for allowing or dismissing it.

In my view the present case is distinguishable from *The Queen v. MacDonald, supra*. In the case at bar the appeal to the Court of Appeal was and the appeal to this Court is simply from the imposition of the sentence, and this is as it should be for, as pointed out above, the only right of appeal given to a person sentenced to preventive detention is that set out in s. 667(1) of the *Criminal Code*:

> 667.(1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against that sentence on any ground of law or fact or mixed law and fact.

It is a trite observation that an appeal is from the judgment pronounced in the Court appealed from and not from its reasons. It appears to me that the existence of our jurisdiction cannot depend upon the grounds upon which we think the sentence should be upheld or set aside. Our jurisdiction to set aside the sentence in the case at bar upon the grounds set out in the reasons of Bull J.A. could not be questioned; in my opinion, it would be consistent with neither principle nor authority to hold that we cease to have jurisdiction because, as it appears to me, the same result should be reached by a different line of reasoning.

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[10] [1966] 2 C.C.C. 268, 53 W.W.R. 244.

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At the risk of appearing repetitious, I wish to emphasize that the answer to the question whether we have jurisdiction to hear and determine an appeal sought to be brought before us depends on the subject matter of the appeal and on the terms of the Statute conferring jurisdiction. The question arises *in limine* and can and should be answered before we enter upon the merits of the appeal. Either we have or have not jurisdiction to decide the appeal; it is, in my view, a misconception to suggest that our jurisdiction, if we have it, can be lost because we would allow or dismiss the appeal for one reason rather than another. We have held often enough in dealing with the question whether an inferior tribunal has exceeded its jurisdiction that we cannot say it has jurisdiction to decide a question rightly but not to decide it wrongly.

I have reached the conclusion that the judgment of the majority in *The Queen v. MacDonald, supra,* does not bind us to say that we are without jurisdiction in the case at bar and I am satisfied that we have jurisdiction to deal with the appeal on the merits.

I would dispose of the appeal as Bull J.A. would have done, that is to say, I would allow the appeal, quash the sentence of preventive detention and restore the sentences imposed on the convictions of the four substantive offences.

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

RITCHIE J. (*dissenting*):—I have had the advantage of reading the reasons for judgment prepared by the Chief Justice in which he has described the circumstances giving rise to the re-hearing of this appeal and concluded that this Court has jurisdiction to hear it and that is should be allowed, but I remain in agreement with the reasons for judgment rendered by Martland J. at the first hearing in which he says that:

> Once the finding as to the status of the accused as an habitual criminal is not an issue, this Court has no jurisdiction to entertain an appeal against sentence.

As has been pointed out by the Chief Justice, if there be jurisdiction in this Court to hear an appeal from the imposition of a sentence of preventive detention, imposed "in lieu of any other sentence that may be imposed" for an

indictable offence pursuant to the provisions of s. 660(1) of the *Criminal Code,* then that jurisdiction must be found in s. 41 of the *Supreme Court Act* (hereinafter called "the Act"), and it accordingly appears to me to be of first importance to consider the jurisprudence of this Court governing the interpretation of s. 41 in relation to appeals against sentence.

The first case in which it was contended that s. 41 of the Act gave the Court jurisdiction to consider an appeal against sentence was *Goldhar v. The Queen*[11], in which Mr. Justice Fauteux, after a detailed review of the provisions of the statute, concluded, at page 71 that:

> Under the former Code, appeals against sentence have always been left to the final determination of the provincial courts and there is nothing, under the new Code or s. 41 of the *Supreme Court Act,* indicating a change of policy in the matter, with respect to indictable offences.
>
> The Court is without jurisdiction to entertain the present application which I would dismiss.

These reasons for judgment were reaffirmed in *Paul v. The Queen*[12], where Taschereau J. (as he then was) said:

> It was held in *Goldhar v. The Queen* that if an appeal from a sentence was not given by 41(3), nor the *Criminal Code,* we could not find any authority in 41(1) to review the sentence imposed by the Courts below.

In that case it was stated by Fauteux J.:

> . . . that in order to determine if a convicted person could appeal against a sentence in a matter of indictable offence it was not permitted to look at s. 41(1) for authority to intervene but only to the Criminal Code which does not permit an appeal against sentence.

The effect of these decisions appears to me to have been accurately summarized by Mr. Justice Fauteux in rendering the judgment of the Court in *The Queen v. Alepin Freres Ltee. et al*[13], in which case the Crown had, *with leave granted under s. 41,* launched an appeal against the finding of the Court of Appeal on the question of whether the Court of Queen's Bench or the magistrate had jurisdiction to impose sentences, and after quoting ss. 41(1) and 41(3), Mr. Justice Fauteux went on to say:

> It is clear from the terms of subsection (3) that, unless the judgment sought to be appealed is a judgment 'acquitting or convicting or setting aside or affirming a conviction or acquittal' of either an indictable offence

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[11] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.
[12] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[13] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

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or an offence other than an indictable offence, there is no jurisdiction in this Court under that subsection to entertain this appeal. The judgment here sought to be appealed does not come within that description. It is not a judgment related to an acquittal or a conviction of an offence and, while an important question of jurisdiction is involved therein, this question does not relate to an acquittal or a conviction within the meaning of subsection (3) but to sentence. Neither can jurisdiction of this Court be found in subsection (1). The general proposition that matters which are not mentioned in s. 41(3) must be held to be comprised in s. 41(1), with the consequence that this Court would have jurisdiction to entertain an appeal from a judgment of a nature similar to the one here considered, is ruled out by what was said by this Court in *Golhar v. The Queen* and *Paul v. The Queen*. It may be a matter of regret that this Court has no jurisdiction to decide the important question which gave rise to conflicting opinions in the Court below, but strong as my views may be with respect to that question, I am clearly of opinion that this Court has no jurisdiction to entertain this appeal.

There is accordingly a clear line of authority which establishes that this Court has no jurisdiction to entertain an appeal with respect to sentences for an indictable offence.

In the present case like the Chief Justice, I proceed on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, and that the sole question to be determined is whether an appeal lies to this Court from the determination made by the Court of first instance, in conformity with the provisions of s. 660(1)(*b*) of the *Criminal Code*, that "The Court is of the opinion that because the accused is a habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention".

The concept of imposing preventive detention in the case of habitual criminals was first introduced into our *Criminal Code* by Chapter 55 of the Statutes of Canada, 1947, which enacted sections 575A to 575H under the heading "PART X(A) HABITUAL CRIMINALS", where it was provided that a statement that the accused was an habitual criminal was to be added to the indictment after the charge for the substantive offence and further provided that the offender should first be arraigned on the substantive offence and if found guilty the judge or jury were charged to inquire whether or not he was an habitual criminal. Section 575c(4) of the same statute provided, in part, that:

> (4) A person shall not be tried on a charge of being a habitual criminal unless
>
> (*a*) the Attorney General of the Province in which the accused is to be tried consents thereto; and

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

It will thus be seen that in the 1947 statute the allegation that an offender was an habitual criminal was included in the indictment and was regarded as being in the nature of an additional charge. This is made clear by the case of *The King v. Robinson*[14] which was decided under the 1947 Code and is illustrative of the way in which s. 575c was applied by the Crown authorities. In that case, as Mr. Justice Fauteux said at page 523:

> . . . Each of the respondents was separately indicted on two counts: one being that, at some definite time in 1950, in the province of British Columbia, he was found in unlawful possession of drugs, under the *Opium and Narcotic Drug Act,* 1929 as amended, and the second one charging him to be a habitual criminal within the meaning of the provisions of Part X(A) of the *Criminal Code of Canada.*

The appeal in the *Robinson* case, *supra,* raised a question of law as to the meaning to be attached to the provisions of s. 575c and the jurisdiction of this Court was not in question, the matter being treated in all respects and by all concerned as if it were an appeal from a conviction for an indictable offence. This is no doubt explained by the fact that s. 575E of the *Criminal Code* at that time provided that:

> A person convicted and sentenced to preventive detention, may appeal against his conviction and sentence, *and the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto.*

The italics are my own.

This meant that the provisions of s. 1025 of the Code providing for an appeal to this Court from a conviction for an indictable offence were applicable to "a person convicted and sentenced to preventive detention" and accordingly that such an appeal would lie "on a question of law" if leave to appeal were granted by a judge of this Court. That this is the meaning which was attached to s. 575E is made plain from a further excerpt from the reasons for judgment of Mr. Justice Fauteux in the *Robinson* case, *supra,* at page 523 where he said:

> . . . the judgment rests on the interpretation of the provisions of s. 575c 1(a) of Part X(A). On this point and under the authority of s. 1025 of the *Criminal Code* leave to appeal to this Court was granted to the appellant.

[14] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.

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The next "HABITUAL CRIMINAL" case heard in this Court was *Brusch v. The Queen*[15] which was also decided under the 1947 Code and where there was a dissenting judgment so that the appeal came here under s. 1023 of the Code which provided that:

> Any person convicted of an indictable offence whose conviction has been affirmed on appeal taken under s. 1013 may appeal to the Supreme Court against the affirmance of such conviction *on any question of law on which there has been a dissent in the Court of Appeal.*

The italics are my own.

The question of law with which the appeal was concerned was whether the "charge" of being an habitual criminal was "a charge of a criminal offence" entitling the accused to make an election as to his mode of trial and the Court decided in the clearest terms that it was not such a charge and in so doing adopted the language of Lord Reading in *Rex v. Hunter*[16], where he said at page 74, speaking of s. 10 of the English Statute (*The Prevention of Crimes Act*, 1908, Ch. 59) upon which Part X(A) of the 1947 Code was based:

> . . . that to be a habitual criminal within the meaning of the statute is not a substantive offence, but is a state of circumstances affecting the prisoner which enables the court to pass a further or additional sentence to that which has been already imposed; . . .

Although it was clearly held in the *Brusch* case, *supra,* that "the charge" of being an habitual criminal was not a charge for a criminal offence, it was nevertheless recognized that the penalty of preventive detention attached to the habitual criminal finding as distinct from the crime which was charged. As Mr. Justice Estey said at page 382:

> Throughout the proceeding the offence or crime charged is treated in every respect, *even as to punishment,* as separate and distinct from being a habitual criminal.

The italics are my own.

The *Criminal Code* was, however, revised by Chapter 51 of the Statutes of Canada 1953-54 by which the provisions of Part X(A) were recast and appeared as Part XXI under the general heading of "PREVENTIVE DETENTION". The new statute adopted a completely different

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[15] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

[16] (1920), 15 Cr. App. R. 69.

approach to the whole question and under the new Part XXI the practice of making "the charge" of being an habitual criminal a part of the indictment was abolished and a procedure for making of "an application for preventive detention" was substituted therefor. The new section 660(1) provided:

660(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in addition to a sentence 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.

It is important also to notice the changes in the section providing for appeals. The new s. 667 provided that:

667. (1) A person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against the sentence.

(2) The Attorney General may appeal to the Court of Appeal against the dismissal of an application for an order under this Part.

(3) The provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis*, to appeals under this section.

This is a far cry from the terms of the old s. 575E which, as I have said, provided that in appeals from convictions and sentence of preventive detention

. . . the provisions of this Act relating to an appeal from a conviction for an indictable offence shall be applicable thereto. . . .

Under the new Code there was no provision for an appeal to this Court in habitual criminal cases and accordingly in *Parkes v. The Queen*[17], which was the next such case to come here, application for leave to appeal was not made under the *Criminal Code* but was made under s. 41 of the Act on the ground that the judgment of the Court of Appeal of Ontario finding the accused to be an habitual criminal was a final judgment of the highest Court of final resort in the Province within the meaning of s. 41(1) and that it was not a judgment affirming conviction of an indictable offence or indeed any offence. (See *Brusch v. The Queen, supra*).

In the *Parkes* case, *supra*, the application for leave to appeal was granted and the judgment granting leave was

[17] [1956] S.C.R. 134.

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delivered by the present Chief Justice who, at page 135, cited the decision in *Brusch v. The Queen, supra,* as authority for the proposition

> ...that the 'charge' of being an habitual criminal is not a charge of an offence or crime but is merely an assertion of the existence of a status or condition in the accused which enables the Court to deal with the accused in a certain manner,...

and who then continued:

> It follows from this that when His Honour Judge Grosch decided that the applicant was an habitual criminal he was not convicting him of an indictable offence but was deciding that his status or condition was that of an habitual criminal. It was this decision which was affirmed by the Court of Appeal. That such a decision is a 'judgment' within the meaning of that word in s. 41(1) does not appear to me to admit of doubt. It is indeed a 'final judgment' under the definition contained in s. 2(b). It is a 'decision which determined in whole ... a substantive right ... in controversy in a judicial proceeding'—i.e., the right of an accused to his liberty at the conclusion of whatever sentence might be imposed for the substantive offence of theft of which he was convicted prior to the trial and adjudication of the question whether his status was that of an habitual criminal, or, alternatively, *the right of the Crown to ask that he be sentenced to preventive detention.*

The italics are my own.

In my respectful opinion, the "substantive right... in controversy" in an appeal from a finding that the accused has the status of an habitual criminal is "the right of the Crown to ask that he be sentenced to preventive detention", because although such a sentence cannot be awarded unless the accused has been found to be an habitual criminal it by no means follows that the "habitual criminal" finding automatically carries with it a sentence of preventive detention. In order to fully understand what was decided on the motion for leave to appeal in the *Parkes* case, *supra,* it appears to me to be desirable to quote the last three paragraphs of the reasons for judgment where it was said:

> Mr. Common's argument that for the purpose of determining whether or not a right of appeal is given the adjudication that the applicant is an habitual criminal should be treated as a conviction of an indictable offence cannot in my view be reconciled with the decision in *Brusch v. The Queen.* I conclude that we have jurisdiction to grant leave under s. 41(1).
>
> As to the merits, it was intimated at the hearing that it was the view of the Court that leave should be granted if we have jurisdiction to grant it and accordingly counsel for the applicant was directed to confine his reply to the question of jurisdiction.

I would accordingly grant leave to appeal, pursuant to the terms of s. 41(1) of the *Supreme Court Act*, from the affirmation by the Court of Appeal of the decision of His Honour Judge Grosch that the applicant is an habitual criminal.

I have quoted at such length from this decision because it is the case which established the jurisdiction of this Court to hear appeals under s. 41 of the Act in habitual criminal cases, and because it limits the ground upon which leave was granted to the question of whether the accused had been properly found to have the status of an habitual criminal.

The *Parkes* case, *supra,* does not appear to me to afford any authority for the submission that this Court has jurisdiction to entertain an appeal from the sentence of preventive detention in isolation from the finding as to status, although it might perhaps have been contended that, as the sentence under the 1953-54 Code was specified as being "in addition to" any sentence for the indictable offence, it was a sentence for being an habitual criminal and was therefore not a sentence for a criminal charge so that the reasoning in *Goldhar v. The Queen, supra,* did not apply to it.

Any doubts in this latter regard have, however, been resolved by the enactment of s. 33(2) of Chapter 43 of the Statutes of Canada 1960-61 whereby s. 660 was amended so as to make it clear that the sentence of preventive detention is no longer to be treated as being "in addition to the sentence for the substantive offence", but that it is in lieu of such sentence. The new section reads:

660.(1) Where an accused has been convicted of an indictable offence the court may, upon application, impose 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, 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 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.

(3) At the hearing of an application under subsection (1), the accused is entitled to be present.

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In the case of *Gordon v. The Queen*[18], Judson J. had occasion to comment on this section and said, at page 316:

> ...the only sentence of preventive detention which could be imposed in the circumstances of this case was one *in lieu of the sentence that had been imposed.*

The italics are my own.

Had it not been for the decision on the application for leave to appeal in the *Parkes* case, *supra,* it would, I think, have been arguable that s. 660(1)(*a*) and (*b*) should be read together and that the section should be construed as dealing with sentence alone and raising no separate question of the finding as to status. This would perhaps have been more in line with s. 667(1) which now provides that:

> 667.(1) A person who is sentenced to preventive detention under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.

This section appears to treat the whole matter as being one of sentence, but in view of the *Parkes* decision and the decisions subsequently delivered in this Court concerning the habitual criminal finding, I do not think that our jurisdiction under s. 41 in appeals from the findings as to status can be questioned.

I have read the habitual criminal cases which have come to this Court since the *Parkes* case and it appears to me that until the case of *The Queen v. MacDonald*[19], to which reference has been made by the Chief Justice, there was no case of an appeal against sentence when the question of the finding as to status was not in issue. In each case the appeal was treated as an appeal from the "habitual criminal" finding and was decided on that basis.

It is said, however, that the case of *Mulcahy v. The Queen*[20] was an exception and is to be treated as an appeal against the sentence of preventive detention *simpliciter.*

In the *Mulcahy* case, *supra,* Chief Justice Taschereau delivered the following oral judgment on behalf of this Court:

> We are all of opinion that the appeal against the sentence of preventive detention should be allowed for the reasons given by MacQuarrie J.

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[18] [1965] S.C.R. 312, 45 C.R. 98, 4 C.C.C. 1.
[19] [1965] S.C.R. 831, 46 C.R. 399, [1966] 2 C.C.C. 1, 52 D.L.R. (2d) 701.
[20] (1963), 42 C.R. 8.

and that the record should be returned to the Supreme Court of Nova Scotia *in banco* to impose a sentence for the substantive offence of which the appellant was convicted.

Any suggestion that this decision recognized the jurisdiction of this Court to entertain an appeal against a *sentence of preventive detention* as opposed to an appeal from a finding that the accused was an habitual criminal, must be considered in light of the dissenting judgment of Mr. Justice MacQuarrie, which this Court adopted, in which he said:

> I would allow the appeal, *quash the finding that the appellant was an habitual criminal* and the sentence that he be held in preventive detention and impose a sentence of three years...for the substantive offence.

The italics are my own.

With the greatest respect for those who hold a contrary view, I do not think that if the appeal presently before us is to be disposed of on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, it can at the same time be said that the *Mulcahy* case, *supra,* is an applicable authority because in that case the finding that the accused was an habitual criminal was quashed and it therefore followed that the question of whether it was expedient for the protection of the public to sentence the accused to preventive detention could not arise. The fact that Mr. Justice MacQuarrie expressed the view that the accused's record indicated to him that he was not the type of person of whom it could properly be said "it is expedient for the protection of the public to sentence him to preventive detention", is, in my view, with the greatest respect, beside the point because once the habitual criminal finding had been quashed, the matter of sentence was no longer in issue.

The grounds of appeal considered in this Court in the *Mulcahy* case, *supra,* are made apparent from a consideration of the notice of appeal and of the factum of the appellant. The notice of appeal set forth the following grounds:

> (1) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that the Crown did not prove beyond reasonable doubt that the accused was leading persistently a criminal life as required under Section 660(2)(*a*) of the Criminal Code.

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(2) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that there was no evidence against the appellant to sustain a finding that the accused was leading persistently a criminal life as required by Section 660(2)(*a*).

(3) That the Supreme Court of Nova Scotia In Banco erred in failing to hold that even although the Crown proved the accused was leading persistently a criminal life a sentence of preventive detention was not necessary or expedient for the protection of the public.

This Court, having found, as Mr. Justice MacQuarrie did, in favour of the appellant on the first two grounds, it followed that the appeal against the sentence of preventive detention must be allowed.

It has been suggested that the fact that leave to appeal to this Court was granted in the present case should have some controlling effect on the decision to be made, after having heard the appeal, with respect to our jurisdiction to entertain it. In this regard it does not appear to me to have been the practice of this Court on hearing an appeal to consider itself in any way affected in deciding the question of whether or not it has jurisdiction, by the fact that leave to appeal has been granted. The matter arose in the case of *The Queen v. Warner*[21], where leave had been granted and where the Chief Justice, in the course of his reasons for judgment in the appeal, said:

> While it was announced that we had jurisdiction, further consideration has persuaded the majority of the Court that such is not the case.

Other illustrations which come to my mind are *The Queen v. Alepin Frères Ltée et al, supra,* and *The Queen v. MacDonald, supra,* in both of which cases leave to appeal had been granted and the Court subsequently held that it had no jurisdiction.

As I have indicated, in my view the only reported case in this Court in which an appeal has been taken from a sentence of preventive detention when the finding as to the status of the accused was not an issue, is the case of *The Queen v. MacDonald,* and in that case the majority of the Court decided that there was no jurisdiction under s. 41 to entertain an appeal from a sentence of preventive detention alone. The majority opinion was there expressed in the following terms:

> The sentence of preventive detention could only have been imposed on a man who had been found to have the status of an habitual criminal but it was the conviction of an indictable offence which afforded the

[21] [1961] S.C.R. 144, 34 C.R. 246, 128 C.C.C. 366.

occasion for its imposition and as this appeal is from the sentence and the finding as to status is not an issue it is in my opinion governed by the decision of this Court in *Goldhar v. The Queen, supra.*

As will be apparent from what I have said, I am unable to appreciate any distinction between the present case and the case of *The Queen v. MacDonald* in so far as the question of jurisdiction is concerned.

In my opinion the question is a fundamental one because when such an appeal is taken against the sentence in isolation from the finding as to status, it is nothing more than an appeal from a sentence imposed "in lieu" of a sentence for an indictable offence and I can see no logical distinction between the case of a man who has been sentenced to imprisonment for life for manslaughter, in which case we would have no jurisdiction under the *Goldhar* case, *supra,* and those which followed it, and the case of a man sentenced to preventive detention.

For all these reasons I would dismiss this appeal.

SPENCE J.:—I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Ritchie J. It is my intention to follow the course which both of my learned brethren have adopted and consider this appeal on the basis that the appellant has been properly found to be an habitual criminal. I am also ready to accept the view of the Chief Justice that it is not expedient for the protection of the public to sentence the accused to preventive detention and I adopt the reasons outlined by the Chief Justice for such conclusion.

This leaves, therefore, only the question of whether this Court has any jurisdiction to allow the appeal for the latter reason. It is, in my opinion, unnecessary to analyze the various decisions of this Court referred to in the judgments of the Chief Justice and of Ritchie J. They have performed that task most adequately and repetition would add nothing. I propose to approach the problem in a different way and to attempt to determine just what is the appeal which now comes before this Court.

In this case, the accused was convicted on August 10, 1965, on four charges as outlined by the Chief Justice in his reasons and was sentenced to terms of three years' imprisonment upon two of them and two years' imprisonment on the other two, all to run concurrently. By notice

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of application dated November 5, 1965, properly served upon the accused, the prosecutor gave to the accused notice that he was applying to have the accused found to be an habitual criminal and that, therefore, it was expedient for the protection of the public to sentence him to protective detention.

On June 14, 1966, Magistrate Levey found that the accused was an habitual criminal and that it was expedient for the protection of the public to sentence him to protective detention, and, therefore, imposed a sentence of preventive detention upon the accused.

By notice of application for leave to appeal and notice of appeal to the Court of Appeal for British Columbia, the accused appealed "from the said finding (that he was an habitual criminal) and the said sentence (the sentence of preventive detention)" and by a judgment of the Court of Appeal for British Columbia pronounced on November 1, 1966:

> The appeal of the above named appellant from the sentence of preventive detention imposed on him by Magistrate G. L. Levey at Vancouver, B.C., on the 14th June 1966...
>
> THIS COURT DOTH ORDER AND ADJUDGE that the said appeal by the above named appellant from the sentence of preventive detention imposed on him be and the same is hereby dismissed.

The accused obtained leave to appeal to this Court and pursuant to such leave did appeal by notice of appeal dated January 27, 1967. That appeal purported to be "from the judgment of the Court of Appeal for British Columbia made on the 1st day of November 1966 whereby it was adjudged that the appeal of the above named appellant from the judgment of Magistrate G. L. Levey made on the 14th of June 1966 finding that the appellant was an habitual criminal and imposing the sentence of preventive detention was dismissed . . .".

As has been said by the Chief Justice, this is an appeal for which leave was granted under the provisions of s. 41 of the *Supreme Court Act* and is not one which is barred by the provisions of subs. (3) of that section as it is not an appeal "from the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence . . .".

Despite the appearance of being an appeal from a sentence of preventive detention, what the appeal consisted of in the Court of Appeal for British Columbia and what, in my view, it consists of here, is an appeal from a decision which has resulted in the accused being sentenced to preventive detention. I say this despite the words of s. 667(1) of the *Criminal Code* which provides "a person who is sentenced to preventive detention under this Part may appeal to the Court of Appeal against that sentence on any ground of law or fact or mixed law and fact". However much those words may imply an ordinary appeal against sentence the matters considered in this case and in all the other cases in the provincial courts of appeal are not the matters considered in an ordinary appeal from sentence but on the other hand resemble the consideration of appeals from conviction. So in s. 583(*b*) of the *Criminal Code*:

> 583. A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> * * *
>
> (*b*) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

(The underlining is my own.)

In consideration of such appeals against sentence the court of appeal commences and should commence with the conviction and proceed to consider whether the form and length of sentence chosen by the trial court is appropriate to the particular circumstances of the case and the characteristics of the convicted person.

The task of the provincial Court of Appeal in considering an appeal under the provisions of s. 667 of the *Criminal Code* is quite different. There the Court must consider whether each element of the finding of the Court hearing the application is supportable. Those elements are as follows:

(a) the conviction of an indictable offence, i.e., the substantive offence;

(b) that the accused is an habitual criminal in that he has since attaining the age of 18 years on at least

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three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more, and that he is leading a persistently criminal life;

(c) that because the accused is an habitual criminal it is expedient for the protection of the public to sentence him to preventive detention.

If the Court hearing the application found that each of these three prerequisites was satisfied then the Court hearing the application may impose a sentence of preventive detention. The Court hearing the application had no alternative but to impose such sentence of preventive detention or refuse to do so. The court hearing the application, for instance, could not have imposed a sentence of eight years rather than the 2 or 3 years given for the substantive offences. It is an example of a sentence fixed by law in the words of s. 583(*b*) of the *Criminal Code*. So the provincial Court of Appeal when considering the appeal from the sentence of preventive detention must consider the same three questions which I have recited above. The provincial Court of Appeal must find affirmatively as to these three questions before it may affirm the sentence of preventive detention.

In my view, the leave to appeal to this Court, which was properly granted by this Court, brings forward for consideration the same three matters and it is the right and the duty of this Court acting within its jurisdiction as granted by s. 41 of the *Supreme Court Act* to consider all three matters. In doing so, this Court is not going beyond its jurisdiction as limited by the series of cases such as *Goldhar v. The Queen*[22], *Paul v. The Queen*[23] and *The Queen v. Alepin Frères Ltée, et al.*[24].

In each of these cases the Court refused to consider an appeal which concerned the propriety of a sentence imposed after a conviction. In the present case, it is proposed that this Court consider whether or not a sentence of preventive detention should be imposed upon the

[22] [1960] S.C.R. 60, 125 C.C.C. 209, 31 C.R. 374.
[23] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[24] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

accused and determine that question upon its opinion as to whether he falls within the three categories in which it is necessary for him to fall before such sentence may be imposed.

For these reasons I concur with the opinion of the Chief Justice and would allow the appeal.

PIGEON J.:—Having had the advantage of reading the reasons for judgment prepared by the Chief Justice and by Ritchie and Spence JJ., I agree with the Chief Justice that, on the assumption that the finding that the appellant is an habitual criminal should not be disturbed, it has not been shown that it is expedient for the protection of the public to sentence him to preventive detention.

On the question of jurisdiction, all my brethren agree that this Court has jurisdiction under s. 41 of the *Supreme Court Act* to hear appeals by special leave in the case of persons sentenced to preventive detention. The only difference of opinion is whether this jurisdiction is limited to a review of the finding that the accused is an habitual criminal in the same way as in appeals from indictable offences under the provisions of the *Criminal Code*, it is restricted to questions pertaining to conviction as opposed to sentence.

After anxious consideration, I have come to the conclusion that no such restriction exists. The basis for the distinction in appeals under the *Criminal Code* is that its provisions for appeals to the Court of Appeal in ordinary cases contemplate separate and distinct rights of appeal against conviction and against sentence. (Sections 583, 584, 720, etc.). In the case of sentences of preventive detention passed upon habitual criminals, a single right of appeal is provided for embracing all grounds of law or fact or mixed law and fact (Section 667). This appeal is given against the sentence of preventive detention, not separately against the finding that the accused is an habitual criminal and the conclusion that it is expedient to sentence him to preventive detention. It does therefore contemplate a review of all the questions involved in passing this sentence, that is the question of whether this is expedient for the protection of the public as well as the finding that the

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accused is an habitual criminal. Seeing that no one doubts that s. 41 of the *Supreme Court Act* confers jurisdiction to hear appeals by special leave from the decision of the Court of Appeal in such cases, I can find no basis for deciding that this jurisdiction is limited to a consideration of a part only of the questions involved in the judgment appealed from.

The previous decisions of this Court concerning our jurisdiction over sentences of preventive detention are reviewed in the reasons for judgment of the Chief Justice and of my brother Ritchie. I agree with the Chief Justice that in considering them one should bear in mind the rule, often stated, that "a case is only an authority for what it actually decides". On that basis, I do not find that it was ever decided that our jurisdiction in dealing with appeals against sentences of preventive detention is limited to a review of the finding that the accused is an habitual criminal.

For those reasons, I concur in disposing of the appeal as proposed by the Chief Justice.

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

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