SC CR 77 013

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN,

Appellant,

- and -

DAVID HUSKEY,

Respondent.

REASONS FOR JUDGMENT

of Deputy Judge W. A. Stevenson

This is an appeal by the Crown as to sentence only following the accused's conviction under s. 236 of the *Criminal Code*. The issue is whether or not the learned Justice of the Peace erred in failing to impose the minimum sentence specified for a conviction for a third or subsequent offence under what is now s. 236(1)(c) under 1974-75-76 C. 95, S. 17.

The accused was sentenced to 30 days to be served intermittently. There were four previous convictions under s. 234, all prior to the coming into force of this section.

The offence here occurred after the section came into force and the accused pled guilty to it. The Crown seeks only the minimum punishment and seeks to vary the sentence on the basis that there was an error in law.

The amendments impose a greater penalty for subsequent offences and, moreover, under s. 236.1 convictions under ss. 234, 234.1, 235 and 236 are deemed to be a first or second offence as the case may be.

The respondent's position is that his prior convictions did not, at the time they were made have the status that they now possess, namely that of being previous convictions for the purpose of later offences.

In my view this matter is determined by the decision of the Court of Appeal for the Northwest Territories in *The Queen v. Johnston*, delivered March 18, 1977. That case is distinguishable in that the prior conviction was a conviction under the same section, namely s. 236 while in the instant case all the prior convictions are under s. 234.

The distinction is, in my view, one without a difference. The principle which the Court applied in that

case is extracted from *Rex v. Austin* [1913] 1 K.B. 551 and *In re A Solicitor's Clerk* [1957] 1 W.L.R. 1219. Phillimore, J. said at page 556 of the former case:

> "It is said that a retrospective effect must not be given to a penal statute. No doubt; one can hardly imagine the Legislature punishing a man for having done an act which at the time of its commission was a perfectly innocent act. But to prescribe punishment for an old offender in case in the future he persists in his crime is quite another matter. The offence in question was committed since the Act. The Act says that a man guilty in the future may, if he has already been guilty in the past, be punished as he could not have been before the Act. There is nothing wrong in that. No man has such a vested interest in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatever be had to his previous history."

The statute in question does impose a new punishment for an old offender who has persisted in his crime. There is no principle which precludes Parliament from defining the old offences in the way that they have done here to embrace all offences under the drinking and driving provisions.

Accordingly, the appeal must be allowed and the accused sentenced to three months' imprisonment. That imprisonment is the penalty which the learned Trial Judge should have imposed and her sentence is varied accordingly.

It appears the accused has already served part of that sentence and will now have to serve the remainder. Since the sentence exceeds the minimum under s. 663(1)(c) there is no power to order it to be served intermittently. If the accused's Counsel so requests I would recommend that the accused be given the alcohol counselling course at the Yellowknife Correctional Institute.

Deputy Judge of the Supreme Court
of the Northwest Territories

DATED at Edmonton, Alberta,

this 23 day of March, 1977.

Counsel:

B. Fontaine, Esq.,
for the Appellant.

C. Dalton, Esq.,
for the Respondent.