

Criminal Code

clause would seem to indicate that the judge would have to make the finding. It reads:

Where an accused is charged with an offence . . . the court may find the accused not guilty if it is of opinion that . . .

If you argue that the court means both the judge and the jury, then before the person could be acquitted the judge would have to say, "In my opinion the accused was not wholly or chiefly to blame" but you would also have to have the jury join with him in that finding if after having listened to all the evidence they were doubtful as to whether or not the accused was wholly or mainly to blame. I am afraid that the change in the wording of this clause is going to bring about a number of appeals. Certainly it was clear before. The section has withstood the test of years of experience and there is no doubt whatever as to its meaning:

On the trial of any offence against paragraph (b) of this section, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

While the section was permissive, actually in the course of years the matter became one of mandatory direction on the part of the judge. The question had to be left to the jury. Now we change all that. Although we say that the section, as far as its import is concerned, is not to be changed, we substitute a section that is subject to ambiguity.

I suggest that the minister might allow this section to stand because certainly, if you read the subsection literally, you must come to the conclusion that both elements of the court must come to the conclusion that the evidence does not show that the accused is wholly or chiefly to blame. It is difficult enough, on occasion, to get judges to properly charge the jury under the section as it now exists. If, in addition to the difficulties of today, you impose the necessity for the judge to be in agreement, you will raise difficulties that will cause many appeals.

As a matter of fact, it would almost seem that those who drafted this section had in mind the type of conclusion to which the judge must come before he makes his charge in connection with civil actions for malicious prosecution, for instance. Here the judge must come to certain conclusions, and having come to those conclusions he leaves questions for the jury to answer, after first having himself decided the absence of malice, the absence of reasonable and probable cause, or whatever the other considerations are that he must first decide have affirmatively been established.

On the face of the section as it now stands I think a serious ambiguity has been created. In my opinion it is a type of hurdle which we need not build by new draftsmanship when the old section has stood up throughout the years.

Mr. Garson: Mr. Chairman, I do not want to prolong the discussion upon this section. Out of the abundance of caution I have no objection to holding it for the purpose of checking on this point. But with respect, I must say that I cannot agree with my hon. friend, for this reason. If the court is one of a judge without a jury, I think they will agree with me that no difficulty arises. If the court is made up of a judge with a jury, then I do not know how any person could interpret this section as saying that any person other than the jury could find the accused guilty because, in a court with a jury, it is only the jury that can find an accused guilty.

Mr. Fulton: Wait a minute. Surely under certain circumstances a judge might withdraw a case from a jury and make a finding.

Mr. Garson: Oh, yes.

Mr. Fulton: So the judge does have the right to enter a verdict one way or the other in certain circumstances.

Mr. Diefenbaker: He has the right only to direct a verdict. He has no right to withdraw a case from the jury once it is in their custody.

Mr. Fulton: That may be so.

Mr. Garson: I would submit that what we have here is a carefully and intelligently drawn clause which applies both to courts composed of a judge and a jury and courts consisting of only a judge. The clause clearly covers both these cases. I think it is quite clear, but we want to get the very best code we can, and we are quite willing to consider any worth-while suggestion. The suggestion is that we should reopen the section now; but would my hon. friend accept our undertaking that we will give this suggestion the most careful consideration, and if it appears to have merit we will open the section and incorporate what he has suggested.

Mr. Fulton: I will take the minister's assurance on that point, but I should like to make this further observation. Although "court" is not defined in the bill, I do not see how a jury can be held to be part of a court. It seems to me it is the court and the jury, with the court being the judge and perhaps certain executive or administrative officers, but a jury is not a part of a court.