

Criminal Code

the proposed new section the court may find the accused not guilty if he is of that opinion. Why is discretion taken away from the jury and made a matter exclusively to be determined by the judge?

Mr. Garson: Mr. Chairman, I think the short answer to my hon. friend's question is that if the case is tried before a jury, in effect the court is the jury. My hon. friend is familiar with the principle that where the case is being tried before a jury, the jury are the judges of all questions of fact. This is a question of fact.

Mr. Fulton: But even so, why is the change in the wording necessary? In the present code it states explicitly that the trial judge may instruct the jury. That is the only way in which it can arise, and that leaves it clearly to the jury.

Mr. Garson: I am sure my hon. friend would agree that in cases of this kind the trial judge would certainly instruct as to the provisions of section 138 (3). He would instruct the jury in all points of law.

Mr. Fulton: The minister states that the court is the jury in this case. I would be a little bit worried about that. I would have thought that "court" would clearly refer to the judge and that the jury were not specifically concerned.

Mr. Garson: If the case is being tried by a jury then it is the jury that brings in the verdict, not the judge.

Mr. Montgomery: I feel doubtful about that. Is it not the case that the court passes sentence after the jury reaches a verdict? It seems to me that raises a bit of a question as to who is the court.

Mr. Fulton: Would it not be clearer if the word "jury" were inserted instead of "court"?

Mr. Garson: No, I do not think so. Depending upon the options which the accused may have taken during the course of the case against him, he may appear before a judge without a jury. Then the term in the section applies to the judge without a jury. Alternatively he may elect a trial by jury. In this case the term applies to the court in a jury trial. In such a case, upon all matters of fact the jury are supreme, but the judge would certainly instruct them, I would think, as to the bearing of this clause 138(3).

Mr. Fulton: I wonder whether I can make one more effort to suggest a change to the minister. Why not make it "the jury or in the case of trial without a jury, the judge, may find the accused not guilty"? I think that would make it perfectly clear.

[Mr. Fulton.]

Mr. Garson: I really do not think it is necessary. This has run a pretty long gauntlet—

Mr. Fulton: I beg the minister's pardon?

Mr. Garson: This legislation has been considered at great length by a number of very capable and experienced criminal lawyers including the members of the royal commission and the members of the committee of the other place, to say nothing of the members of the House of Commons committee. This is the first time this point has been raised. I think it is fairly well taken care of.

Mr. Fulton: I am sure one can find a number of points which are first-time ones, even after the very careful consideration I know the matter has been given. After very careful consideration in two other places, the house committee found a number of points. I am not setting myself up against any of those who have already considered this matter, but I am quite sure there are a number of points which could be raised for the first time and to which it is no answer to say that the matter has been considered by previous committees, and so on. If the minister can say the point was considered and was rejected as not having any validity, then I think possibly I would be disposed to say, "All right, I accept the previous opinion". But the mere answer that the point was never raised before does not seem to me to be a valid answer to what I think is an objection of some substance.

Mr. Diefenbaker: As you know, Mr. Chairman, this provision is applied within the terms of the statute which is in effect today. The judge, after charging the jury generally with regard to the component elements of the offence, concludes by directing them that even if they come to the conclusion that the physical act itself has been committed, the jury may then, even in that event, find the accused not guilty if the evidence does not show that the accused was wholly or chiefly to blame. I find it difficult to understand the reasons that impelled the commissioners to change that section, because no definition has been given for "court". If you look up the section dealing with definitions, you will find that there is no definition for "court".

Mr. Fulton: The jury is not the court. It is not part of the court at all.

Mr. Diefenbaker: It might be argued that the court consists of the judge and the jury but I think that would be going rather far because, in the ordinary usage of the language, the court refers to the presiding judge and the jury is always referred to as the jury. I would also point out this fact. This