HER MAJESTY THE QUEEN .....APPELLANT;

AND

ROBERT JAMES McGRATH .....RESPONDENT.

1962

*May 24, 25
June 25

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Habitual criminal—Notice of preventive detention—Whether certificate of previous convictions adequate—Whether accused's testimony at trial of substantive offence admissible on hearing for preventive detention—Criminal Code, 1953-54 (Can.), c. 51, ss. 574, 660, 662.

*PRESENT: Locke, Fauteux, Martland, Judson and Ritchie JJ.

53480-0—3½

1962

THE QUEEN
v.
McGRATH

The accused was charged with an offence under ss. 24 and 292 of the *Criminal Code* of attempting to break and enter a shop with intent to steal. Prior to the trial, he was served with a notice in writing under s. 662(1)(*a*)(ii) of the Code stating that if he were convicted of this offence an application would be made to the Court to find that he was an habitual criminal and to impose on him a sentence of preventive detention. In due course he was convicted on the substantive offence. At the hearing on the application to impose a sentence of preventive detention, the trial judge heard evidence in support of the allegations contained in the notice, and also took into consideration evidence concerning the accused's previous convictions and past habits which had been given by the accused himself under cross-examination at the trial of the substantive offence. The accused was sentenced to preventive detention as an habitual criminal. The Court of Appeal quashed and set aside the finding that the accused was an habitual criminal. The Crown was granted leave to appeal to this Court.

Held: The appeal should be allowed and the sentence of preventive detention restored.

The form of the certificates filed by the prosecutor appeared to sufficiently identify the judge who presided at the time of both the convictions and the sentences mentioned therein, and the fact that the convictions mentioned in the certificates and those mentioned in the notice were identical as to the name of the person convicted, the offences committed and the date and nature of the sentences imposed was enough to show that the convictions referred to therein were the same as those referred to in the notice. In any event, the form of the certificates satisfied the provisions of s. 574 of the Code requiring that the conviction be set out with "reasonable particularity".

The judge presiding at the hearing on the application for imposition of a sentence of preventive detention was entitled to take into consideration the evidence taken at the trial of the substantive offence, and was justified in accepting the accused's own admission of previous convictions as serving to identify him as the person who was convicted. An accused person who elects to go on the witness stand at his own trial has the benefit of all the safeguards referred to in the case of *Parkes v. The Queen*, [1956] S.C.R. 768, and the evidence elicited from such an accused is admissible and does not violate the provisions of s. 662(2) of the Code.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], quashing and setting aside a finding that the appellant was an habitual criminal. Appeal allowed.

J. J. Urie, Q.C., for the appellant.

H. Rankin, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal brought by leave of this Court from a judgment of the Court of Appeal of British Columbia[1] quashing and setting aside the finding of His

[1] (1961-62), 36 W.W.R. 553, 36 C.R. 375, 132 C.C.C. 49.

Honour Judge Remnant of the County Court of the County of Vancouver that the respondent was an habitual criminal and the consequent imposition of a sentence of preventive detention pursuant to the provisions of s. 660 of the *Criminal Code*. It is to be noted that the provisions of ss. 660 and 662 of the *Criminal Code* were substantially amended by c. 43 of the Statutes of Canada (1960-61) which was not in force at the time of the finding and sentence in the present case, and wherever reference is herein made to either of those sections it relates to the *Criminal Code* as it existed immediately before the said amendment came into force.

The respondent, having been charged with an offence under ss. 24 and 292 of the *Criminal Code* of attempting to break and enter a shop with intent to steal, was, on December 7, 1960, served with a notice in writing in compliance with s. 662(1)(*a*)(ii) of the *Criminal Code* stating that if he were convicted of this offence an application would be made to the Court to find that he was an habitual criminal and also to sentence him to preventive detention in addition to any sentence in respect of the said offence. In due course, on December 21, 1960, the respondent was convicted of the said offence before the aforesaid County Court judge who, on January 23, 1961, conducted a hearing in respect of the application to impose a sentence of preventive detention and who, having heard evidence in support of the allegations contained in the said notice and having taken into consideration evidence concerning his previous convictions and his past habits given by the respondent himself under cross-examination at the trial of the substantive offence, proceeded to sentence the respondent to preventive detention as an habitual criminal.

The notice given by a prosecutor under the provisions of s. 662(1)(*a*)(ii) is required to specify "the previous convictions and the other circumstances, if any, upon which it is intended to found the application . . ." and the notice given in the present case recited, *inter alia,* that the accused was convicted in the Supreme Court of Alberta at Edmonton before Mr. Justice Clinton J. Ford on the 4th and 8th of October, 1946 of two separate offences, one of "breaking and entering" and the other of "breaking, entering and theft" for which he was sentenced to terms of five and eight years' imprisonment to run concurrently. The same notice went

1962

THE QUEEN v. McGRATH

Ritchie J.

on to specify that certain other named persons were convicted of the same offences and to describe the premises broken into, and in the theft case the nature and amount of the property stolen.

A certificate purporting to be signed by the clerk of the Court "setting out with reasonable particularity the conviction in Canada of an accused for an indictable offence" is, upon proof of the identity of the accused, *prima facie* evidence of that conviction by virtue of the provisions of s. 574 of the *Criminal Code*.

In the present case the certificates of conviction produced by the prosecution in proof of the offences above referred to purport to be signed by the clerk of the Court and are in the following form:

> I, the undersigned, do hereby certify that at a Sitting of the Supreme Criminal Court held at the Court House in the City of Edmonton, the following prisoner, having been duly convicted of the crime set opposite his name, was sentenced as hereunder stated BEFORE THE HONOURABLE MR. JUSTICE CLINTON J. FORD.

The body of the two certificates contains the following information:

NAME OF PRISONER	*CRIME*	*DATE OF SENTENCE*	*SENTENCE*
ROBERT McGRATH	Break, enter and theft	October 4th, 1946	Eight (8) years imprisonment in the Saskatchewan Penitentiary at Prince Albert, in the Province of Saskatchewan.
ROBERT McGRATH	Break, enter	October 8th, 1946	Five (5) years imprisonment in the Saskatchewan Penitentiary at Prince Albert, in the Province of Saskatchewan, to run concurrent with previous sentence.

In the course of the reasons delivered by Bird J.A. on behalf of the Court of Appeal, that learned judge found that these certificates were insufficient to satisfy the requirements of s. 574(*a*) of the *Criminal Code* on the ground that:

> . . . neither document contains more than a sketchy reference to the conviction alleged and omits the names of the confederates of the convicted

man, the description of the premises broken and of the property stolen as well as the name of the learned Judge presiding at the time when the conviction was entered, all of which are set out in detail in paragraphs (*c*) and (*d*) of the notice.

With the greatest respect, I must say that the form of the certificates filed by the prosecutor appears to me to sufficiently identify Mr. Justice Clinton J. Ford as the judge who presided at the time of both the convictions and the sentences therein referred to and the fact that the convictions mentioned in the certificates and those mentioned in paras. (*c*) and (*d*) of the notice are identical as to the name of the person convicted, the offences committed and the date and nature of the sentences imposed is enough to satisfy me that the convictions referred to therein are the same as those referred to in the notice.

In any event, in my view the provisions of s. 574 requiring that the conviction be set out with "reasonable particularity" are satisfied by the form of the certificates above referred to, and I am of opinion that the "reasonable particularity" required by the section is in no way controlled by the manner in which the offences are described in the notice filed under s. 662 provided that it is apparent that the certificates refer to convictions described in that notice.

Mr. Justice Bird, however, considered that there was no sufficient proof to identify the respondent as the person named in certain of the convictions set out in the certificates and the notice because the only evidence to this effect was elicited from the respondent on cross-examination at the trial of the substantive offence when it was admitted for the sole purpose of testing the respondent's credibility. As will hereafter appear, I am of opinion that the judge presiding at the hearing of the application for imposition of a sentence of preventive detention is entitled to take into consideration the evidence taken at the trial of the substantive offence, and in so doing he is, in my opinion, justified in accepting the accused's own admission of previous convictions as serving to identify him as the person who was convicted.

A strong argument was made on behalf of the respondent in support of Mr. Justice Bird's further finding that admissions made by him at the trial of the substantive offence as to his past conduct and associations should not have been considered in determining the issue of whether or not he was

1962

THE QUEEN v. McGRATH

Ritchie J.

an habitual criminal. Mr. Justice Bird rested this finding on the ground that consideration of such evidence constituted a violation of the provisions of s. 662(2) of the *Criminal Code* which reads as follows:

> 662. (2) An application under this Part shall be heard and determined before sentence is passed for the offence of which the accused is convicted and shall be heard by the court without a jury.

It is contended that the circumstances are governed by the decision of this Court in *Parkes v. The Queen*[1], in which case highly damaging information concerning the previous career of the convicted person was introduced, directly after his conviction and before the opening of the hearing of the application for imposition of a sentence of preventive detention, in the form of an unsworn "Probation Officer Pre-Sentence Report". In commenting on the effect of this information on the mind of the judge at the preventive detention hearing, Mr. Justice Fauteux said at p. 779:

> However, prior to such hearing, the judge, for the purpose of determining what sentence he should impose, received from the prosecution and exacted from the defence, in a most exhaustive manner, information of a character highly damaging to the accused. In the result, when the subsequent hearing of the issue related to preventive detention commenced, his mind was no longer free, in the measure it should have been, had the provisions of s. 662(2) been complied with, and the effective exercise of the right which the appellant had, on the hearing of such issue, to remain silent and hold the prosecution strictly to its obligation to prove its case according to rules of procedure and rules of evidence, was henceforward jeopardized.

Mr. Justice Bird adopted this reasoning as applying "with equal force in the present circumstances", and in so doing it seems to me with all respect that he failed to appreciate that Mr. Justice Fauteux was addressing himself to the special circumstances of the *Parkes* case in which the mind of the judge at the commencement of the preventive detention hearing "was no longer free in the measure it should have been" had the damaging information tendered before him been subjected to the "rules of procedure and rules of evidence" which normally attend the trial of any issue.

The accepted practice concerning the material which a judge may properly consider before sentencing a convicted

[1] [1956] S.C.R. 768, 24 C.R. 279, 116 C.C.C. 86.

person in respect of the offence for which he has been convicted is well described in Crankshaw's Criminal Code of Canada, 7 ed., p. 912, as follows:

> After conviction, accurate information should be given as to the general character and other material circumstances of the prisoner *even though such information is not available in the form of evidence proper,* and such information when given can rightly be taken into consideration by the judge in determining the *quantum* of punishment, unless it is challenged and contradicted by or on behalf of the prisoner, in which case the judge should either direct proper proof to be given or should ignore the information. There should be precision and accuracy in any such information: . . . . (The italics are mine.)

In the *Parkes* case, *supra,* it was held that the introduction of such information between the time of conviction and the opening of the preventive detention hearing constituted a violation of the provisions of s. 662(2) of which section Mr. Justice Fauteux observed at p. 779:

> Under the imperative provisions of s. 662(2) of the *Criminal Code,* the hearing and determination of this issue must take place before sentence is passed for the offence of which the accused is convicted. The reason for this order of precedence established in the procedure is *to assure the effective operation of all the safeguards which, both by the method of inquiry and by the rules of evidence, attend the trial of any issue* and, more particularly to exclude definitely any possibility that the judge entrusted with the matter be, until it is finally determined, adversely influenced in any degree by facts or representations of which, once an accused is convicted, he may, without the same safeguards, be apprised for passing a sentence. (The italics are mine.)

An accused person who, like the respondent, elects to go on the witness stand at his own trial has the benefit of all the safeguards to which Mr. Justice Fauteux refers in this passage, and evidence elicited from such an accused on cross-examination is, in my opinion, in an entirely different category from the kind of information with which this Court was concerned in *Parkes v. The Queen, supra.*

It has been pointed out in this Court in the cases of *Kirkland v. The Queen*[1], and *Harnish v. The Queen*[2], that the proceedings at the trial of the substantive offence are relevant material for the consideration of a court in determining the issues raised by an application under ss. 660 and 662, but it was seriously contended on behalf of the respondent that His Honour Judge Remnant, when he presided at the preventive detention hearing, was precluded from considering the sworn evidence given at the trial on the ground

[1] [1957] S.C.R. 3, 25 C.R. 101, 117 C.C.C. 1.
[2] [1961] S.C.R. 511, 35 C.R. 1, 130 C.C.C. 97.

1962

THE QUEEN v. McGRATH

Ritchie J.

that a transcript of that evidence was not introduced at the hearing under the oath of the Court reporter. It appears to me to be altogether unrealistic to suggest that in enacting Part XXI of the *Criminal Code* Parliament intended to provide for a hearing to be interposed between conviction and sentence on the substantive offence at which the trial judge is required to close his mind to relevant evidence adduced before him at the trial which led to the conviction unless and until a transcript of such evidence has been introduced before him at the hearing under the oath of the Court reporter.

In my view His Honour Judge Remnant, when he presided at the hearing of the application for imposition of a sentence of preventive detention, was fully justified in taking into consideration the evidence as to his identity and his past life and habits which was given by the accused at his trial, and I am, therefore, with great respect, unable to agree with the Court of Appeal that there was any violation of the provisions of s. 662(2) in the conduct of these proceedings.

I would allow this appeal and restore the finding of the learned trial judge that the respondent is an habitual criminal and the consequent imposition of a sentence of preventive detention.

Appeal allowed.

Solicitor for the appellant: G. L. Murray, Vancouver.

Solicitor for the respondent: H. Rankin, Vancouver.