MICHAEL MENDICK ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

1969

*April 28
June 16

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Preventive detention—46 convictions prior to substantive offence—Most of the offences being related to possession and use of gasoline credit cards or automobiles—Whether it was expedient for the protection of the public to impose sentence of preventive detention—Menace to society—Criminal Code, 1953-54 (Can.), c. 51, s. 662.

Following his conviction on a charge of theft of an automobile in January 1967, the appellant, who had been apprehended in May 1967, was sentenced to a term of 3-year imprisonment on June 10, 1967. The notice required by s. 662(1) of the *Criminal Code* was duly served and the appellant was brought before the magistrate on November 14. The notice specified 46 convictions in addition to the substantive offence. With the exception of one conviction for armed robbery and one for theft of money, all convictions related to unlawful possession and use of gasoline credit cards or automobiles. The magistrate found that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life and that he was an habitual criminal. A sentence of preventive detention was then imposed. The Court of Appeal affirmed the finding and the sentence. The appellant was granted leave to appeal to this Court.

Held (Fauteux, Abbott, Martland and Ritchie JJ. *dissenting*): The appeal should be allowed and the sentence imposed in respect of the substantive offence restored.

Per Cartwright C.J. and Judson, Hall, Spence and Pigeon JJ.: On the evidence, the finding that the appellant was an habitual criminal was a proper finding. However, it has not been shown beyond a reasonable doubt that it was expedient for the protection of the public that the appellant should be sentenced to preventive detention. His criminal record is a formidable one but there is evidence that his last employer would be willing to re-employ him on his release. The appellant did not constitute so grave a menace that the protection of the public required that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

Per Fauteux, Abbott, Martland and Ritchie JJ., *dissenting*: The finding that the appellant was an habitual criminal was a proper one under the circumstances and the Court of Appeal did not err in affirming the magistrate's finding that it was expedient for the protection of the public in that province to sentence him to preventive detention. In forming its opinion as to whether or not it is expedient for the protection of the public to sentence an habitual criminal to preventive detention, one of the main questions to be determined by the Court is whether he is a man whose record indicates that after he has

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

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derived the maximum benefit from imprisonment the public will be best protected, and his own interest best served, by ensuring that his return to society is made subject to supervision and control of the Parole Board. In imposing a sentence of preventive detention the Court must be satisfied that there is a real danger to the public in the prospect of the accused being allowed at large in society without supervision after the expiration of his sentence for the substantive offence with which he is charged. Section 660 is to be applied in the cases of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision. Habitual criminals with records such as the present appellant are proper subjects for the application of s. 660 of the *Criminal Code*.

Droit criminel—Repris de justice—Détention préventive—46 condamnations antérieures à la dernière infraction—La plupart des infractions se rapportent à la possession et l'utilisation illégales d'automobiles ou de cartes de crédit de gazoline—Opportunité pour la protection du public d'imposer une sentence de détention préventive—Menace pour la société—Code Criminel, 1953-54 (Can.), c. 51, art. 662.

Ayant été déclaré coupable sur une inculpation de vol d'une automobile en janvier 1967, l'appelant, qui avait été arrêté en mai 1967, a été condamné à un terme de trois ans d'emprisonnement le 10 juin 1967. L'avis requis par l'art. 662(1) du *Code Criminel* lui a été dûment signifié et l'appelant a comparu à nouveau devant le magistrat le 14 novembre. L'avis contenait 46 condamnations en plus de l'infraction dont il s'agit. Sauf une déclaration de culpabilité pour vol à main armée et une pour vol d'argent, toutes les déclarations de culpabilité se rapportent à la possession et l'utilisation illégales d'automobiles ou de cartes de crédit de gazoline. Le magistrat a conclu qu'au moment de la commission de l'infraction dont il s'agit l'appelant menait avec persistance une vie criminelle et il l'a déclaré repris de justice. Une sentence de détention préventive lui a alors été imposée. La Cour d'appel a confirmé la déclaration ainsi que la sentence. L'appelant a obtenu la permission d'appeler à cette Cour.

Arrêt: L'appel doit être accueilli et la sentence de trois ans imposée le 10 juin doit être rétablie, les Juges Fauteux, Abbott, Martland et Ritchie étant dissidents.

Le Juge en Chef Cartwright et les Juges Judson, Hall, Spence et Pigeon: Sur la preuve, la conclusion que l'appelant était un repris de justice est la conclusion appropriée. Cependant, il n'a pas été démontré hors d'un doute raisonnable qu'il était opportun pour la protection du public que l'appelant soit condamné à la détention préventive. Son dossier est formidable mais la preuve contient une déclaration que son dernier employeur serait consentant à l'employer à nouveau après sa mise en liberté. L'appelant n'est pas une menace si grave que la protection du public exige qu'il soit privé de sa liberté pour le reste de sa vie, sujet seulement aux dispositions de l'art. 666 du *Code Criminel* et de la *Loi sur la libération conditionnelle de détenus.*

Les Juges Fauteux, Abbott, Martland et Ritchie, *dissidents*: Dans les circonstances, il était approprié que l'appelant soit déclaré repris de justice, et la Cour d'appel n'a pas fait erreur en confirmant la conclu-

sion du magistrat qu'il était opportun pour la protection du public dans cette province d'imposer à l'appelant une sentence de détention préventive. En se faisant une opinion sur la question de savoir s'il est opportun pour la protection du public d'imposer une sentence de détention préventive à une personne déclarée repris de justice, une des questions principales que la Cour doit déterminer est de savoir s'il s'agit d'un homme dont le dossier indique qu'après qu'il a tiré le plus grand avantage possible de l'emprisonnement le public sera des mieux protégé, et ses propres intérêts à lui seront des mieux servis, si l'on s'assure que son retour dans la société est sujet à la surveillance et au contrôle de la Commission nationale des libérations conditionnelles. La Cour doit être satisfaite, lorsqu'elle impose une sentence de détention préventive, qu'il y a un danger réel pour le public dans la perspective qu'il soit permis à l'accusé de s'en aller en liberté dans la société sans surveillance après l'expiration de sa sentence pour l'infraction dont il a été accusé. L'article 660 s'applique aux cas de personnes qui se sont montrées tellement adonnées habituellement au crime qu'elles constituent une menace pour les autres personnes ou la propriété dans la communauté où elles vivent, et pour aussi longtemps qu'elles demeurent en liberté sans surveillance. L'article 660 du *Code Criminel* s'applique aux personnes déclarées repris de justice et possédant un dossier comme celui que possède l'appelant.

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

APPEAL 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.

Kenneth G. Young, for the appellant.

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

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

THE CHIEF JUSTICE:—This appeal is brought, pursuant to leave granted by this Court, from a unanimous judgment of the Court of Appeal for British Columbia, pronounced on January 30, 1968, dismissing an appeal against a sentence of preventive detention imposed upon the appellant by His Worship Magistrate Isman, at Vancouver, on November 14, 1967, in lieu of a sentence of three years

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imprisonment imposed upon him by His Worship Magistrate Walker, at Vancouver, on June 10, 1967, following his conviction on June 3, 1967, on a charge that, at the City of Vancouver, between the 1st and 11th days of January, 1967, he did commit theft of a 1966 Ford Galaxie automobile of a value in excess of $50.

At the date of the hearing before Magistrate Isman, November 14, 1967, the appellant was forty-seven years of age.

No question was raised as to the fulfilment of the conditions precedent to the hearing of the application by Magistrate Isman prescribed by s. 662(1) of the *Criminal Code*. The notice required by that subsection was duly served on the appellant and a copy was filed with the Clerk of the Court.

The notice specified forty-six convictions in addition to the conviction on June 3, 1967, before Magistrate Walker of the offence set out in the opening paragraph of these reasons, which is hereinafter referred to as "the substantive offence", and concluded

B. Other circumstances:

1. That you are an habitual associate of criminals;
2. That after brief periods of freedom you have consistently returned to your criminal way of life;
3. That during your brief periods of freedom you have not had regular gainful employment.

No evidence was called by the Crown to show that since his release early in October 1966 the appellant was associating with criminals.

The learned magistrate found that it was proved beyond a reasonable doubt that at the time of the commission of the substantive offence the appellant was leading persistently a criminal life. This finding was concurred in by the Court of Appeal and I can find no ground for disagreeing with it. This leaves for consideration the question whether it is expedient for the protection of the public to sentence the appellant to preventive detention.

Davey C.J.B.C., who gave the judgment of the Court of Appeal, opened his reasons on this branch of the matter with the sentence:

> The only doubt I have, or did have, is whether a sentence of preventive detention is expedient.

The learned Chief Justice continued:

...This man produced a letter from his employer, Ann Kostrich, which said that he was an honest man, which perhaps is true limited to her experience with him, but certainly was not true in view of his record and in view of his conduct while he was employed by her, because while employed by her he bought a car in Ontario for one hundred and twenty-five dollars and he switched the licence plates from the Ontario car to the B.C. car and vice versa, so that the presence of the B.C. car would not be noticed and identified. During that time, from the statement of Staff Sergeant Campbell, he continued to use the credit card, notwithstanding that he was gainfully employed at seventy-five dollars a week, I think it was.

Now the learned Magistrate expressly refrained from taking those circumstances into consideration. In my judgment they were both relevant and material, and important. They are relevant to the question of whether this man was persistently leading a criminal life at the date of the substantive offence, because while they occurred after the commission of the substantive offence, they show full light on his activities at the time of the commission of the offence, and they explain what he did. They are also relevant and material to the question of the expediency of preventive detention, because they show that while gainfully employed he was still using the motor car which he had stolen; he switched the plates to conceal its identity; and he continued to use the stolen credit card. To my mind those circumstances destroy the inference which might have otherwise been open that by getting gainful employment he had determined to rehabilitate himself and that a sentence of preventive detention was no longer necessary. On those grounds I would dismiss the appeal.

It should be explained that while the substantive offence was committed between the 1st and 11th of January 1967, the appellant was not apprehended until the end of May 1967. The exact date of his arrest does not appear in the record.

I agree with the view of Davey C.J.B.C. that evidence as to the appellant's way of life between the date of the commission of the substantive offence and his arrest some time thereafter was admissible and relevant to both the questions (i) whether he was leading persistently a criminal life and (ii) whether it is expedient to sentence him to preventive detention. The contrary view expressed by the learned magistrate was, no doubt, founded on the following passage in *Kirkland v. The Queen*[1]:

In my opinion it is established by these decisions, and I would so hold on the wording of s. 575c(1) if the matter were devoid of authority, that before an accused can be found to be an habitual criminal the Crown, in addition to proving the prescribed number of previous convictions, must

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

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satisfy the onus of proving beyond a reasonable doubt that at the time when he committed the indictable offence referred to in s. 575B the accused was leading persistently a criminal life.

While the question which I am now considering did not arise in the *Kirkland* case, as there the accused was arrested immediately after committing the substantive offence, the statement that the date as of which it is to be determined whether an accused is leading persistently a criminal life is the date of the substantive offence has been repeated in subsequent judgments of this Court.

In *Paton v. The Queen*[2], Judson J. who delivered the judgment of the majority of the Court said at p. 355:

> ...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.

In *Hadden v. The Queen*[3], with the concurrence of Judson, Hall and Spence JJ., I said:

> It has been held in a unanimous judgment of this Court in *Kirkland v. The Queen* 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.

But Pigeon J., while agreeing in the result, did not agree with this passage.

The question which I am now considering did not arise for decision in either *Paton v. The Queen* or *Hadden v. The Queen*. In each of these cases the accused was arrested on the same day as that on which he committed the substantive offence.

I find myself in complete agreement with the following passage in the reasons of Pigeon J. in *Paton v. The Queen, supra,* at pp. 362 and 363:

> Concerning the unanimous decision of this Court in *Kirkland v. The Queen*, this appears to be a case for the application of the rule enunciated by Lord Halsbury in *Quinn v. Leathem* and often referred to in this Court *v.g. Regina v. Snider; The Queen v. Harder; Robert v. Marquis,* '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

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[2] [1968] S.C.R. 341, 3 C.R.N.S. 242, 63 W.W.R. 713, [1968] 3 C.C.C. 287, 68 D.L.R. (2d) 304.

[3] [1968] S.C.R. 258 at 263, 3 C.R.N.S. 321, [1968] 4 C.C.C. 1.

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 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.

In the case at bar if it were shown beyond a reasonable doubt that up to the time when he was arrested in May 1967 the appellant was leading persistently a criminal life and the other conditions prescribed in s. 660(2) were fulfilled, this would warrant a finding that the appellant was an habitual criminal. I have already stated my conclusion that this was a proper finding on the evidence in this case.

I am, however, of opinion that it has not been shown beyond a reasonable doubt that it is expedient for the protection of the public that the appellant should be sentenced to preventive detention.

Of the 47 convictions set out in the Notice of Application, 27 (Nos. 7, 20, 21 and 23 to 46 inclusive), relate to the unlawful possession and use, by the appellant, of gasoline credit cards. Twenty-four of them, Nos. 23 to 46 inclusive, all of which were made on July 21, 1965, and involved sums totalling $245.95 resulted, in the words of counsel for the appellant, from "a single spree" extending over the month of December 1964 and early January 1965. Of the remaining offences enumerated in the Notice of Application 8, Nos. 1, 3, 5, 10, 13, 18, 19 and the "substantive offence" itself, relate to the theft and/or unlawful possession and use, by the appellant, of automobiles.

Since 1957, with the exception of one conviction for theft of money in March 1965, the appellant has been involved in no criminal activity which has not, in some way, related to automobiles or gasoline credit cards.

Only one of the 47 convictions was for a crime of violence, armed robbery. This conviction was in October 1957 and the appellant was sentenced to 8 years imprisonment. He

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appears to have served 5 years of this sentence and I think it not unreasonable to assume that that sentence has had the effect of deterring him from the commission of further violent crime.

The appellant has now served almost two years of the sentence of three years imposed for the substantive offence. He must realize that if he is set at liberty at the expiration of that sentence and thereafter commits either of the offences of stealing an automobile or obtaining gasoline by fraudulent means he will be liable to a maximum sentence of 10 years imprisonment. His criminal record is indeed a formidable one but there is evidence that his last employer is willing to re-employ him on his release. On the whole, I am of opinion that, although it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

I would allow the appeal, set aside the sentence of preventive detention and restore the sentence of three years imprisonment imposed in respect of the substantive offence.

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 of the Chief Justice and after careful consideration, I have decided that it is desirable for me to record my reasons for dissenting from his view.

The Chief Justice has concluded that the finding that the appellant was an habitual criminal was a proper one under the circumstances and with this I respectfully agree; but I cannot assign any ground for holding that the Court of Appeal of British Columbia erred in affirming the opinion of the learned magistrate that it was expedient for the protection of the public in that Province to sentence the appellant to preventive detention.

I think it to be convenient at the outset to reproduce in full the habitual criminal provisions contained in s. 660 of the *Criminal Code* which read as follows:

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

tion 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 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.

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

In the case of *Poole v. The Queen*[4], which was heard by the full Court in December of last year, it was decided by the majority that this Court has jurisdiction under s. 41 of the *Supreme Court Act* to entertain an application for leave to appeal from a finding that, in relation to the appellant "it is expedient for the protection of the public to sentence him to preventive detention". In the reasons for judgment of the majority it was stipulated that:

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.

It was also recognized by the Court of Appeal of British Columbia in *Regina v. Channing*[5] that the determination of what is expedient for the protection of the public is a question of fact in each case, but as the determination of this issue is, under the provisions of s. 660(1)(*b*) of the *Criminal Code* made dependent upon the opinion of the courts concerned, it is desirable, as the Chief Justice appears to me to have recognized, that some principle should be established according to which such opinion is to be formulated. It appears to me that the guiding principle to be gathered from the reasons for judgment of the Chief Justice in the present case is expressed in the following terms:

...I am of opinion that, although it is impossible to say that the appellant is merely a nuisance, he does not constitute so grave a

[4] [1968] S.C.R. 381, 3 C.R.N.S. 213, [1968] 3 C.C.C. 257.

[5] (1965), 52 W.W.R. 99, [1966] 1 C.C.C. 97, 51 D.L.R. (2d) 223.

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menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*.

The requirement that a man must be found to be a menace before a sentence of preventive detention can be properly imposed upon him finds its origin in the decision of Lord Goddard in *Rex v. Churchill*[6], where he 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.

In order to determine the sense in which Lord Goddard used the word menace, it is necessary to consider the statement he made in the same case at page 112 where he said:

> 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.

The italics are my own.

The test of whether or not a man constitutes a "menace to society" was first applied in this Court in relation to s. 660(1)(*b*) in *Poole v. The Queen, supra,* where it was said of the appellant on behalf of the majority of the Court:

> ...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.

If the word "menace" as used in this excerpt from the reasons for judgment in that case and in the present case were to be given the meaning attributed to it by Lord Goddard, it would appear to include anyone who could be said to "prey upon society"; but in the present case the Chief Justice appears to have added a further ingredient as a prerequisite to the imposition of a sentence of preventive detention by indicating that before such a sentence is imposed, the accused man must "constitute *so grave a menace* that the protection of the public requires *that he*

[6] (1952), 36 Cr. App. R. 107, 2 Q.B. 637.

be deprived of his liberty for the remainder of his life, subject only to the provisions of s. 666 of the *Criminal Code* and the *Parole Act*". (The italics are my own).

In this regard I think it desirable to examine the provisions of s. 666 of the *Criminal Code* and the *Parole Act* in order to determine whether the question of "being deprived of his liberty for the remainder of his life" is one which necessarily arises at all as a result of the imposition of a sentence of preventive detention. I think on the contrary that under the provisions of s. 666 of the *Criminal Code* and the terms of the *Parole Act*, 1958 (Can.), c. 38, Parliament has expressly provided for the supervised return to society of habitual criminals who have been sentenced to preventive detention. Section 666 of the *Criminal Code* reads as follows:

> Where a person is in custody under a sentence of preventive detention, *the Minister of Justice shall, at least once in every year, review the condition, history and circumstances* of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions.

The italics are my own.

By s. 24(5) of the *Parole Act,* it is indicated that the powers, functions and duties of the Minister of Justice under s. 666 of the *Criminal Code* are transferred to the National Parole Board established by that Act. Turning to the provisions of the *Parole Act* itself, the following sections appear to me to be relevant:

> 8. The Board may
>
> (*a*) grant parole to an inmate if the Board considers that the inmate has derived the maximum benefit from imprisonment and that the reform and rehabilitation of the inmate will be aided by the grant of parole;
>
> (*b*) Grant parole subject to any terms or conditions it considers desirable;...

Section 11 provides:

> 11. (1) The sentence of a paroled inmate shall, while the parole remains unrevoked and unforfeited, be deemed to continue in force until the expiration thereof according to law.
>
> (2) *Until a parole is revoked, forfeited or suspended* the inmate is not liable to be imprisoned by reason of his sentence, and *he shall be allowed to go and remain at large* according to the terms and conditions of the parole and subject to the provisions of this Act.

The italics are my own.

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In the case of *Poole v. The Queen, supra,* at p. 392, these provisions are referred to in the reasons for judgment of the majority of the Court in the following terms:

> In Canada if sentence is passed at all it must decree imprisonment for the remainder of the person'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.

It is true that a parole granted by the Parole Board may be revoked "without the intervention of any judicial tribunal". What Parliament has seen fit to do is to establish a Board composed of people who are experienced in dealing with criminals and to assign to that Board the duty of reviewing at least once in each year "the *condition, history* and *circumstances*" of every person upon whom a sentence of preventive detention has been passed, together with the power to allow such persons "to go and remain at large" under its supervision and subject to its right to recall such persons to imprisonment.

It is true that a man who is on parole has less than complete freedom, but in my view the *Parole Act* is directed to his "reform and rehabilitation" rather than to depriving him "of his liberty for the remainder of his life". It seems to me that in forming its opinion as to whether or not it is expedient for the protection of the public to sentence an habitual criminal to preventive detention, one of the main questions to be determined by the Court is whether he is a man whose record indicates that after "he has derived the maximum benefit from imprisonment" the public will be best protected, and his own interests best served, by ensuring that his return to society is made subject to the supervision and control of the Parole Board.

It is my view that in imposing a sentence of preventive detention the Court must be satisfied that there is a real danger to the public in the prospect of the accused being allowed at large in society without supervision after the expiration of his sentence for the substantive offence with which he is charged.

I do not find any decision so far rendered by this Court which makes it plain that a sentence of preventive detention is only to be imposed on persons who have been guilty of repeated crimes of violence, and I can find nothing in s. 660 itself to indicate that it is directed solely to the pro-

tection of the public against violence; it rather appears to me that the section is to be applied in the cases of persons who have shown themselves to be so habitually addicted to serious crime as to constitute a threat to other persons or property in any community in which they live, and for so long as they remain at large without supervision. The persons to whom Parliament intended the preventive detention provisions to apply are specified in s. 660(2) where "habitual criminal" is defined as one who has

> ...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...

It will be observed that it is not necessary for a man to have committed any crime of violence in order to be an habitual criminal and thus to be subject to a sentence of preventive detention. In my view the section has particular, though not exclusive, application to the hardened criminal who has spent the greater part of his life in prison and who, on his release, unless supervised, will commit a further offence. These are the people for whom, as Lord Goddard observed: "...the time for punishment has gone by, because it has had no effect".

As I have indicated, the question of what is expedient for the protection of the public is a question of fact in each case, but it is essential that some principles be established against which to assess the facts. While I do not consider that we are bound in this case by the decision in *Poole v. The Queen, supra,* the two cases are undoubtedly similar and it has been suggested that as this Court has decided that it was not expedient for the protection of the public to sentence a man with such a formidable criminal record as Poole to preventive detention, it would be inconsistent to impose such a sentence on the present appellant.

It therefore appears to me to be desirable to examine the facts in these two cases.

In the case of Poole, the following factors appear to have influenced the majority of the Court:

> 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.

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In the case of the present appellant, he is 47 years of age and has a record of 47 convictions which, according to my calculations, has resulted in his spending far the greater part of his adult life in prison, and I can find no evidence that he was at any time "trying to live a normal life". Very soon after his release from prison in 1967, he stole an automobile in British Columbia and drove it to Ontario, using stolen credit cards with which to fuel it. Of this incident he says:

> A. I couldn't find no work.
> Q. So you decided to steal a car?
> A. So I was reading the paper and there was work in Ontario, so I figured—I didn't know how to get to tell you the truth the proper way, I haven't got too much money, to get there.
> Q. So you decided to steal a car?
> A. So I decided to get a car and get over there.
> Q. Steal a car?
> A. Steal a car.

It was not surprising that the appellant should follow this course as he had previously been convicted on six separate occasions for unlawful possession of motor vehicles and his convictions for use of other people's credit cards were numerous.

When the appellant got to Hamilton he obtained employment as a bartender in a hotel which was apparently owned by a woman by the name of Ann Kostrich with whom he became "quite friendly". He kept this job from February 1967 until he was arrested on the 30th of May in that year, and all the time he was so employed he was driving a stolen motor vehicle and fueling it with gasoline obtained with a stolen credit card. After his arrest his lawyer wrote to Ann Kostrich and received a reply which was admitted in evidence by consent and which read, in part, as follows: (referring to the appellant as Michael)

> Michael was a very good worker, honest and non-drinker, in fact I went away on two different occasions and left him in charge looking after the business. Whenever he is released, he always has a job with me, this I guarantee. If there is anything that I can do to help him, I will.

The Chief Justice was apparently referring to this letter when he said, after reviewing the appellant's criminal record:

> His criminal record is indeed a formidable one but there is evidence that his last employer is willing to reemploy him on his release. On the whole I am of opinion that...he does not constitute so grave a menace that the protection of the public requires that he be deprived of his liberty for the remainder of his life.

The Chief Justice also points out that the appellant "must realize that after he is set at liberty at the expiration of his present sentence and thereafter commits either of the offences of stealing an automobile or obtaining gasoline by fraudulent means, he will be liable to a maximum sentence of 10 years' imprisonment". It is perhaps worth observing that if the accused should receive such a ten-year sentence there will be no obligation upon the Minister of Justice *"at least once in every year"* to review his "condition, history and circumstances".

The disturbing feature of this case and one which in my opinion differentiates it from the *Poole* case, is indicated in the following paragraph of the Chief Justice's reasons for judgment:

> Since 1957, with the exception of one conviction for theft of money in March 1965, the appellant has been involved in no criminal activity which has not in some way related to automobiles or gasoline credit cards.

When one considers that the appellant has been convicted 28 times since 1957, the record certainly appears to disclose a pattern of behaviour which is well illustrated by the appellant's own evidence in cross-examination when he said:

> Q. First question, Mr. Mendick, at any time during your career from 1937 on, did you ever decide to quit the life of crime and stop committing offences?
>
> A. Well, I've tried many times; I never made, I never made—I wasn't thinking of making any, of making a living out of crime. It seems like I was enjoying taking these cars and pass a few cheques. I didn't make no money at all. As a crime, I don't know what—can't explain why I do all this, because I'm working all the—nearly all the time.

In my view, habitual criminals with records such as the present appellant are proper subjects for the application of s. 660 of the *Criminal Code* and I can find no ground for holding that the courts below were wrong in forming the opinion which they did.

I would dismiss this appeal.

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

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