The Habitual Criminal — A Review of the Jurisprudence

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The habitual criminal constitutes a distinct category of offenders distinguished both legally and theoretically from the mass of criminals. In almost every modern legal system the habitual criminal is treated as one who requires additional or special sanctions.

In Canada, an offender characterised as an habitual offender and sentenced to preventive detention,[1] begins to serve an indeterminate sentence,[2] meaning at worst life imprisonment and at best permanent parole. In short he is a perpetual prisoner, and "it is not within this man's power to serve his sentence, pay his penalty and enter society again as a free and effective citizen".[3]

It has been said "that this most severe and extreme interference with the liberty of the subject and an extension of the rights of the state",[4] originally designed to protect the public from hardened criminals,[5] has punished those who are of danger only to themselves.[6]

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[1] In virtue of the extraordinary procedure found in Part XXI of the Criminal Code (Sections 659-667), a person can be sentenced to preventive detention if he is found to be an habitual criminal or a dangerous sexual offender. This article will only deal with the habitual criminal.

[2] The Canadian legislation of 1947 represents, with one major amendment, the present Canadian legislation dealing with the habitual criminal. S.660(1) was amended in 1961 (S.C., 1960-61, c. 43, s. 33) to eliminate the determinate sentence that was mandatory under the subsection as it stood before. The words "in addition to" were amended to read "in lieu of". For a discussion of problems inherent in the legislation, see A. W. Mewett "The Habitual Criminal Legislation Under the Criminal Code", 39 C.B.R. 43, at p. 58 and B. A. Grosman "The Treatment of Habitual Criminals in Canada", 7-9 C.L.Q. 95.

[3] Thorsten-Sellin, "The Treatment of the Recidivist in the United States", (1945) 23 C.B.R. 639.

[4] *Harnish* v. *The Queen* (1961) 129 C.C.C. 188, 35 C.R. 1.

[5] Our legislation in Canada is based wholly on the English Prevention of Crime Act 1908, which grew out of recommendations made by the Gladstone Committee in 1894. Gladstone felt there would have to be legislation drafted to deal with the *dangerous professional criminal.* See N. Morris, The Habitual Criminal (1951), p. 40.

[6] T. E. James, "Preventive Detention in 1961 in the Court of Criminal Appeal", [1962] Crim. L.R. 352.

The purpose of this case law review is to ascertain the meaning of Part XXI of the Criminal Code as actually applied by the Canadian courts.

Under section 660 of the Criminal Code, there are three constitutive elements to the finding that an accused should be sentenced to preventive detention because he is an habitual criminal.

1. He must have recently been convicted of an indictable offense.[7] This is known as the substantive offense.

2. He must be found to be an habitual criminal. That is to say:

a) Since attaining eighteen years of age, he must have been convicted on three separate and independent occasions of indictable offenses to which he was liable to imprisonment of at least five years.[8]

b) He must be persistently leading a criminal life.

3. It must be expedient for the protection of the public that he be sentenced to preventive detention.

The history of Section 660 is the history of the continued sophistication with which the courts have dealt with "persistently leading a criminal life" and "expedient for the protection of the public". Let us consider the one, and then the other.

1. Persistently Leading a Criminal Life.

The point of departure is *Kirkland* v. *The King*,[9] in which it was clearly established that the onus of proving that the prisoner has been leading persistently a dishonest or criminal life lay upon the Crown and that the prisoner was never to be required to disprove that charge.[10] Further, the *Kirkland* case lay down that since the verb in the statute was in the present tense, the Crown had to prove

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[7] In *R.* v. *Sneddon* [1966] 1 C.C.C. 397, Sheppard, J., held that the primary offense could be any indictable offense.

[8] *a)* If one is tried by a magistrate one cannot show that the offense had a lesser penalty in the instance.

b) S.574 must be complied with. *R.* v. *McGrath* (1962), 133 C.C.C. 57, *R.* v. *Delaney* (1964), 42 C.R. 298.

c) S.660(2)(*b*) has not come up as yet in case law.

[9] (1957) 117 C.C.C. 1.

[10] This concept was taken from the English case of *R.* v. *Brown* (1913) 9 Cr. App. R. 161 and has been applied in *Harnish* v. *The Queen, supra,* and *R.* v. *Channing* [1966] 1 C.C.C. 97. However, it must also be noted, although the finding of habitual criminal is not the conviction of an offense, nevertheless it was held in *Kirkland* v. *The Queen,* at p. 7, that "the rule requiring proof beyond a reasonable doubt applies to such an adjudication as fully as in the case of any criminal charge". This statement was also applied in *R.* v. *Channing* at p. 107.

the dishonest or criminal character of the prisoner's life at the time when he committed the substantive offense. The courts have held that the only relevent period to consider is the interval between the accused's last release from prison and his arrest for the substantive offense,[11] as "the legislature never intended that a man should be convicted of being a habitual merely because he had a number of previous convictions against him".[12]

Therefore, the Crown[13] must show more than the qualifying three convictions. But a long list of convictions in itself may permit an inference that the accused is an habitual criminal. The decision of Sheppard, J. in the recent case of *R.* v. *Channing*,[14] "which summarized the effect of previous decisions of the Supreme Court of Canada and of this court",[15] lays down four tests the courts have used in determining whether or not the accused is leading persistently a criminal life, "and these tests are not exclusive".

a) "Whether the substantive offense was premeditated or without planning."
b) "Whether the accused had done anything unlawful or dishonest during the period of his release immediately preceding the substantive offense."
c) "Whether the substantive offense is of the same general pattern as the previous offenses."
d) "Whether the accused has been an habitual associate of criminals."

The jurisprudence must be considered in relationship to these criteria in order to ascertain whether one condition is of paramount importance, or whether the Crown will succeed by proving any one of them.

In *R.* v. *Paulk* [15a] the accused was held to be a habitual criminal, and sentenced to preventive detention because he satisfied the requirements of the statute, and furthermore was associating with people of ill-repute and criminal records. This association consisted of having been seen once with a criminal. It is significant that the Saskatchewan Court of Appeal reversed the decision on pro-

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[11] However, the length of time since the last release is definitely considered as a mitigating factor in determining whether a person is persistently leading a criminal life. This was considered in *Kirkland* v. *The Queen, supra, Harnish* v. *R., supra, R.* v. *Heard* (1911) 7 Cr. App. R. 80, *R.* v. *McKenzie* (1960) 128 C.C.C. 92.

[12] *R.* v. *Jones* (1920) 15 Cr. App. R. 20 at p. 21, Lord Reading, L.C.J. However, in *Kirkland* v. *The Queen, supra,* at p. 2, Cartwright, J., said "there are other cases where a prisoner could be considered an habitual criminal on the ground that the nature of the substantive offense viewed in the light of his previous record was in itself evidence that he was persistently leading a criminal life".

[13] *R.* v. *Blackstock* (1950) 97 C.C.C. 171, 10 C.R. 52.

[14] *R.* v. *Channing* [1966] 1 C.C.C. 97 (B.C.C.A.).

[15] *R.* v. *Marcoux* [1966] 1 C.C.C. 389, at p. 392, Norris, J.

[15a] (1955) 111 C.C.C. 333.

cedural grounds. However, the accused in *R.* v. *Seibel*[15b] on roughly the same facts, was held not to be leading a persistently criminal life.

Furthermore, it must be shown that this association was more than cursory, and was for unlawful purposes.[16] Thus it is safe to assume that today an accused will not be found to be persistently leading a criminal life solely on the grounds that he was an habitual associate of criminals.[17] It is what the association has led to that is important.

Nor is the same general test pattern exclusive. In five cases[18] where the substantive offense coincided with past convictions, the accused was found to be an habitual criminal, and sentenced to preventive detention. However, in each instance the substantive offense was also planned and premeditated. In *R.* v. *Morgan* it was held that the nature of the substantive offense viewed in the light of his previous record was enough to show that he was an habitual criminal.[19]

Thus it can be seen that the real test is whether or not the substantive offense was planned and pre-meditated. So much so in fact, that the Supreme Court said:[20]

> I have examined all the cases of this class to which we were referred by Counsel and find that in each of them the substantive offense was of such a nature as to show premeditation and careful preparation.
> In that case the substantive offense was the picking of a pocket and the court said at p. 10:
> In my opinion, the offense thus committed by the appellant is not of such a nature as to warrant the inference that he was leading persistently a criminal life. The circumstances are consistent with the view that, yielding to a sudden temptation, he availed himself of the opportunity afforded by his chance meeting with McCulloch following the collision.

This test has been applied numerous times.[21] If the substantive offense was not planned and premeditated it is highly unlikely that the accused will be found to be an habitual criminal. But if the offense was planned and premeditated, an inference will be drawn against

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[15b] 114 C.C.C.

[16] *R.* v. *Dawley* (1957) 23 W.W.R. 430, 22 C.R. 59.

[17] However, in 1959 in a judgment rendered by Manson, J., in *R.* v. *McKnight*, 124 C.C.C. 297, it was held that "the Crown must prove that the accused has been persistently leading a criminal life and one of the most frequent ways in which this is done is by the proof of the association of the accused with known criminals".

[18] *R.* v. *Buckingham* [1965] 2 C.C.C. 229, *R.* v. *Swontek* (1965) 1 C.C.C. 242, *R.* v. *Edgecombe*, 96 C.C.C. 93, *R.* v. *Morgan*, *Harnish* v. *R.*, *supra*.

[19] This follows *R.* v. *Swontek*, *supra*, and *Harnish* v. *R.*, *supra*.

[20] *Kirkland* v. *The Queen*, *supra*, quoted in *R.* v. *Channing*, *supra*, at p. 106.

[21] *Mulchay* v. *The Queen* (1963) 42 C.R. 1 and 8, *R.* v. *Marcoux*, *supra*, *R.* v. *Channing*, *supra*.

the accused, with the tactical burden on him to establish that he was not persistently leading a criminal life.

Thus "whether the accused has done anything unlawful or dishonest[22] during the period of his release immediately preceding the substantive offense" is merely a guide in ascertaining whether or not the substantive offense was premeditated.[23]

In both *R.* v. *Seibel* and *R.* v. *Dawley,* the accused had done something dishonest since his last release, but this combined with the substantive offense was not enough to show the persistent leading of a criminal life. The accused in the *Dawley* case had assaulted a policeman and escaped from custody, but these unlawful acts could not be construed as a guide in determining whether or not the substantive offense was premeditated. Furthermore the accused had been working and providing for his family, evidence consistent with the view that he was not leading a criminal life.

To conclude then; if the substantive offense was premeditated, the accused will be found to be persistently leading a criminal life, unless there is some mitigating factor in his favour.

II. Expedient for the Protection of the Public to Sentence him to Preventive Detention.

A finding that a person is an habitual criminal does not necessarily mean that a sentence of preventive detention is expedient for the protection of the public. Only recently have the courts emphasized the distinction between persistently leading a criminal life and expediency.[24] With preventive detention provisions being increasingly

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[22] It was held by Jelf, J., in *R.* v. *Stewart* (1910) 4 Cr. App. R. 178, "It does not follow because he is not getting an honest living that it must be a dishonest one — he may be doing nothing."

However, in *R.* v. *Lavender* (1927) 20 Cr. App. R., it was said "the fact that some honest work was done since his release, it is by no means conclusive proof that he is not an habitual criminal".

[23] *R.* v. *Seibel* (1955) 114 C.C.C. 68.

[24] The early cases of *R.* v. *Schaf,* reported in the Winnipeg Free Press, on June, 9, 1955, and *R.* v. *Short* and *R.* v. *Dushin,* reported in (1955) 33 C.B.R. 1106, were all unreported and isolated. The application of expediency did not become important until the 1961 amendment. However some cases still confuse expediency and persistently leading a criminal life. For example *R.* v. *Channing* and *R.* v. *Marcoux, supra.* In a recent Quebec decision, *R.* v. *Plante* Oct. 2, 1967, File No. 12165, handed down by Trahan J., Judge of Sessions of the Peace, it was held that due to defendant's active criminal life amounting to sentences totalling over 101 years since 1946, that it was expedient that "this anti-social individual and constant menace to society, should be locked up indefinitely for the public good".

used against dope addicts and petty theives coupled with the 1961 amendment imposing possible life imprisonment, the courts have begun to use every bit of discretion the legislation can be construed to allow. Once again, Mr. Justice Sheppard provides us with the rationale behind the new application of section 660:

> Moreover, as the sentence for the substantive offense will have considered the protection of the public as one of the elements, it would follow that preventive detention should not be imposed unless the Crown has proven that the protection of the public is not sufficiently safeguarded by sentence for the substantive offense, but does require some additional protection involved in a sentence of preventive detention.
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> In determining this need of preventive detention, the courts have considered the type of the accused; and whether the accused's conduct shows that he is a recidivist.[25]

In *R.* v. *Sneddon*, a sixty-five year old alcoholic with a record of forty-eight convictions was convicted of stealing a towel and a kleenex holder from a parked automobile. He was sentenced to preventive detention by D.D. Hume, Esq., Magistrate, Vancouver. He was last convicted of assault in 1937 and for breaking and entering in 1954. Since then he was no more than a petty thief and shoplifter, stealing in order to drink. In the British Columbia Court of Appeal, Chief Justice Bird supported the sentence on the grounds that he was a menace to the local merchants. However, the majority found "nothing in his conduct which would suggest a danger to the public such as in the case of armed robbery or trafficking or other like offense".[26]

Drug addicts bear the brunt of preventive detention proceedings, especially in British Columbia. The cases indicate that an addict could be an addict pure and simple, but often he either trafficks or steals in order to support his habit.

If the substantive offense is possession of narcotics the basic propositions of Mr. Justice Norris in *R.* v. *Marcoux*,[27] will apply:

> 1. That possession of drugs contrary to provision of S.3 of the Norcatic Control Act, is a crime and a substantial record of convictions of such offense may without more bring an accused within the provisions of s.660 (1)(a) of the Cr. Code.
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> 2. That such a record of itself without more will seldom if ever bring an accused person within para. (B) of s.660 (1) of the Criminal Code.

Mr. Justice Norris also adopted the language of Whittaker, J.A. in *R.* v. *Jeffries*,[28] where he said:

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[25] *R.* v. *Channing, supra,* at p. 108.

[26] *R.* v. *Sneddon, supra,* at p. 403. *Mulchay* v. *The Queen* and *R.* v. *Marcoux, supra,* held the same.

[27] [1966] 1 C.C.C. 389.

[28] *R.* v. *Jeffries* [1965] 1 C.C.C. 247.

> To remove a person from society permanently simply because he is a drug addict would be to deny the possibility of a cure either through the addicts own efforts or with the assistance of any public agency set up to alleviate the problem. This, I feel sure, was not the intention of parliament in enacting the habitual criminal provisions of the code.

However, if in addition he is a trafficker, it will be expedient to sentence him to preventive detention.[29]

If we may offer a tentative conclusion, it would be to the effect that if the substantive offense was such that it indicated the very real possibility of a serious offense being committed in the future, the accused will be sentenced to preventive detention. The test as to whether or not the substantive offense was of the same general pattern as previous convictions should be a test not as to whether the accused is persistently leading a criminal life, but rather whether or not it is expedient for the protection of the public that a sentence of preventive detention be imposed. *R.* v. *Jeffries* should be read in this light. Sheppard, J.A. found the accused to be an habitual criminal but because the substantive offense of trafficking was isolated it could not be said to be expedient to impose preventive detention.[30]

Nor is the judge's discretion limited to determining the content of persistently leading a criminal life and expedient for the protection of the public, for Section 660 provides, "where an accused has been convicted of an indictable offense the court *may*, upon application, impose a sentence of preventive detention". There is no reported case where the court relied on this permissive wording.[31] Indeed, it is illogical that a court could find it expedient to impose a sentence of preventive detention and yet not do so.

The procedural aspect of this legislation cannot be ignored. The requirement of notice is *strictissimi juris*. In the celebrated case of *Parkes* v. *The Queen*,[32] Mr. Justice Rand recalled the words of the Lord Chief Justice in *Martin* v. *MacKonochie*[33]: "in a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law." Ten

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[29] *R.* v. *Jones* [1966] 2 C.C.C. 370 where it was said that "addicts usually traffick". However this is mitigated by *R.* v. *Rose* [1965] 1 C.C.C. 320, where he was found to be an habitual criminal, but that it was not expedient to sentence him to preventive detention, even though his substantive offense was the serious crime of trafficking. For it was an isolated offense which did not show signs of repeating itself.

[30] *R.* v. *Rose*, *supra*, held the same.

[31] See A. W. Mewett, *supra*, footnote 2.

[32] *Parkes* v. *The Queen* (1956) 116 C.C.C. 86, [1956] S.C.R. 768.

[33] (1878) 3 Q.B.D. 730 at 775.

years later in 1965, a proceeding did not commence until after a year following the giving of notice to the accused (thus giving ample time for the preparation of a suitable defence) but because seven clear days was not provided for in the notice, the conviction was quashed.[34]

The scope of the legislation on the habitual criminal is much too wide, and even with the added criteria of expediency being employed by the courts, the case law still does not give rise to a sense of predictability. It would be well to consider the words of Mr. Justice Norris in *Regina* v. *Marcoux;*

> It is to be remembered that little is to be gained by the comparison of facts in different decisions on s.660 and each case must be decided on the basis of its own facts.[35]

In the case of S. 660 where the legislation proves to be vague, the decision of the judge will be based upon his inherent sense of justice.

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[34] *R.* v. *Bryson* (1966) 3 C.C.C. 182.
[35] *Supra.*