R. v. Kienapple

Kienapple v. The Queen

Supreme Court of Canada

Fauteux C.J.C., Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.

Judgment: February 12, 1974

Counsel: J.D. Morton, Q.C., for appellant.
D.A. McKenzie, for the Crown.

Subject: Criminal

Criminal Law --- Defences -- Res judicata.

Criminal Law --- Defences -- Res judicata -- Charges not arising from same cause or matter -- General.

Res judicata -- Definition -- Distinguished from autrefois and issue estoppel and double punishment -- As preventing double convictions on alternative counts -- The Criminal Code, R.S.C. 1970, c. C-34, ss. 7(2), 11, 536, 537.

Trials -- Alternative counts -- Double conviction -- Whether trier of fact should be instructed not to consider alternative count if there is a conviction on the main count -- Rape and carnal knowledge -- The Criminal Code, R.S.C. 1970, c. C-34, ss. 11, 143, 146(1), as amended by 1972, c. 13, s. 70.

Included offences -- Carnal knowledge -- Whether carnal knowledge is an included offence in rape -- Whether there can be convictions for both offences -- The Criminal Code, R.S.C. 1970, c. C-34, ss. 11, 143, 146(1), as amended by 1972, c. 13, s. 70.

The offence of unlawful carnal knowledge is not an included offence on a charge of rape. Where consent is an issue, it is understandable that the Crown would indict an accused on both charges. However, there is an overlapping of the two offences when the sexual intercourse has been with a girl under 14 without her consent. Where the accused is convicted of rape the jury should be directed that the second charge is an alternative count and directed that they may still find the accused guilty of carnal knowledge if they find him not guilty of rape. There should not be multiple convictions for the same delict against the same girl. The history of carnal knowledge indicates that it was regarded as an alternative charge to rape.

The maxim nemo debet bis puniri pro uno delicto, although framed in terms of double punishment, has come to be understood as directed also against double or multiple convictions, i.e., nemo bis vexari as well as nemo bis puniri. In Cox and Paton v. The Queen, [1963] S.C.R. 500, 40 C.R. 52, [1963] 2 C.C.C. 148, the Court held that one should not be convicted twice for the same matter. Res judicata is a common-law defence preserved by Code s. 7(2). It expresses the theory of precluding multiple convictions for the same delict although the matter is the basis of two separate offences. In such

circumstances issue estoppel and autrefois convict are inappropriate. Code s. 11 does not modify the scope of res judicata or the pleas of autrefois although it speaks against double punishments under more than one Act. The relevant inquiry for res judicata is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences. And that defence applies whether all charges are on the same or different indictments. In the past, multiple convictions for the same "crime" were not interfered with on appeal because only one sentence was imposed. However, the better practice is to avoid multiple convictions. Parliament's power to constitute two separate offences out of the same matter is not in question, but unless there is a clear indication that multiple prosecutions and convictions are envisaged, the common-law principle of res judicata should be followed.

Per Ritchie J. (dissenting) (Fauteux C.J.C., Abbott and Martland JJ. concurring):

The purpose and effect of s. 146(1) is to protect female children under 14 years from sexual advances leading to intercourse by males over 14 (s. 147). Therefore an assailant is not relieved of the consequences of violating a child because the same act constitutes rape. They are separate and distinct offences. Cox and Paton v. The King, supra, is not authority for the proposition that an accused cannot be charged and convicted on two separate offences when both those offences have been committed by means of a single act. Code s. 11 recognizes that more than one offence may be committed as a result of a single act. But it applies to two sections of the Code as well as to two statutes so that one act may thus be the subject of convictions under two sections of the Code, but only one punishment can be imposed for the same offence.

The age of the victim is not an essential element of rape. Rape does not necessarily involve the offence of carnal knowledge under s. 146(1). There is nothing in the Criminal Code preventing conviction for both offences. One would not be convicted twice in respect of the same offence.

A New Meaning For Res Judicata and Its Potential Effect On Plea Bargaining

The meaning given to the term res judicata by Laskin J. (as he then was), in his majority judgment in *Kienapple v. The Queen*, is new to Canadian law. In its common usage in the courts, res judicata has been employed to refer to a defence more properly called "issue estoppel"; *McDonald v. The Queen*, [1960] S.C.R. 186, 32 C.R. 101, 126 C.C.C. 1; *Wright, McDermott and Feeley v. The Queen*, [1963] S.C.R. 539, 40 C.R. 261, [1963] 3 C.C.C. 201, 40 D.L.R. (2d) 563; *Public Prosecutor (Malaya) v. Sambasivam*, [1950] A.C. 458, 11 C.R. 55, [1950] 2 W.W.R. 817. Issue estoppel is that defence which prevents an issue from being relitigated if it can be said to have been decided in a previous action between the same parties. The definition given res judicata is usually much wider than that given by *Kienapple*. In his book, Double Jeopardy (1969), Professor Friedland states at p. 17:

Res judicata in criminal matters comprises not one, but a number of overlapping concepts: the special pleas of *autrefois acquit* and *autrefois convict*: issue or collateral estoppel; and the rule, which is part of a wider principle of abuse of process, which prevents the Crown from unreasonably splitting its case. These concepts associated with the *bis vexari* maxim (*nemo debet bis vexari pro una et eadem causa*) differ from the far different question involving *bis puniri (nemo debet bis puniri pro uno delicto)* whether multiple convictions are permissible when an accused is charged with more than one offence at the same time.

Laskin J. uses res judicata with reference to a new defence which, from now on, is to prevent multiple convictions arising out of the same factual transaction or delict. As he states, ante p. 7:

In my view, the term res judicata best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences.

And ante p. 8:

I cannot view s. 11 as modifying the scope of res judicata, let alone the scope of the pleas of autrefois as defined in ss. 535 to 537 of the Criminal Code. The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences.

This quotation suggests that autrefois is something distinct from res judicata rather than being part of it. The quotation also suggests that issue estoppel is something distinct from res judicata. If Laskin J had meant otherwise, he would have said that the "relevant inquiry" for res judicata is not simply whether the same *matter* is comprehended by two or more offences, but also whether the same *issue* is comprehended by two or more offences.

It is true that His Lordship also states (p. 10): "In saying that res judicata (as an expression broader than autrefois convict) would be a complete defence, I am applying the bis vexari principle against successive prosecutions". However, considering his judgment as a whole it cannot be taken from this statement that Laskin J. is using res judicata in its broader and more recognized sense as a comprehensive term embodying a number of overlapping concepts as used by Professor Friedland. For example, His Lordship also states (p. 7):

Where there has been a previous conviction of an accused, whether in a former trial or on one count of a multi-count indictment, issue estoppel is obviously an inappropriate term to urge against a further conviction of another offence. So too would be autrefois convict in its strict connotation; hence, the utility of res judicata.

His Lordship's definition of res judicata is much narrower than other definitions, some of which equate the term roughly with the more comprehensive phrase "double jeopardy".

Res judicata as used in *Kienapple* does not include the pleas of autrefois acquit or convict or the defences of issue estoppel or abuse of process or the protection against double punishment offered by s. 11 of the Criminal Code, R.S.C. 1970, c. C-34. It is given a narrower meaning which restricts it to a particular single defence.

Therefore, Laskin J. not only gives res judicata a new meaning, he also creates a new defence. Prior to *Kienapple*, the principles of double jeopardy in Canada provided protection by way of autrefois acquit and convict, issue estoppel, s. 11 and abuse of process. Autrefois acquit and convict prevented reprosecution for the same or an included *offence* or the same offence with a statement of intention or circumstances of ag gravation added (s. 538(1)) after an acquittal or a conviction. Issue estoppel prevented re-litigation of a previously decided *issue* between the same parties. Although the Supreme Court of Canada has never decided whether issue estoppel is part of Canadian criminal law, there are numerous examples in the provincial superior and county courts and Laskin J.A. (now C.J.C.) recognized its existence in *Regina v. Peda*, [1969] 1 O.R. 90, 4 C.R.N.S. 161, [1969] 2 C.C.C. 228, affirmed [1969] S.C.R. 905, 7 C.R.N.S. 243, [1969] 4 C.C.C. 245, 6 D.L.R. (3d) 177. Section 11 prevented double punishment which was interpreted by some of the cases to mean concurrent sentences for multiple conviction and by others as a prohibition against multiple convictions. And, abuse of process was a newly emerging, and still not precisely defined doctrine which had been used most

frequently to prevent a retrial of the same charge where there had not been a trial on the merits at the first proceedings.

This new defence of res judicata is very similar to the protection provided by s. 11 against double punishment where an act or omission is an offence under more than one Act of Parliament. Section 11 has been interpreted to apply to two offences in the same Act: *Rex v. Quon*, [1948] S.C.R. 508, 6 C.R. 160 at 172, 92 C.C.C. 1, [1949] 1 D.L.R. 135; *Regina v. Georgieff and Dickemous* , [1955] O.W.N. 148, 20 C.R. 142, 111 C.C.C. 3 (C.A.); *Regina v. Siggins* , [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409 (C.A.); *Rex v. Harper* , [1950] O.W.N. 791, 11 C.R. 31, 98 C.C.C. 84 (C.A.); *Regina v. Nugent* , [1955] O.W.N. 291, 20 C.R. 360 (C.A.). Therefore the res judicata defence of *Keinapple* covers the same territory as s. 11. But, whereas it has never been clear whether s. 11 does anything more than prevent double punishments arising out of the same factual transaction, the new defence of res judicata definitely prevents double *convictions* arising out of the same factual transaction. The cases are split on whether s. 11 prevents double convictions or double punishments. This new use of res judicata will operate in all those situations where s. 11 would have operated. Section 11 will no longer have operation. Laskin J. applies res judicata to the "same cause or matter" and s. 11 applies its protection to the same "act or omission". Is there any difference in the meaning of these two phrases? However, the majority decision in *Kienapple* provides no answer to the argument that Parliament does not enact in vain. And, as Ritchie J. points out in his dissenting judgment, to hold that one cannot be convicted of two offences committed by means of a single act contravenes s. 11. It states that the accused is "subject to proceedings under any of those Acts", which would include multiple offences under the same Act.

But considering that this new defence seems a most reasonable proposition, why has its status not been firmly established before this? The answer is that the same protection was given by three established principles: s. 11, alternative verdicts and plea bargaining.

Some of the cases on s. 11 have held that it is not sufficient merely to give concurrent sentences where there is a conviction on both alternative counts but rather the trier of fact should be instructed not to consider the alternative count if there is a conviction on the main count. That is to say, the new defence provided in *Kienapple* has had its forerunners. But whereas there has not been consistency among the decisions of the provincial superior courts on the question of whether there can be more than one conviction for the same single criminal act, the Supreme Court has now determined for every province that there cannot be. And whereas the inconsistency of the judgments on the point resulted in conflicting decisions as to the effect of s. 11, the Supreme Court has decided the point by giving the term "res judicata" a new narrower meaning than previously understood, which meaning is to be entirely independent of s. 11 for its operation.

The new defence is to be called "res judicata" and "s. 11" and it settles the pre-existing conflict as to whether s. 11 prevents double convictions or merely double punishments. For these reasons it is suggested that one is justified in interpreting Laskin J.'s majority judgment as creating a new defence.

The Canadian case law before *Kienapple* can be summed up by stating that generally British Columbia interpreted s. 11 as allowing double convictions on alternative counts but directed concurrent sentences, while the Ontario Court of Appeal interpreted s. 11 as allowing a conviction on only one of two alternative counts.

Decisions allowing double convictions on alternative counts but directing concurrent sentences:

Regina v. McKay, [1973] 1 W.W.R. 592, 21 C.R.N.S. 67, 10 C.C.C. (2d) 200, affirmed [1973] 6 W.W.R. 192, 24 C.R.N.S. 128, 13 C.C.C. (2d) 574n (B.C.C.A.) : impaired driving and over 80 mg. of alcohol per 100 ml. of blood.

Regina v. Mozel and McCauley, [1973] 5 W.W.R. 333 (B.C.C.A.): unlawfully engaging in book-making and keeping a common betting house.

Regina v. Vickers (1963), 41 C.R. 235, 43 W.W.R. 238 (B.C.C.A.): possession of a narcotic and trafficking.

Regina v. Spence and Scott (1955), 23 C.R. 255, 17 W.W.R. 662, 114 C.C.C. 249 (B.C.C.A.): robbery and assault causing bodily harm.

Beechin v. The Queen (1957), 119 C.C.C. 182 (N.B.C.A.): breaking, entering and theft and possession.

Regina v. St.-Jean (1970), 15 C.R.N.S. 194 (Que. C.A.): breaking, entering and theft and possession.

Decisions allowing one conviction on alternative counts:

Regina v. Funell (1973), 12 C.C.C. (2d) 215 (Ont. C.A.): assault causing bodily harm and possession of a weapon for a dangerous purpose.

Regina v. Hunt (1972), 6 C.C.C. (2d) 501 (Ont. C.A.): uttering and attempted fraud.

Regina v. Cosentino, [1971] 3 O.R. 411, 15 C.R.N.S. 238, 4 C.C.C. (2d) 95 (Ont. C.A.): breaking, entering and theft and possession.

Regina v. Peda, [1969] 1 O.R. 90, 4 C.R.N.S. 161, [1969] 2 C.C.C. 228 affirmed [1969] S.C.R. 905, 7 C.R.N.S. 243, [1969] 4 C.C.C. 245, 6 D.L.R. (3d) 177: impaired driving and dangerous driving.

Regina v. Fennell (1961), 130 C.C.C. 66 (N.S. C.A.): theft and possession.

Regina v. Siggins, [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409 (C.A.): theft and possession.

Regina v. Hogg, [1958] O.R. 723, 29 C.R. 144 (C.A.): breaking, entering and theft and possession.

Regina v. Nugent, [1955] O.W.N. 291, 20 C.R. 360 (C.A.): attempted rape and assault causing bodily harm.

Regina v. Georgieff and Dickemous, [1955] O.W.N. 148, 20 C.R. 142, 111 C.C.C. 3 (C.A.): obstructing police and assaulting police.

Rex v. Harper, [1950] O.W.N. 791, 11 C.R. 31, 98 C.C.C. 84 (C.A.): assault causing bodily harm and attempted robbery.

Regina v. Varkonyi, 42 W.W.R. 507, [1964] 1 C.C.C. 311 (Man. C.A.): breaking, entering and theft and possession.

As to whether *Cox and Paton v. The Queen*, [1963] S.C.R. 500, 40 C.R. 52, [1963] 2 C.C.C. 148, should be added to this list depends on whether one accepts the interpretation of that decision of the majority or minority in *Kienapple*. Laskin J. treats

Cox and Paton as a forerunner of what he has done in *Kienapple*, while Ritchie J. considers the two charges in question in *Cox and Paton* as being the same charge rather than alternative charges.

The interesting question will be whether *Kienapple* will be applied to all cases where multiple charges arise out of a single act and will it apply to charges arising out of more than one act? Allowing the Crown only one conviction on the impaired driving-dangerous driving combination, or the robbery-weapon dangerous combination may seem reasonable, but what of the dangerous driving-driving under suspension combination? It may not seem to be anything new to limit the Crown to one conviction on an idictment containing breaking and entering and possession of burglar's tools, but what if the same restriction were placed on an information containing impaired driving and refusal to provide a breath sample? Will res judicata apply to the forgery-uttering combination? Will it make any difference to the dangerous driving-failing to remain combination if the accused fails to remain by driving away from the accident dangerously, which means a single act supports two counts, or if he drives dangerously into the accident and then flees the accident scene on foot, meaning separate acts supporting each of the counts?

Theft and possession almost always arise from a single act and the Crown is content with a conviction on one of these alternative counts. But in April 1974, in *Côté v. The Queen* [post, p. 26] the Supreme Court of Canada held that one could be convicted of possession of stolen property committed after serving a three-year term for having stolen the very same property. In *Côté* Laskin J. dissented. Can *Côté* be reconciled with *Kienapple*? These and other questions will be examined in another article, "A New Meaning For Res Judicata and Its Potential Effect on Plea Bargaining, Part II".

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Appeal from convictions for rape and carnal knowledge.

***Laskin J.* (*Judson, Spence, Pigeon* and *Dickson JJ.* concurring):**

1 There are no facts in dispute in this appeal and only the barest narration is necessary for its disposition. The appellant accused was indicted jointly with another male person on two counts of sexual offences against a girl admittedly 13 years of age at the time. The offences charged were (1) rape, contrary to s. 143 of the Criminal Code, R.S.C. 1970, c. C-34; and (2) unlawful carnal knowledge of a female under 14 years of age, contrary to s. 146(1) [am. 1972, c. 13, s. 70].

2 The relevant portion of the trial Judge's charge to the jury in respect of these two counts was as follows:

As to Kienapple, your possible verdicts are guilty or not guilty on Count 1, rape; if you find him guilty on Count 1, then you need not consider any of the included offences that I am about to mention and mentioned previously and you may also proceed at once to find him guilty on Count 2, because a conviction for rape also includes a finding of intercourse with a girl. It is admitted that she is under 14. So that you may find him guilty on Counts 1 and 2, but if you find him not guilty on Count 1, that is, of rape, then you should consider whether it has been proven that he is guilty in Count 2, that is, of having had sexual intercourse with a girl under 14. If you find him guilty of rape, then you stop right there because that takes care of the other count. If you find him not guilty of rape, go on to consider whether there was intercourse in Count 2.

3 The jury, on this direction, brought in a verdict of guilty on both counts, and the accused was subsequently sentenced to two concurrent terms of imprisonment of ten

years. The Court of Appeal of Ontario dismissed the accused's appeal without written or recorded reasons. Leave to appeal to this Court was given on the following question:

Whether the accused, having been convicted of rape, should in respect of the same single act have also been convicted of sexual intercourse with a female under the age of fourteen, not being his wife.

I should say that the issue raised by this question was not raised in the courts below.

4 Sections 143 and 146(1) read as follows:

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

(*a*) without her consent, or

(*b*) with her consent if the consent

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

146.(1) Every male person who has sexual intercourse with a female person who

(*a*) is not his wife, and

(*b*) is under the age of fourteen years,

whether or not be believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

The punishment for rape is prescribed by s. 144 which, as also amended by 1972, c. 13, s. 70, reads now as follows:

144. Every one who commits rape is guilty of an indictable offence and is liable to imprisonment for life.

At the material time, so far as the charges against the accused were concerned, the punishments provisions for the two offences also included liability to be whipped. Section 140 is material to the definition of the offence under s. 146(1) in providing that the fact that there was consent to the commission of the offence is not a defence.

5 It is common ground that unlawful carnal knowledge under s. 146(1) is not an included offence on a charge of rape. Indeed, it could not be because s. 146(1) embraces two situations, one of which has all the ingredients of rape but is in respect of a female under age 14, and the second of which is inconsistent with rape in that there is consent. In a case therefore where there has been sexual intercourse with a girl under age 14 and the question of consent is in issue (the burden being on the Crown on a charge of rape to negative it beyond a reasonable doubt), it is entirely understandable that the Crown would seek to indict an accused on two counts, as in the present case. Where the jury brings in a verdict of guilty on the first count of rape, there being only one act of sexual intercourse involved with the same girl, it has perforce found that the sexual intercourse was without consent and there can be no finding of guilt on the second count on the basis

of consent, albeit this is not a defence. It is said, however, that there is no inconsistency in finding the accused guilty under s. 146(1) simply on the basis of the verdict of guilty of rape; such a finding, it is contended, merely fastens on that aspect of s. 146(1) which I described as parallelling all the ingredients of rape but in respect of a female under age 14.

6 It is plain, of course, that Parliament has defined two offences in ss. 143 and 146(1), but there is an overlap in the sense that one embraces the other when the sexual intercourse has been with a girl under age fourteen without her consent. It is my view that in such a case, if the accused has been charged, first, with rape and, secondly, with a s. 146(1) offence, and there is a verdict of guilty of rape, the second charge falls as an alternative charge and the jury should be so directed. Correlatively, however, the jury should also be directed that if they find the accused not guilty of rape they may still find him guilty under s. 146(1) where sexual intercourse with a girl under age 14 has been proved.

7 The rationale of my conclusion that the charges must be treated as alternative if there is a verdict of guilty of rape on the first count, that there should not be multiple convictions for the same delict against the same girl, has a long history in the common law. A convenient beginning is with the maxim expressed in *Hudson v. Lee* (1589), 4 Co. Rep. 43a, 76 E.R. 989 at 990, *"nemo debet bis puniri pro uno delicto"*, which although framed in terms of double punishment, has come to be understood as directed also against double or multiple convictions; in short, nemo bis vexari as well as nemo bis puniri. This was exemplified in the unanimous judgment of this Court in *Cox and Paton v. The Queen*, [1963] S.C.R. 500, 40 C.R. 52, [1963] 2 C.C.C. 148, which involved, inter alia, convictions of the accused on two counts, numbered 1 and 3, for conspiracy to steal and conspiracy to defraud, both relating to the same money and securities. Cartwright J., as he then was, speaking for this Court, held that the Manitoba Court of Appeal had properly quashed one of the convictions. He put the matter in these words (at p. 516):

The reason that the convictions on counts 1 and 3 cannot both be supported is not that they are 'mutually destructive', as was said of the counts in *Regina v. Mills*, [1959] Crim. L.R. 662, but rather that if both were allowed to stand the accused would in reality be convicted twice of the same offence. It
is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence.

8 Of course, in a strict sense, *Cox and Paton* was no more a case of multiple convictions for the same offence than is the present case. Rather it was a case, as is the present one, of multiple convictions for the same matter. It is clear to me that in the context of the decision in *Cox and Paton* the word "offence" was used in the sense attributed to it by Pollock B. in *Regina v. Miles* (1890), 24 Q.B.D. 423 at 436, where he said:

At the trial it was proved on behalf of the prisoner, and admitted by counsel for the prosecution, that the first four counts of the indictment referred to the same matter as the offence mentioned in the record. In substance, therefore, the plea and the evidence establish that there was but one offence, and that the acts done by the defendant in respect of which he was convicted, by whatever legal name they might be called, were the same as those to which the indictment referred, and therefore the rule of law Nemo debet bis puniri pro uno delicto applies, and if the prisoner were guilty of the modified crime only he could not be guilty of the same acts with the addition of malice and design.

That case involved a charge of wounding laid under a statute. There had been a previous conviction for assault at common law, and although the offences were different it was held that the accused could not be convicted again for the same matter. Reference was

made to *Regina v. Miles* by Humphreys J. in *Rex v. Thomas*, [1950] 1 K.B. 26 at 29, 33 Cr. App. R. 200, [1949] 2 All E.R. 662, as follows:

The accused entered a plea in bar in which he alleged that the assault of which he had been convicted previously and the wounding and battery in the first four counts of the indictment, were one and the same assault and battery and not other and different. The Court for the Consideration of Crown Cases Reserved upheld the appellant's plea, which they regarded as an informal plea of autrefois convict, and it is important to examine the reasons why they so held. All the judges considered that the plea and the evidence established that there was one offence only committed by the accused. It was one and the same assault, although in three of the counts that assault was alleged to have been accompanied by circumstances of aggravation.

9 Blackburn J. had earlier expressed a similar view in his judgment in *Wemyss v. Hopkins* (1875), L.R. 10 Q.B. 378 at 381, when he said (in respect of a case where there were successive prosecutions under different statutes):

I think the fact that the appellant had been convicted by justices under one Act of Parliament for what amounted to an assault is a bar to a conviction under another Act of Parliament for the same assault. The defence does not arise on a plea of autrefois convict, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a Court of competent jurisdiction, transit in rem judicatam, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter; otherwise there might be two different punishments for the same offence.

This statement was quoted with approval by Kellock J. in *Rex v. Quon*, [1948] S.C.R. 508 at 519, 6 C.R. 160, 92 C.C.C. 1, [1949] 1 D.L.R. 135. In *Connelly v. D.P.P.*, [1964] A.C. 1254, 48 Cr. App. R. 183, [1964] 2 All E.R. 401, Lord Pearce, at p. 1362 referred to *Wemyss v. Hopkins* and like cases for the proposition that "the court in its criminal jurisdiction retained a power to prevent a repetition of prosecutions even when it did not fall within the exact limits of the pleas in bar."

10 The pleas in bar are dealt with in ss. 535 to 537 and s. 743(2) of the Criminal Code. So far as autrefois convict is concerned, the relevant provisions, for present purposes, are ss. 536 and 537(1)(*a*) which speak, respectively, of "the identity of the charges" and, in that connection, "that the matter on which the accused was given in charge on the former trial is the same in whole or in part". This last quoted provision in s. 537(1)(*a*) suggests that, so far at least as successive prosecutions are involved, the plea of autrefois convict goes beyond strict identity of offences and is akin to res judicata. But even if the pleas of autrefois be narrowly construed, res judicata as a common-law defence to a charge is preserved by s. 7(2) of the Criminal Code.

11 In my view, the term res judicata best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences. In Studies in Criminal Law (1964), by Morris and Howard, the authors in an essay entitled "Res Judicata in the Criminal Law," at p. 252, say that "*res judicata* as a general principle concerns itself only with the question whether an issue has been decided not with the question in whose favour the decision went". Although transit in rem judicatam, as used by Blackburn J. in *Wemyess v. Hopkins*, supra, is more appropriate to a plea of autrefois acquit or issue estoppel, it is clear that he was concerned with a matter more akin to double jeopardy and autrefois convict, as was Cartwright J. in the *Cox and Paton* case, supra. Where there has been a previous conviction of an accused, whether in a former trial or on one count of a multicount indictment, issue estoppel is obviously an inappropriate term to urge against a further conviction of another offence. So too would be autrefois convict in its strict connotation; hence, the utility of res judicata.

12 On this view, nothing is added or subtracted by s. 11 of the Criminal Code which reads as follows:

11. Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

This provision had its origin, as a general provision, in An Act respecting Punishments, Pardons and the Commutation of Sentences, R.S.C. 1886, c. 181, s. 3, where it was as follows:

3. Whenever any offender is punishable under two or more Acts or two or more sections of the same Act, he may be tried and punished under any of such Acts or sections, but no person shall be twice punished for the same offence.

The above-quoted s. 3 was an amalgam of earlier legislation having a particular application and found in the Offences against the Person Act, 1869 (Can.), c. 20, ss. 40 and 41, The Wreck and Salvage Act, 1873 (Can.), c. 55, s. 33, and the Breaches of Contract Act, 1877 (Can.), c. 35, s. 6. It was carried literally into the first Criminal Code, 1892 (Can.), c. 29, s. 933, but in the 1906, c. 146 revision it underwent a change to conform with s. 33 of the Interpretation Act, 1889 (U.K.), c. 63. The present s. 11 of the Criminal Code is in substance a re-enactment of the United Kingdom s. 33, but with a slight alteration in language. In its material terms, it conforms to the comparable United Kingdom section. I find it a curious provision because in its opening words ("where an act or omission is an offence under more than one Act") it appears to reflect the maxim nemo bis vexari, and yet in its concluding words ("not liable to be punished more than once for the same offence") it reflects the maxim nemo debet bis puniri pro uno delicto.

13 Humphreys J. in *Rex v. Thomas*, supra, insisted on a literal application of those concluding words, rejecting a text-book gloss on them as embracing "act" and "cause" as well as "offence" in the strict sense. I do not think that his illustration of successive successful prosecutions for assault and for manslaughter (after the assault victim dies), as shown in *Regina v. Morris* (1867), L.R. 1 C.C.R. 90, 10 Cox C.C. 480, is a convincing support for reading s. 33 with literal emphasis on its concluding words and no emphasis on its opening words. That situation and the one that was presented in *Rex v. Thomas* itself (conviction of wounding with intent to murder, followed by an indictment for murder when the victim died) can stand on their own without warranting a restrictive reading of the English s. 33 and our s. 11. The ensuing death brings into view a new relevant element not present when the first conviction occurred. That is not so in the case at bar. I would note, further, that if manslaughter and assault were charged in the same indictment the accused could not be convicted of both because of the included offence rule.

14 I cannot view s. 11 as modifying the scope of res judicata, let alone the scope of the pleas of autrefois as defined in ss. 535 to 537 of the Criminal Code. The relevant inquiry so far as res judicata is concerned is whether the same cause or matter (rather than the same offence) is comprehended by two or more offences. Moreover, it cannot be the case that if an accused is tried on several counts charging different offences, he is liable to be convicted and sentenced on each count, and yet if he was tried and convicted on one only he would be entitled to set up the defence of res judicata as a defence to other charges arising out of the same cause or matter.

15 Although there have been cases where multiple convictions were registered, when in substance only one "crime" has been committed, refusal to interfere on appeal was justified on the "no substantial wrong" basis because only one sentence was imposed: see *Rex v. Lockett*, [1914] 2 K.B. 720, 9 Cr. App. R. 268; *Kelly v. The King*, 54 S.C.R. 220, 27 C.C.C. 282, [1917] 1 W.W.R. 463, 34 D.L.R. 311. The better practice, however, is to avoid multiple convictions, as was done in the *Cox and Paton* case, and earlier by the Ontario Court of Appeal in *Regina v. Siggins*, [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409, which relied on the opinion of Kellock J. in *Rex v. Quon*, supra. *Siggins* was a not uncommon case of charging an alleged thief, found in possession of stolen goods, with both theft and unlawful possession. It was there said (at p. 285):

The Crown is entitled to lay both charges against him, but at the trial, if the jury convict of theft they should not convict on the charge of unlawful possession. If they acquit on the charge of theft, they may then consider and, if they see fit to do so, convict on the charge of unlawful possession.

In short, in relation to potentially multiple convictions, it is important to know the verdict on the first count, just as in the case of successive prosecutions it is important to know the result of the first trial: see Friedland, Double Jeopardy (1969), at p. 94.

16 If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions: see *Connelly v. D.P.P.*, supra, at pp. 1305 and 1308, per Lord Morris of Borth-y- Gest; cf. *Rex v. Kendrick and Smith* (1931), 23 Cr. App. R. 1.

17 I test the matter in two other ways. If an accused may be charged on two counts, as in the present case, and may properly be found guilty on each for the one act of sexual intercourse with the same girl, it should be open to the Crown to charge him successively in the same way. If it obtains a verdict of guilty of rape it should be entitled to prefer another charge under s. 146(1) in order to obtain another verdict of guilty and seek a further consecutive sentence. Yet it seems clear enough that on the second charge res judicata would be a complete defence since all the elements and facts supporting the conviction of rape would necessarily be the same under s. 146(1). Moreover, since the occurrence involved a proved negation of con sent there could be no conviction under the second aspect of s. 146(1) when there has been a conviction of rape.

18 In saying that res judicata (as an expression broader than autrefois convict) would be a complete defence, I am applying the bis vexari principle against successive prosecutions, a principle that, according to Morris and Howard, in the essay mentioned earlier, is grounded on the court's power to protect an individual from an undue exercise by the Crown of its power to prosecute and punish.

19 The second test is to reverse the order of the counts in the present case. If on the first charge of an offence under s. 146(1) the jury brings in a verdict of guilty, it would be inconsistent to find an accused guilty on a second count of rape because there may have been consent; and even if not, the considerations underlying res judicata would preclude a verdict of guilty of rape. Of course, if on a first count under s. 146(1) the accused were found not guilty, there could obviously be no finding of guilty of rape unless on the basis that the girl involved was over age 14; apart from that, there has been either no sexual intercourse proved even if there was no consent, or there has been no sexual intercourse proved albeit there was consent.

20 Parliament's power to constitute two separate offences out of the same matter is not in question, but unless there is a clear indication that multiple prosecutions and, indeed, multiple convictions are envisaged, the common-law principle expressed in the

Cox and Paton case, supra, should be followed. Neither the definitions of the respective offences nor their history gives any support to the view that that common-law principle has been ousted. The limits of punishment are the same, and I have already spoken of the ingredients of the respective offences. As a matter of history, the present s. 146(1) has its origin in s. 269 of the original Criminal Code, 1892 (Can.), c. 29, which used the phrase "carnally knows" instead of "sexual intercourse" both for that offence and for rape. Section 269 was taken from s. 39 of the Offences against the Person Act, R.S.C. 1886, c. 162, which, as amended by 1890 (Can.), c. 37, s. 12, raised the age ingredient from ten years to 14 and added whipping to the prescribed punishment of a term for life or for not less than five years. When the Offences against the Person Act was first enacted in Canada by 1869, c. 20, carnal knowledge of a girl under ten was a capital offence under s. 51, as was rape; but, unlike rape, which remained a capital offence until the enactment of 1953-54 (Can.), c. 51, s. 136 (although whipping was added in 1921 to the alternative maximum punishment of life imprisonment), the maximum punishment for unlawful carnal knowledge was changed to a life term by 1877 (Can.), c. 28, s. 2.

21 If any conclusion can be drawn from this short history, it is that carnal knowledge of a victim under age ten, and later under age 14, with its lesser punishment after 1877 (and until that for rape was changed), was regarded as an alternative charge to rape, unnecessary where there was no consent (since age was not and is not a necessary averment in rape) but available where proof of want of consent could not be made or was doubtful. As a practical matter, this situation invited statutory reform to make it possible for a jury to return a verdict of guilty of unlawful carnal knowledge on a charge of rape of a girl under 14. In England, this situation was met by the Criminal Law Amendment Act, 1885 (U.K.), c. 69, s. 9, and similar enactments were made in the Australian States: see Howard, Australian Criminal Law (1970), 2nd ed., pp. 172-3. The English provision was continued under s. 37 of the Sexual Offences Act, 1956 (U.K.), c. 69, but was repealed by s. 10 and Sched. 2, s. 13(1)(*d*)(i) of the Criminal Law Act, 1967 (U.K.), c. 58; and see *Regina v. Hodgson*, [1973] Q.B. 565, 57 Cr. App. R. 502, [1973] 2 All E.R. 552.

22 We have never had legislation of that kind in Canada, and hence we continue to be governed by the law as to included offences, which excludes a conviction under s. 146(1) on a charge of rape. *Rex v. Marcus and Richmond* , [1931] O.R. 164, 55 C.C.C. 322, a judgment of the Ontario Appellate Division, is particularly illustrative. The accused was charged with rape, the victim being a girl under age 14. There was some question at the trial whether the Crown proved want of consent, and the trial Judge charged the jury, wrongly, that it was open to them to bring in a verdict of guilty of unlawful carnal knowledge of a girl under age 14. In setting aside the verdict and ordering a new trial on the charge of rape the Court added (at p. 166) that "it is probable that the Crown will see fit to lay a further charge based upon the provisions of sec. 301 [now s. 146(1)]".

23 In the circumstances of the present case, the superadded element of age in s. 146(1) does not operate to distinguish unlawful carnal knowledge from rape. Age under 14 is certainly material where consent to the sexual intercourse is present; but once that is ruled out, as it is in the present case, it becomes meaningless as a distinguishing feature of the offences of rape and unlawful carnal knowledge. No doubt, it can be taken into account on sentence under s. 146(1), but, equally, it can be considered under s. 143; and I can see no basis for departing from the principle under discussion if the age of the victim happens to be 13 instead of 15 when the maximum punishment is the same under both s. 143 and s. 146(1).

24 In the result, I would allow the appeal and quash the conviction for unlawful carnal knowledge under s. 146(1), and, of course, the concurrent sentence of ten years imposed in consequence of that conviction must also fall.

Ritchie J. **(dissenting) (*Abbott J.* concurring):**

25 I have had the advantage of reading the reasons for judgment of my brother Laskin in which he has recounted the circumstances giving rise to this appeal.

26 The appeal came on for hearing pursuant to an order of this Court granting leave to appeal in accordance with the provision of s. 618(1)(*b*) of the Criminal Code, R.S.C. 1970, c. C-34. The jurisdiction conferred by that section is, of course, confined to questions of law in the strict sense and the order which was granted in the present case reads as follows:

IT IS ORDERED that leave to appeal be and the same is hereby granted *limited* to the question whether the accused, having been convicted of rape, should in respect of the same single act have also been convicted of sexual intercourse with a female under the age of fourteen, not being his wife. (The italics are mine.)

27 In my understanding it has been the general practice of this Court, when hearing an appeal pursuant to an order granting leave, to confine itself exclusively to the question or questions posed in such an order, and even if the order here in question had not contained express words of limitation, I think it would be contrary to this practice to entertain the appeal on any ground other than the one which is expressly specified.

28 It is, therefore, important in my view to determine at the outset the exact limits of the question with which this appeal is concerned.

29 It will at once be apparent that the issue before us is confined to the validity of the second *conviction*. No question is raised as to the propriety of the Judge's action in sentencing the appellant as he did on both counts if the second conviction is valid, and indeed, while that was a matter over which the Court of Appeal had jurisdiction, this Court is not clothed with the same authority.

30 The appellant was charged, together with one Wayne Ronald Constable, that he raped one Jacqueline Mary Chafe contrary to the Criminal Code, and second, that he had sexual intercourse with the same girl, she being a female under the age of 14 years who was not his wife, contrary to the Criminal Code. The two accused were arraigned separately on each of the two charges and the appellant pleaded "not guilty" to both. The two offences with which the appellant was charged are defined in the following terms in Code ss. 143 and 146(1), as amended by 1972, c. 13, s. 70:

143. A male person commits rape when he has sexual intercourse with a female person who is not his wife,

(*a*) without her consent, or

(*b*) with her consent if the consent

(i) is extorted by threats or fear of bodily harm,

(ii) is obtained by personating her husband, or

(iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

146.(1) Every male person who has sexual intercourse with a female person who

(*a*) is not his wife, and

(*b*) is under the age of fourteen years,

whether or not he believes that she is fourteen years of age or more, is guilty of an indictable offence and is liable to imprisonment for life.

Everyone who commits the indictable offence of rape is also liable to imprisonment for life.

31 I think it of first importance to recognize that the offences created by ss. 143 and 146(1) are separate and distinct offences and it appears to be common ground that the latter offence is not included in the former. The fundamental difference between the two offences is that a conviction under s. 146(1) can only be sustained if the victim is under 14 years of age, whereas the age of the victim forms no part of the offence described in s. 143. The provisions of s. 140 also make it clear that consent is no defence to a charge under s. 146(1), whereas, of course, lack of consent is an essential ingredient of rape.

32 It was contended on behalf of the appellant that as a conviction for rape negatives consent, it also precludes a conviction under s. 146(1) in respect of the same act because where a lack of consent has been proved, age ceases to be a distinguishing factor between the two offences. This reasoning appears to me to be predicated on the assumption that the only difference between the two offences is that consent is excluded as a defence to s. 146(1) by the provisions of s. 140, and to overlok the fact that an accused charged under s. 146(1) would be equally guilty under that section whether his victim had consented or not provided that she was under 14 years of age and not his wife. Consent or lack of consent form no part of the offence described in s. 146(1), but it contains an ingredient which is not included in a conviction for rape, namely, the age of the child victim.

33 The situation in the present case is that the act for which the appellant was convicted of rape also constituted the additional offence of having sexual intercourse with a female person under the age of 14 years who was not his wife. The purpose and effect of s. 146(1) is, in my view, to protect female children under the age of 14 years from sexual advances leading to intercourse by male persons over that age (see s. 147), and I cannot subscribe to a result which relieves an assailant from the consequences of violating a child on the ground that his act also constitutes the crime of rape.

34 Under these circumstances I am unable to see how it can be said that the appellant did not commit both offences.

35 It is contended, however, that, because it is an accepted principle of our law that no one shall be punished twice for the same offence, it must follow, according to the same principle, that nobody can be convicted more than once in respect of the same act. The chief authority to which we were referred in support of this contention was the unanimous judgment of this Court in *Cox and Paton v. The Queen*, [1963] S.C.R. 500, 40 C.R. 52, [1963] 2 C.C.C. 148, where the accused had been convicted on two counts, each of which was found to be referrable to the same conspiracy and Cartwright J. (as he then was) held that both convictions could not stand on the ground that (p. 516): "It is the same conspiracy which is alleged in the two counts and it would be contrary to law that the accused should be punished more than once for the same offence."

36 In that case, the accused having been charged with conspiracy, the essence of the offence was the illegal agreement: see *Belyea v. The King; Weinraub v. The King*, [1932] S.C.R. 279, 57 C.C.C. 318, [1932] 2 D.L.R. 88; *Paradis v. The King*, [1934] S.C.R. 165, 61 C.C.C. 184, [1934] 2 D.L.R. 88; and particularly *McDonald v. The Queen*, [1960] S.C.R. 186 at 195, 32 C.R. 101, 126 C.C.C. 1. There was but one agreement alleged and the fact that the conspirators were shown to have had more than one breach of the law in

contemplation in forming that agreement did not convert the conspiracy into two offences so as to justify separate convictions in respect of each.

37 With the greatest respect for those who may entertain a different opinion, I do not view the judgment in *Cox and Paton v. The Queen* as authority for the proposition that an accused cannot be charged and convicted on two separate offences when both those offences had been committed by means of a single act.

38 It appears to me that in enacting s. 11 of the Criminal Code Parliament recognized that more than one offence may be committed as a result of a single act. Section 11 reads as follows:

11. Where an act or omission is an offence under more than one Act of the Parliament of Canada, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence.

A similar section appears as s. 33 of the Interpretation Act, 1889 (U.K.), c. 63, which reads:

Where an act or omission constitutes an offence under two or more Acts, or both under an Act or at common law, ... the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished twice for the same offence.

In interpreting the effect of this section, Humphreys J. in *Rex v. Thomas*, [1950] 1 K.B. 26, 33 Cr. App. R. 200, [1949] 2 All E.R. 662, said at p. 204:

It is not the law that a person shall not be liable to be punished twice for the same act; no one has ever said so in any case, and the Interpretation Act does not say so. What the Act says is that a person 'shall not be liable to be punished twice for the same offence'. Not only is it not the law, but it never has been the law, and that it is not the law was expressly decided in the highest criminal Court in the land then existing the Court for the Consideration of Crown Cases Reserved, as far back as 1867, in *Regina v. Morris* (1867), L.R. 1 C.C.R. 90, 10 Cox C.C. 480.

39 In the *Thomas* case the accused had been convicted of assault and was thereafter tried again for manslaughter arising out of the same facts, his victim having died after his first conviction as a result of the assault, but the observations of Humphreys J. are by no means limited to such a case as can be seen from the reasons for judgment of Lord Reading in *Rex v. Barron* , [1914] 2 K.B. 570, 10 Cr. App. R. 81, where the accused, having been convicted of sodomy, was also charged with an act of gross indecency with another male person, and Lord Reading took occasion to comment on the observations of Hawkins J. in *Regina v. King*, [1897] 1 Q.B. 214, where that Judge had said:

...it is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation.

As to this Lord Reading said, at 575:

It is quite plain that the learned judge did not intend to lay down and did not lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same.

40 Being satisfied that the first and second counts of this indictment charge separate offences and that the second is not included in the first, I think it must follow that the defence of autrefois convict is not available to the appellant, but it was strongly contended that the plea of res judicata or issue estoppel was available in this case to preclude a conviction being entered on the second count after a finding of guilty on the first. In regard to this last argument I have been greatly assisted by a text book entitled Res Judicata (1969), 2nd ed. prepared by Spencer-Bower and Turner, where it is said at p. 391, para. 479:

As has been pointed out in a previous chapter, the plea of *autrefois convict* is the process by which the doctrine of merger in judgment becomes effective in criminal jurisdiction. Once the accused has been tried for an offence, and convicted of it, that is an end to his criminal liability, and his conduct cannot serve as the basis of a second accusation of the same crime. As in civil, so in criminal law -- *transit in rem judicatem*: the criminal liability of the prisoner for the offence which he has committed is merged in his conviction for that offence, once it has been obtained, and his liability to be punished is discharged by the punishment (if any) which has been inflected in respect thereof.

It is particularly to be noticed, however, that while the maxim *nemo debet bis puniri pro uno delicto* forbids a second verdict of guilty for the same *crime*, it does not forbid a second prosecution for the same *conduct*, in cases in which such conduct may amount to two separate crimes. Whether it is just to prosecute an accused again after one conviction, may be debated on the facts of the particular case; but the maxim will not forbid it. Neither will an exemption from criminal liability on the second charge follow from the application of the maxim *transit in rem judicatam*. What has passed into *res judicata* is the *offence* of which he was convicted, together with those other offences of which he could have been convicted on the same facts on the same indictment.

I think it is clear that the words "same indictment" as employed in the last sentence of this quotation are, for the purpose of this case, synonymous with "second count": see s. 520(2) of the Criminal Code.

41 The comment made by Lord Morris of Borth-y-Gest in the course of his very comprehensive judgment in *Connelly v. D.P.P.*, [1964] A.C. 1254 at 1307- 1308, 48 Cr. App. R. 183, [1964] 2 All E.R. 401, also appears to me to be of assistance in determining the validity of a second conviction arising out of the same facts. Lord Morris of Borth-y-Gest there said:

The principle seems clearly to have been recognised that if someone had been either convicted or acquitted of an offence he could not later be charged with the same offence or with what was in effect the same offence. In determining whether or not he was being so charged the court was not confined to an examination of the record. The reality of the matter was to be ascertained. That, however, did not mean that if two separate offences were committed at the same time a conviction or an acquittal in respect of one would be any bar to a subsequent prosecution in respect of the other. It was the offence or offences that had to be considered. Was there in substance one offence -- or had someone committed two or more offences?

42 In considering the question posed by the last sentence in this passage, I think it desirable to make reference to the cases *Rex v. Quon*, [1948] S.C.R. 508, 6 C.R. 160, 92 C.C.C. 1, [1949] 1 D.L.R. 135, and *Regina v. Siggins* , [1960] O.R. 284, 32 C.R. 306, 127 C.C.C. 409 (C.A.).

43 In the *Quon* case the accused had been charged on two counts: the first laid under the Criminal Code, R.S.C. 1927, c. 36, s. 446(*c*) alleged robbery while armed; the second

laid under code s. 122 [re-en. 1938, c. 44, s. 7] alleged possession of a firearm capable of being concealed upon the person while committing "any criminal offence". At his trial Quon pleaded guilty to the first charge and he was also found guilty of the second offence and sentenced to two years on each count. The Court of Appeal quashed the conviction on the second count and this decision was affirmed on appeal to this Court. In the course of his reasons for judgment, Kellock J. made it clear that his reason for affirming the dismissal on the second count was that he regarded the offence there charged, not as a separate offence, but as an essential part of the offence charged in the first count. In the course of these reasons he said, at p. 525:

Coming to section 446(*c*), Parliament has by this provision, declared that for that offence, involving as one of its main elements, the presence on the offender of an offensive weapon, the penalty may be imprisonment for life and whipping. That is expressly the penalty for the totality of that conduct. I do not think therefore, that there is to be attributed to Parliament the intention that one part of that conduct (where the weapon in question is a firearm) may be made the subject of a separate charge under section 122.

In reaching this conclusion Kellock J. had occasion to quote [p. 519] from the judgment of Blackburn J. in *Wemys v. Hopkins*, (1875), L.R. 10, Q.B. 378, the passage to which reference has been made in the reasons for judgment of my brother Laskin, the most relevant part of which reads as follows:

The defence does not arise on a plea of autrefois convict, but on the well established rule at common law, that when a person has been convicted and punished for an offence by a court of competent jurisdiction, *transit in rem judicatam*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same matter.

At the conclusion of this quotation Kellock J. observed:

The above principle is embodied is section 14 of the *Code*. The common law principle is as applicable, in my opinion, in the case of two sections of the same statute as in the case of separate statutes.

44 Reference to the Code as it existed in 1948 makes it plain that Kellock J. was referring to s. 15 rather than s. 14 in making the last-quoted comment. Section 14 of the Code, as it then read, abolished the distinction between felony and misdemeanour, but s. 15 was the precursor of the present s. 11, and I am in any event in agreement that the provisions of that section, viewed in the light of what Humphreys J. said in *Rex v. Thomas*, supra, respecting the equivalent English section, are just as applicable in the case of two sections of the Criminal Code as they are in the case of two statutes. One act may thus be the subject of convictions under two sections of the Code, but only one punishment can be imposed for the same offence.

45 The clear distinction between the *Quon* case and the case at bar is that the age of the victim is not one of the essential elements in the offence of rape and the same distinction applies to the case of *Regina v. Siggins*, supra, in which the reasons for judgment delivered by MacKay J.A. on behalf of the majority of the Court were clearly predicated on the assumption that (p. 411):

The offence of theft where the person charged is the actual thief, necessarily involves the taking of possession by him of the article stolen, and the person found in possession of goods which he himself has stolen has also committed the offence of having in his possession goods knowing them to have been stolen.

I do not purport to either approve or disapprove this assumption, but I mention it simply to indicate that the counts charging unlawful possession in that case were quashed because the Court took the view that theft "necessarily involves the taking of possession" whereas, as I have said, rape does not necessarily involve an offence under s. 146(1).

46 In summary, the position in the present case is this. The appellant has been charged with two separate and distinct offences under the Criminal Code. He was tried in respect of both charges. He was guilty of both offences. In those circumstances, on what basis can it be said that he cannot be convicted of both? There is nothing in the Criminal Code to preclude it. He was not being convicted twice in respect of the same offence. The cases dealing with double punishment are not relevant to the issue of law which is before us, which is concerned with the legal power to convict in respect of two offences, and not with the question of sentence.

47 For all these reasons I would dismiss this appeal.

Fauteux C.J.C. **(dissenting):**

48 For the reasons given by Ritchie J. and the comments relevant to this case which I made in *Doré v. A.G. Can.* (not yet reported), the judgment of which is to be rendered concurrently with the judgment in this case, I would dismiss the appeal.

Martland J. **(dissenting):**

49 I agree with the reasons of my brother Ritchie. I would like to add the following comment. The point which is in issue in the present appeal was never raised at trial, or before the Court of Appeal.

50 Presumably, when leave to appeal to this Court was granted it was felt that the outcome of the appeal, if successful, would have some practical favourable consequences for the appellant. However, in the course of his argument, counsel for the appellant conceded that if the appeal succeeded the appellant would not be entitled to obtain a new trial in respect of both the charges against him. He was still subject to the sentence on the charge of rape, which sentence was exactly the same as, and concurrent with, the sentence on the other charge.

51 In the result, therefore, the appeal to this Court constituted an academic exercise, the only result of which, if successful, will be to prevent the addition to the appellant's already lengthy criminal record of a conviction for the crime of sexual intercourse with a female under the age of 14, not being his wife, which crime it is clear that he committed.

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