HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROBERT CECIL MACDONALD .....RESPONDENT.

1965

*May 17, 18
June 24

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Appeals—Jurisdiction—Finding of habitual criminal affirmed in Court of Appeal, but sentence of preventive detention set aside—Whether Supreme Court of Canada has jurisdiction to entertain appeal by Crown—Criminal Code, 1953-54 (Can.), c. 51, s. 667—Supreme Court Act, R.S.C. 1952, c. 259, s. 41.

Following his conviction on a charge of theft, the respondent was found to be an habitual criminal, and a sentence of preventive detention

*PRESENT: Taschereau C.J. and Cartwright, Abbott, Martland, Judson, Ritchie and Hall JJ.

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was imposed in lieu of the sentence imposed for the substantive offence. The Court of Appeal affirmed the finding that the respondent was an habitual criminal, but set aside the sentence of preventive detention and restored the sentence of one year imposed upon him by the Magistrate. The Crown was granted leave to appeal to this Court. The only question raised was whether a sentence of preventive detention should be imposed. At the hearing of the appeal the question of the jurisdiction of this Court was raised for the first time from the Bench. The contention of the Crown was that there was an appeal to this Court under the provisions of s. 41 of the *Supreme Court Act.*

Held (Taschereau C.J. and Martland J. dissenting): The appeal should be quashed.

Per Cartwright J.: Since the decisions of this Court in *Brusch v. The Queen,* [1953] 1 S.C.R. 373 and *Parkes v. The Queen* [1956] S.C.R. 134, it could not be said that any right of appeal to this Court was conferred by the *Criminal Code*. An order made under Part XXI of the Code is neither a conviction nor an acquittal of an indictable offence. If the Crown has a right of appeal it must be found in s. 41(1) of the *Supreme Court Act.* However, the power to grant the right of appeal sought by the Crown in this case is not conferred by the general words of s. 41(1) although on their literal meaning they would appear wide enough to comprehend it. The construction of s. 41(1), for which the Crown contends in this case would result in an incongruity. The case of *The King v. Robinson (or Robertson),* [1951] S.C.R. 522, could not now be regarded as an authority for the existence of jurisdiction in this Court to entertain an appeal by the Crown from a judgment of a Court of Appeal setting aside a sentence of preventive detention.

Per Abbott, Judson, Ritchie and Hall JJ.: This Court was without jurisdiction to entertain the appeal. Neither the Crown nor the accused is given any right under the *Criminal Code* to appeal to this Court from the disposition made of an application for preventive detention by the Court of Appeal of a province. 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 occasion for its imposition and as this appeal is from the sentence—the finding as to status not being an issue—it is governed by the decision of this Court in *Goldhar v. The Queen,* [1960] S.C.R. 60, where it was held that this Court has not jurisdiction to entertain an appeal against sentence. Parliament could not have intended the anomaly which would result from the provisions of s. 667(2) of the *Criminal Code* and s. 41(1) of the *Supreme Court Act,* if there was an appeal to this Court at the instance of the Crown from an order of the Court of Appeal setting aside a sentence of preventive detention.

Per Taschereau C.J. and Martland J., *dissenting:* It is clear that no appeal lies to this Court from a sentence imposed under s. 660 of the *Criminal Code* by virtue of the provisions of the *Criminal Code* governing appeals in respect of indictable offences, for such appeals are limited to judgments respecting convictions or acquittal of an indictable offence. However, all the necessary elements of s. 41(1) of the *Supreme Court Act* are met in this case. The decisions in *Goldhar v. The Queen, supra,* and in *The Queen v. Alepin Frères Ltée,* [1965] S.C.R. 359, do not preclude an appeal in the present case. A sentence under s. 660 is not imposed as a punishment for the indictable offence, but

is imposed because the accused is an habitual criminal and it is expedient that the public be protected from him. The contention that, while an appeal to this Court might lie in relation to the finding that the accused is an habitual criminal, it could not lie in respect of the question as to whether it was expedient for the protection of the public that he be sentenced, could not be supported. There is no incongruity in permitting an appeal by the Crown in this case. Section 41(1) of the *Supreme Court Act* was a means provided by Parliament to enable this Court to deal with a situation such as the one in this case. There is no valid reason for reading into s. 41(1) of the *Supreme Court Act* a limitation as to an appeal by the Crown when a right of appeal by the accused is well recognized. Leave having been granted, this Court did have jurisdiction to entertain the present appeal.

As to the merits, the Court of Appeal erred when it ruled that it could not impose a preventive sentence unless there was evidence on which a magistrate could find beyond a reasonable doubt that it was expedient for the protection of the public to so sentence the accused. A standard which is applied in weighing proof of the guilt of the accused has no application to the formulation of an opinion as to what is expedient to protect the public.

Droit criminel—Appels—Juridiction—Déclaration que l'accusé est un repris de justice confirmée par la Cour d'Appel, mais sentence de détention préventive mise de côté—La Cour suprême du Canada a-t-elle juridiction pour entendre l'appel de la Couronne—Code criminel, 1953-54 (Can.), c. 51, art. 667—Loi sur la Cour suprême, S.R.C. 1952, c. 259, art. 41.

Ayant été trouvé coupable de vol, l'intimé a été subséquemment reconnu repris de justice et une sentence de détention préventive lui fut imposée au lieu de la sentence qui avait été imposée pour l'infraction dont il avait été déclaré coupable. La Cour d'Appel confirma la déclaration que l'intimé était un repris de justice, mais mit de côté la sentence de détention préventive et rétablit la sentence d'un an qui avait été imposée par le magistrat. La Couronne a obtenu permission d'en appeler devant cette Cour. La seule question soulevée était de savoir si une sentence de détention préventive pouvait être imposée. Lors de l'audition de l'appel, la question de la juridiction de cette Cour a été soulevée pour la première fois par la Cour. La prétention de la Couronne était qu'il y avait appel devant cette Cour en vertu des dispositions de l'art. 41 de la *Loi la Cour suprême.*

Arrêt: L'appel doit être rejeté, le Juge en Chef Taschereau et le Juge Martland étant dissidents.

Le Juge Cartwright: Depuis les jugements de cette Cour dans *Brusch v. The Queen,* [1953] 1 R.C.S. 373 et *Parkes v. The Queen,* [1956] R.C.S. 134, on ne peut pas dire qu'un droit d'appel devant cette Cour est attribué par le *Code criminel.* Une ordonnance passée en vertu de la partie XXI du Code est ni une déclaration de culpabilité ni un acquittement d'un acte criminel. Si la Couronne a un droit d'appel, ce droit doit se trouver dans l'art. 41(1) de la *Loi sur la Cour suprême.* Cependant, le pouvoir d'accorder le droit d'appel recherché par la Couronne dans cette cause ne se trouve pas dans les mots

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généraux de l'art. 41(1) quoique en regard de leur sens littéral ces mots semblent avoir une étendue assez grande pour englober ce pouvoir. L'interprétation de l'art. 41(1) telle que soutenue par la Couronne dans cette cause aurait le résultat de créer une incongruité. La cause de *The King v. Robinson (or Robertson),* [1951] R.C.S. 522, ne peut pas maintenant être considérée comme une autorité pour l'existence de la juridiction de cette Cour d'entendre un appel par la Couronne d'un jugement de la Cour d'Appel mettant de côté une sentence de détention préventive.

Les Juges Abbott, Judson, Ritchie et Hall: Cette Cour n'avait pas la juridiction d'entendre l'appel. Le *Code criminel* ne donne ni à la Couronne ni à l'accusé le droit d'en appeler devant cette Cour de la disposition faite par la Cour d'Appel d'une province de la demande pour détention préventive. La sentence de détention préventive ne peut être imposée qu'à une personne dont la statut a été déclaré être celui d'un repris de justice, mais c'est la déclaration de culpabilité d'un acte criminel qui donne ouverture à l'imposition de cette sentence, et comme cet appel est de la sentence—la déclaration relativement au statut n'étant pas en litige—l'appel est gouverné par la décision de cette Cour dans *Goldhar v. The Queen,* [1960] R.C.S. 60, où il a été jugé que cette Cour n'avait pas juridiction d'entendre un appel de la sentence. Le parlement n'a pas pu avoir eu l'intention de créer l'anomalie qui résulterait des dispositions de l'art. 667(2) du *Code criminel* et de l'art. 41(1) de la *Loi sur la Cour suprême,* s'il existait un appel devant cette Cour de la part de la Couronne d'une ordonnance de la Cour d'Appel mettant de côté une sentence de détention préventive.

Le Juge en Chef Taschereau et le Juge Martland, *dissidents:* Il n'existe aucun appel devant cette Cour d'une sentence imposée en vertu de l'art. 660 du *Code criminel* en vertu des dispositions du *Code criminel* gouvernant les appels relativement aux actes criminels, de tels appels étant limités aux jugements relativement à une déclaration de culpabilité ou un acquittement d'un acte criminel. Cependant, tous les éléments nécessaires de l'art. 41(1) de la *Loi sur la Cour suprême* se rencontrent dans cette cause. Les décisions de *Goldhar v. The Queen, supra,* et de *The Queen v. Alepin Frères Ltée,* [1965] R.C.S. 359, n'empêchent pas un appel dans cette cause. Une sentence en vertu de l'art. 660 n'est pas imposée comme punition pour un acte criminel, mais est imposée parce que l'accusé est un repris de justice et qu'il est opportun que le public soit protégé contre lui. La prétention à l'effet que, quoiqu'un appel puisse exister relativement à une déclaration que l'accusé est un repris de justice, un appel ne peut exister relativement à la question de savoir s'il est opportun pour la protection du public qu'une sentence soit imposée, ne peut pas être supportée. Il n'y a aucune incongruité de permettre un appel par la Couronne dans cette cause. L'art. 41(1) de la *Loi sur la Cour suprême* est un moyen prévu par le parlement pour permettre à cette Cour de disposer d'une situation telle que celle qui se présente dans cette cause. Il n'y a en conséquence aucune raison valide pour voir dans l'art. 41(1) de la *Loi sur la Cour suprême* une restriction quant à un appel par la Couronne lorsqu'un droit d'appel par l'accusé est reconnu. Permission d'appeler ayant été accordée, cette Cour avait juridiction d'entendre l'appel.

Quant aux mérites, la Cour d'Appel a erré quand elle a décidé qu'elle ne pouvait imposer une sentence préventive à moins qu'elle ne trouve une preuve sur laquelle un magistrat pourrait déclarer hors de tout doute raisonnable qu'il était opportun pour la protection du public que l'accusé reçoive une telle sentence. On ne peut se servir pour formuler une opinion relativement à l'opportunité de protéger le public d'une norme dont on se sert pour évaluer la preuve relativement à la culpabilité de l'accusé.

APPEL d'un jugement de la Cour d'Appel de la Colombie-Britannique, mettant de côté une sentence de détention préventive. Appel rejeté, le Juge en Chef Taschereau et le Juge Martland étant dissidents.

APPEAL from a judgment of the Court of Appeal for British Columbia, setting aside a sentence of preventive detention. Appeal quashed, Taschereau C.J. and Martland J. dissenting.

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

Angus Carmichael, Q.C., for the respondent.

The judgment of Taschereau C.J. and of Martland J. was delivered by

MARTLAND J. (*dissenting*):—This is an appeal, brought by the Crown, pursuant to leave granted by this Court, from a judgment of the Court of Appeal for British Columbia, which reversed the decision of a magistrate, who had imposed a sentence of preventive detention on the respondent pursuant to s. 660 of the *Criminal Code*, which provides:

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

(*b*) he has been previously sentenced to preventive detention.

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

This section deals exclusively with the matter of sentence, as is made clear by the opening words of s. 667(1), which deals with the right of appeal of the accused:

A person who is sentenced to preventive detention under this Part may appeal to the court of appeal. . . .

Before a sentence of preventive detention can be imposed the court must reach a decision on two matters, defined in paras. *(a)* and *(b)* of subs. (1); i.e.,

(a) That the accused is an habitual criminal; and

(b) That because of that fact, it is expedient for the protection of the public that he should be sentenced to preventive detention.

A decision in favour of the accused on each of these matters was the basis of the dissenting judgment of MacQuarrie J., in the Supreme Court of Nova Scotia, in *Mulcahy v. The Queen*[1], which was adopted by this Court[2] when the appeal of the accused was allowed.

These matters are, I think, of importance in considering the first issue raised by the respondent as to the jurisdiction of this Court to hear this appeal.

It is clear that no appeal lies to this Court from a sentence imposed under s. 660 by virtue of the provisions of the *Criminal Code* governing appeals in respect of indictable offences, for such appeals are limited to judgments respecting conviction or acquittal of an indictable offence.

Appeals to this Court, in respect of a sentence under s. 660, have been brought, with leave pursuant to s. 41(1) of the *Supreme Court Act*, which provides:

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.

As my brother Cartwright points out, in the present case, all of the necessary elements of that subsection are here met. The judgment of the Court of Appeal is a final judgment, and it is the judgment of the highest court of final resort in which judgment could be had in this case.

[1] (1964), 42 C.R. 1. [2] (1964), 42 C.R. 8.

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This being so, on what basis can it be contended that this Court lacks jurisdiction? In my opinion the decisions in *Goldhar v. The Queen*[1] and in *The Queen*[1] *v. Alepin Frères Ltée and Clément Alepin*[2] do not preclude an appeal in the present case. Each case was concerned solely with the matter of sentence in respect of an offence imposed in consequence of a conviction of such offence. A sentence under s. 660, while it is made following conviction of an indictable offence, is not imposed as a punishment for that offence, but is imposed because the accused is an habitual criminal and it is expedient that the public be protected from him. In *Parkes v. The Queen*[3], Cartwright J., who delivered the judgment of the Court, said, at p. 135:

> It appears to me that the majority of this Court decided in *Brusch v. The Queen,* (1953) 1 S.C.R. 373, 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, if established, enables the Court to deal with the accused in a certain manner. In so deciding the majority followed the reasoning of the English courts in *Rex v. Hunter,* (1921) 1 K.B. 555, approved by a court of thirteen judges precided over by Lord Hewart L.C.J. in *Rex v. Norman,* (1924) 18 Cr. App. R. 81.

It is, therefore, established that a sentence under s. 660 is not one which is imposed in relation to a charge of an offence or crime, but is a disposition which may be made by the court, if it is expedient for the protection of the public, with relation to a person in a particular status or condition.

Appeals from a sentence under s. 660 have been determined in this Court on a number of occasions, one of the most recent being the *Mulcahy* case previously mentioned, in which Chief Justice Taschereau commenced his judgment with the words: "We are all of the opinion that the appeal against sentence of preventive detention should be allowed . . ."

It is contended that, while an appeal to this Court might lie in relation to the finding of the accused to be an habitual criminal, it could not lie in respect of the question as to whether it was expedient for the protection of the public that he be sentenced. If a finding as to the status of the accused, on the first point, is not a judgment acquitting or convicting or setting aside or affirming a conviction or

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.
[3] [1956] S.C.R. 134.

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acquittal of an indictable offence, within s. 41(3) of the *Supreme Court Act*, as was held in the *Parkes* case, I find it hard to understand how the decision on the second point as to expedience can fall within it. Furthermore, I do not agree that the appeal to this Court respecting matters under s. 660 can be arbitrarily divided in respect of the two items under paras. *(a)* and *(b)* of subs. (1). Any appeal in relation to s. 660 is an appeal from sentence, but it is not within s. 41(3) of the *Supreme Court Act* because, as was said in *Parkes*, it does not relate to conviction or acquittal of an indictable offence, but to a method of dealing with people of a particular status.

Another ground for contending that no appeal lies in the present case is because this appeal is by the Crown, and the Crown is limited, in respect of its right of appeal to the court of appeal, to matters of law, and consequently the general words of s. 41(1) of the *Supreme Court Act* should be narrowed in respect of the nature of this subject-matter. It is said that it would be incongruous to permit an open appeal by the Crown to this Court, when it has only a limited right in the court below.

The Crown's right to appeal to the court of appeal, while limited to a question of law, is absolute, whereas there is no appeal to this Court under s. 41(1) without leave.

The limitation upon the position of the Crown in the court of appeal is only in those cases in which the accused has succeeded in the court of first instance. In a case of that kind, if the Crown's appeal to the court of appeal failed, it is clear that, if it were to obtain leave to appeal to this Court, its appeal, of necessity, could only lie in relation to the question of law which had been determined adversely to it in the court of appeal. Under s. 46 of the *Supreme Court Act*, this Court could only dismiss the appeal or give the judgment which should have been given in the court below, i.e., on a question of law.

In the case of an appeal to the court of appeal by an accused who has been sentenced under s. 660, it would be open to the Crown to raise any ground for contending that the initial decision should be maintained, and in respect of that kind of an appeal the position of the Crown is unrestricted. That being so, I do not find it incongruous that it

should be entitled to seek leave to appeal to this Court on any ground taken by it before the court of appeal.

In the present case, the ground for seeking leave was solely with respect to an important question of law on which it was contended that the Court of Appeal had erred. If the Crown can appeal on a matter of law to the Court of Appeal, and if the accused can seek leave to appeal to this Court upon any ground, I see no basis for limiting the words of s. 41(1) of the *Supreme Court Act* so as to preclude any right of appeal by the Crown to this Court, upon a question of law. To deny such a right is to make it possible for differing applications of s. 660 in different provinces, with no power in this Court to determine the matter. Section 41(1) was a means provided by Parliament to enable this Court to deal with a situation of that kind.

I can, therefore, see no valid reason for reading into s. 41(1) of the *Supreme Court Act* a limitation as to an appeal by the Crown when a right of appeal to this Court by the accused is well recognized.

I am, therefore, of the opinion that this Court does have jurisdiction to entertain the present appeal, leave having been granted.

The decision of the Court of Appeal, that, although the respondent was an habitual criminal, yet it was not expedient for the protection of the public to sentence him to preventive detention, was stated to be based on the proposition that a court, under s. 660, cannot impose that sentence unless there is evidence "on which a magistrate could find beyond a reasonable doubt that it was expedient for the protection of the public to sentence him to preventive detention."

Proof beyond reasonable doubt is the well-recognized standard applied in the criminal law in respect of the establishing of the guilt of an accused person. In my opinion it has no application to the matter of the imposition of sentence. A court, under s. 660, having determined that an accused person is an habitual criminal, is required to exercise its judgment as to whether it is expedient for the protection of the public to impose a sentence of preventive detention. Section 660(1)(*b*) states specifically that this is a matter of opinion. That opinion must be as to expediency for public protection. In my view, a standard which is

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applied in weighing proof of a fact, i.e., guilt of the accused, has no application to the formulation of an opinion as to what is expedient to protect the public.

I would allow the appeal and restore the judgment of the magistrate.

CARTWRIGHT J.:—An account of the proceedings in the courts below is given in the reasons of my brother Ritchie.

On March 15, 1965, an order was made by this Court the operative part of which reads as follows:

> THIS COURT DID ORDER AND ADJUDGE that leave to appeal from the Judgment of the Court of Appeal for the Province of British Columbia pronounced on the 24th day of February, 1965 be and the same is granted.

No question as to the jurisdiction of this Court was raised or considered when this order granting leave was made. The question of our jurisdiction was raised for the first time from the bench during the argument of the appeal.

It is well settled that a person who has been sentenced to preventive detention and whose appeal against that sentence has been dismissed by the Court of Appeal may be granted leave to appeal to this Court under s. 41(1) of the *Supreme Court Act*. On this point it is sufficient to refer to the unanimous judgment of the Court in *Parkes v. The Queen*[1]. As is pointed out by my brother Ritchie, a number of such appeals have been allowed by this Court.

As far as I am aware, subject to something to be said later as to *Robinson's* case, *infra,* the question whether this Court has jurisdiction to grant leave to the Attorney General to appeal to this Court against the dismissal of an application for an order that a person be sentenced to preventive detention has not previously been considered by this Court. The answer to this question depends upon the proper construction of the relevant statutory provisions.

Little assistance is to be found in the comparatively short history of the legislation in this country relating to preventive detention. The predecessors of the group of sections which now form Part XXI of the *Criminal Code* were first enacted by Statutes of Canada, 1947, 11 Geo. VI, c. 55 and

[1] [1956] S.C.R. 134.

were numbered 575A to 575H. Section 575E corresponded to the present s. 667, which is set out in full in the reasons of my brother Ritchie. It was silent as to any right of the Attorney General to appeal. It read as follows:

575E. 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 first alteration in the provisions as to appeal was made when the present *Criminal Code,* 2-3 Eliz. II, c. 51, came into force on April 1, 1955, at which time s. 667 read as follows:

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.

Section 667, in its present form was enacted by Statutes of Canada, 1960-61, 9-10 Eliz. II, c. 43, s. 40.

It is clear that the provisions quoted above deal only with the right of appeal to the Court of Appeal from a decision of the tribunal of first instance. It cannot be said that sub-section (3) of s. 667, providing that "the provisions of Part XVIII with respect to procedure on appeals apply, *mutatis mutandis* to appeals under this section", has the effect of conferring jurisdiction on this Court. Part XVIII deals only with appeals in regard to convictions or acquittals of indictable offences.

Since the decisions of this Court in *Brusch v. The Queen*[1] and *Parkes v. The Queen*[2], it cannot be said that any right of appeal to this Court is conferred by the *Criminal Code.* An order made under Part XXI is neither a conviction nor an acquittal of an indictable offence. If the Attorney General has a right of appeal to this Court it must be found in s. 41(1) of the *Supreme Court Act.* It is clear that if on its true construction subs. (1) confers the right of appeal which the Attorney General seeks to assert that right is not taken

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

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away by the terms of subs. (3) for we are not here concerned with the judgment of any court acquitting or convicting or setting aside or affirming a conviction or acquittal of an indictable offence or of any offence.

Section 41(1) reads a follows:

> 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.

Applying these words to the circumstances of the case before us it appears: (i) that the judgment from which the Attorney General appeals is a final judgment, it finally determines that the sentence of preventive detention imposed upon the respondent by the learned Magistrate is set aside; and (ii) that it is a judgment of the highest court of final resort in the Province of British Columbia in which judgment can be had in this particular case. That being so, the application for leave to appeal made by the Attorney General would appear to be warranted by the literal meaning of the words of the sub-section and *prima facie* this Court would seem to have jurisdiction to entertain the appeal unless it appears by the application of the rules which guide the Court in the interpretation of statutes that Parliament did not intend to confer a right of appeal from a judgment such as that pronounced by the Court of Appeal in this case.

The words of s. 41(1) are general and it is necessary to consider the possible application of the rule expressed in the maxim *"Verba generalia restringuntur ad habilitatem rei vel personae"* (Bac. Max. reg. 10) Broom's Legal Maxims, 10th ed. 438. The maxim was applied in *Cox v. Hakes*[1]. It was held in that case by the House of Lords that the following words in s. 19 of the *Judicature Act,* 36 and 37 Vict., c. 66:

> 19. The said Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order . . . of Her Majesty's High Court of Justice, or of any Judges or Judge thereof

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

did not confer a right of appeal from an order of the High Court directing the discharge of a prisoner on *habeas corpus,* although as was said by Lord Herschell at page 428:

> It cannot be denied that an order for the discharge of a person in custody, such as was made in the present case, is, *prima facie,* an order to which this section applies.

Lord Bramwell, at page 527, concluded his speech with the following sentence:

> I think if an order of discharge is a judgment or order of judicature, and so within the very words of section 19, a limitation must be put upon them to avoid futility, inconvenience, and incongruity which would otherwise result.

The construction of s. 41(1), for which the Attorney General contends in the case at bar would result in an incongruity pointed out in the reasons of my brother Ritchie to which further reference will be made.

I am able to derive little assistance in the solution of the question before us from the judgments of this Court in *Goldhar v. The Queen*[1] or in *The Queen v. Alepin Frères Ltée and Clément Alepin*[2]. They establish only that this Court is without jurisdiction to entertain an appeal, even on a question of law in the strict sense, against a judgment of the Court of Appeal affirming or quashing a sentence imposed following conviction of an indictable offence or of an offence other than an indictable offence; and it is well settled that this Court has jurisdiction to entertain an appeal against the imposition of a sentence of preventive detention. There is something to be said for the view that the Court should have a corresponding jurisdiction to entertain an appeal against an order dismissing an application for the imposition of such a sentence, but in dealing with a similar argument in *Cox v. Hakes, supra,* Lord Herschell said at pages 535 and 536:

> It will be seen that the reasoning which has led me to the conclusion that an appeal will not lie from an order discharging a person from custody under a writ of habeas corpus has no application to an appeal from an order refusing to discharge the applicant. I intend to express no opinion whether there is an appeal in such a case. That question does not arise here, and any opinion expressed upon it would be extra-judicial. I refer

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

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to it only because it was suggested that if there was an appeal in the one case, it was scarcely to be conceived that there should not be an appeal in the other. I do not think so. There would be to my mind nothing surprising if it should turn out that an appeal lay by one whose discharge had been refused, but that there was no appeal against a discharge from custody. It would be in strict analogy to that which has long been the law. The discharge could never be reviewed or interfered with; the refusal to discharge, on the other hand, was always open to review; and although this review was not properly speaking, by way of appeal its practical effect was precisely the same as if it had been.

My brother Ritchie points out that if we should uphold the Attorney General's right of appeal in this case it would have the anomalous result which he describes as follows:

> It would mean that although the Crown is restricted to "any ground of law" when appealing to the Court of Appeal of a province against the dismissal of an application for preventive detention by a trial judge, it can obtain access to this Court on unrestricted grounds when appealing from a judgment of the Court of Appeal which has the same effect.

The unlikelihood of Parliament intending such a result appears to me to be a sufficient reason for applying the maxim quoted above and holding that power to grant the right of appeal sought by the Attorney General in this case is not conferred by the general words of s. 41(1) although on their literal meaning they would appear wide enough to comprehend it.

Before parting with the matter I wish to refer to the case of *The King v. Robinson (or Robertson)*[1], which, on its face, appears inconsistent with the conclusion at which I have arrived. The respondent in that case was found to be a habitual criminal and was sentenced by Whittaker J. to preventive detention. On appeal to the Court of Appeal for British Columbia[2] the sentence of preventive detention was set aside. The Attorney General applied to a single judge of this Court under s. 1025 of the *Criminal Code* then in force for leave to appeal on a question of law. Leave was granted and the full Court allowed the appeal, set aside the judgment of the Court of Appeal and referred the matter back to that Court to deal with other grounds which had been raised in the notice of appeal but which the Court had found it unnecessary to consider in view of its decision on the point

[1] [1951] S.C.R. 522, 12 C.R. 101, 100 C.C.C. 1.
[2] (1950), 2 W.W.R. 1265, 11 C.R. 139, 99 C.C.C. 71.

of law. I was a member of the Court which heard the appeal and took part in the judgment allowing the appeal of the Attorney General. I have confirmed my recollection by examining the record and consulting the Judge who gave leave and it is clear that our jurisdiction was not questioned at any stage of the proceedings in this Court. The Court and all counsel concerned appear to have proceeded on the view that an appeal to this Court lay as if the finding that the respondent was a habitual criminal was tantamount to his conviction of an indictable offence. This view may have been induced by the following expressions found in the sections then in force which no longer appear in Part XXI: in s. 575 C(3) "unless he thereafter pleads guilty to being a habitual criminal"; in s. 575 C.(4) "A person shall not be tried on a charge of being a habitual criminal unless"; in s. 575 E, "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"; and in s. 575 G(1) "The sentence of preventive detention shall take effect immediately on the conviction of a person on a charge that he is a habitual criminal".

It is, I think, a tenable view that under the wording of the relevant sections then in force the procedure followed in *Robinson's* case was correct. The question of a right of appeal to this Court was not discussed in *Brusch v. The Queen, supra,* and by the time *Parkes v. The Queen, supra,* was decided Part XXI had been enacted in substantially its present form. In view of the changes in wording made when the new Code came into force and the decision of this Court in *Parkes v. The Queen, supra,* it is my opinion that *Robinson's* case cannot now be regarded as an authority for the existence of jurisdiction in this Court to entertain an appeal by the Attorney General from a judgment of a Court of Appeal setting aside a sentence of preventive detention.

I would dispose of the appeal as proposed by my brother Ritchie.

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

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RITCHIE J.:—This is an appeal brought at the instance of Attorney General of British Columbia and with leave of this Court from a judgment of the Court of Appeal for British Columbia. The order for judgment of that court reads, in part, 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.

No appeal has been asserted from the finding that the respondent, Robert MacDonald is an habitual criminal and the Crown seeks to confine its appeal to that part of the judgment which allowed the appellant's appeal from the sentence of preventive detention imposed on him by Magistrate Cyril White of Vancouver on December 29, 1964.

Robert MacDonald was tried and convicted before Magistrate Jackson on the charge that he "unlawfully did commit theft of one case containing 50 cartons of DuMaurier cigarettes of a value in excess of $50.00 . . ." and for this crime he was sentenced to imprisonment for a term of one year. Having regard to the respondent's past criminal record, an application was made with the consent of the Attorney General of British Columbia for the imposition of a sentence of preventive detention in lieu of the sentence imposed upon him by Magistrate Jackson.

Applications for preventive detention are governed by s. 660 of the *Criminal Code* which reads as follow:

> 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 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.

It is to be observed that the finding that an accused is an habitual criminal is a necessary prerequisite to the imposition of a sentence of preventive detention but that it does not result in the imposition of such a sentence unless the court is of opinion that it is expedient for the protection of the public that it should be imposed. As has been indicated, the only question raised on this appeal is whether a sentence of preventive detention should have been imposed in the present case.

The only provision in the *Criminal Code* for an appeal from the disposition of an application made under s. 660 is contained in s. 667 and it was pursuant to the provisions of this section that the respondent appealed to the Court of Appeal of British Columbia. This section reads as follows:

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.

(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.

(2a) On an appeal against a sentence of preventive detention the court of appeal may

(*a*) quash such sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or

(*b*) dismiss the appeal.

(2b) On an appeal against the dismissal of an application for an order under this Part the court of appeal may

(*a*) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of preventive detention, or

(*b*) dismiss the appeal.

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(2c) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.

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

Under this section the right of the Attorney General to appeal against the dismissal of an applicaiton for preventive detention is strictly limited to "any ground of law" and it is to be observed also that neither the Crown nor the accused is given any right under the *Criminal Code* to appeal to the Supreme Court of Canada from the disposition made of such an application by the Court of Appeal of a province. It is contended, however, on behalf of the Attorney General of British Columbia that an appeal lies to this Court under the provisions of s. 41 of the *Supreme Court Act* which reads, in part, a follows:

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.

* * *

(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.

Counsel for the appellant concedes that it has been decided in the case of *Goldhar v. The Queen*[1] that criminal offences and sentences imposed therefor are excluded from the operation of s. 41(1) by the terms of s. 41(3), but he contends that a sentence of preventive detention is imposed as a result of a finding that the accused has the status of an habitual criminal which this Court has held not to be a criminal offence (see *Brusch v. The Queen*[2]). It is therefore argued that the judgment of the Court of Appeal setting aside the sentence of preventive detention is unaffected by s. 41(3) and is a judgment of the highest court of final resort in a province determining the rights of an individual and

[1] [1960] S.C.R. 60, 31 C.R. 374, 125 C.C.C. 209.
[2] [1953] 1 S.C.R. 373, 16 C.R. 316, 105 C.C.C. 340, 2 D.L.R. 707.

accordingly a proper subject for appeal under section 41(1).

There have been a number of cases in this Court in which leave to appeal has been granted pursuant to s. 41(1) from the granting of an application for the imposition of a sentence of preventive detention under s. 660, but each of these cases involved an appeal from the finding that the person seeking leave to appeal was an habitual criminal, and that finding was in each instance set aside with the result that the sentence of preventive detention for which it was a prerequisite was also set aside. As has been indicated, it is upon the ground that the finding that a man is an habitual criminal is a determination of status and not a conviction of a criminal offence that leave to appeal has been granted in the past and counsel were unable to cite any case except the present one in which the finding of status was not in issue and the entire appeal has been limited to the question of sentence.

Reference was made to the case of *Mulcahy v. The Queen*[1] where the judgment of this Court is reported as follows:

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

It must be noted, however, that in that case MacQuarrie J. had concluded his reasons for judgment by saying:

> 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 in Dorchester Penitentiary for the substantive offence".

The italics are my own.

It is true that the finding of the appellant's status in the present case was not a conviction of a criminal offence, but the sentence of preventive detention imposed by Magistrate White was "in lieu of the sentence of one year imposed earlier upon the said Robert Cecil MacDonald . . ." upon his conviction for an indictable offence. 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,

[1] (1964), 42 C.R. 1 and 8.

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but it was the conviction of an indictable offence which afforded the 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.*

The effect of the *Goldhar* case is summarized in the judgment of Taschereau J., as he then was, in *Paul v. The Queen*[1], where he says at 457 speaking of s. 41(3):

> In matters of indictable offences, it confers no jurisdiction on this Court, and we must find in the *Criminal Code* the rules that govern such appeals. In summary matters, on the other hand, jurisdiction to appeal to this Court is given in s. 41(3). 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 a sentence imposed by the Courts below. In that case it was stated by Fauteux J. with whom all the members of the Court agreed, Cartwright J. dissenting, that in order to determine if a convicted person could appeal against a sentence in a matter of indictable offence, it was not permissible to look to s. 41(1) for the authority to intervene, but only in the *Criminal Code* which does not permit an appeal against a sentence.

In the recent case of *Her Majesty the Queen v. J. Alepin Frères Ltéé and Clément Alepin*[2], the Crown sought to appeal the quashing of a sentence by the court below on jurisdictional grounds and Fauteux J., speaking on behalf of the Court, had occasion to comment on the effect of s. 41(1) and 41(3) of the *Supreme Court Act,* saying:

> 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 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 *Goldhar 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

[1] [1960] S.C.R. 452, 34 C.R. 110, 127 C.C.C. 129.
[2] [1965] S.C.R. 359, 46 C.R. 113, 3 C.C.C. 1, 49 D.L.R. (2d) 220.

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.

The italics are my own.

As has been pointed out, the *Criminal Code* makes express provision under s. 667 for appealing to the court of appeal of a province from the disposition made by a trial judge of an application for preventive detention and by s. 667(2) the Attorney General is limited to "any ground of law" in appealing from the dismissal of such an application. If counsel for the appellant were right in his contention that an appeal can be had to this Court under s. 41(1), at the instance of the Crown, from an order of the court of appeal setting aside a sentence of preventive detention, it would mean that although the Crown is restricted to "any ground of law" when appealing to the Court of Appeal of a province against the dismissal of an application for preventive detention by a trial judge, it can obtain access to this Court on unrestricted grounds when appealing from a judgment of the Court of Appeal which has the same effect. I cannot think that Parliament intended such an anomaly to result from the provisions of s. 667(2) of the *Criminal Code* and s. 41(1) of the *Supreme Court Act*.

The limitation to "any ground of law" of the right of the Attorney General to appeal to the Court of Appeal was first enacted by Chapter 43 of the *Statutes of Canada*, 1960-61, and s. 667(2) in its present form has not been previously considered by this Court.

In view of the above, I am of opinion that this Court is without jurisdiction in the circumstances and I would accordingly quash this appeal.

Appeal quashed, TASCHEREAU C.J. *and* MARTLAND J. *dissenting.*

Solicitor for the appellant: R. D. Plommer, Vancouver.

Solicitor for the respondent: A. Carmichael, Vancouver.