# CRIMINAL LAW *

*Emilio S. Binavince* ** *and Robert D. Chapman* **

In the criminal law field, research [1] showed that, whereas many problems were discussed in the reports, a small number of topics received significant treatment. These predominant areas have been chosen for discussion. Briefly, the topics include rights of the accused, evidence, *mens rea,* sentencing and habitual criminal legislation, and procedural defects. There is, naturally, some overlapping in this selection in spite of attempts to allot cases to their most suitable categories.

## I. STATISTICS

The Canadian crime rate continues to rise as evidenced by an almost 8 per cent increase in both 1963 and 1964. [2] But the police have at least kept abreast of this advance in their investigations, clearing some 55.1 per cent of offences reported in 1963, and 56.4 per cent in 1964. [3] With respect to the offence of murder, the available statistics show no increase in the number of offences, capital or non-capital, [4] and this, despite the practical abandonment of capital punishment.

## II. LEGISLATION

Recent amendments to the Criminal Code have been few and of little interest. One change of note was the creation of an appeal from a dismissal of an application for habeas corpus. [5] The Crown was granted no corresponding right in the case where the writ is granted.

## III. RIGHTS OF THE ACCUSED

Unlike the recent approach of American courts, Canadian courts have avoided laying down too wide guidelines in this area. Whereas the United

---

* This study is substantially based on the research carried out in Professor Binavince's Seminar on Legal Research in the academic year 1965-1966. Mrs. Gladys M. Choquette, Geoffrey C. Langdon, Kenneth P. McCloskey, Yvon J. Montpetit, Brian E. Quinlan and John C. Wade have participated in the collection and analysis of the materials used in the study.

** Of the Board of Editors.

[1] The survey was made of reported cases in which decisions were handed down during the period September 1964 to September 1965. In some instances, these limits have been necessarily ignored.

[2] DOMINION BUREAU OF STATISTICS, CRIME STATISTICS (POLICE) 1964, at 14.

[3] *Id.* at 17.

[4] *Id.* at 16.

| OFFENCE | 1962 | 1963 | 1964 |
|---|---|---|---|
| Capital Murder | 1.0* | 1.0 | 1.0 |
| Non-Capital Murder | 0.4 | 0.4 | 0.3 |

* (rate per 100,000 population)

[5] Can. Stat. 1964-1965 c. 53, § 1.

States Supreme Court has established precedents to guide its lower courts, [6] the Canadian courts deal with each case on its own merits. [7]

During the survey period, there was a noticeable lack of reliance upon the Canadian Bill of Rights [8] in criminal proceedings involving the rights of the accused. In the cases of *Regina v. Piper* [9] and *Regina v. O'Connor* [10] the Courts of Appeal of Manitoba and Ontario declined to find protection for the accused in the bill. This indicates that the document is of little practical value and that the system presently administered by the courts will usually suffice to provide the accused with adequate protection.

The system is not without its shortcomings. Although in cases such as *Regina v. Wright* [11] and *Batary v. Attorney General for Saskatchewan,* [12] the courts have clarified and expanded existing rights; in others, such as *Regina v. Starr* [13] and *Regina v. MacDonald,* [14] they seem to have stressed procedural conveniences rather than the accused's rights. This stems from the court's wide discretion in interpreting these rights. However, even if the Bill of Rights provided for its effective enforcement, the same problems would exist as the courts would have to interpret and apply it.

The cases under consideration involve many of the rights of the accused. For convenience, these rights are dealt with chronologically as they pertain to individual stages of the proceedings.

### A. *Pre-Trial Rights*

Two cases dealt with the accused's pre-trial rights. The first of these, *Regina v. Brooks,* [15] affirms the right of the accused to call witnesses at the preliminary inquiry. This right is expressly guaranteed by section 454(3), (4) of the Criminal Code. Under these provisions the judge must ask the accused if he desires to call any witnesses and must hear any witnesses that are called. In the *Brooks* case, the magistrate not only failed to ask the accused whether he wished to call witnesses but refused further to allow him to do so. Mr. Justice Kirby of the Alberta Supreme Court held that compliance with section 454 was mandatory and that failure to so comply deprived the magistrate of jurisdiction. It is to be noted here for the purpose of later comparison that the accused's right is coupled with a duty upon the court.

---

[6] Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964).
[7] Regina v. Piper, 51 D.L.R.2d 534 (Man. 1964).
[8] Can. Stat. 1960 c. 44.
[9] *Supra* note 7.
[10] [1965] 2 Ont. 773, 52 D.L.R.2d 106; *aff'd* 57 D.L.R.2d 123 (Sup. Ct. 1966).
[11] [1965] 2 Ont. 337, 50 D.L.R.2d 498.
[12] [1965] Sup. Ct. 465 (1964).
[13] [1965] 3 Can. Cri. Cas. 138 (Man. Q.B. 1964).
[14] [1965] 3 Can. Cri. Cas. 332 (N.B. 1964).
[15] [1965] 1 Can. Cri. Cas. 290 (Alta. Sup. Ct. 1964).

The second case, *Batary v. Attorney General for Saskatchewan*, [16] dealt with the right to protection from self-incrimination at a coroner's inquest. After Batary had been charged with murder, the Attorney General, acting under the Coroner's Act of Saskatchewan, [17] ordered the inquest reopened. Batary was subsequently served with a subpoena to attend, and he was ruled a compellable witness by the coroner under section 15 of the act. The Supreme Court of Canada held the legislation invalid because, among other reasons, "such legislation trenches upon the rule expressed in the maxim 'nemo tenetur seipsum accusare'." [18]

This case overrules such decisions as *Regina v. Barnes* [19] where the accused was a compellable witness at a coroner's inquest although he could not be examined in any way regarding the pending charge. This is a desirable result since it is difficult to imagine an examination which in some way does not touch upon the charge. In providing against the contingency of any evidence being admitted, the Supreme Court has substantially expanded the accused's rights in this area.

B. *Trial Rights*

The right to protection from self-incrimination as it exists at trial was also considered in *Regina v. Wolbaum.* [20] The Saskatchewan Court of Appeal dealt with this right in relation to the admissibility at trial of a pre-trial confession. This right does not of necessity involve a requirement that the accused receive a warning. A court may still admit what it deems to be a voluntary pre-trial statement, as was done in *Wolbaum,* in the absence of any warning. [21]

Closely related to the accused's right to protection from self-incrimination is his right to protection from incrimination by other accused persons during a joint trial. The general rule as laid down by Lord Goddard in *Regina v. Grandkowski* [22] is that where the case is prima facie one of common enterprise the accused should be jointly tried. Of course, the court will grant separate trials where it appears that at least one of the accused would be prejudiced. [23] This amounts, however, to a matter of pure judicial discretion and the inevitable inequities are illustrated in two cases from the survey period.

---

[16] *Supra* note 12.

[17] SASK. REV. STAT. c. 106 (1953).

[18] *Supra* note 12, at 478. But the driver of a car involved in a fatality is a compellable witness at an inquest if there is as yet no charge laid against him; see *Re* Wyshynski, [1966] 2 Can. Cri. Cas. 199, at 203 (Sask. Q.B. 1965).

[19] 36 Can. Cri. Cas. 40 (Ont. 1921).

[20] 50 West. Weekly R. 405 (Sask. 1964).

[21] See text accompanying note 70 *infra* for a further discussion of this case.

[22] [1946] 1 All E.R. 559 (Crim. App.).

[23] The Queen v. Weir, 3 Can. Cri. Cas. 351 (Que. Q.B. 1899).

In *Regina v. Starr,* [24] four men were charged with rape. Two made statements to the police in which the other two were named as being with them, but not named as having taken part in the rape. The accused were jointly indicted, and Starr moved for separate trials on the ground that the pre-trial statements by the other accused would prejudice the jury against him. [25] His motion for severance was refused on the ground that the statements indicated only that he was present and they did not involve him in the crime.

The reasoning is just on its face but it fails to take into account the impact of such a confession upon the jurors' minds. The fact that a man is charged with rape and evidence of his co-accused is admitted that places him at the scene of crime would certainly influence the jury and, in effect, put upon the accused a burden to disprove his guilt. The court's remedy for situations such as this was indicated by Mr. Justice Kerwin in *Schmidt v. The King* where he stated : "A trial judge, during the course of the trial of two or more persons jointly indicted and tried, must make it clear to the jury that a statement by one of the accused is evidence only against him." [26]

This course was followed in *Regina v. MacDonald.* [27] MacDonald and Yeates were jointly indicted and tried for capital murder. Before the trial, severance was refused. During the trial, evidence was given of a statement by Yeates to his girl friend to the effect that he and MacDonald had committed the crime. MacDonald appealed on the ground that the trial judge had exercised his discretion erroneously in allowing the Crown to proceed by way of a joint trial. The appeal was dismissed by the New Brunswick Supreme Court as the trial judge had twice warned the jury that the statement made was not evidence against MacDonald. In fact, the court also found sufficient evidence of a different nature to support the jury finding.

But the question again arises whether a simple warning is enough to prevent the jury from improperly taking such evidence into consideration. In some instances, then, the accused has not been afforded proper protection. This is perhaps a consequence of the very nature of the right under consideration, depending, as it does, upon an appellate court's hindsight as to the conduct of the trial.

However, even those trial rights which are capable of a clearer definition and are therefore more obvious, have not gained the recognition that would be expected. This is especially true of the right to counsel which was considered in *Regina v. Piper.* [28] In that case the Manitoba Court of Appeal

---

[24] *Supra* note 13.

[25] One co-accused, being jointly tried, could never, of course, be called by the Crown as a witness to give evidence against another at the joint trial; see CROSS, EVIDENCE 149 (2d ed. 1963).

[26] [1945] Sup. Ct. 438, at 439.

[27] *Supra* note 14.

[28] *Supra* note 7.

upheld a conviction after a trial at which the accused was neither represented by counsel nor informed that such assistance was available to him. In the course of his opinion, Mr. Justice Monnin said: "It would have been preferable if Darichuk, P.M., had informed accused that he might request the services of the Legal Aid Committee but, under the circumstances of the case, there was no infringement of any rights guaranteed under the Bill of Rights since he was not deprived of the privilege to retain and instruct counsel." [29] In his view, the right to counsel existed only if the accused asked for counsel. However, by definition, a right necessarily involves a duty upon someone else. [30]

As noted above in *Regina v. Brooks,* [31] the court had a duty to ask the accused whether he wished to call any witnesses and failure to so ask resulted in a breach of the right to call witnesses. Of course, that duty was statutorily imposed, [32] whereas the duty, if any, to inform the accused of his right to counsel is not. Under section 590 of the Criminal Code, the court may assign counsel to a party to an appeal when it deems it just to do so, but there is no such provision for the trial level proceedings.

It seems obvious that counsel is one of the basic requirements of a fair trial. The layman is not qualified to defend or even to know all of his rights under our criminal-law system. It seems equally apparent that the courts, whose primary function is to enforce and interpret the individual's rights, should at least inform the accused of his rights and inquire as to whether or not he wishes the aid of counsel. The remedy to the problem is legislation making mandatory a request by the court as to whether the accused wishes counsel and the furnishing of legal aid where necessary.

It may be argued that any miscarriage of justice resulting from the lack of counsel at trial will be remedied on appeal. But, especially in the case of an indigent, who is to guarantee that the case will be appealed?

A great advance has been made by the Ontario Court of Appeal in the accused's right not to be tried twice for the same crime in *Regina v. Wright.* [33] This right had long been guaranteed by section 516 of the Criminal Code, under which an accused is entitled to plead *autrefois convict* and *autrefois acquit.* But as Chief Justice Porter said in referring to these pleas: "Until recently, the only test which has been applied by the Courts is whether the *offence* of which the accused was acquitted (or convicted) was substantially the same as the one with which he was later charged." [34]

---

[29] *Id.* at 535.

[30] BLACK, LAW DICTIONARY 1487 (4th ed. 1954). For a similar view, see Note, 40 ST. JOHN L. REV. 51 (1965).

[31] *Supra* note 15.

[32] CRIM. CODE § 454(3).

[33] *Supra* note 11.

[34] *Id.* at 338, 50 D.L.R.2d at 499.

*Wright* clarified the defence of res judicata or issue estoppel as it applies to criminal cases in Canada. The defence is distinguished from *autrefois acquit* and *autrefois convict* in that the area of exploration is greater and the accused may show that the same element, not merely the offence, which is in issue in a subsequent trial was decided in his favour in previous criminal proceedings. This defence has been recognized as part of our criminal law for some time, but until this case it had been applied only to simple fact situations and had never been set out in detail. [35]

In *Wright,* the Ontario Court of Appeal took into consideration an acquittal and a conviction on different counts of conspiracy and also the evidence at the trials on those counts in arriving at a conclusion that the elements in further counts alleging a substantive offence were res judicata and that the court must thereby acquit the accused on the latter counts. The accused had, with others, been convicted on a count of a conspiracy to effect an unlawful purpose, contrary to section 408(2) of the Criminal Code. That purpose was the obtaining from a police officer of information which it was his duty not to divulge. Previously, the accused had been acquitted of conspiracy to commit an indictable offence, contrary to section 408(1)(d). The indictable offence involved was the bribery of a peace officer with intent that the latter should interfere with the administration of justice, contrary to section 101(b). The evidence adduced of payments by the accused to the police constable was the same in the trial on each of the conspiracy counts. And the Crown admitted that there had only been one conspiracy. Since the accused was convicted of the conspiracy to effect an unlawful purpose, there was no conspiracy to commit an indictable offence, and the evidence of payments was evidence only of intent to effect an unlawful purpose, the subject matter of the conspiracy proved. Thus, said the Ontario Court of Appeal, it could not also be evidence of an intent to bribe, the subject matter of the conspiracy not proved. As a result, the court ordered acquittal on three counts of the substantive offence of bribery. There was simply no evidence of payments made by way of a bribe as defined by section 101(b).

### C. *Rights During Jury Direction*

It is fundamental to our law that the accused has the right to the benefit of a reasonable doubt; unless this is clearly explained to the jury, a serious miscarriage of justice could result. The courts have jealously guarded this right of the accused as illustrated in *Regina v. Dilabbio.* [36] The trial judge did not relate the doctrine of reasonable doubt to the defences of accident and self-defence. He had referred to the doctrine of reasonable doubt at the beginning of his instruction. However, following this, each time that he

[35] See Judson, J., in Wright v. The Queen, [1963] Sup. Ct. 539, at 543.
[36] [1965] 4 Can. Cri. Cas. 295 (Ont.).

stated a portion of the evidence concerning the two defences he, in effect, asked the jury whom they believed. A new trial was ordered because of the possibility that the jury had inferred that unless they believed the evidence of the accused they should find him guilty.

The accused also has the right to have the theory of his defence presented to the jury. The importance of this is evident in that the jury after witnessing disconnected bits of evidence brought before them cannot be expected to realize their total significance and to tie them together. The judge must explain exactly what the accused's defence is and the evidence upon which it is based.

In a case like the *Dilabbio* situation, the courts will order a new trial if there is the slightest possibility of an injustice. Mr. Justice Ritchie of the Supreme Court of Canada in *Colpitts v. The Queen*, said: "Even if it be conceded to be improbable that the decision of any juror was affected by the errors which all the judges of the court of appeal [37] have found to have existed in the charge of the learned trial judge, I am nevertheless unable to say that the verdict would *necessarily* have been the same if the charge had been correct . . . ." [38] In this case, the accused was being tried for the murder of a prison guard. At the trial, he gave evidence on his own behalf and claimed that statements which he made to the Royal Canadian Mounted Police immediately after the crime, confessing to it, were false, that they had been made to protect a friend, and that he had not killed the guard. The trial judge simply put it as a theory of the accused that he had made a false confession without mentioning the reason which the accused gave for having done so. Moreover, the trial judge failed to discuss any of the Crown's evidence concerning this defence. The Supreme Court of Canada ordered a new trial.

D. *Post-Trial Rights*

Two cases dealt with the accused's right to be present at post-trial proceedings — at his sentencing and at the hearing of his appeal. *Regina v. Mackin* [39] dealt with the former. The accused was charged under the New Brunswick Motor Vehicles Act and appeared in magistrate's court where evidence was adduced and the case adjourned for judgment. A month later the court convicted the accused who was neither present in court nor represented by counsel. The accused and his counsel learned of the conviction twenty-four days later when the time for appeal had passed. The conviction was quashed by way of certiorari. It was held that when a conviction is pronounced in the absence of the accused or of someone repre-

[37] The New Brunswick Court of Appeal affirmed the conviction of the accused on the opinion of the majority that there had been no substantial wrong or miscarriage of justice.

[38] [1965] Sup. Ct. 739, at 745.

[39] [1965] 3 Can. Cri. Cas. 297 (N.B. Sup. Ct. 1964).

senting him, the Crown has a duty to give notice of the conviction to the accused or to his counsel within such time that all rights to appeal are protected.

Whereas a conviction may, with the above qualification, be made in the absence of the accused, a court of appeal has no power to hear an appeal in the absence of the appellant who has expressed a desire to be present at the hearing. This was the decision of the Supreme Court of Canada in *Smith v. The Queen,* [40] and is the clear result from a reading of section 594(1) of the Criminal Code. [41]

## IV. Evidence

The matter of evidence is inextricably bound up with the rights of the accused. The frequency of cases in which evidentiary law was discussed, however, has made this area suitable for separate treatment.

### A. *Admissibility*

On the question of admissibility, a number of cases touched on section 224(4) of the Criminal Code which reads as follows :

> No person is required to give a sample of blood, urine, breath or other bodily substance for the purposes of this section and evidence that a person refused to give such a sample or that such a sample was not taken is not admissible nor shall such a refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

In *Regina v. Beauvais,* [42] the accused's conviction for impaired driving under section 223 of the Criminal Code was appealed to the British Columbia Supreme Court on the ground that, in violation of this section, evidence had been admitted that the appellant had refused to give a sample of breath. The only Crown evidence on the point was that of the arresting constable who testified that the appellant said : "You are not going to hold me for a breathalizer, are you ?" Mr. Justice McFarlane held that this did not constitute evidence that a sample was refused or that a sample was not taken. All other evidence on the subject was adduced through cross-examination of the Crown witness by defence counsel and could not be a ground for setting aside the conviction at the instigation of the appellant. Mr. Justice McFarlane went on to say : "[E]ven assuming a breach of sec. 224(4), I am far from satisfied that the result in the circumstances should be the reversal of a conviction." [43]

---

[40] 47 Can. Cri. R. 1 (Sup. Ct. 1965).

[41] *But see* § 594(2)(a) where an appellant who is represented by counsel is not entitled to appear when a question of law only is involved.

[42] [1965] 3 Can. Cri. Cas. 281 (B.C. Sup. Ct.).

[43] *Id.* at 284.

In *Regina v. French,* [44] which was heard in magistrate's court, defence counsel sought to have the evidence of a doctor relating to the examination of the accused ruled inadmissible because a medical examination was conducted without the consent of the accused and, in fact, against his will. Counsel invoked the maxim that no one is compelled to accuse himself.

The accused was charged with driving while impaired, and the doctor gave an opinion of his condition based on observations of the seated accused. The magistrate said these observations "could as readily have been made by an alert layman; if it could be called a medical examination, it could only be because these were the observations of a medical doctor." [45] He went on to say :

> No tests were performed by the defendant at the request of the police; if such had been done there would be no burden on the Crown to establish that the taking of such tests was voluntary on the defendant's part before evidence regarding them could be adduced : .... He would not, however, be obliged to take such tests. No inference of guilt could be drawn from his refusal and evidence of such refusal should be excluded : .... [46]

The doctor had testified that as he prepared to examine the accused's injured head, the accused moved it away, and the police sergeant moved toward him to prevent the movement. Though conceding the evidence indicated that the accused did not wish to be examined, the magistrate pointed out that evidence illegally obtained is not by that fact alone rendered inadmissible. The test to be applied is one of relevancy to the matters in issue. [47]

The magistrate left open the question of admissibility of evidence of this type obtained by force because he considered the doctor's opinion as to the condition of the accused "was arrived at quite independently of any examination he may have made against the defendant's will, ... and for that reason is admissible." [48]

In *Regina v. Shaw,* [49] referred to by the court, the Crown appealed from an acquittal on a charge of impaired driving on the ground that the trial judge erred in excluding evidence that the respondent refused to perform physical tests at the police station to determine whether he was impaired or not. The Crown submitted that the refusal was relevant and admissible because the jury might properly draw the inference that he refused to comply because he knew his condition and his inability to perform the tests would

---

[44] 54 West. Weekly R. 104 (B.C. Magis. Ct. 1966).

[45] *Id.* at 106.

[46] *Ibid.*

[47] See Regina v. Johnston, [1965] 3 Can. Cri. Cas. 42, 51 West. Weekly R. 280 (Man. 1965); Attorney General for Quebec v. Bégin, [1955] Sup. Ct. 593; Rex v. Nowell, 32 Cri. App. R. 173, [1948] 1 All E.R. 794.

[48] *Supra* note 44, at 108.

[49] 43 Can. Cri. R. 388, 48 West. Weekly R. 190 (B.C. 1964).

disclose it. The tests involved were not within section 224(4). The court held that, although an accused's silence in face of a statement calling for an answer, or his failure to give an explanation when the circumstances call for one, may lead to an inference of guilt, no inference can be drawn from an accused's silence or failure to provide an explanation, unless the circumstances fairly call for an answer or explanation. It was clearly the accused's common-law right to refuse to incriminate himself by performing the tests and to require the Crown to prove its case against him at the trial without his assistance. No inference of guilt could be drawn against him because he stood on those rights and refused to submit to physical tests. The trial judge was right in excluding the evidence because it was not relevant.

The British Columbia Court of Appeal explained the *Shaw* case in *Regina v. Brager.* [50] The trial court there, relying on *Shaw,* had refused to allow the defence counsel to cross-examine the arresting officer as to whether any physical tests of the accused had been made before or after arrest. Mr. Justice Davey pointed out that the trial judge had interpreted *Shaw* to mean that the Crown could not lead evidence on that subject and that the judge concluded as a corollary that defence counsel ought not to be permitted to do so by cross-examination. He concluded:

> The *Shaw* case does not bear that interpretation. [The court] held only that an accused's refusal to submit to tests not falling within section 224(4) is irrelevant and that on that... ground, evidence of such refusal ought not to be led by the Crown. If tests have been made, the results unless objectionable on other grounds, are relevant and admissible, examination-in-chief and cross-examination are proper on that subject.... In the present case, the questions by defence counsel on cross-examination were wrongly disallowed. But if... the defence had elicited that fact that no tests had been made, Crown counsel was entitled to ask why, and to bring out the fact of refusal, not to prove guilt, but to explain the omission, because that fact without explanation might have invited an inference that they were not made because they would not support the Crown's case. [51]

*Regina v. Burns* [52] dealt with the admissibility of evidence of a refusal by the accused to give a blood sample in a prosecution for a death caused by negligent operation of a motor vehicle, contrary to section 192 of the Criminal Code. Section 224(4) refers to samples taken for chemical analysis "for the purposes of this section," and prohibits comment on the refusal to give such a sample "in the proceedings." The subsections that precede subsection (4) refer specifically to proceedings under sections 222 (driving while intoxicated) and 223 (driving while ability is impaired) but not to section 192 (causing death by criminal negligence). It was submitted by the Crown that the statutory prohibition against comment on refusal to give a sample does not apply to proceedings under section 192.

---

[50] [1965] 4 Can. Cri. Cas. 251 (B.C.).
[51] *Id.* at 252.
[52] 51 D.L.R.2d 393 (Ont. High Ct. 1965).

Mr. Justice Gale, Chief Justice of the High Court of Ontario, pointed out that the case of *Attorney General for Quebec v. Bégin* [53] is authority for the proposition that the provisions of subsection (4) are restricted to charges under sections 222 and 223, and that in all other cases the admissibility of testimony regarding tests of blood and other bodily substances must be decided upon general evidentiary principles. Gale went on to say that the accused's refusal to provide a blood sample was within his common-law rights, and that no evidence of such refusal should be admitted to prejudice him by an inference that he had something to hide. He concluded :

> This position is logically consistent with the provisions of s. 224(4). Had the accused been charged under s. 223 with driving while impaired, a much less grave offence, the fact that he refused to give a sample could not be given in evidence at the trial. A far greater reason to follow the same course exists, as it seems to me, in logic and in reason, when he is charged with causing death by criminal negligence, where the criminal negligence is based upon an allegation of impairment. [54]

In *Regina v. O'Connor,* [55] the Ontario Court of Appeal reviewed a decision of Mr. Justice Haines [56] allowing an appeal by the respondent by way of stated case following his conviction on a charge of impaired driving contrary to section 223 of the Criminal Code. The accused voluntarily submitted to a breathalizer test before he had been told he was under arrest. When he was told this, he requested permission to contact his solicitor. He was allowed to make one telephone call only and was told his solicitor was away. Haines held that evidence of the breathalizer test was inadmissible. He outlined the question as follows :

> The case as stated involves the *apparently* distinct concepts or precepts of (a) full answer and defence under s. 709 of the Criminal Code; (b) natural justice, as that expression is understood at common law; and (c) retaining and instructing counsel without delay, as enunciated in section 2(c)(ii) of the Canadian Bill of Rights. [57]

After enlarging on this statement, he stated :

> Whether the three above-mentioned concepts or precepts as applied to this case be considered distinct propositions or as alternative statements of the same principle, nevertheless it does not seem open to doubt that violation in this case has been complete .... I venture to suggest that the studied indifference demonstrated by the police towards the accused throughout as regards his very basic civil rights might equally suggest to any Court a parallel degree of studied indifference on the part of the police in their execution of the other procedures in their processing of this case. [58]

He suggested further that this studied indifference in dealing with civil rights

---

[53] *Supra* note 47.
[54] *Supra* note 52, at 395.
[55] [1965] 2 Ont. 773.
[56] [1965] 1 Ont. 360, 1 Can. Cri. Cas. 20, 48 D.L.R.2d 110 (High Ct. 1964).
[57] *Id.* at 364, [1965] 1 Can. Cri. Cas. at 24, 48 D.L.R.2d at 114.
[58] *Id.* at 366-67, [1965] 1 Can. Cri. Cas. at 26-27, 48 D.L.R.2d at 116-17.

might suggest "unfairness of mind" and hence unreliability on the part of the police in handling the other procedures.

The Court of Appeal held that section 709 of the Criminal Code relates only to the proceedings at the trial of an accused, and that there was no violation of its provisions at the respondent's trial. The court considered that a further opportunity should have been given to the accused to reach counsel. However, even if the withholding of this opportunity should be held to be a denial of the right guaranteed to him by the Canadian Bill of Rights, that denial would not estop the Crown from placing in evidence the result of the breathalizer tests. The court believed that the evidence of the breathalizer tests was, as a matter of law, admissible beyond question. If the evidence is admissible the court has no power to exclude it. The "unfairness of mind" of the police referred to by Haines was a question of fact, not of law, and could go only to the weight or probative value of the evidence, not to its admissibility. [59]

In the case of *Regina v. Johnston,* [60] evidence was given by two psychiatrists pursuant to section 661 of the Criminal Code. [61] The Manitoba Court of Appeal questioned whether it was correct for two psychiatrists (if they are people in authority, which the court did not decide) to interview and examine a man in custody, having in mind the pending serious proceedings against the accused under section 661, without giving him some intimation of what the probable consequences of the interview might be, or in fact of the purpose of the interview. The court remarked that the judicial approach to the admissibility of illegally secured evidence has undergone a change over the years. Referring to *Rex v. Nowell* [62] and *Attorney General for Quebec v. Bégin,* [63] the court held that such evidence is not inadmissible merely because it has been illegally secured.

---

[59] The decision of the Ontario Court of Appeal was affirmed by the Supreme Court in a judgment handed down April 26, 1966, *supra* note 10. Of note is the recent decision in Regina v. De Clercq, [1966] 2 Can. Cri. Cas. 190 (1965), where the Ontario Court of Appeal stated that there is no duty on police officers, unless they are asked, to tell people they question when investigating complaints or before they take statements, that they are entitled to counsel.

[60] *Supra* note 47.

[61] Section 661 reads in part:

661(1). Where an accused has been convicted of

(a) an offence under
(i) section 136,
(ii) section 138,
(iii) section 141,
(iv) section 147,
(v) section 148, or
(vi) section 149, or

(b) an attempt to commit an offence under a provision mentioned in paragraph (a);

the court shall, upon application hear evidence as to whether the accused is a dangerous sexual offender.

(2). On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

[62] *Supra* note 47.

[63] *Supra* note 47.

From the foregoing we can arrive at a number of conclusions:

(1) Where an accused refuses to submit to physical tests then no evidence of such refusal can be led by the Crown against him. This is both a statutory rule with respect to offences within sections 222 and 223 [64] and a rule of general evidentiary law. [65]

(2) Where an accused's counsel brings out that no test was performed, the Crown is entitled to adduce the reason for such non-performance, notwithstanding that the reason may be the refusal to submit by the accused. [66]

(3) The law remains unsettled on the question of whether the results of a medical examination carried out by force are admissible against the accused. [67] But the established principle that evidence is not inadmissible merely on the grounds that it is procured illegally, and that it is relevancy which is the governing factor, may result in undesirable future decisions.

In two cases, the defence sought unsuccessfully to have the rules relating to the admissibility of confessions applied to certain statements made by the accused. *Regina v. Grey* [68] held that exculpatory statements made by an accused to police officers which later became incriminatory at trial when proved to be false are not confessions; accordingly, they are not subject to the rules relating to admissibility of inculpatory statements by an accused. In *Regina v. Brager,* [69] the accused replied to questions of the arresting officers as to where he had been drinking and how many drinks he had taken; the trial court held the accused's replies a confession and ruled them admissible after a *voir dire*. The defence on appeal complained that the trial judge did not specifically tell the jury that the weight to be attached to a so-called "confession" was for them to determine. The British Columbia Court of Appeal found that this conversation was not a confession because it was not incriminating when it was made. The incriminating nature of the incident lay not in the truth of the contents of the conversation, but in what the incident revealed to the policemen by the appellant's appearance, conduct, manner of speech and lack of orientation, about the impairment of his faculties. It was not a confession and did not requue to be treated as such in the charge.

In *Regina v. Wolbaum,* [70] the Saskatchewan Court of Appeal considered the admissibility of a confession made by a youth to a United States Border Patrol Officer. The sixteen-year old boy told the officer he was wanted for murder in Canada and that he had, in fact, killed his grandmother. Under questioning, with no warning being given, he gave additional information

---

[64] Attorney General for Quebec v. Bégin, *supra* note 47; Regina v. Beauvais, *supra* note 42.
[65] Regina v. Burns, *supra* note 52; Regina v. Shaw, *supra* note 49.
[66] Regina v. Shaw, *supra* note 49.
[67] Regina v. French, *supra* note 44.
[68] [1965] 4 Can. Cri. Cas. 240 (B.C.).
[69] *Supra* note 50.
[70] *Supra* note 20.

which amounted to a full confession. The trial judge admitted the statement as voluntary. On appeal, the Court of Appeal held that it was properly admitted. The statement was a spontaneous and voluntary outburst and it in no sense resulted from any fear of prejudice or hope of advantage exercised or held out by the officer in question. In the light of all of the circumstances, the absence of a warning had not prejudiced the accused or robbed the statement of its voluntary nature.

B. *Opinion Evidence*

In two impairment cases the question of what constitutes an expert witness who may give opinion evidence was considered. The general rule regarding opinion evidence has been restated by a county court in *Regina v. Nagy*:

> No doubt, the general rule is that it is only persons who are qualified by some special skill, training or experience who can be asked their opinion upon a matter in issue. The rule is not, however, an absolute one. There are a number of matters in respect of which a person of ordinary intelligence may be permitted to give evidence of his opinion upon a matter of which he has personal knowledge. Such matters as the identity of individuals, the apparent age of a person, the speed of a vehicle are among the matters upon which witnesses have been allowed to express an opinion, notwithstanding that they have no special qualifications, other than the fact that they have personal knowledge of the subject-matter, to enable them to form an opinion.[71]

For this reason, the court believed that the opinion evidence of police witnesses as to the condition of an accused due to his use of alcohol was admissible.

In *Regina v. Bunniss,*[72] a county court ruled admissible the opinion evidence of a police officer trained in the use of a breathalizer device as to the effect of the determined quantity of alcohol on the accused. The court defined an "expert" as a person whose opinion is admissible in the law of evidence; the test of expertness is skill in the field in which it is sought to have the opinion of the witness. So long as a witness satisfies the court that he is skilled, the way in which he acquired his skill is immaterial. The court then defined a "skilled person" as one who has, by dint of training and practice, acquired a good knowledge of the science or art concerning which his opinion is sought, and the practical ability to use his judgment in that science.

On what is an expert entitled to give opinion evidence? The Supreme Court of Canada in *Bleta v. The Queen*[73] reiterated the principle that an

---

[71] 51 West. Weekly R. 307, at 308-09 (B.C. County Ct. 1965), citing Rex v. German, [1947] Ont. 395, 3 Can. Cri. R. 516.

[72] [1965] 3 Can. Cri. Cas. 236 (B.C. County Ct. 1964).

[73] [1964] Sup. Ct. 561.

expert witness is not entitled to give an opinion based on his own assessment of the evidence. He can comment only upon a stated set of facts, whether these be the facts as proved in the case or as contained in an hypothesis put to him. In the instant case, however, the evidence as to the facts was wholly consistent and undisputed, and the Supreme Court held that the opinion given on such evidence was admissible as the evidence was tantamount to an hypothesis and involved no assessment of conflicting evidence, the latter being a question for the judge or the jury.

Thus, in *Regina v. Sanders* [74] two psychiatrists gave opinions that the accused's condition fulfilled the definition in the Criminal Code of a "criminal sexual psychopath." [75] The reviewing judge, on the return of a motion for a writ of habeas corpus with certiorari in aid, pointed out that the judge below had abandoned to these experts the judicial function of reviewing the evidence and arriving at an independent conclusion thereon.

### C. *Evidence of Previous Offences*

In *Colpitts v. The Queen,* [76] the accused appealed against his conviction on a charge of capital murder. He contended that the trial judge erred in allowing the admission, on cross-examination of the accused, of evidence of his previous conduct and criminal offences. Section 12 of the Canada Evidence Act [77] permits a witness to be questioned as to previous convictions. The Crown counsel had put questions to the accused as to how he was armed during previous offences, and whether he had ever used a knife in a previous holdup. He suggested that the accused had in fact done so. The accused denied this, and the Crown made no attempt to prove it. In the Supreme Court of Canada, Mr. Justice Spence considered the following statements of the Ontario Court of Appeal in *Rex v. MacDonald* :

> With respect to all the evidence of the kind objected to, the rules are well established. On the trial of a criminal charge the character and record in general of the accused are not matters in issue, and are not proper subjects of evidence against him .... Further, if the accused becomes a witness, as he has the right to do, he may be cross-examined as to any previous conviction, and if he does not admit it, it may be proved against him. As a witness, the accused is also subject to cross-examination as to matters affecting his credibility in the same way as another witness. Except for this the character and record of the accused are not proper subjects of attack by the Crown, and it is clearly improper for the Crown to adduce evidence, by cross-examination or otherwise, with a view to putting it before the jury that the accused has been "associated with others in a long

[74] [1966] 2 Can. Cri. Cas. 345 (B.C. Sup. Ct. 1965).
[75] CRIM. CODE § 659(b).
[76] *Supra* note 38.
[77] CAN. REV. STAT. c. 307, § 12(1) (1952) provides: "A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction."

> and serious criminal career." The accused person is to be convicted, if at all, upon evidence relevant to the crime with which he is charged, and not upon his character or past record.[78]

Mr. Justice Spence believed that on the facts of *MacDonald* the reference by the Ontario Court of Appeal to the impropriety of the Crown's adducing evidence "by cross-examination or otherwise" was obiter, since the court was considering the examination in chief of a Crown witness, a person closely associated with the accused. He thought that a cross-examination of an accused person which indicated that he had been "associated with others in a long and serious criminal career" would be perfectly admissible cross-examination upon the issue of the credibility of that accused person. The permission to cross-examine the accused person as to his character on the issue of his credibility is within the discretion of the trial judge. The judge should exercise that discretion with caution and should exclude evidence, even if it were relevant upon the accused's credibility, if its prejudicial effect far outweighs its probative value. Although it was not necessary to the allowance of the accused's appeal, Mr. Justice Spence reached a conclusion on this issue, finding that there was no prejudice to the accused.

### D. *Circumstantial Evidence*

Two cases dealing with the rule in *Hodge's Case*[79] were *Regina v. Halvorsen*[80] and *Regina v. Mitchell.*[81] The first case involved a charge that the accused drove a motor vehicle while his ability to drive was impaired. Found guilty of violating section 223 of the Criminal Code, the accused appealed to the British Columbia Supreme Court.

The evidence against the accused was entirely circumstantial; there was no direct evidence that the accused occupied the driver's seat. The court found that an inference might be drawn from other circumstances which might be found to meet the test in *Hodge's Case* :

> To so infer in the case of purely circumstantial evidence involves a consideration of the difference between drawing an inference from the facts reasonably and objectively established as contradistinguished from speculation, conjecture or suspicion which might flow from such facts, but which might not be capable of satisfying the two pronged test laid down in Hodge's Case .... Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish .... [I]f there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.[82]

---

[78] [1939] Ont. 606, at 623-24, 72 Can. Cri. Cas. 182, at 196-97.
[79] 168 Eng. Rep. 1136 (1838).
[80] 53 West. Weekly R. 541 (B.C. Sup. Ct. 1965).
[81] [1964] Sup. Ct. 471.
[82] *Supra* note 80, at 545.

The court determined that whether or not a body of purely circumstantial evidence is capable of satisfying the test laid down in *Hodge's Case* is a question of law. If it is so capable, then it becomes legal evidence and a jury may consider it to see whether or not it does satisfy that test and is cogent enough to offer proof beyond a reasonable doubt. This is a question of fact and the decision is not reviewable by way of stated case. It concluded that in this case there was no legal evidence upon which the magistrate could convict the accused.

The Supreme Court of Canada considered in *Regina v. Mitchell* [83] the question of whether the rule in *Hodge's Case* applies to the issue of planning and deliberation to determine whether the accused is guilty of capital or non-capital murder. The Court held that the rule did not apply to this issue. Mr. Justice Spence said that planning and deliberation involve the exercise of mental processes. Because of that, in almost every case where a jury is required to reach a conclusion as to whether or not a murder was planned and deliberate on the part of the accused, it must reach a conclusion on the basis of evidence which is circumstantial. According to Spence, Baron Alderson's test in *Hodge's Case* was concerned only with the identification of the accused as being the person who had committed the crime. He concluded that before the jury is called upon to determine the issue of planning and deliberation, it must already have reached the conclusion, beyond a reasonable doubt, that the accused has committed murder. The pattern of evidence on the mental issue is not a series of facts, which, in order to establish guilt, must lead to a single conclusion. Rather, the jury must consider the accused's actions, conduct, statements and capacity to plan and deliberate, and after weighing all of this evidence, must reach a conclusion. [84]

Mr. Justice Cartwright disagreed, holding that the trial judge should have charged the jury on the rules relating to circumstantial evidence as set out in *Hodge's Case*. The rule appears to follow inevitably as a corollary of the rule that the jury must not convict unless it is satisfied beyond a reasonable doubt of the guilt of the accused. "How," he asked, "can the proof of circumstances which are rationally consistent with the innocence of the accused establish his guilt beyond a reasonable doubt?" [85]

## V. MENS REA

The cases dealing with the concept of *mens rea* point up the confusion of thought and language which abounds in our courts with respect to attaching criminal responsibility to an accused. Attempts at a definition have included an "evil," "culpable," "guilty," or "blameworthy state of

[83] *Supra* note 81.
[84] *Id.* at 478-79.
[85] *Id.* at 482-83.

mind." [86] *Mens rea* obviously constitutes an element in the more traditional crimes of violence, but there are areas of the criminal law which require closer inquiry to determine whether this element is a necessary constituent of an offence.

A. *Fraud*

*Regina v. Selkirk* [87] involved charges of obtaining credit by fraud [88] and a credit card by fraudulent means. [89] The trial judge defined fraud in his instruction to the jury, as follows: "Well, fraud is simply the ordinary meaning of fraud. He must have fraudulent intent to commit fraud and fraud has its ordinary connotation which I do not need to explain to you gentlemen of the jury." [90] The Court of Appeal, however, felt that the evidence before the jury was inadequate and ordered that the accused be acquitted on one of the charges.

In *Regina v. Pace,* [91] a cook on a Royal Canadian Air Force base took home some pastry to his children. He stated that he honestly believed the loaf of bread was destined for the trash can. He originally pleaded guilty, but appealed on the ground that the taking was not fraudulent and was with colour of right; he did not intend to deprive the owner of the loaf, and that accordingly, he had no *mens rea* and no intention to steal. In spite of this, the Nova Scotia Supreme Court affirmed the conviction of the accused. To the court, his belief was consistent with fraud and no facts constituted a colour of right.

In *Regina v. Colucci,* [92] the accused, a broker, sent out a circular letter to prospective customers. The circular contained excerpts from an engineer's report on a mining property. The engineer had set out the factors favourable to continue prospecting on a mining property, contrasted these with unfavourable indices and concluded that the company should abort all operations. The excerpts reproduced included mostly the favourable points and made no mention of the conclusions drawn by the author of the report. The broker encouraged his readers to continue buying shares. The accused argued that the Crown must prove deceit and fraud in order to convict under the relevant section. It was held that deceit was sufficient. The implication here is that fraud could not have been proven.

The conclusion from these cases is that the lack of a consistent rationale of criminal liability leads to loose language which is used to disguise and rationalize instinctive decisions where the cases are not clear cut.

---

[86] Binavince, *The Doctrine of Mens Rea in Canada and Germany,* 7 PROCEEDINGS FOURTH INT. SYMPOSIUM ON COMP. L. — (1966).

[87] [1965] 2 Can. Cri. Cas. 353 (Ont.).

[88] CRIM. CODE § 304(1)(b).

[89] CRIM. CODE § 323(1).

[90] *Supra* note 87, at 359.

[91] [1965] 3 Can. Cri. Cas. 55 (N.S. Sup. Ct.).

[92] [1965] 4 Can. Cri. Cas. 56 (Ont.).

B. *Negligence*

One of the most difficult problems facing the criminal law and probably the one most requiring a consistent and logical approach to the rationale of criminal liability is that of negligence. The issue of negligence and *mens rea* arose in the rash of so-called "careless driving" cases which followed the enactment of section 221(4) of the Criminal Code, the "dangerous driving" provision.[93] The differences in wording of the legislation in this area are indicative of a basic uncertainty as to fundamental concepts. A provincial law, for instance, provides that it is an offence to drive a vehicle on a highway "without due care and attention or without reasonable consideration for other persons using the highway."[94] "Due care and attention," undoubtedly, set mental standards, as does "reasonable consideration." On the other hand, the federal law prescribes an objective standard. Yet, in *Regina v. Mann,*[95] Mr. Justice Haines had no hesitation in ignoring the subjective hypothesis of the provincial law, stating that:

> [T]he use of the words "due care and attention" and "reasonable consideration for other persons using the highway" clearly contemplates a manner of driving that is dangerous to the public or that ... for practical purposes is so similar as to be indistinguishable from the manner of driving proscribed by the corresponding section of the Criminal Code.[96]

Accordingly, he concluded that: 1) the two sections proscribed substantially identical conduct; 2) *mens rea* did not pertain to either of them; 3) "since both sections deal with inadvertent negligence, which does not admit of varying degrees of inattention, the mental element required to convict of either offence is the same."[97]

However, the Ontario Court of Appeal in the instant case stressed the difference in language of the two legislations. The court contrasted the purposes of the two enactments in this language:

> [Whereas] the dangerous driving section creates a crime of a standard of driving which involves danger to the public, ... the provincial section ... by formulating comprehensive rules of the road is designed to provide for control of the flow of traffic in a safe and orderly manner....[98]

*Regina v. Lykkemark*[99] also held that the word "dangerous" imports a considerably greater degree of negligence than does the word "careless." The Alberta district court considered dangerous driving as

---

[93] Enacted by Can. Stat. 1960-61 c. 43, § 3.

[94] The Highway Traffic Act, ONT. REV. STAT. c. 172, § 60 (1960).

[95] [1965] 2 Can. Cri. Cas. 338 (Ont.), *aff'd* [1966] Sup. Ct. 238.

[96] *Id.* at 342.

[97] *Id.* at 349.

[98] *Id.* at 351.

[99] [1965] 4 Can. Cri. Cas. 132 (Alta. Dist. Ct.).

constituting advertent negligence, whereas careless driving was mere inadvertent negligence. [100]

The subjectiveness of meaning of the epithets used is emphasized by the trial court in *Jeffers v. The Queen*, [101] whose conclusion was approved by the Court of Appeal:

> I submit that *O'Grady v. Sparling* [102] brings out that insofar as negligent driving is concerned, inadvertent negligence is the only kind which is involved in dangerous driving, the kind where *mens rea* is not an ingredient. There can be no negligent driving situated somewhere in "no man's land" between advertent and inadvertent negligence. Section 221(1) deals with advertent, and I can't think of any negligent driving left which could be made criminal except inadvertent. Consequently, dangerous driving does not require any "mental state" other than inadvertence. [103]

Both the trial court in the *Lykkemark* case and the appellate court in the *Jeffers* case came to their directly opposite conclusions after referring to *O'Grady v. Sparling*. [104] And no wonder if we stop to examine the common definitions of some of the words the debaters bandied about so nonchalantly.

### C. *Strict Liability*

The problem of negligence is intimately linked with that of strict liability. For as the degree of negligence decreases, we reach a grey area in which the judges feel it is impossible to say that the party had a "blameworthy state of mind." Before the boundary of "strict liability" is reached, a hybrid situation arises where the judges feel they can still pay lip-service to the *mens rea* concept. They conclude that in these cases "a presumption arises that he [accused] had a blameworthy state of mind", [105] or that the conduct, "if . . . not conscious wrongdoing, . . . is a very marked departure from the standards by which responsible and competent people . . . habitually govern themselves." [106] The courts face a dilemma in these borderline cases. Thus, some held that section 221(4) did not require *mens rea*, yet spoke of presuming *mens rea*. This proceeds from unclearness not only as to the nature of the concept of strict liability but also as to that of negligence.

A further complication in the Canadian context rendering strict liability a doubtful solution to the need for increased regulation of human activity

---

[100] *Id.* at 136.

[101] 45 Can. Cri. R. 177 (N.S. Sup. Ct. 1965).

[102] [1960] Sup. Ct. 804.

[103] 45 Can. Cri. R. at 182 (per Pothier, County Ct. J.).

[104] An illustration of the division of thought on the element of *mens rea* in the offence of dangerous driving is a series of further recent decisions by various Canadian courts: Regina v. Greene, 47 Can. Cri. R. 98 (Alta. Sup. Ct. 1965) and Regina v. Laird, [1966] 2 Can. Cri. Cas. 168 (N.B.) (*mens rea* required); Regina v. White, 44 Can. Cri. R. 396 (Nfld. Sup. Ct. 1964) and Regina v. Binus, [1966] 2 Ont. 324 (no *mens rea* required).

[105] Jeffers v. The Queen, *supra* note 103, at 179.

[106] Regina v. White, 44 Can. Cri. R. 396, at 398, [1965] 3 Can. Cri. Cas. 147, at 149, (Nfld. Sup. Ct.), quoting Duff, C.J., in McCulloch v. Murray, [1942] 2 D.L.R 179, at 180 (Sup. Ct.).

through the criminal law is the distribution of legislative powers as between the Dominion Parliament, on the one hand, and the provincial legislatures, on the other. The British North America Act [107] distributes the power to legislate in criminal law to the federal legislature, [108] and in civil matters to the provinces. [109] Our courts must have some distinct basis on which to decide the constitutional issue of where the bona fide exercise of the criminal-law power ends. This is especially so if one accepts the statement of a judge in *The Queen v. Stephens* that, "although the nature of the proceedings in which strict liability could be imposed is criminal, it was only so in form; in substance, however, it is a civil action in which no *mens rea* is required." [110]

It has been noted that the courts have in recent times attempted to limit the scope of operation of strict liability. [111] Certainly, the sole fact that a crime is statutorily created as opposed to being one of the classical common-law offences does not bring into operation the principle of strict liability. [112] Where the statute requires intent and knowledge, these must be directed to all elements of the crime. To hold otherwise is contrary to the *nullum crimen sine lege* principle. [113] So where, as in *Regina v. Sehn,* [114] the accused is charged with contributing to the juvenile delinquency of a child under eighteen, [115] an essential element to be proved in the Crown's case is that the accused had knowledge that the child was under eighteen. But in *Regina v. Ladue* [116] which concerned a charge under section 167(b) of the Criminal Code of indecently interfering with a dead human body, Mr. Justice Davey, in speaking for the Yukon Territory Court of Appeal, held that knowledge that the *corpus* was dead was not an essential element of the offence charged. The accused had pleaded the defence of no *mens rea* in that he was so drunk at the time of the act of copulation that he thought the woman was merely unconscious. Thus, he could not be said to have formed the intent to commit the offence charged. The conviction of the accused was confirmed. The court's decision was tantamount to construing the provision of the Criminal Code as imposing strict liability. That the judge attempted to disguise this result by speaking of a *mens rea* in a wide sense does not change the result. Mr. Justice Davey stated that the accused had the intention to commit rape as there could be no consent from the "unconscious" woman. And while there could be no conviction on a charge of rape as that offence required a live victim, the intent present

---

[107] 30 & 31 Vict. c. 3 (1867).
[108] 30 & 31 Vict. c. 3, § 91(27) (1867).
[109] 30 & 31 Vict. c. 3, § 92(13) (1867).
[110] [1866] 1 Q.B. 702, at 708-10.
[111] Binavince, *op. cit. supra* note 86, *passim.*
[112] *Id.* at—.
[113] *Id.* at—.
[114] [1964] 2 Can. Cri. Cas. 90 (B.C. Sup. Ct.).
[115] Juvenile Delinquents Act, CAN. REV. STAT. c. 160, § 33 (1952).
[116] 51 West. Weekly R. 175 (Yukon Terr. 1965).

provided the necessary *mens rea* under a statute *in the form* of section 167(b). Davey failed to realize that the accused may have committed a different crime. [117]

The search then continues for a rationale in the imposition of criminal responsibility.

## VI. PENOLOGY

In the area of penology, special attention was given to the rationale invoked in sentencing and to the unique sentence of preventive detention, applicable to him who is deemed an habitual criminal. [118] There is also a brief treatment of two outmoded types of social revenge — capital and corporal punishment.

### A. *Disparate Sentencing*

In pointing out the discrepancies in recent sentences, mention is made of some recommendations which could have a curative effect. It is not novel to note that rehabilitation has overshadowed retribution as the primary object in sentencing, and yet the cases surveyed show a remarkably wide range as to what is conceived to be a rehabilitating formula. While most courts profess similar aims, they differ greatly on their conclusions notwithstanding a similarity in fact situations.

The recent cases of *Deschenes v. The Queen* [119] and *Regina v. Dick,* [120] deal with convictions of a number of accused on charges of rape. In *Deschenes,* the accused were given sentences ranging from twenty to twenty-five years, plus six to eight strokes of the strap. In *Dick,* the accused were each given four years in prison and ten lashes. It is true that on their face we cannot object to the wide divergence in these sentences, a disparity of up to twenty-one years. But a comparison of what the judges said in each case points up the confusion existing in this area of the law today. In the *Dick* case, the judge stated: "I am convinced that it [rape] can be deterred by a sufficiently impressive and unpleasant treatment." [121] The Manitoba Court of Appeal thereupon imposed a four-year sentence. In the *Deschenes* case, the judge stated: "Since punishment is no longer inflicted for the sake of punishment, the purposes sought by the sentencing judge are the protection of society and the reform of the offender . . . ." [122] The Queen's Bench of Quebec thereupon imposed sentences of up to twenty-

---

[117] Binavince, *op. cit. supra* note 86, offers the solution that the accused could have been convicted of an impossible attempt of rape and, therefore, need not go unpunished for his objectionable conduct.

[118] This sentence may also be imposed upon a "criminal sexual psychopath." CRIM. CODE § 659(b).

[119] 42 Can. Cri. R. 40 (Que. 1964).

[120] [1965] 1 Can. Cri. Cas. 171 (Man.).

[121] *Id.* at 172.

[122] *Supra* note 119, at 41.

five years in prison. An even more disturbing aspect is that the facts of the two cases were not that dissimilar — both crimes were committed by a group, both violently forced their victims into submission. Besides, in *Deschenes,* when the defendants were first introduced to their victim on the night of the crime, she was standing there completely nude, which if not provocation is certainly a mitigating circumstance. It is true that the defendants in the *Dick* case were younger and there was not as much violence "proven" in that case, but certainly it would require a great deal more than this to justify a difference of twenty-one years in the sentences.

The same result appears from a comparison of other recent cases, for example, *Choiniere v. The Queen* [123] and *Regina v. Sandy.* [124] In *Choiniere,* the sentence for a conviction of robbery was three years imprisonment. In *Sandy,* the sentence for a conviction of robbery with violence was three years. In *Choiniere,* the defendant was a twenty-year old girl who, while in a hotel, "picked up" her victim, lured him to an alley where he was set upon by the defendant's friends and relieved of his money. She had no previous record of any kind. In *Sandy,* the defendants were two eighteen-year old Indians who assaulted their victim twice; he was beaten so severely that when discovered by a close friend, this friend could not recognize him — his face was beaten to a pulp. The Indians were also drunk at the time.

It is difficult to conceive how both cases resulted in an identical sentence. One of the reasons stated for not giving the accused in *Choiniere* a suspended sentence was that "on the whole, it seems wiser to separate the appellant from the milieu in which she has been living." [125]

Then there is the case of *Regina v. Dupuis.* [126] The defendant was convicted of robbery with threats of violence. The sentence here was a suspended sentence for two years. The court based its decision on the fact that "the chances for rehabilitation appear to be good," [127] despite the fact that "as a general rule, this crime calls for a substantial sentence." [128] A judge's intuitions result in one defendant spending three years in prison, whereas another defendant, though equally guilty, is free. A breakdown in communication as to what sentencing principles are to be followed among the different courts exists in these cases.

Other instances of this lack of uniformity can be found in the cases of *Regina v. Bruneau* [129] and *Regina v. Laroche.* [130] What makes an analogy

---

[123] 46 Can. Cri. R. 28 (Que. 1965).
[124] 43 Can. Cri. R. 380 (Man. 1964).
[125] *Supra* note 123, at 30.
[126] 44 Can. Cri. R. 57 (Que. 1964).
[127] *Id.* at 61.
[128] *Id.* at 62.
[129] [1964] 1 Can. Cri. Cas. 97 (Ont.).
[130] [1965] 2 Can. Cri. Cas. 29 (Ont.) (appeal from sentence dismissed); [1963] 3 Can. Cri. Cas. 5 (Ont.) (conviction quashed); [1965] 1 Can. Cri. Cas. 261 (Sup. Ct. 1964) (conviction restored).

of these cases more interesting than most is that the factual situations are quite similar and both cases were decided by the same court — the Ontario Court of Appeal. In *Bruneau,* the defendant, a member of Parliament, was convicted of bribery and was given a two-year suspended sentence by the trial judge. On an appeal to the Ontario Court of Appeal, he was sentenced to five years in prison. The *Laroche* case involves another public servant who was convicted of the theft of funds from the municipal treasury over a period of years. The defendant here was an official of the municipality and was sentenced to nine months in prison by the same Ontario Court of Appeal. Why the great difference in the punishment? Was it because the defendant in the *Laroche* case was a woman? Was it because the defendant in the *Bruneau* case was a federal member of Parliament and therefore subject to more publicity? There cannot be such a great difference in the gravity of these crimes. In the *Bruneau* appeal, the court simply stated that "the over-whelming consideration is as a deterrent to others for the protection of the public by reason of the responsibilities and duties of a member of Parliament." [131] The reason given in *Laroche* was "to indicate the seriousness of her conduct." [132] Ordinary common sense indicates an injustice.

A number of suggestions have been made to remedy such injustices as this one. Among these is the implementing of the Authority Plan discussed by Tappan. [133] This involves the setting up of a single agency to handle all sentencing, so as to reduce greatly the possibility of a wide divergence in results. However, one can foresee that courts and judges throughout the country would raise a howl of protest at such a move. They believe the transfer of the sentencing function to an administrative board would undermine the authority and independence of the judicial process. Besides, the trial judge who now imposes the sentence is deemed the most qualified person to do so, since he has before him all the facts, the arguments, the observations of witnesses, how the defendant acted, how he reacted to questions. But, as Mr. Justice Owen pointed out in *Deschenes,* "it seems to me that he may well suffer from certain disadvantages in that there is a danger of his outlook being restricted and also a danger of his decision being unconsciously affected by the pressure of opinion in a particular locality." [134] Of course, the legislature has the responsibility to effect a change in sentencing practice, and there is no move afoot at this time.

Another less all-embracing suggestion has been that probation should be the preferred disposition in all non-dangerous cases. [135] For example,

---

[131] *Supra* note 129, at 104.

[132] *Supra* note 130, at 29-30.

[133] TAPPAN, CRIME, JUSTICE AND CORRECTION 455-56 (1960).

[134] *Supra* note 119, at 51.

[135] Wechsler, *Sentencing, Correction and the Model Penal Code,* 109 U. PA. L. REV. 465, at 470 (1961).

in *Choiniere,* probation would seem to have been dictated in the circumstances, but the court did not consider this possibility.

The Model Sentencing Act [136] contains an important and practical proposal. It provides that each judge make a brief statement of basic reasons for the sentence he imposes. Any notable variation between his sentence and those of other judges under similar circumstances would thus be thrown into sharp relief. This would eliminate the present practice of stating broad purposes and then trying to "fit in" the sentence imposed in an attempt to justify an arbitrary conclusion. It would enable a judge who must make a decision to investigate what other judges have decided, what reasons they gave for their decision, and then distinguish the essential differences between the cases and arrive at a more uniform sentence. In effect, a more jurisprudential approach is required in the field of sentencing.

A recent application of this approach is *Regina v. Rogers.* [137] The magistrate sentenced the two defendants who were convicted on a charge of unlawful possession of a narcotic to three and four months respectively. On appeal to the British Columbia Court of Appeal, the sentence was extended to two and three years respectively. The court consulted a number of cases involving the same circumstances as were present in the case, and, by comparing the sentence imposed in those cases, the sentence was determined. If such a procedure had been followed more closely in either the *Deschenes* or *Dick* cases perhaps such a great diversity in the results reached might not have occurred.

More frequent use of pre-sentence and probation department reports would aid the judge in his sentencing function. Material on family background, employment, environment, activities, interests, health and habits should be made more accessible to the sentencer. Better facilities and more progressive legislation would prevent sentencers from being compelled to send to jail persons who should be in hospitals. For example, in New Jersey a statute has been enacted under which an individual convicted of repeated sex offences involving minors may be treated in a hospital rather than in a penal institution. [138] If we had similar legislation in Canada, the fears of the magistrate concerning narcotic addiction in the *Rogers* case could be laid to rest. Such people could be sent to specialized institutions where proper treatment is available. One would thereby avoid the problem of a judge trying to reconcile his belief of what he ought to do with what the law says he must do. An example of this problem is *Regina v. Mabec.* [139] The defendant was convicted of the indecent assault of a girl. He had committed

[136] See Flood, *The Model Sentencing Act: A Higher Level of Penal Law,* 9 CRIME & DELINQUENCY 370, at 375 (1963).

[137] 52 West. Weekly R. 423 (B.C. 1965).

[138] Brancale, *Diagnostic Techniques in Aid of Sentencing,* 23 LAW & CONTEMP. PROB. 442, at 456 (1958).

[139] [1965] 3 Can. Cri. Cas. 150 (Ont.).

the same offence ten years before and was given a suspended sentence at that time. But in the interval, he had married and had a child. He was receiving psychiatric treatment but had to discontinue it because it was too expensive. He was sentenced to five years in prison though it was obvious to the court that the man should have been in a hospital. The court felt compelled to impose the sentence due to the lack of proper legislation.

No matter how the principles and objectives of punishment or sentencing are stated, disparity or lack of uniformity will continue to some extent. To maintain this at a minimum, the courts should strive to give individualized treatment to the offenders before them. All relevant facts concerning the offender and his crime should be examined. Before passing sentence, judges should consult precedents which are applicable, in much the same manner as they do for the ordinary rules of law. Detailed reasons for the sentence they impose should be set out; an explanation should accompany any decision which does not correspond with sentencing precedents. In this way any lack of uniformity which appears in a particular case will at least have the advantage of an explanation for that divergence. In the present state of law this is all the courts could do; other suggested solutions require legislative action.

Some cases raise doubts on the utility of imprisoning an accused, even though he has been convicted under the Criminal Code. *Regina v. Motuz* [140] is perhaps a typical case. The parents of two small children, aged four and five, left their children alone at home and went to the local tavern for a beer. While the parents were there, both children were killed when the house burned down. The parents, convicted of criminal negligence, were sentenced to four months in prison. The parents' conduct is, without doubt, reproachable, but one can challenge the utility of sentencing them to prison. The general-prevention aim is unrealizable; a four-month prison term is too short to "rehabilitate" them, assuming they need rehabilitation; they are not dangerous offenders who require isolation. At best, this is an application of what Mr. Justice Schroeder in *Regina v. Roberts* [141] called: "The barbarous doctrine of an eye for an eye and a tooth for a tooth," a doctrine that "has no place in our law, although its influence may still linger when punishment is imposed for crimes characterized by great viciousness or extreme violence." [142] The court abhorred the parents' conduct; hence it felt a psychological need to punish. It ignored the dissenting judge's perceptive observation that the proper punishment should have been a suspended sentence because he was "unable to see where any good purpose would be served by sending these two people to prison." [143] The result is difficult to justify if one accepts at face value the oft-repeated statement that Canadian

[140] [1965] 2 Can. Cri. Cas. 162 (Man.).
[141] 36 D.L.R.2d 696 (Ont. 1962).
[142] *Id.* at 716.
[143] *Supra* note 140, at 163.

courts expressly rule out retribution as an objective of sentencing when no other useful purpose would be served by a prison term. One can only conclude that in *Motuz*, the court, in its outrage at the act, based its decision on reasons beyond the interest of both the defendants and society.

B. *Corporal and Capital Punishment*

Imprisonment is the deprivation of the liberty of the convict, his isolation from the rest of society; no physical violence is involved. Capital and corporal punishment involve the imposition of physical violence, actual physical harm in corporal punishment, death in capital punishment. Because of this distinctive nature of corporal and capital punishment, their use has been widely debated.

The arguments that have been raised for abolition and retention of capital punishment in Canada are familiar to everyone; Mr. Guy Favreau's "White Paper," presented to Parliament in 1965 when he was the Minister of Justice, [144] is an excellent summary. It contains sixty-five arguments for abolition and eighty-seven for retention. After a lengthy debate in the House of Commons, a decision to retain it has been made. Before this decision, however, the death penalty had been, in practice, abolished; over the past several years every death sentence has been commuted to life imprisonment. How the Pearson government will deal with commutations in the face of Parliament's decision is not yet clear.

Corporal punishment is also a part of the law of Canada. It takes various forms depending on the jurisdiction involved. In Manitoba, a paddle is used to strike the bare bottom of the prisoner. Some places use a leather strap across the back, others use a whip with leather knots along its extension and its manner of execution is a slash across the bare back.

Generally, the courts today are reluctant to apply this form of punishment except in severe cases, usually involving crimes of extreme violence or brutality. Nevertheless, that this penalty still remains on the statute books of Canada at this time is incomprehensible. No one can seriously suggest that it is of any value whatsoever — it is purely and simply a form of retribution, a means by which society can avenge some outrageous crime. This form of punishment is held in such disrepute throughout the civilized world that, besides Canada, only one state in the United States, South Africa, Egypt, and other colonial territories retain it. [145]

Judges in Canada feel compelled to impose it in some cases even though they violently reject its usefulness or moral justification. The words of Mr. Justice Monnin in *Sandy* give expression to this "reverential fear" :

---

[144] FAVREAU, CAPITAL PUNISHMENT — MATERIAL RELATING TO ITS PURPOSE AND VALUE (1965).

[145] *Hearings Before the Special Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries*, DEBATES SENATE CANADA, session 156, at 873 (June 27, 1956).

"It is not part of my duties to decide whether the lash or the strap should or should not be abolished, nor to relegate it to oblivion by obdurate refusal to impose it, nor to set it aside because one does not approve of corporal punishment. That is a matter entirely within the exclusive jurisdiction of the legislative power." [146] The penalty is barbaric; it is a sad commentary on our criminal-law system that it remains in force and is occasionally imposed.

## VI. PREVENTIVE DETENTION

The provisions dealing with habitual criminals [147] were first introduced to the Criminal Code in 1948. They were modelled after the English Prevention of Crime Act of 1908, [148] as revised by the Criminal Justice Act of 1948. [149] Amendments to clarify and simplify the procedure required were introduced in 1961. [150]

The proceeding is not a form of prosecution, but an inquiry or hearing conducted by the court. The Crown attorney submits to the court for its consideration all of the accumulated data related to the accused's criminal record, the number and seriousness of the crimes he has committed, and the danger which he poses to the public. The court must then determine whether or not the accused should be classified as an habitual criminal, and if so, whether or not he should be sentenced to preventive detention.

One criticism levelled at the habitual criminal provisions in the Criminal Code refers to the burden which the proceeding imposes upon the Crown attorney. Voluminous data must be assembled, many hurdles have to be overcome before a "conviction" [151] can be obtained. Once the Crown attorney

---

[146] *Supra* note 124, at 387.

[147] Section 660 of the Criminal Code is the relevant provision.

[148] 8 Edw. 7, c. 59 (U.K.).

[149] 11 & 12 Geo. 6, c. 58 (U.K.).

[150] The 1961 Amendment provided the following procedural changes:

(a) Eliminated the requirement that the accused receive both a determinate sentence for the specific offence out of which the proceedings arose and a sentence of preventive detention.

(b) Removed procedural difficulties relating to the time within which notice must be given to the accused by the prosecutor.

(c) Specified in greater detail the grounds of appeal and the power of the Court of Appeal in proceedings under Part XXI.

[151] The British Columbia Court of Appeal held in Regina v. MacNeill, 53 West. Weekly R. 244 (1965), that finding a person to be an habitual criminal is not a conviction under § 583 of the Criminal Code so as to give a right of appeal under that section. But this was doubted by the Manitoba Court of Appeal in the later case of Regina v. Negrey, 47 Can. Cri. R. 255 (1965). The court considered that an appeal lay both from the sentence of preventive detention and from the finding of habitual criminal. It is interesting to note that the same British Columbia court which decided the *MacNeill* case had, four months earlier, in Regina v. Channing, 52 West. Weekly R. 99 (1965), allowed an appeal from both the finding and the sentence (notwithstanding that the head-note of the case report refers only to the sentence). The Manitoba Court of Appeal suggests the solution to this conflict in the 1966 decision, Regina v. Larocque, 55 West. Weekly R. 638. There, the court said that the *MacNeill* case was right in holding that no appeal lay from the finding of habitual criminal in view of the express words of § 667(1) of the code which provide that a person "who is sentenced to preventive detention" may appeal. However, the appeal may be "on any ground of law or fact or mixed law and fact." That the accused is an habitual criminal is a question of mixed fact and law and so an appeal from sentence which succeeds on this ground, necessarily results, as in the *Channing* case, in a setting aside of the finding of habitual criminal.

has assembled and examined the evidence available and has secured the consent of the attorney general of the province to proceed, itself an arduous process, he must then prove to the court that the accused is an habitual criminal. He must show that the accused has been convicted on at least three separate and independent occasions of indictable offences for which he was liable to be imprisoned for five years and that the accused is "leading persistently a criminal life." [152]

This latter requirement can be most difficult to prove. The following has been suggested as a guide-line :

> Since the onus is on the Crown to prove that the accused is leading a criminal life, it would appear that it must prove at least one, or preferably a combination of the following facts, namely that the accused has committed criminal offences other than those necessary to support the initial application for preventive detention, that he is not working and has made no effort to find work and therefore has no visible reasonable means of support, and that he is constantly in the company of known criminals. From these facts, the court may infer that he is leading a persistently criminal life, but since the onus is not on the accused to show he is leading an honest life, [153] the accused may raise sufficient doubts as to the validity of the inference. [154]

Because of these difficulties, it is not surprising that in practice the Crown attorney prefers to urge the court to impose a longer sentence on the accused for conviction on a specific offence than to initiate later habitual criminal proceedings.

If the Crown attorney can prove to the court that the accused is an habitual criminal as defined by section 660(2) of the Criminal Code, the court, in exercise of its discretion, will decide whether it will pass sentence or not. Section 660(1)(b) provides that the court must be of the opinion that it is "expedient for the protection of the public" before it should pass sentence on the accused. This discretion has been exercised by the court against committal in *Regina v. Schaf*. [155] The trial judge held a drug addict to be an habitual criminal, but found him to be a menace to himself rather than to the public and declined to pass a sentence of preventive detention. The same occurred in the more recent case of *Regina v. MacNeill*. [156] It has been suggested that the phrase "expedient for the protection of the public" should be interpreted to mean "expedient for the prevention of further crime." However, the courts tend to ignore the provision, and assume that the finding of an accused to be an habitual criminal automatically includes a finding that he should be sentenced to preventive detention. [157]

---

[152] CRIM. CODE § 660(2)(a).

[153] Regina v. Dawley, 23 West. Weekly R. 430, at 434 (B.C. Sup. Ct. 1956).

[154] Mewett, *Habitual Criminal Legislation Under the Criminal Code*, 39 CAN. B. REV. 43, at 47 (1961).

[155] Reported in Winnipeg Free Press, June 9, 1965.

[156] *Supra* note 151 (no facts given as to why accused "not menace to public").

[157] *Supra* note 154, at 48. The discretion in the court is also provided in the words of § 660(1) : "the court may . . . impose a sentence of preventive detention . . .."

There are aspects of the procedure apart from its complexity that bring about undesirable results. For instance, the proceedings are not mandatory; their being initiated is dependent upon the discretion of the Crown attorney. Whether or not an accused person is to be declared an habitual criminal depends almost entirely upon the personal beliefs of the Crown attorney in the county where the offence is prosecuted. Statistical data on the number of persons who have been sentenced to preventive detention as habitual criminals since 1948 show disparity in enforcement of the law.[158] British Columbia, compared with other provinces, has been exceedingly vigorous in its application of the Criminal Code provisions on habitual criminals. This gross disparity could be avoided to a large extent if the proceedings were made mandatory rather than discretionary. The data also reveal that over 50 per cent of the sentences of preventive detention imposed in Canada since 1948 have been imposed in the past five years. This trend is due almost entirely to the increased activity in British Columbia.[159]

A further criticism is that preventive detention in practice today means a life sentence, subject to parole for life. This is far too severe a penalty for one who is not being punished for his past, but who is being detained to protect society from crimes he would probably commit in the future. Perhaps this is the reason why the courts, except those in British Columbia, are generally reluctant to impose this sentence on the accused. An improvement has been introduced by the 1960 amendment to the Criminal Code. Section 666 provides that the Minister of Justice[160] should review the case of persons in preventive detention at least once every year. Prior to this amendment the review was every three years. Preventive detainees are eligible for parole in the same manner as any other prisoner, except that such parole continues for life.

The failure of Canadian authorities to provide special facilities for the preventive detainees has been another common criticism of the system. Section 665(2) of the Criminal Code provides: "An accused who is sen-

---

[158] 

| Year | British Columbia | Other Provinces | Total |
|---|---|---|---|
| 1965 | 12 | 2 | 14 |
| 1964 | 27 | 2 | 29 |
| 1963 | 7 | 2 | 9 |
| 1962 | 3 | 1 | 4 |
| 1961 | 1 | 2 | 3 |
| 1960 | 1 | 6 | 7 |
| Totals | 51 | 15 | 66 |
| Totals since 1948 | (62) | (54) | (116) |

Based on data obtained from the National Parole Board, which may not be entirely complete.

[159] A problem which emerged in the United States is the use of the habitual criminal legislation by prosecutors as a means of bargaining with accused persons for pleas of guilty. Such practice does much to undermine the purpose for which this legislation was intended, as well as casting doubt on the proper administration of justice. There have been some allegations made but there seems to be no evidence that plea bargaining has presented a problem in Canada.

[160] By § 24(5) of the Parole Act, Can. Stat. 1958 c. 38 the powers, functions and duties of the Minister of Justice under § 666 of the Criminal Code are transferred to the National Parole Board.

tenced to preventive detention may be confined in a penitentiary, or part of a penitentiary set aside for that purpose, and shall be subject to such disciplinary and reformative treatment as may be prescribed by law." This provision has not been implemented, probably because there are relatively few preventive detainees. In practice, a sentence of preventive detention is served in an ordinary penitentiary, and the detainee is treated as any other person serving a term of life imprisonment. No special working facilities are provided him, nor does he receive any special treatment. The recommendations of the 1938 Royal Commission [161] have not been put into operation, and the prediction of this commission that judges and magistrates would be reluctant to sentence persons to preventive detention [162] seems to have come true with, of course, the exception of British Columbia.

The difficult onus which is on the Crown was emphasized by the British Columbia Court of Appeal in *Regina v. Channing* [163] where an appeal by the accused was allowed. The court pointed out that the onus is on the Crown to prove beyond a reasonable doubt that the accused is leading a persistent criminal life. Among the facts which the court must consider in addition to a lengthy criminal record are: a) whether the substantive offence was premeditated or a sudden yielding to temptation; b) whether the accused had done anything unlawful in the period immediately preceding the substantive offence; c) whether the substantive offence is of the same general pattern as the previous offences; d) whether the accused has been associating with criminals.

In dealing with the sentence of preventive detention, the court noted that to support a sentence, the Crown must assume the onus of proving beyond a reasonable doubt that it is expedient for the protection of the public that the accused be sentenced beyond that imprisonment for the substantive offence. On this point, reference was made to the case of *Regina v. Mulcahy* [164] where Mr. Justice MacQuarrie noted that even though the accused had a lengthy criminal record, the petty nature of it indicated "that he is not the type of person of whom it can properly be said it is expedient for the protection of the public to sentence him to protective detention." [165]

The reported cases during the past year have dealt either with procedural questions [166] or with questions revolving around the interpretation and

---

[161] ROYAL COMM. TO INVESTIGATE THE PENAL SYSTEM OF CANADA, REPORT at c. 19(1938) (Archambault Report).

[162] *Id.* at 224.

[163] *Supra* note 154, 52 West. Weekly R. 99 (1965).

[164] 42 Can. Cri. R. 1 (N.S. Sup. Ct. 1964). The dissenting opinion of MacQuarrie, J., was adopted on appeal by the Supreme Court of Canada, 42 Can. Cri. R. 8 (1964).

[165] *Id.* at 7.

[166] For examples of these procedural decisions see: Regina v. MacNeill, *supra* note 151, Gordon v. The Queen, [1965] 4 Can. Cri. Cas. 1 (Sup. Ct.); *Re* Harney, [1965] 4 Can. Cri. Cas. 246 (B.C. Sup. Ct.); Regina v. Hume, *ex parte* Fielding, [1965] 3 Can. Cri. Cas. 222 (B.C. Sup. Ct.); Regina v. Hadden, 51 West. Weekly R. 693 (B.C. 1965).

application of the Criminal Code provisions on habitual criminals. Perusal of these cases reveals that there has been no judicial modification or alteration of the substantive law as it currently is stated in the Criminal Code. There does not appear to be any judicial trend which, if projected, could bring about any change in the law as it now stands. Nor does it appear that Parliament desires legislative changes, even to the repeal of the provisions.

In some jurisdictions there is a growing tendency to regard habitual criminal legislation as a failure since it has not succeeded in bringing about desired results. In the United Kingdom, the government recently set before Parliament its broad proposals for early reform in the treatment of offenders. [167] The recommendation is that the courts be given the power to impose a sentence longer than the particular crime calls for where the accused is shown by evidence to have been a persistent offender. A similar sentiment was expressed by the American Law Institute when it excluded habitual criminal legislation from the Model Penal Code, even though such legislation exists on the statutes of 90 per cent of the states. [168]

## VII. Criminal Procedure

The rights of the accused, albeit loose terminology, have not been dealt with wholly under criminal procedure, as is usually the approach. The cases dealt with here highlight what we may call the misuse, non-use and abuse of power in criminal prosecutions. The first problem, an area of misuse of power, is the charging of a person with a crime without properly informing him of the charge against which he must defend himself.

Section 323(1) of the Criminal Code creates an indictable offence for: "Every one who, by deceit, falsehood or other fraudulent means...." Section 492(1) requires that each count in an indictment shall apply to a single transaction; section 492(3) says: "A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him, and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count." The count in *Regina v. Foulis* [169] was drawn as follows:

> That he, at the city of Victoria between Oct. 1, 1958, and March 31, 1963, by deceit, falsehood or fraudulent means and with intent to defraud did unlawfully obtain from John G. Patterson money in the sum of approximately $58,800, for the alleged purpose of financing a transaction involving the purchase and re-sale of branded liquor, in that he the said Robert A. Foulis did by words and otherwise make material misrepresentations of

[167] Home Department, The Adult Offender (1965) (White Paper presented to U.K. Parliament).

[168] [1949] Federal Probation 28.

[169] [1965] 2 Can. Cri. Cas. 248 (B.C. Sup. Ct.).

> matters of fact known to him to be false with the fraudulent intent that they should be acted upon by the said John G. Patterson contrary to the Criminal Code. [170]

The question is whether the accused knows what he must defend himself against. The case came before Mr. Justice Aikins of the British Columbia Supreme Court, and he held that the count applied to a single transaction — the obtaining from John G. Patterson of a sum of money in the amount of approximately 56,800 dollars; that it contained in substance a statement that the accused committed an indictable offence. The accused, in applying for certiorari to quash the information, was, in effect, objecting to a lack of particulars in the count as framed. The judge, in concluding that the count was proper, said: "the count in an indictment, in my respectful opinion, should be as succinct as possible provided that it complies with the requirements of the Criminal Code." [171]

Again, in *Regina v. Matspeck Construction Co.*, [172] the judge was willing to accept that the words of the Ontario Water Resources Commission Act constituted a proper phrasing of a single offence. The charge against the accused read that he did "discharge or deposit or cause or permit the discharge or deposit of material . . . into a watercourse . . . , which material may have impaired the quality of the water in the said watercourse." [173] The Ontario court held that the situation was covered by the provisions of section 703 of the Criminal Code. The court went on to say that "there can be no doubt in the mind of the accused that he is charged with having in one mode or another discharged or deposited material into water and that this material may have impaired its quality." [174] The accused contended that duplicity existed because of the phrases "discharges or deposits" and "causes or permits the discharge or deposit."

The Supreme Court of Canada in *Kipp v. Attorney General for Ontario* [175] split three-to-two on the issue of duplicity where the offence was selling dead animals as food and the relevant statutory provisions gave two descriptions of a "dead animal." The count read:

> That he, the said Joseph Raymond Kipp, between the 9th day of August, A.D. 1961, and the 20th day of October, A.D. 1961, at the then town of Eastview in the Province of Ontario did unlawfully sell as food dead animals or parts thereof in violation of s. B. 14.010 of the Food and Drug Regulations . . . , thereby committing an indictable offence contrary to para. (6) of sec. 25 of the Food and Drugs Act, Statutes of Can. 1952-53, c. 38. [176]

---

[170] *Id.* at 248-49.
[171] *Id.* at 250.
[172] [1965] 4 Can. Cri. Cas. 78 (Ont. High Ct.).
[173] *Id.* at 79.
[174] *Id.* at 80.
[175] [1965] 2 Can. Cri. Cas. 133 (Sup. Ct.).
[176] *Id.* at 138.

Regulation 14.010 provides: "No person shall sell as food a dead animal or any part thereof." "Dead animal" is defined in Regulation B. 14.012 as follows: "For the purpose of s. B. 14.010 and B. 14.011, dead animal means a dead animal that (a) was not killed for the purpose of food in accordance with the commonly accepted practice of killing animals for the purpose of food, which shall include exsanguination, or (b) was affected with disease at the time it was killed."

Speaking for the majority of the Supreme Court, Mr. Justice Judson said that there was no duplicity on the face of the indictment: "It charges only the one offence of selling dead animals or parts thereof, and Reg. B. 14.012 does no more than define two different modes of the same offence." [177] Mr. Justice Cartwright and Mr. Justice Spence dissented. On the issue of duplicity, Cartwright pointed out that regulation B. 14.010 read with the definition of "dead animal" created two distinct offences. [178] On the further issue of whether mandamus should issue to compel the county court judge to proceed with the trial where he had quashed the indictment, the majority of the Court ruled that the extraordinary remedy did lie. The difference in the conclusions reached on this point by the majority and minority stems from the view by the former that the judge declines jurisdiction in quashing an indictment. And so the court is not improperly reviewing its decision on the merits as was the opinion of Spence and Cartwright.

This latter development would seem to strip the accused of the one means of ensuring that he knows the specific charge against which he must defend himself, that is, the pressure on the prosecutor to frame the charge specifically or take the consequence of having to commence fresh proceedings. [179]

A number of cases involved the question of whether the judge has jurisdiction to proceed in the face of a technical defect in the procedure. These cases affirm that a judge may question his own jurisdiction, and if, for example, in the case of an appeal he doubts whether conditions precedent have been met, he may hear evidence to resolve any fact upon which his jurisdiction depends. Moreover, he has a duty to do so where he is in doubt.

To illustrate, before setting an appeal down for hearing, a judge before whom the application is made is required to examine closely the material filed, pursuant to section 722 of the Criminal Code. Can the appeal judge reopen these procedural matters where the case is set down by another judge who has examined the material filed? Such a situation came before

---

[177] *Ibid.*
[178] *Id.* at 137.
[179] The Code provides no appeal from the quashing of a count.

the Alberta Court of Appeal in *Regina v. Kalischuk.* [180] A magistrate's dismissal of a charge for impaired driving was appealed to the district court. At the hearing of the appeal, the judge called the attention of counsel to what he thought were irregularities in the affidavit of service of the notice of appeal upon the magistrate and the respondent. These affidavits were not entitled in any court and were simply headed "Affidavit of Service." The notice of appeal was not made an exhibit or otherwise identified, it was directed to all persons named as having been served in the affidavits. The district court judge said: "Whatever was filed, whatever was served, it is not made clear and I think it must be established before the case can be set down for trial that all documents are in order .... I am afraid that I am without jurisdiction in the circumstances." [181]

The Alberta Court of Appeal found that there was nothing in this case to suggest that the proper parties were not, in fact, served with a copy of the notice of appeal, so that once the judge before whom the application came had examined the material filed, pursuant to section 722 of the Criminal Code, and had decided that the section had been complied with, the question of jurisdiction became settled and the judge on appeal could not set aside the entry of the appeal.

But where there is some condition precedent to an appeal in addition to the requirements of section 722, then a failure to examine for such condition being met leaves the question of jurisdiction unsettled. Thus, in *Regina v. Bailey* [182] where there was an offence charged under the Liquor Control Act of Alberta [183] and that act required an affidavit of innocence by the accused on an appeal, the appellate court concluded that it had no jurisdiction where the judge setting down the appeal for hearing had failed to satisfy himself that the condition had been satisfied. In effect, the judge setting down the appeal failed to exercise jurisdiction. In the *Kalischuk* case, jurisdiction was exercised and a judicial determination made. Again, a judicial determination was reached in *Regina v. Terrabain* [184] where the judge refused to set down an appeal for hearing where the mode of service of the notice of appeal as provided in section 722(1)(b)(ii) had not been met. It was also pointed out that the term "personal service" means service upon the very person designated by a statute rather than upon some substituted person, and does not mean service by a person.

Two principles of law relating to appeals were affirmed. Despite the seeming triteness of these cases, they serve as useful reminders.

---

[180] 49 West. Weekly R. 703 (Alta. 1964).
[181] *Id.* at 704.
[182] [1965] 1 Can. Cri. Cas. 279 (Alta. Sup. Ct. 1964).
[183] Alta. Stat. 1958 c. 37.
[184] 50 West. Weekly R. 560 (Alta. Dist. Ct. 1964).

The British Columbia Court of Appeal in *Regina v. Anatole* [185] reaffirmed that an appeal is a statutory right and does not exist unless authorized by statute. So, where an accused is denied leave to appeal from sentence by a single judge of the Court of Appeal, the matter is concluded. The refusal, not being an interlocutory order, does not entitle the accused to appeal to the court of appeal by virtue of a provision in the provincial Court of Appeal Act. [186] The refusal is a final order.

The rule that the ancient remedy of the prerogative writ is not available if an appeal lies was reiterated by the British Columbia Supreme Court in *Re Ambeau.* [187] The wording of the applicable Summary Convictions Act [188] was similar to that found in section 682 of the Criminal Code. [189] The law is that no conviction or order shall be removed by certiorari where an appeal was taken, notwithstanding that it was not carried to a conclusion, or where the accused appeared and pleaded, the merits were tried, and an appeal might have been taken but the accuse did not appeal.

The problem of abuse of judicial power arose in two cases, *Regina v. Guest* [190] and *Regina v. Magistrate Taylor, ex parte Ruud.* [191] In both instances, the accused succeeded in having the conduct of the magistrate censured by a higher court, and in addition an order to pay costs was issued against the magistrate. The protection against civil proceedings which is furnished by section 689 of the Criminal Code to a magistrate whose conviction or order is quashed was withheld until such time as the order for costs was complied with.

In the *Guest* case the magistrate had convicted the accused for failing to stop his vehicle for a pedestrian contrary to a by-law of Edmonton. The by-law provided for a maximum sentence of sixty days in default of a maximum fine of 500 dollars. The magistrate sentenced the accused to fourteen days imprisonment without the option of a fine. The Supreme Court of Alberta, in quashing the conviction, thought that the interests of justice would be best served by ordering the police magistrate to pay the costs of the proceedings below and in the appeal. An order for protection from civil proceedings would not go in default of such payment. [192]

---

[185] [1965] 4 Can. Cri. Cas. 358 (B.C.).

[186] B.C. REV. STAT. c. 82 (1960).

[187] [1965] 2 Can. Cri. Cas. 372 (B.C. Sup. Ct.).

[188] B.C. REV. STAT. c. 373 (1960).

[189] Regina v. Thibault, 41 Can. Cri. R. 33, at 35 (B.C. Sup. Ct. 1963) said of § 682: "[I]t is couched in language of the utmost clarity and if the intention of Parliament in enacting this section was to wholly take away the power of the superior court to grant certiorari in those cases which fall within s. 682, it is difficult to see how more apt or cogent language could have been selected."

[190] 49 West. Weekly R. 610 (Alta. Sup. Ct. 1964).

[191] [1965] 4 Can. Cri. Cas. 96 (Sask. Q.B.).

[192] *Supra* note 190, at 615.

The magistrate in the *Ruud* case was said to be openly carrying on a vendetta against the accused's counsel with the result that a real likelihood of bias against the accused himself was present. The court granted an order prohibiting the magistrate from proceeding with the hearing of a charge against the accused and also ordered the magistrate to pay the accused's costs. It was the court's sentiment that justice should not only be done, but should also be seen to be done. [193]

[193] *Supra* note 191, at 102. In both the *Guest* and *Ruud* cases the magistrates were lawyers and so the protection given them under § 689 of the code was probably less than would have been given to a non-professional magistrate.