

Criminal Code

the question. In one case the woman wanted to get a divorce; in the other case the woman wanted to send her husband to the penitentiary in order to get rid of him.

I feel quite strongly that it should be included in the provision because I am afraid that otherwise the courts will say that up to now it has been the practice. Within the last few months I have heard a judge tell a jury that they should not convict, that it was dangerous to do so. But I am afraid that with this provision the judge will say, "Under the old law I would have told you not to convict, but since the parliament of Canada has expressly taken out that section, you do what you like".

Mr. Diefenbaker: In support of what my hon. friend has said, may I direct the attention of the minister to the fact that this general rule applies to all sexual offences except those that require specific corroboration. In other words, it was a requisite for a judge to warn the jury of the fact that it was unsafe to convict, that they ought not to do so, but that if they registered a conviction, the conviction was a proper one. Parliament, having chosen to apply this general principle to clauses 136 and 137, and subsections 1 and 2 of section 138, would not a judge be justified in concluding that thereby parliament in its wisdom had decided, in the case of offences covered by section 142, that such a direction was unnecessary?

I feel the department should have given consideration to the point raised, because unless consideration is given by parliament we will find ourselves in a position where the court in one province will have decided that a warning is necessary, and the courts in other provinces will decide the warning is not necessary, and before the question is determined it will finally have to go to the Supreme Court of Canada.

If we want to preserve the benefit of the rule which experience has shown is necessary in order to protect an accused who is innocent from being convicted by those who by design invent a story, which is simple to invent and difficult to rebut, surely we do not want to remove that protection which the accused who is innocent has under the rule of practice in effect today.

The Minister of Justice says, "Well, the commission did not refer to that and it was not referred to in the examination made by a committee of this house or the committee of the other place". That may be so, but it is in circumstances such as that that lawsuits are created, and certainly I do not believe parliament intends to take away that element of protection against the kind of

[Mr. Nowlan.]

unfounded charges frequently to be found in families when wives decide that they wish to dissociate themselves from their husbands, and, as a result of direct or indirect influence, children in that family develop antipathy toward their fathers which ultimately finds them making allegations which they swear to but which later on they regret.

I feel the minister might give consideration to the point raised by my hon. friend, for certainly I would be loath, while not desiring in any way to defend individuals who commit these terrible offences, to allow the bulwarks of the law to be broken down and an innocent man convicted because of the absence of the warning which experience over 100 years under British law has shown to be necessary and which should be thrown around the accused.

Mr. Garson: We would be very glad to consider that. There is one difficulty of course. What we have been discussing are matters which include incest, which is dealt with in clause 142. I believe my hon. friend, upon reflection, will recall that incest, at least as between adults, differs from rape and some types of carnal knowledge in that it implies consent upon the part of both parties and therefore the lady in the case, who is giving evidence against the gentleman, will be an accomplice, because in most cases the offence of incest could not be committed without her voluntary participation. The general rule would then apply that evidence of an accomplice could not be used unless it was corroborated. I think that is one of the difficulties.

Mr. Nowlan: But surely the minister is up against the same thing under clause 131, which makes statutory provisions with respect to evidence of an accomplice. It does not include incest, though I would be perfectly happy to see it included in clause 131.

Mr. Garson: Which subsection is my hon. friend referring to? Would it meet my hon. friend's wishes if clause 142 were included in clause 131?

Mr. Nowlan: I have not thought it all through, but I think it would be better that way. There is no doubt she would be an accomplice, if she were old enough, mature enough, or had reached the age of consent, but you would not have the protection you have now because it is barred under the other section.

Mr. Garson: I am quite agreeable to allowing this present section to stand. I know we would all want to have it in as good shape as possible, and if any other ideas