HER MAJESTY THE QUEEN .....APPELLANT;

AND

SIDNEY KEITH NEIL .....RESPONDENT.

1957

*June 10, 11
**Oct. 1

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Criminal sexual psychopaths—Sufficiency of evidence—Whether accused "likely" to act as set out in the Criminal Code, 1953-54 (Can.), c. 51, s. 659(b)—Meaning of "inflict"—Validity of legislation.

The Crown appealed from the reversal of a finding by a trial judge that the respondent was a criminal sexual psychopath.

Held (Taschereau and Locke JJ. dissenting): The appeal should be dismissed.

Per Kerwin C.J. and Abbott J.: It was proved that the respondent had shown "a lack of power to control his sexual impulses", and proof that he was likely to repeat his conduct would have brought him within the definition in s. 659(*b*) of the *Criminal Code*. It was possible to "inflict" evil, in the sense of causing another person to suffer or incur it, by mere persuasion and without any use of force or coercion. But it was not shown that he was likely to repeat his conduct; the proper conclusion on the evidence was that such a repetition was improbable, and one essential element of the definition was therefore not satisfied.

Per Rand J.: Parliament intended by the definition in s. 659(*b*) to describe a condition of impulse that in certain circumstances of normal control would become uncontrollable. The medical evidence in this case was only to the effect that the respondent's impulses were "uncontrolled or uncontrollable" and the medical witnesses further said that normally a man in possession of his faculties (which the respondent was) could control his criminal sexual impulses. It had not been shown, as was essential, that the respondent's impulses were uncontrollable, rather than merely uncontrolled.

Per Cartwright J.: The primary meanings of the word "inflict" involved an element of force, violence or coercion and the word was not apt to describe conduct consisting solely of temptation and persuasion. It was therefore not shown on the evidence that the respondent, even assuming that he was likely to repeat his offences, was "likely to . . . inflict . . . evil" on other persons. Further, the evidence did not indicate that the respondent was likely to repeat acts of the kind in respect of which he had been convicted.

Per Taschereau and Locke JJ., *dissenting*: The long course of criminal conduct of the respondent inflicted "injury . . . or other evil" upon his victims within the meaning of s. 659(*b*) and there was ample evidence on which the trial judge might properly find that it was likely that he would in the future act in the same manner with other children. The finding of the trial judge should therefore be restored.

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*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Nolan JJ.

**Nolan J. died before the delivery of judgment.

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Per Kerwin C.J. and Rand, Locke, Cartwright and Abbott JJ.: A psychiatrist called as a witness on a hearing under s. 661(1) should not be asked to give his opinion upon the very question that is to be determined by the Court, *viz.*, whether or not the accused is a criminal sexual psychopath.

Per Kerwin C.J. and Cartwright and Abbott JJ.: The trial judge, on the hearing of an application under s. 661(1) of the *Criminal Code*, has not only the right but the duty to consider the evidence given on the substantive charges against the accused, and that evidence should form part of the record on an appeal from his decision.

Constitutional law—Criminal law and procedure—Validity of the Criminal Code, 1953-54 (Can.), c. 51, ss. 659-667.

Sections 659 to 667 of the *Criminal Code* are *intra vires* of the Parliament of Canada, being legislation in relation to "the Criminal Law, . . . including the procedure in Criminal Matters" within s. 91(27) of the *British North America Act*.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta, reversing a judgment of Boyd McBride J. finding the respondent to be a criminal sexual psychopath.

H. J. Wilson, Q.C., and *J. J. Frawley, Q.C.*, for the appellant.

M. E. Shannon, for the respondent.

D. H. W. Henry, Q.C., and *M. M. de Weerdt*, for the Attorney General of Canada, intervenant.

The judgment of the Chief Justice and Abbott J. was delivered by

THE CHIEF JUSTICE:—By leave of this Court the Attorney General of Alberta appeals from a decision of the Appellate Division of the Supreme Court of Alberta setting aside a finding of Mr. Justice McBride under s. 661 of the *Criminal Code*, 1953-54 (Can.), c. 51, that the respondent was a criminal sexual psychopath. The appeal to the Appellate Division was under s. 667 of the Code and the leave to appeal to this Court was granted under s. 41 of the *Supreme Court Act*, R.S.C. 1952, c. 259, as amended by 1956, c. 48, s. 3, so that we are not restricted to questions of law. Section 659(*b*) of the Code defines criminal sexual psychopath as

> a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Mr. Justice McBride had presided over the trial with a jury of the respondent on two counts of an indictment charging:

1. That he, at Calgary, in the Judicial District of Calgary, on or about the 1st day of September, A.D. 1955, being a male person, did commit an act of gross indecency with Hugh Ernest Helmer, another male person, contrary to the Criminal Code.

2. That he, at Calgary, in the Judicial District of Calgary, on or about the 31st day of March, A.D. 1956, being a male person, did commit an act of gross indecency with George Melville Gibson, another male person, contrary to the Criminal Code.

The respondent was convicted on both counts and, pursuant to s. 661(1) of the Code, the Court heard evidence as to whether the respondent was a criminal sexual psychopath and made the finding in question. No appeal was taken from the conviction on the two counts and on the appeal by the respondent to the Appellate Division from the finding and sentence of preventive detention no application was made by the Crown to have the record of the trial proceedings before that Court, which thereupon proceeded to hear the appeal on the record of the application made under s. 661(1). Oral reasons were delivered as follows:

The Court feels, with our brother Mr. Justice Johnson in doubt, that the appeal should be allowed and the conviction quashed, on the grounds that the Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

The trial judge was, of course, not only entitled but obliged to consider the evidence adduced at the trial on the two counts and that should have been produced before the Appellate Division. It is in the record before this Court and we have had the advantage of argument of counsel with reference as well to it as to the proceedings under s. 661(1).

The details appear elsewhere and need not be repeated. Upon a consideration of them and of all the evidence I am satisfied that it was proved that the respondent "has shown a lack of power to control his sexual impulses". In my opinion the evidence of his actions with young boys and his own testimony on the application under s. 661(1) makes that clear. As to the last part of the definition, "and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person",—if, because of his lack of power to control his sexual impulses, he is likely to repeat the actions referred to, then the mere fact that he would not use force upon the other party is not sufficient to take

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it out of the phrase. Parliament has distinguished "attack", which indicates force, from inflicting injury, pain or other evil. One may inflict, that is, cause another to suffer or incur, something that is inherently evil by persuading him without the use of force to commit the act, the effect of which may remain with him for many years. I am unable to restrict the meaning of the words Parliament has chosen to carry out its intention to those cases where coercion is used.

There remains the question whether the respondent is *likely* to inflict that evil upon another in the future. The disease is a terrible one and requires treatment, but the penalty imposed is severe. The sentence of preventive detention is to be served in a penitentiary. By s. 664 it does not commence until the two years shall have been served, although the Governor in Council may commute the latter to a sentence of preventive detention. By s. 666 where a person is in custody under a sentence of preventive detention, the Minister of Justice shall, at least once in every three years, 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.

I have the greatest sympathy with the object desired to be attained by Parliament, but each case must be decided on its own circumstances. After careful consideration of these, I have come to the conclusion, by virtue of the powers conferred as a result of leave having been given to appeal to this Court under s. 41 of the *Supreme Court Act,* that the respondent is not *likely* to repeat the acts with young boys of which he has been found guilty, or similar acts, and, therefore, he is not *likely* to inflict evil on any person in the future. Undoubtedly the trial judge had an advantage in seeing and hearing the respondent who gave evidence upon the application to declare him a criminal sexual psychopath, but on that application the two doctors were asked by counsel for the Crown questions that should not have been put and gave evidence that should not have been received. The nature of these questions and answers appears elsewhere. Even though the application under s. 661(1) was made to a judge alone, the fact that the doctors gave their opinion upon the very question to be determined by the

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Court makes it impossible for me to read the learned judge's reasons as showing that he came to his conclusion without being swayed by these opinions.

For this reason I am, with respect, unable to agree with him. Even if s. 592(1)(*b*)(iii) applies to appeals under s. 667 and if "procedure on appeals" in subs. (3) of s. 667 is applicable, not only am I not satisfied that no substantial wrong or miscarriage has occurred, but I have reached the conclusion that the Appellate Division was right in setting aside his finding.

At the argument, and without calling upon counsel for the Attorney General of Canada, we disposed of the respondent's contention that the sections were *ultra vires* of Parliament on the short ground that they were legislation in relation to criminal law, including procedure in criminal matters, within head 27 of s. 91 of the *British North America Act*.

The appeal should be dismissed.

TASCHEREAU J. (*dissenting*):—I agree with my brother Locke that this appeal should be allowed, and the order of the Court of Appeal set aside.

I do not find it necessary, however, for the determination of this case, to give any opinion as to the legality of the evidence of Drs. Michie and Carnat, who testified that the respondent was a criminal sexual psychopath who had a lack of power to control his sexual impulses, and was likely to inflict injury, pain, *or other evil* on any person.

The other evidence adduced, and particularly the continued misconduct of the respondent, was, I think, sufficient to justify the trial judge in reaching the conclusion at which he arrived.

The appeal should be allowed.

RAND J.:—This appeal calls for the interpretation of the definition, in s. 659(*b*) of the *Criminal Code*, of a criminal sexual psychopath. The definition is in these words:

> "Criminal sexual psychopath" means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

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The accused respondent was found by the trial judge to come within that definition but that finding was reversed in the Appellate Division. The facts have been set forth by my brother Cartwright and it will not be necessary for me to deal with them. The provision is new, and involving, as it may, the deprivation for years of a person's liberty, it calls for a careful examination of its terms and the considerations which lie behind it.

The essence of the defence is that what the definition describes is one who, in circumstances within the range of normal control over sexual impulses or tendencies, has no control; that within that range his desires are such as may seek satisfaction to the point of physical attack or its equivalent on another person. Sexual desires and impulses express themselves in a gamut of modes, and that fundamental characteristic of human beings must be kept in mind as the background to gross manifestations. By a loose sense of the word "lack", the definition is broad enough to include all the degrees of demand for gratification within or beyond the point of government; but the word may also signify the absence of control within that range as the essential factor; and applying the long-established rule for interpreting statutes creating criminal offences, the stricter and more limited scope must be attributed to the definition. In each case the distinctive features pertinent to that issue must be given the fullest enquiry and the conclusion reached beyond a reasonable doubt.

The question of the elements of control and their presence or absence becomes, then, of fundamental importance. In this, the will in action which dominates such emotional pressures, the act of volitional rejection, is associated with ideas and feelings; they may be moral, ethical, religious or of any other character, and the resulting action executes or fulfils one or more of them. The criminal psychopath is afflicted with a constitutional endowment which in the particular respect does not provide that strength of restraint that keeps within the band of normal behaviour; and the critical degree lies at the point when the forces acting present a danger sufficiently great to be brought under social control. Here that point is argued to be where uncontrollability is present as abnormality.

Parliament has dealt with the dereliction of indecency in the extreme manner in s. 149 of the *Criminal Code,* by which the offence as of April 1, 1953, was extended to embrace any two persons. Under that provision the accused was found guilty and sentenced to a term of two years in prison.

In the light of all this, I cannot but think that Parliament, by the definition, intended to describe a condition of impulse that in certain circumstances of normal control would become uncontrollable. The language applies to persons of both sexes and all ages. In matters involving boys in their 'teens, as here, there is in fact a consent on their part and that becomes relevant to the determination of controllability. As was put to counsel, if at any stage of the approach, upon a boy's turning away or resenting suggestions made, the accused had at once desisted, how could it be said that he was a victim of uncontrollable impulses? I do not think it can be. Dr. Michie spoke of the homosexual "drive" of the accused as either "uncontrolled or uncontrollable" (and these would, in the particular circumstances of the case, seem to distribute the alternatives) and that he (the doctor) had always "had the feeling that the person who is not mentally disturbed can control his impulses. All do not agree with that." Dr. Carnat agreed that to a "great extent" a man who has possession of his faculties can control his "criminal sexual impulses". He was of the opinion that the accused was sane and had possession of his mental faculties; and that the trial and exposure to which he had been subjected could quite possibly act as a permanent deterrent of the practices indulged in.

The opinion of both psychiatrists that the accused was a criminal sexual psychopath was on their own interpretation of the definition, an interpretation which was not elaborated or even attempted to be stated to them but which, on a reading aloud of the definition, was assumed by both, and evidently by the trial judge and counsel prosecuting, to be of such plain and understandable simplicity as not to require any examination or analysis. Dr. Carnat agreed with every "material part" of the evidence of Dr. Michie "relevant to this case", and I take this to include the statement that the "drive" was either "uncontrolled or

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uncontrollable". The impulse was patently "uncontrolled" in the sense that it was given expression; but the vital question was whether, at the critical time, it was uncontrollable. On this we have no confirmatory medical opinion which s. 661 requires.

I should repeat, by way of emphasis, that the section applies to sexual manifestation in relation to both sexes and all ages. It is not merely a protection to young persons. It may be that it would be socially desirable to subject victims of this weakness to indefinite detention merely for a tendency that involved young boys. That can easily be understood. But the statute, in my opinion, does not go so far: such an extension of criminality and magnitude of punishment have not been deliberated upon by Parliament; and the Courts are not the constitutional organs to enter upon questions of legislative policy.

The constitutionality of the statute was raised but I cannot think that its validity can be seriously challenged.

I would, therefore, dismiss the appeal.

LOCKE J. (*dissenting*):—We were informed upon the argument of this matter that the evidence taken at the trial of the respondent upon the two offences of which he was found guilty by the jury was not made part of the record considered by the Appellate Division.

The oral reasons delivered in the Appellate Division for setting aside the finding that Neil was a criminal sexual psychopath simply say that:

> The Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

With respect, the meaning of this appears to me to be obscure .

Subsection (2) of s. 661 of the *Criminal Code* requires that on the hearing of an application under subs. (1) the Court "may hear any evidence that it considers necessary, but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General".

Dr. T. C. Michie and Dr. Morris Carnat, whose qualifications are unquestioned, gave evidence on the application, the former having been nominated by the Attorney General. Dr. Michie had heard all of the evidence given at the trial before the jury and on the application. Dr. Carnat had

heard all of that evidence and, in addition, had examined Neil for some one and one-half hours while he was in custody to assist him in forming an opinion as to his mental state.

Paragraph (*b*) of s. 659 defines "criminal sexual psychopath" as meaning

> a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Offences of the nature described in s. 661(1)(*a*)(iv),(v) and (vi) suggest mental infirmity and it was presumably for this reason that subs. (2) requires that in deciding such applications the Court should hear the opinions of at least two psychiatrists as to the sanity of the convicted person and as to whether he is likely to attack or otherwise inflict injury, pain or other evil on any person.

The decision as to whether Neil had shown by the long-continued course of misconduct in sexual matters, proven at the trial and on the application, a lack of power to control his sexual impulses was, of course, for the judge alone. Counsel appearing for the Crown, however (who did not appear on the argument in this Court), asked both Drs. Michie and Carnat if they considered Neil to be a criminal sexual psychopath and both answered in the affirmative. No objection was made by counsel for the convicted man but the question was clearly improper and should not have been permitted.

The oral reasons given by McBride J. for his finding show clearly, in my opinion, that that learned judge determined the question on his own view of the effect of the evidence and that the evidence of the doctors was treated by him as opinion evidence only as to the man's sanity, his power to control his sexual impulses and the likelihood of his attacking or otherwise inflicting pain or other evil on any person.

Had the matter been one for determination by a jury it would be my opinion that the improper admission of this evidence would have necessitated a rehearing for the reasons stated by Sir Charles Fitzpatrick C.J. in *Allen v. The King* (1), and by Lord Herschell L.C. in *Makin et ux. v. The Attorney-General for New South Wales* (2). In the

(1) (1911), 44 S.C.R. 331 at 339, 18 C.C.C. 1.

(2) [1894] A.C. 57 at 69.

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present case, where the matter was one for the decision of a single judge, and in the circumstances above stated, I would apply s. 592(1)(*b*)(iii), since, in my opinion, no wrong or miscarriage of justice has occurred.

I consider that the long course of criminal conduct of this respondent inflicted "injury . . . or other evil" upon the children who were his victims within the meaning of that language in s. 659(*b*). There was ample evidence upon which the learned trial judge might properly find that it was likely that he would in the future act in like manner with other children.

For the reasons so clearly stated by McBride J., I would allow this appeal and set aside the order of the Appellate Division.

CARTWRIGHT J.:—On May 24, 1956, the respondent was convicted after trial before Boyd McBride J. and a jury on the two following counts:

1. That he, at Calgary, in the Judicial District of Calgary, on or about the 1st day of September, A.D. 1955, being a male person, did commit an act of gross indecency with Hugh Ernest Helmer, another male person, contrary to the Criminal Code.

2. That he, at Calgary, in the Judicial District of Calgary, on or about the 31st day of March, A.D. 1956, being a male person, did commit an act of gross indecency with George Melville Gibson, another male person, contrary to the Criminal Code.

Following these convictions, and before sentence was passed, counsel for the Crown made application to the learned trial judge, pursuant to s. 661(1) of the *Criminal Code,* to hear evidence as to whether the respondent was a criminal sexual psychopath. Evidence was heard accordingly and at the conclusion of the hearing the learned trial judge found the respondent to be a criminal sexual psychopath, sentenced him to two years' imprisonment on each of the counts set out above, the sentences to run concurrently, and also imposed a sentence of preventive detention.

The respondent did not appeal from the convictions of the two substantive offences but did appeal against the sentence of preventive detention, pursuant to s. 667(1) of the Code.

On October 10, 1956, the Appellate Division, Johnson J. *dubitante,* set aside the finding that the respondent was a criminal sexual psychopath and the sentence of preventive detention.

On November 26, 1956, the appellant was granted leave to appeal to this Court from the judgment of the Appellate Division. Leave having been granted pursuant to s. 41(1) of the *Supreme Court Act,* R.S.C. 1952, c. 259, as amended by 1956, c. 48, s. 3, our jurisdiction is not restricted to questions of law.

Prior to the appeal coming on for hearing, the respondent gave notice to the Attorney General of Canada that he questioned the validity of ss. 659 to 667 of the *Criminal Code* and leave to intervene was granted to the Attorney General. At the hearing the Court was unanimously of opinion that these sections were *intra vires* of Parliament as being legislation in relation to the criminal law, including the procedure in criminal matters, within s. 91, head 27, of the *British North America Act,* and did not find it necessary to call upon counsel for the Attorney General of Canada.

We were informed by counsel that the Appellate Division was not furnished with the transcript of the evidence given at the trial of the two substantive offences but this was included in the appeal case in this Court. In my opinion the learned trial judge was entitled, and indeed required, to consider that evidence in addition to the evidence given before him on the application under s. 661(1).

As the definition of "criminal sexual psychopath" in s. 659(*b*) of the Code necessitates a consideration of the respondent's "course of misconduct in sexual matters", it is desirable to set out in chronological order the facts regarding that misconduct which are disclosed by the evidence.

There is no direct evidence as to the age of the respondent but he was teaching in a high school in 1937. The respondent did not give evidence on the trial of the substantive offences but did on the hearing under s. 661(1). He stated that he first remembered "homosexual activities" taking place in his own life when he was about 13 or 14. He was not asked to say what these activities were. Two witnesses were called who had associated with the respondent in the years 1938 and 1939. The first, Nares, gave evidence of no importance. The second, Stapley, stated (i) that the respondent had shared a bed with him and had handled his penis and that he had done the same to the respondent; (ii) that the respondent had committed sodomy upon him

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on several occasions; and (iii) that he and the respondent had engaged in acts of *fellatio* with each other on several occasions. The respondent explicitly denied statements (ii) and (iii) and stated that the thought of such actions was repugnant to him. He was not cross-examined and no finding of fact was made by the learned trial judge in regard to these two statements. In these circumstances counsel for the appellant stated in answer to a question from the bench that he did not ask the Court to proceed on the basis that either of these statements (ii) and (iii) was true, and in my opinion he was right in taking this position.

Apart from the respondent's own testimony, to be mentioned later, there is no evidence of other sexual misconduct until the years 1954, 1955 and 1956. During these years the respondent engaged in indecent acts with Gibson and Helmer and with two other youths in regard to whom no charges were laid. The course of conduct described was substantially the same in all cases and culminated in what counsel for the appellant described as "mutual manual masturbation". At the time of these occurrences the ages of the youths concerned varied from 14 to 17 years.

The testimony of the respondent, mentioned above, from which it might be inferred that there were other similar acts, is as follows:

> Q. Now when do you first remember homosexual activities taking place in your own life? I mean, how far back does it go? A. I would think when I was about 14 or 13.
>
> Q. Now, can you tell the Court how frequent those episodes have occurred in your life? Has it been a continuous thing, or have they broken off? A. They have broken off from time to time. The only times that there has been any pattern, if you could call it such, has been when the pressure of school work or some other such thing has forced me into the company of students whose problems actually became part of my own pattern of life, you might say. That is, in all cases I have tried to help whenever I could. In the case of the two boys that are mentioned in the indictment here, it seemed to me that they both had real problems, problems that were real to them, and I was trying to help build those people up mentally, to give them more confidence in themselves, and give them a better physique in order that they could appear to better advantage among other fellows. In the case of months of close association with them, then this very pattern grew out of it.
>
> Q. You mean, those homosexual practices? A. Yes, but there has never been any, as it were, impulse that has grown up suddenly or anything like that.

Questioned as to the future the respondent gave the following evidence:

Q. What do you have to say as to the likelihood of ever indulging in these homosexual practices in the future? A. I began to say, Mr. Shannon, that I can state unequivocally that it could never possibly happen again. For the first time in my life I have seen how this looks to other people. It is the first time in my life I have ever been confronted with public opinion and I can only say this, that under no circumstances would it ever happen again. In the first place, I voluntarily sent my school certificate to Edmonton to have it cancelled by my request so that at no time in the future could I be associated with schools or with young people. Furthermore, I have no intention of at any time associating with them, and the only reason it has happened in the past is where that association has been possible. As I see these actions now through other people's eyes I can merely say it will never happen again, it simply could not, my whole attitude, I think, has been entirely changed.

Q. What do you feel has been effect of the trial and your conviction on your attitude in this regard? A. It has been a tremendous shock, it was from the very first time, as a matter of fact, that Detectives Gilkes and Evans spoke to me in the morning of April 3rd, but the shock has been accumulative ever since and culminated as it has today. It has been a tremendous upheaval, but I will also say this, in those two months that have elapsed in between I have given very serious thought to my mental condition and all circumstances pertaining to this trial and to my past actions. And I say that not merely under oath, but with the deepest sincerity with which I am capable.

Q. Have you ever been in trouble with the law before? A. I have not.

Q. You have no previous convictions of any kind? A. No.

Q. How important do you feel the steps are that you have taken so that you will not be associated with young boys again, how important do you feel that will be? A. It means a complete reorientation of my life. I have always been associated with schools. From this time on I will not have any association with schools, Scout Troops or anything else. I intend, as a matter of policy, regardless of where I am, to keep entirely disassociated with anything to do with young people in any form.

Q. You said previously, as I understood your evidence, it was only through a period of time of associating with young people that those practices had developed, is that right? A. That is correct, yes.

Up to this point I have been dealing with the factual evidence. Its effect may be summarized as follows. From the age of 13 or 14 the respondent has had a recurring abnormal desire to indulge in homosexual practices. Those practices have been uniform; the other party concerned has been a youth between 14 and 17 with whom the respondent had for some time previously to their commencement been in close association as a teacher. In each case a considerable period of time has been taken in inducing the youth to participate in the practices. There is no suggestion of the

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respondent ever having employed anything in the nature of force. The word "seduction", used by Dr. Michie, aptly describes his method.

In allowing the appeal the Appellate Division gave brief oral reasons as follows:

> The Court feels, with our brother Mr. Justice Johnson in doubt, that the appeal should be allowed and the conviction quashed, on the grounds that the Crown has failed to bring the evidence of the psychiatrists within the definition of criminal sexual psychopath.

The two main grounds on which it was sought to support this judgment are (i) that even if the evidence supports the view that on regaining his liberty the respondent is likely to continue the same course of criminal conduct this does not bring him within the words of the definition in s. 659(*b*) "a person who . . . is likely to attack or otherwise inflict injury, pain or other evil on any person", and (ii) that the evidence does not warrant a finding that the respondent has shown such a lack of power to control his sexual impulses as makes it likely that he will in the future be unable to control them and be guilty of the same sort of conduct as that of which he has been convicted.

The validity of the first ground depends upon the proper construction of the definition in s. 659(*b*), and that of the second upon the effect of the evidence.

After anxious consideration I have reached the conclusion that Mr. Shannon is right in the first of the two submissions mentioned. S. 659(*b*) reads as follows:

> "criminal sexual psychopath" means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who as a result is likely to attack or otherwise inflict injury, pain or other evil on any person.

Assuming for the purposes of this branch of the matter that the course of misconduct in sexual matters pursued by the respondent has shown a lack of power on his part to control his impulses to engage in homosexual practices of the sort of which he has been convicted and that, therefore, when set at liberty he is likely to engage in similar practices, the question is whether this shows him to be "likely to attack or otherwise inflict injury, pain or other evil on any person". On the evidence there is no room for the suggestion that the respondent has ever attacked or is ever likely to attack anyone, and in the course of his full and helpful argument Mr. Frawley disclaimed any suggestion

that the respondent had used, or was likely to use, anything in the nature of force or compulsion to bring about the gratification of his abnormal desires. The submission of counsel for the appellant was that, on the assumption made at the opening of this paragraph, the respondent "is likely to . . . inflict . . . evil" on other youths. To persuade a youth to participate in acts of gross indecency is in itself a crime and there is no need to expatiate on the heinousness of such conduct; but the person who so persuades a youth is causing him to do evil rather than inflicting evil upon him. The primary meanings of the word "inflict", given in the Shorter Oxford Dictionary, are "to lay on as a stroke, blow or wound; to impose; to cause to be borne". In my opinion, neither of the verbs "to attack" or "to inflict" is apt to describe conduct, however evil in its ultimate purpose, which contains no element of force, violence or coercion but consists solely of temptation and persuasion.

I have reached this conclusion on the construction of the words of the definition, but it appears to me to be strengthened by a consideration of the evil which the enactment of the sections dealing with criminal sexual psychopaths was intended to remedy. The purpose of the enactment appears, from the related sections read as a whole, to be to protect persons from becoming the victims of those whose lack of power to control their sexual impulses renders them a source of danger; and the danger envisaged is, I think, that of coercive conduct resulting in the active infliction of pain, injury or other evil on the victim, not merely the persuading or seducing of another to participate in sexual misconduct. This view is also, in my opinion, supported by a consideration of the drastic nature of the preventive measure provided, that is, incarceration which may continue for life.

Having reached the above conclusion as to the meaning of the definition, it follows that I would dismiss the appeal, but I propose to deal also with the second main ground mentioned above on which it was sought to support the judgment of the Appellate Division.

The reasons of the Appellate Division are susceptible of the interpretation that, in their view, the evidence does not support a finding that the respondent has shown such a lack of power to control his sexual impulses as to render it

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likely that he will in the future commit further criminal acts of the sort of which he has been convicted. I do not find it necessary to decide whether the words in the definition "a lack of power to control" mean, as was submitted for the respondent, a total absence of power to control or, as was argued for the appellant, such a deficiency in power to control as renders it likely that control will not in fact be exercised, because, in my opinion, even if the latter meaning be adopted it cannot be said that the Appellate Division erred in their view that it was not established that the appellant was likely to repeat acts of the sort mentioned.

I have already quoted the evidence of the respondent to the effect that he is confident that there will be no repetition of his misconduct. Against this is to be set the evidence of the two psychiatrists. I have no criticism of these witnesses. They possess high professional qualifications and their answers were responsive to the questions put to them; but, in my respectful opinion, their examination was conducted in an improper manner. Under s. 661(3) it is the duty of the Court to find whether an accused is a criminal sexual psychopath. Section 661(2) provides that the Court may hear any evidence that it considers necessary but shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General. This provision does not effect any alteration in the rules as to the nature of the evidence which may be given by an expert witness, or as to the manner in which his examination should be conducted.

It will be sufficient to state briefly the course of the examination of Dr. Michie by counsel for the Crown. Having proved his professional qualifications, counsel asked him if he had listened to all the evidence both on the trial of the substantive offences and on the hearing under s. 661(1). The witness having answered in the affirmative, he was next asked whether he had listened for the purpose of determining to himself whether the accused was a criminal sexual psychopath. His answer was "Yes". He was then asked if he had "arrived at a decision". His answer was "Yes"; and he was then asked to make his decision known to the Court. His examination-in-chief concluded as follows:

Q. Just one step further in clarification of your final finding that he is a criminal sexual psychopath. The definition in the Code of criminal

sexual psychopath includes all of the following, and with leave of the court I would read it to you, Doctor. I am reading 659, subsection (*b*) of the Code in the following words:

> "'Criminal sexual psychopath' means a person who, by a course of misconduct in sexual matters, has shown a lack of power to control his sexual impulses and who, as a result, is likely to attack or otherwise inflict injury, pain or other evil on any person."

Do you find, Doctor, that each one of the isolated requirements set forth in section 659, subsection (*b*) are found affirmatively against the accused? A. It is my opinion that that is so.

The objections to such a method of examination are obvious. The witness is being asked to weigh conflicting evidence; the Court does not know, for example, whether he accepted as true the evidence of Stapley, as to acts of *fellatio* and sodomy, which was denied by the respondent and which counsel for the appellant did not ask this Court to accept. The witness may have disbelieved the testimony of the respondent *in toto*. The witness could not be expected to know the rules as to weighing the evidence of an accomplice or to appreciate the significance of the respondent not having been cross-examined. The Court is unaware of the foundation of assumed facts on which the opinion of the witness was based. The witness is also, in effect, being called upon to interpret the definition contained in s. 659(*b*), a task the difficulty of which is emphasized by the different submissions as to its meaning made by counsel in the course of the argument before us.

In the cross-examination of Dr. Michie the following appears:

> Q. I notice in your evidence, Dr. Michie, that you said, I think you used the term "sex impulses", I think that was the term you used, "are either uncontrollable or uncontrolled"? A. That is what I said, uncontrollable or uncontrolled.
>
> Q. Uncontrollable or uncontrolled. May I draw the inference from that that Neil could control his sexual impulses? A. I have always had the feeling that the prisoner, that the person who is not mentally disturbed can control his impulses. All do not agree with that.
>
> Q. That is your opinion? A. Yes.

And in the cross-examination of Dr. Carnat:

> Q. Do you agree with Dr. Michie that a man, and here I do not misrepresent what Dr. Michie said, that a man who has possession of his mental faculties can control criminal sexual impulses. A. A man in possession of his mental faculties can control them?
>
> Q. Yes? A. To a great extent, he probably can.

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Q. Do you have any reason to believe that the accused, Sidney Keith Neil, does not have possession of his mental faculties? A. He is mentally sane.

Q. Does he have possession of his mental faculties? A. Yes.

Q. In your opinion, could a public trial and conviction and all of the publicity and humiliation that goes with it, bearing in mind the circumstances of this case, could that have a therapeutic effect on this accused? A. It is quite possible it could. It could definitely act as a deterrent.

Q. It could make sufficient impression on him that he would no longer indulge in those practices? A. It is possible.

The question as to whether an accused who has shown a lack of power to control his sexual impulses is as a result likely to continue to fail to control them is one of fact in deciding which the trial judge undoubtedly has certain advantages over an appellate tribunal, but these advantages are not decisive in the case at bar where the finding depends on inferences to be drawn from past facts as to future probabilities. After a careful reading of all the record I have, as indicated above, reached the conclusion that it cannot be said that the Appellate Division was wrong in deciding that the evidence does not warrant a finding that the respondent is likely in the future to repeat the criminal conduct of which he has been found guilty.

I rest my decision, therefore, on both of the two main grounds set out above urged on behalf of the respondent.

I would dismiss the appeal.

Appeal dismissed, TASCHEREAU *and* LOCKE JJ. *dissenting.*

Solicitor for the appellant: L. A. Justason, Calgary.

Solicitor for the respondent: M. E. Shannon, Calgary.

Solicitor for the Attorney General of Canada: W. R. Jackett, Ottawa.