

THE COURT OF CRIMINAL APPEAL.¹

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During the last two sessions of Parliament a bill has been before a Special Committee of the Senate with a view of amending the Criminal Code of Canada in a very material respect. It is one of the most important pieces of proposed legislation which has been presented to Parliament for some time. If the bill becomes law it will establish in the different Provinces of Canada a Court of Criminal Appeal to which persons convicted of indictable offences by juries or judges may take an appeal on the facts. The proposed bill makes ample provision for the consideration of legal questions which may arise on the trial of a criminal offender and for their expeditious determination; but the most wholesome provision of the proposed legislation is the machinery provided for the rehearing of the case on the facts, and for the revising of sentences imposed by the Courts.

It is not generally known, that when an accused person is tried for an indictable offence, that is, an offence which is triable only before a Supreme Court Judge and a jury, or a County Court Judge under "The Speedy Trials Act" or a Stipendiary Magistrate of a city, that those tribunals are final as to the facts. There is no appeal from their decision on a question of fact, by way of a review, no matter how unreasonable the finding. For instance, A. may sue B. for the price of a tub of butter worth, say \$20.00, and the suit be tried in the Supreme Court with a jury, and after the verdict is given there may be an appeal

¹ EDITOR'S NOTE.—This article was in type before the Bill in question became law, as part of the Criminal Code, on 30th June last. It was felt, however, that Hon. Mr. O'Hearn's views on the necessity for the establishment of such a Court ought to be published for the benefit of our readers.

to the Full Bench of the Province, where from three to seven Judges of the Supreme Court may sit for a whole day, perhaps, or longer, majestically reading the pages of an appeal book, the printing of which probably cost four times the value of the butter, and reserve judgment. Some time afterwards the Court may decide one of many things: First, perhaps, that the price of the butter was not \$20.00; or in the alternative, that the butter was not as represented; or again, that the defendant was under age, and did not need the butter; or decide on different legal theories which are peculiarly applicable to the sale of a tub of butter. If A., however, is being tried for murder or any offence which may involve his life or deprivation of liberty, the same Court is powerless to review in the same manner and with the same scope as in the butter case the facts upon which the verdict was founded.

The right of appeal either in civil or criminal cases was unknown to the common law of England, and the right in civil cases came to be developed by statute. But unfortunately legislators ignored the requirements of the criminal law and paid no attention to the question of appeal as affecting that department of the administration of justice. This state of affairs continued in England until 1907 when the Imperial legislature passed "The Criminal Appeals Act." This statute was passed as the result of the regrettable miscarriage of justice in the well-known case of Adolph Beck. Mr. Beck, a respectable mining engineer, was arrested on three occasions and convicted at the Old Bailey in London of obtaining goods under false pretences. The trials were conducted before the Recorder, Sir Forrest Fulton, and a jury. It subsequently transpired that it was a cruel case of mistaken identity, and the real offender, who was an accomplished rogue and who closely resembled Mr. Beck, was caught and punished.

Mr. Beck was released from custody and compensated by the British Treasury, but not until after he

had served the whole of two sentences and a portion of the third. At the time of his conviction there was no Court of Criminal Appeal which could thoroughly review the facts, and as a result of his incarceration a Royal Commission was appointed to investigate, which reported in favour of the establishment of a Court of Criminal Appeal. Since this court has been constituted in England there have been many appeals; and if one peruses the fifteen volumes of reports which are now in existence one is impressed with the number of cases in which convictions are reversed not on technical legal grounds, but on the merits. What is also surprising is the number of instances in which the sentences imposed by the trial judge have been materially reduced. Then again, an offender occasionally on an appeal against sentence gets a stiffer one from the Appeal Court in England.

Surely if England, which the world regards as a model of judicial fairness and thoroughness, has felt the necessity of establishing such a court, an institution of a similar kind in this country would prove beneficial; especially so, as here in Canada the legislature in conferring criminal jurisdiction in indictable cases has gone to extremes and has introduced a system which is unknown in England and is not in force in any State of the American Union as far as my investigation has been able to lead me, and certainly not in progressive States like Massachusetts, New York, New Jersey, Pennsylvania, or Ohio. I refer to the legislation which was introduced in 1900 and made applicable to all the police magistrates of cities and towns in Canada. By this enactment all indictable offences with the except of murder, treason, manslaughter, rape and criminal libel and a few others may be tried by such a functionary without a jury.

In other words, this functionary may try offences upon the consent of the accused such as burglary, forgery, arson, uttering forged paper, and numerous others of a serious character and which at times involve deli-

cate legal questions. It is true that the legislation imposes the duty upon the magistrate of giving the offender information as to his constitutional rights of being tried by a jury and also the necessity of obtaining his consent; but in my experience as an advocate and as a magistrate I am bound to say that ninety-five per cent. of the prisoners who come before the police magistrates will consent to such a trial if they are not represented by counsel; because while they pretend to understand their rights in the matter they really do not. What then, is the objection to this functionary adjudicating in such cases? One objection is this: Police magistrates of a great many cities and towns throughout Canada are not barristers.

Now, then, if criminal cases of serious character, involving careful and painstaking examination of facts together with a reasonable knowledge of the criminal law of this country and of the rules of evidence, are to be submitted to a police magistracy which is largely recruited from an untrained laity, should there not be an appeal from the decision of these gentlemen?

Also in the Superior Criminal Courts, instances have arisen of grave injustice having been done to defendants. For instance, some years ago a man was tried in a Nova Scotia town before a Supreme Court Justice and a jury for the offence of wounding a police officer. He was convicted by the jury on flimsy evidence and sentenced to ten years imprisonment. The judge was one of the "jury baiting" type, the counsel inexperienced and the prisoner with a previous bad record. It has for years been conceded by some of those connected with the prosecution, including a former distinguished chief of police of Halifax, that this man served ten long years of imprisonment for an offence of which he was entirely innocent.

The writer had the advantage of an interview with this man some seven or eight years ago in the Halifax gaol and the prisoner discussed this trial and his connection with it quite freely; and I am convinced

that his story was absolutely true. Now it may be said, what has the Court of Appeal to do with this, or what use would the Court of Appeal have been in a case like this? The answer is that under the provisions of the English Act and any proposed Canadian legislation authority is vested in the Court of Appeal on the hearing of the appeal to call additional evidence. In the case referred to it developed after this man's trial that there were persons available who, if produced for the defence, could have established a complete and satisfactory alibi. If the Court of Appeal had been then a functioning institution the tragedy of this undeserved sentence could have been at least partially prevented.

I also know personally of another case where a person was unjustly sent to the Dorchester penitentiary for an offence of which he was found guilty by a Superior Court, and in this case the trial judge could not be criticized because he acted conscientiously on the evidence before him. Some months after the trial, the writer was informed by a respectable citizen, who was an onlooker at the commission of the offence, that the accused was entirely blameless and that his story told in the witness box was correct. The respectable citizen at the time, however, had not the moral courage to come forward, and it was not until his conscience severely pricked him that he sought out counsel and made the disclosure. The accused served his full two years just the same.

Critics of this proposed bill will probably say that there is provision in the present law for such a case by application to the Minister of Justice for a new trial. There is no such provision. The provision is, that upon application for a pardon the Minister of Justice may order a new trial. I understand three or four new trials have been granted by the minister since 1892, when the code was first passed. Take, for instance, the recent Peel case at Amherst, *Rex v. Peel*.¹ I

¹ 36 Can. C. C. 221.

have no doubt that when that case was heard by the full court, if the bench had had the wide power conferred under the English Act there would have been an unanimous judgment quashing the conviction which would have prevented the unsatisfactory method adopted in that case of having the Attorney-General *not pros.* the indictment and thus giving the prisoner his liberty, still leaving the question of his guilt or innocence in a state of uncertainty.

The argument cannot be successfully advanced that it will throw too much work on our Judges. In England there are eighteen judges in the King's Bench Division. This division corresponds largely to our Supreme Court in this province. Those judges find time to render judicial service to millions of people. In Nova Scotia for instance seven Supreme Court Justices are required to do similar work for less than half a million people. In England a section of these divisional judges sits as a court of criminal appeal regularly and frequently for the disposal of these cases. I therefore think that our Bench and the Supreme Court Judges of the other provinces throughout the Dominion could do likewise; and I have no doubt they would be quite willing to render such a public service. I understand the special committee of the Senate in considering this piece of legislation has sought the opinion of the Superior Court Judges throughout the whole of Canada, the Attorneys-General and certain members of the Bar.

The proposed legislation in the form in which it is introduced has some defects, but these may be very easily remedied. For instance, the new Act, following the English Statute, does not provide for a new trial irrespective of whether the defect in the proceedings is one affecting the merits or merely one of technical legal error. This should not be. The court of appeal should have power to order a new trial in every case unless it is satisfied that upon the evidence there could be no possibility of a conviction on a re-trial of the facts.

APPENDIX.

Criminal Appeals in the English Courts.

May, 1908—July, 1922.

Convictions considered 775, affirmed 460, quashed on merits 139, quashed technically 176; 315 quashed.

Sentences considered 591, confirmed 191, reduced 352, quashed 12, varied 28, increased 5, remitted for sentence 3.

Leave to appeal against conviction 242, granted 50, refused 192.

Leave to appeal against sentence 126, granted 24, refused 102.

Total matters considered 1,734.

To date sixteen volumes of the English Criminal Appeal Reports have been issued covering a period from May, 1908, to July, 1922. A few cases dealing with such matters as application for extension of time for appealing and applications for bail have not been considered in the above memorandum, nor have four or five cases decided by the House of Lords and reported in the English Criminal Appeal Reports.

The figures amounting in the aggregate to 1,734 given above, do not represent the actual number of cases considered, but the number of matters considered. Sometimes two or more matters were considered in the one case.
