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CRIMINAL LAW IN CANADA

BY WILLIAM RENWICK RIDDELL*

THIS article is descriptive, not polemical; it is not a missionary effort or intended to exhibit any supposed superiority of our system—every free country has the system that it really desires, and what suits us might not suit another people.

By the British North America Act of 1867 which may be considered the written Constitution of Canada, Criminal Law is assigned to the Dominion.

Before 1892, the Common Law of England as modified by statutes, some Imperial but mainly Colonial, was the Criminal Law of the Dominion—this for historical reasons was not precisely the same in all the Provinces. In 1892, a Criminal Code was passed by the Dominion Parliament, which amended, recodified and again amended, states the criminal law of all the Dominion. In the Code, there is given a definition of the various crimes, in plain language devoid of technicality and archaism. The distinction of felony and misdemeanor is abolished—we are a practical people and even our lawyers cannot see any sense of advantage in calling perjury one kind of a crime and stealing another. The crimes are rather divided according to the manner of prosecuting them. We have indictable offences and non-indictable offences.

While Criminal Law, including procedure, evidence, etc., is allotted to the Dominion, the Province is charged with its administration. In every Province there is an attorney-general, a member of the government, whose department attends to the administration of criminal justice.

*This article was prepared by Mr. Justice William Renwick Riddell, Justice of the Supreme Court of Ontario, (Appellate Division) at the request of the editor.

While every municipality, city, town or county has its own police force, most of the Provinces have their provincial police; and all these coöperate with each other. Being very familiar with the work of the police, I confidently assert that while there does occasionally arise a puzzling and apparently insoluble mystery, the cases are exceedingly few in which the authors of a crime escape detection and arrest. In criminal prosecutions we in Canada being a poor and busy people, have no time or money to waste on frills and sensation—we have adopted the view that a criminal prosecution is a solemn investigation by the state to determine whether the accused has been guilty of a crime against it, and not a game at which the smartest man wins and the newspapers get lots of interesting copy

Leaving aside the inferior offences which are tried by justices of the peace in a summary way, let us trace the course of a prosecution for a more serious offence.

The accused being arrested (say) on a warrant is taken before a justice of the peace, evidence is taken, the accused having the right in person or by counsel to cross-examine as well as to adduce evidence—if the evidence seems to make out the offence, the accused may if he sees fit make a statement or remain silent. If no offence is proved, the accused is discharged; if the contrary, he may be committed for trial.

Pausing here to consider a very common procedure—there is a class of magistrates specially appointed called police magistrates, stipendiary magistrates, etc., (some of them being women) who have greater powers than the ordinary justice of the peace—these have power to try certain offences without the consent of the accused. If, however, the offence is of a graver character but not of the gravest, the accused on being brought before such a magistrate is informed of the charge against him and that he has the option of being tried at once by the magistrate without a jury or by the next court of competent jurisdiction with a jury. If he elects trial by jury, he is committed for trial if the evidence seems to establish the crime.

Trials without commitment in this way, we call summary trials—and the great majority of charges of crime which can be, are tried in this method.

Then we have speedy trials. Whenever anyone is committed to gaol for trial whether by a police magistrate or ordinary jus-

tice of the peace for any but certain specified offences, the sheriff must within twenty-four hours notify the county judge, giving name and charge and the county judge must with as little delay as possible (generally only a few hours) cause the prisoner to be brought before him. The judge states to the prisoner that he is charged with the offence (describing it) and that he has the option of a trial by the judge forthwith or remain in custody or under bail as the court may decide and be tried in the ordinary way by the court having jurisdiction. Suppose a speedy non-jury trial is chosen—in the ordinary case the attorney general not forbidding such a trial—in enters now if not sooner the county crown attorney. In every county there is an officer of the Crown appointed *pro vita aut causa* by the government in case of a vacancy. While naturally and of course he is a member of the political party in power at the time of his appointment, he is not a political officer, he takes no further part in politics and does not go out of office where his party is ousted. He represents "the Crown" which with us is an alias for the people; his office affords no means for political advancement, though sometimes an able county crown attorney finds it to his financial advantage to withdraw to private practice.

It is the duty of the county crown attorney in person or by his assistants to prosecute criminal cases before all courts except the Supreme Court and also to prepare cases for the Supreme Court—he attends coroners' inquests, fire inquests, etc., and generally has charge of the administration of criminal justice in his county subject, of course, where necessary, to the direction and control of his official superior, the attorney general, the minister of the Crown who with his colleagues is responsible to the Legislature and people.

The county crown attorney draws up the charge in simple form. The prisoner is arraigned—if he pleads guilty it is noted and the Judge sentences precisely as though there had been a formal trial.

The following indicates the form:

CANADA,
PROVINCE OF ONTARIO,
COUNTY OF YORK:

Be it remembered that John Smith being a prisoner in the gaol of the said County on a charge of having on the third day of January in the year 1926 at Toronto stolen one cow the property of Richard Jones and being brought before me Emerson Coats-

worth, County Judge, on the fifth day of February in the year 1926 and asked by me if he consented to be tried before me without the intervention of a jury consented to be so tried; and that the said John Smith being then arraigned upon the said charge, he pleaded guilty thereof, whereupon I sentenced the said John Smith to three years imprisonment.

Witness my hand this fifth day of February in the year 1926.

(Signed)

EMERSON COATSWORTH, JUDGE.

If the accused pleads not guilty the trial proceeds instanter or at an early convenient day, a full defence is allowed as in an ordinary trial, and a verdict given by the judge who signs a memorandum as in the form just set out with proper changes to express the fact.

A great majority of the cases brought before the county judge are disposed of by him.

..If the accused elects a jury trial, he is remanded to gaol to await the sitting of the court, General Sessions or Supreme Court, moreover, the attorney general may require a trial by jury even though the prisoner elects a speedy trial.

Certain offences cannot be tried in this way, such as treason, piracy, murder, rape, defamatory libel, etc., all carefully specified in a section of the code¹

If an accused is to be tried by a jury, he may sometimes be admitted to bail, in serious cases this is almost invariably refused. At the next court of competent jurisdiction, the accused must expect to be tried. Courts which try criminal cases with a jury are (in Ontario) either the Supreme Court in its High Court Division which has unlimited jurisdiction, or the General Sessions of the Peace presided over by the county judge which cannot try the crimes excepted by section 583.

In the General Sessions the prosecution is conducted by the county crown attorney unless the attorney general considers it proper to retain special counsel which is comparatively rare and occurs only in very important cases. In the Supreme Court, counsel selected by the attorney general for the particular sittings conducts the prosecutions. There is no glory attached to the position, the task is humdrum and consists of bringing out all the evidence which should be believed no matter how it may tell and of summing up fairly and dispassionately to the jury. No lawyer acquires a reputation by "securing" convictions or loses one by failing to do so. As I have said we look upon a criminal trial

¹Sec. 583.

as a solemn enquiry by the state; and any crown counsel who should in the heat of advocacy endeavor to bring about a conviction by an appeal to the sentiment or prejudices of the jury or by unfair comment on the evidence would earn the reprobation of his fellows if not a stern rebuke from the Judge.

The crown counsel prepares an indictment to lay before the grand jury (in Ontario of 13.) We have got away from all technicalities in indictments. The following is the usual form

“In the Supreme Court of Ontario:

The Jurors for our Lord the King present that John Smith murdered Richard Jones at Toronto on January third, 1926.”

This is laid before the grand jury with a list of the witnesses to be called—the grand jury are generally instructed that their whole duty is to see whether it seems so probable that the accused has committed the offence that the matter should be examined into in open court, and when a majority of them are satisfied that such is the case they need enquire no further but should bring in a True Bill.

No record is kept of the proceedings in the grand jury room, no investigation can be made of their proceedings but the grand jury is sworn to keep them secret.

The grand jury is at liberty to bring any matter to the attention of Court or crown counsel and the Court may permit or direct indictments accordingly but the grand jury are not allowed to pass upon any matter not submitted to them by crown counsel. After the secret enquiry in the grand jury room comes the open enquiry *coram populo*. Every person interested may obtain a copy of the jury panel for a few cents at a convenient time before the Court sits; a certain number of peremptory challenges is allowed, 4, 12 or 20, according to the seriousness of the crime. The number of challenges for cause is unlimited but in over forty years' experience, I have known only one instance of challenge for cause. The usual course is for counsel for the accused if there is real cause, to mention the fact to crown counsel and the juror is excused, as of course. I have never known a refusal. Very occasionally a juror himself asks to be excused and counsel agree, as of course, to excuse him.

I have never known it to take half an hour to obtain a jury. A unanimous verdict is required of the twelve petit jurors; if they cannot agree there must be a new trial. The judge has always the right and generally considers it his duty to comment upon

the evidence—but he must make it perfectly clear to the jury that they must exercise their own judgment and that they are the judges of the facts, not he; the law, indeed, they must take from him, the facts they must find themselves, no matter what he may think or say. We are fairly speedy in our criminal trials. I have had a great many, both when at the Bar and on the Bench; and have never except once seen ever a murder case take a day and a half. One case was lengthened by the great number of expert witnesses, and this led to a change in the law, limiting the number of expert witnesses to five on a side without special leave of the court.²

In case of an acquittal there is no more to be done but to discharge the accused. In case of a conviction our practice has recently undergone a profound change, the full effect of which cannot yet be estimated—it will be sufficient here to describe it.

A person convicted on indictment may appeal to the Court of Appeal (which in Ontario means either Divisional Court of the Appellate Division of the Supreme Court of Ontario and, consists of five judges) on any grounds of law, or with leave of the Court of Appeal or certificate of the trial judge that it is a fit case for appeal on any ground of fact or mixed fact and law or “with leave of the Court of Appeal on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal.”³

The Court has been very liberal in granting leave to appeal on any fairly arguable ground. An appeal may also be taken by leave of the Court by the convicted person or by the attorney general from the sentence unless that be fixed by law. More appeals succeed in respect of the sentence than in respect of conviction. The Court of Appeal has very large powers on an appeal—and it is not bound to give effect to objections however well founded. The Court is directed by the statute to allow the appeal if of the opinion that the verdict of the jury should be set aside as unreasonable or unsupported by evidence or that the judgment of the trial Court was wrong on a question of law or that on any ground there was a miscarriage of justice but “the Court may

²Rev. Stat. Can. (1906) c. 145, 3-7 “Where in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the Court or Judge or person presiding.

³Such leave shall be applied for before the examination of any of the experts who may be examined without such leave.”

also dismiss the appeal if notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favor of the appellant, it is also of the opinion that no substantial wrong or miscarriage of justice has actually occurred": in other words the Court is to use common sense (were it a less august body, I should use the words "horse sense") and not trouble about irregularities or even mistakes if substantial justice was done.

While only one judgment is given by the Court of Appeal, if all the judges do not concur, an appeal may be taken to the Supreme Court of Canada. This is rare but not quite unknown.

Theoretically the Judicial Committee of the Privy Council may allow an appeal from either Court, but in practice it never does.

The prerogative of mercy is vested in the central executive of Ottawa—and this seems to be now more sparingly exercised than in the past.

The result—or at least the concomitant—of our criminal law and practice may be of interest.

The Judicial Statistics Branch of the Dominion Bureau of Statistics has just published a Report on Murder, Manslaughter and Attempts to Murder, which is now available.

In the conclusions to be drawn from this report it must always be borne in mind that Canada is a comparatively new country and is blessed or cursed, favored or burdened—select your own word—with a large foreign population. This in two generations or less will be Canadianized, but for the time it runs our percentage up. Most immigrants retain the national revolver or knife but almost all, even of the next generation, forget them.

The report is for the 12-year period, 1914-1925 inclusive.

MURDER PER MILLION

| | |
|--|-------|
| Canadian born..... | 11.8 |
| Born in other British possessions..... | 29.1 |
| Born in United States..... | 69.2 |
| Born in other foreign countries..... | 240.3 |

MANSLAUGHTER

| | |
|--|-------|
| Canadian born..... | 31.5 |
| Born in other British possessions..... | 43.2 |
| Born in United States..... | 93.6 |
| Born in other foreign countries..... | 261.6 |

MURDER, MANSLAUGHTER AND ATTEMPTS TO MURDER

| | |
|--|-------|
| Canadian born..... | 52.4 |
| Born in other British possessions..... | 91.1 |
| Born in United States..... | 224.6 |
| Born in other foreign countries..... | 691.9 |