WILLIAM KOUFIS .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1941

* April 30.
* May 1.
* June 24.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Evidence—Accused charged with arson—Contention that accused arranged that other persons carry out the crime—Evidence of conversations between such other persons—Admissibility—Questioning of accused, in cross-examination, as to alleged fire at other premises than those in question.

The accused appealed from the judgment of the Supreme Court of Nova Scotia *en banc*, 15 M.P.R. 459, affirming his conviction of having unlawfully and wilfully set fire to a store. The appeal was based on certain objections of law, which were grounds of dissent in the said Court *en banc*.

(1) One G. testified that accused hired him to commit the crime and G. arranged with P. to do it. P. testified that he secured the assistance of T. P. and T. gave evidence that they set the premises on fire. It was objected that evidence of P. and T., particularly with reference to their conversations with each other and with G., was improperly admitted.

Held, that this ground of appeal failed.

Per the Chief Justice and Kerwin J.: The evidence of P. and T. did not implicate accused in any way, but was admissible to prove the actual setting of the fire. Accused was not charged with having conspired to commit arson and, as the trial judge explained to the jury, the actions of P. and T. and the conversations between them were relevant to the charge upon which accused was being tried only if the jury were satisfied as to the truth of the evidence given by G. relating to his conversation with accused.

Per Rinfret, Crocket and Taschereau JJ.: Any acts done or words spoken in furtherance of the common design may be given in evidence against all (*Paradis* v. *The King*, [1934] S.C.R. 165). This rule applies to all indictments for crime, and not only when the indictment is for conspiracy, and it also applies even if the conspirator whose words or acts are tendered as evidence has not been indicted (*Cloutier* v. *The King*, [1940] S.C.R. 131, at 137). These principles were properly applied to the present case.

(2) It was objected that the prosecuting officer, in cross-examining accused, had improperly questioned him as to an alleged fire at other premises than those in question, which questioning had greatly prejudiced accused with the jury.

Held: Effect should be given to this objection; the appeal should be allowed and a new trial ordered.

Per the Chief Justice and Kerwin J.: The likely, if not the only, effect upon the jurymen of said questioning would be that accused was a person who was very apt to commit the crime with which he was

* PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin and Taschereau JJ.

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charged. A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the court, but, when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial. The questioning complained of could not be justified on the ground that it went to accused's credibility: credibility cannot arise in connection with questions relating to an extraneous matter that has not been opened by the examination in chief of accused or otherwise on his behalf.

Per Rinfret, Crocket and Taschereau JJ.: An accused has to answer the specific charge mentioned in the indictment for which he is standing on trial, and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment (*Maxwell* v. *Director of Public Prosecutions,* [1935] A.C. 309); otherwise the real issue may be distracted from the jury's minds, and an atmosphere of guilt created, prejudicial to the accused. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis* v. *The King,* [1934] S.C.R. 165, at 169), or unless they show a system or a particular intention, as decided in *Brunet* v. *The King,* 57 Can. S.C.R. 83. The questioning of accused complained of may have influenced the verdict of the jury and caused accused a substantial wrong.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming (Hall and Archibald JJ. dissenting) the conviction of the appellant, at trial before Doull J. and a jury, of having "unlawfully, without legal justification or excuse, and without colour of right, wilfully set fire" to a certain store "and did thereby commit arson."

The questions before this Court on this appeal, and the nature of the evidence or proceedings from which such questions arose, are sufficiently set out in the reasons for judgment in this Court now reported.

The appeal to this Court was allowed and a new trial ordered.

J. W. Maddin K.C. and *I. G. MacLeod* for the appellant.

Hon. J. H. MacQuarrie K.C. and *M. A. Patterson* for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

(1) 15 M.P.R. 459; [1941] 1 D.L.R. 609.

KERWIN J.—The appellant Koufis was convicted on an indictment charging him with having unlawfully set fire to a store known as Diana Sweets, in Sydney, Nova Scotia, on or about April 18th, 1940. On an appeal to the Supreme Court of Nova Scotia *en banc,* the conviction was affirmed. Mr. Justice Hall and Mr. Justice Archibald dissented and would have ordered a new trial on the ground that the prosecuting officer, in cross-examining the accused, had improperly questioned him as to an alleged fire at premises known as the London Grill, in Sydney, which greatly prejudiced the accused with the jury. Mr. Justice Hall also dissented on the ground that the evidence of two witnesses called by the Crown (Pentecost and Thistle), particularly with reference to their conversations with each other and with one Jerome Gerrior, was improperly admitted in evidence.

Koufis appealed to this Court against the affirmance of this conviction on these two questions of law. As to the second point, we announced at the hearing that we would not require to hear counsel for the respondent, as we considered the evidence of the two men admissible. As to the first, we have had the advantage of a complete argument and we have determined that the questions referred to were improperly asked.

At one time Koufis was a partner in the restaurant and confectionery business known as Diana Sweets and also in a similar business operated under the name of the London Grill. He sold his interest in both and left Sydney. Upon his return to that city, he desired to become a partner in the Diana Sweets business again but that was not acceptable to some, if not all, of the then members of the partnership. Thereupon he, with others, commenced a third business known as the Dome, which was still in operation on April 18th, 1940.

On that date the store in which the Diana Sweets business was carried on and which was known by that name was destroyed by fire and it was in connection with that fire that Koufis was charged with arson. The basis for the charge was the evidence of Gerrior. He testified that Koufis had promised to pay him a sum of money to burn Diana Sweets and had said to him: "If you are scared to do it, get somebody else and give him half the money";

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and that he (Gerrior) accordingly arranged with Pentecost to do the work. The latter testified that he in turn secured the assistance of Thistle. Both Pentecost and Thistle gave evidence that they set the premises on fire, and the learned trial judge, therefore, was quite accurate when he stated in his charge to the jury: "so, if you give effect to that evidence, it is clear that somebody is guilty of the crime of arson."

The trial judge put to the jury as the crux of the case: "Did the accused directly or through Gerrior procure Thistle and Pentecost to set the fire?" He instructed the jury as to the danger of convicting upon the uncorroborated testimony of an accomplice and also told them that there was no corroboration of the stories told by Gerrior, Pentecost and Thistle. The evidence of the last two did not implicate Koufis in any way but was admissible to prove the actual setting of the fire. Koufis was not charged with having conspired to commit arson and, as the trial judge explained, the actions of Pentecost and Thistle and the conversations between themselves were relevant to the charge upon which Koufis was being tried only if the jury were satisfied as to the truth of the evidence given by Gerrior relating to his conversations with the accused. On this point we are satisfied that the appeal could not succeed.

Turning now to the first point, we find that when John Raptis, one of the partners in Diana Sweets and a witness on behalf of the Crown, was testifying in chief as to the conversation between him and the accused when the latter wanted to again become a partner in that business, the following occurred:—

Q. Tell us what he said.

A. Lots of us down on Charlotte street and we get along very well. I never saw him until he got the Dome down to the Capital, and I met him one night before the first Dome was burned and he ask me "You have to raise the price, no money in the meals" and I say we are doing all right; and I saw him again after the fire, the first fire in the Dome.

Q. A year ago?

A. Two years ago in August.

Q. It was before that first fire he complained to you about the prices?

A. Yes, wanted to increase the prices. After he was at this Dome I never see him except in Church, just say "hello."

Q. You were not talking to him after the fire?

A. No.

This was the first mention in the evidence of any fire other than the one in question.

The following appears in the examination in chief of Gerrior when he was asked as to whether he had seen Koufis about two weeks before Christmas of 1939 after an accidental fire had occurred in Diana Sweets:—

A. Yes, two days after. I told him about it and he said "Why did you not leave it burn" and I said "Why?" and he said "If you had leave it burn I would give you $50." I let it go at that. Couple of days after I met him and he asked me to go down and see him, and I did go down about twelve at night. He told me if I burn the Diana he would give me $350; he did not like them, they did not come up to his place and they were no good; he wanted them destroyed. He told me how it could be done. He said "You could burn it and nobody would suspect you because you are a fireman. When the other Dome burned nobody suspected the fireman and no questions asked to him."

Q. Was he at the other Dome when it burned?

A. He was running it.

Later in his testimony in chief, in the course of an answer to a question, he stated: "After the Dome Grill burned I went to see Koufis."

Testifying on his own behalf, the accused, in answer to his own counsel and with reference to the Dome business, was asked:—

Q. And you were burned out?

A. Yes.

Q. What did you do then?

A. We have heavy loss in the fire. We lose $5,000 and another $4,000. Either $9,000 or $10,000 altogether.

In cross-examination he was asked what he considered the Diana Sweets business was worth at the time he sold his interest in it.

A. $28,000 or $27,000 besides the good will.

Q. Was the Diana Sweets worth more then than at the time of your last fire?

A. I don't know. That is for the time I was there.

Later in cross-examination he was asked a number of questions as to the amount of insurance that had been carried on the Dome business at the time of a fire there. While we are not concerned with the evidence as to any fire at the Dome restaurant since no dissent is based on the admission of that evidence, I have referred to it in order to show how those fires came to be mentioned. Then

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followed the evidence with reference to the London Grill, upon which the dissent below has been based and which evidence I transcribe:—

Q. Did you own the London Grill?
A. Yes, four partners.
Q. What four partners?
A. Roy Woodill, Russell Urquhart, myself and Gus Mandros.
Q. That place burned too?
A. Never.
Q. Never a fire there?
A. Never a fire there in the London Grill?
Q. Do you mean the London Grill situated on the corner of Charlotte and Wentworth streets was never on fire at any time?
A. Never have any claim for fire insurance.
Q. Was there a fire there?
A. Inside the store?
Q. Yes.
A. The London store never had a fire. The building next to it. There are two places there, the London Grill on one side and groceries on the other.
Q. The two are under one roof?
A. Absolutely.
Q. And this fire was in the partition between the two?
A. No, started at the end of the building.
Q. Was it underneath the building the fire started?
A. I don't know, the other end.
Q. It was underneath the building, wasn't it?
A. No, not in our basement.
Q. Wasn't it underneath the building?
A. I don't know.
Q. Anyway, the building that the London Grill was in caught fire?
A. Yes.

This was the only reference to a fire at or near the London Grill and the likely effect, if not the only effect, upon the jurymen of this line of cross-examination, particularly the questions "Was it underneath the building the fire started" and "It was underneath the building, wasn't it" and "Wasn't it underneath the building," would be that the accused was a person who was very apt to commit the crime with which he was charged. In fact, the trial judge stated to the jury: "The only reason he would be asked about another fire is to show he was likely to start this." Again there is no dissent as to the charge and I mention it merely to indicate that any doubt in the mind of the jury as to the purpose of these questions would be set at rest by this comment.

By section 4 of the *Canada Evidence Act*, every person charged with an offence is a competent witness for the defence, and by section 12, a witness may be questioned

as to whether he has been convicted of any offence and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction. We are not concerned on this appeal with the question as to when the prosecution is entitled to give evidence of the bad character of an accused because it is not suggested that Koufis had been convicted of any crime in connection with the fire at the London Grill, or that he had been even charged with any such crime, or in fact that any crime had been committed by anyone. A person charged with having committed a crime is not only entitled to have placed before the jury only evidence that is relevant to the issues before the Court, but, when testifying on his own behalf, he may not be asked questions that have no possible bearing upon such issues and might only tend to prejudice a fair trial. In the opinion of the majority of the Supreme Court *en banc,* these questions were justified on the ground that they went to the credibility of the accused, but credibility cannot arise in connection with questions relating to an extraneous matter that has not been opened by the examination in chief of the accused or otherwise on his behalf. The conviction should be set aside and a new trial ordered.

The judgment of Rinfret, Crocket and Taschereau JJ. was delivered by

TASCHEREAU J.—The appellant, William Koufis, has been found guilty of the crime of arson and sentenced to serve five years in Dorchester Penitentiary. The Court of Appeal for Nova Scotia confirmed this conviction (Hall and Archibald JJ. dissenting).

There is no suggestion that the accused set fire himself to the building called the Diana Sweets which was burned, but the contention of the Crown is that the accused hired one Jerome Gerrior to commit the crime and that the latter offered Clayton Pentecost one hundred and seventy-five dollars ($175), who shared this sum with Edward Thistle to burn the premises. The grounds of appeal are the following:—

1. The evidence of Clayton Pentecost and Edward Thistle, particularly with reference to their conversations

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with each other and Jerome Gerrior, was inadmissible in the trial against William Koufis and was improperly admitted in evidence.

2. The accused was greatly prejudiced in his defence by the publication and circulation in the City of Sydney and surrounding districts of a certain newspaper known as *The Steelworker and Miner,* which charged the accused with having committed the offence hereinbefore recited as well as imputing to him, the said William Koufis, the crime of arson in connection with fires which have occurred at premises known as the Dome Grill at Sydney, as well as with an alleged fire at premises known as the London Grill at Sydney, and an alleged fire in a bowling alley in Sydney.

3. The learned prosecuting officer for the County of Cape Breton in cross-examining the accused improperly questioned him as to fires in the said Dome Grill and the London Grill, which greatly prejudiced the accused with the jury.

I believe that the first ground of appeal is unfounded. It is well settled law that any acts done or words spoken in furtherance of the common design may be given in evidence against all (*Paradis* v. *The King* (1)). This rule applies to all indictments for crime, and not only when the indictment is for conspiracy, and it also applies even if the conspirator whose words or acts are tendered as evidence has not been indicted (*Cloutier* v. *The King* (2)). These principles were properly applied to the present case, and I believe that the conversations between Gerrior, Pentecost and Thistle were rightly admitted in evidence.

The appellant further submits that even if such an evidence is legal, there must be some independent evidence of conspiracy before the statements of co-conspirators become admissible one against the other. Although the pronouncements on this ground have not always been unanimous, the matter has been definitely settled in the case of *The King* v. *Paradis,* cited *supra,* and which was based on a decision rendered by the Supreme Court of

(1) [1934] S.C.R. 165. (2) [1940] S.C.R. 131, at 137.

British Columbia (*The King* v. *Hutchinson* (1)). In the case of *Paradis* v. *The King* (2), Mr. Justice Rinfret, giving the judgment of the Court, said:—

> Nor would it be error for a trial judge to permit proof of acts of alleged conspiracy to be given in evidence before the agreement to conspire has been established, if the latter is in fact proved during the course of the trial.

The second point raised by the appellant is that the accused has been prejudiced by the publication of certain articles in *The Steelworker and Miner.*

The articles complained of were certainly of a serious character, as they clearly stated that the appellant was the party responsible for several fires which occurred in Sydney some time before the trial. These articles, however, were not referred to at the trial and were put in the record only when the case reached the Court of Appeal. An affidavit was filed signed by I. J. MacLeod to the effect that *The Steelworker and Miner* is widely circulated throughout the County of Cape Breton and the City of Sydney; but there is nothing in the record or the evidence to show that the members of the jury had any knowledge of the contents of these articles nor that they did not give a free unbiased verdict. Under these circumstances, I am of opinion that the appellant cannot succeed on this point.

The third ground of appeal is much more serious and is obviously the one on which the appellant practically rests his whole case. It raises the question of the cross-examination of the accused by the solicitor for the respondent on previous fires which occurred at the Dome Grill and at the London Grill at Sydney. The learned judges, however, do not enter a formal dissent as to the cross-examination on the fire which destroyed the Dome Grill, but they dissent on the ground that the accused has been improperly cross-examined as to the alleged fire at the London Grill. The *Canada Evidence Act,* section 12, says:—

> A witness may be questioned as to whether he has been convicted of any offence, and upon being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove such conviction.

If the accused admits having committed the offence, the answer, being a collateral one, is obviously final. If he

(1) (1904) 8 Canadian Criminal Cases, 486.

(2) [1934] S.C.R. 165, at 170.

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denies having committed the offence, then the conviction may be proved by legal means provided for in subsection 2, paragraphs (*a*) and (*b*), of section 12. The authority given to the Crown is to cross-examine the accused on *previous convictions,* but this section 12 cannot be interpreted as meaning that the accused may be cross-examined on offences which he is suspected of having committed but for which he has not been convicted.

When an accused is tried before the Criminal Courts, he has to answer the specific charge mentioned in the indictment for which he is standing on trial, " and the evidence must be limited to matters relating to the transaction which forms the subject of the indictment " (*Maxwell* v. *Director of Public Prosecutions* (1)). Otherwise, " the real issue may be distracted from the minds of the jury," and an atmosphere of guilt may be created which would indeed prejudice the accused.

In the present case, the accused was asked in cross-examination *if he had owned the London Grill? If that place had burned too? If the fire had started underneath the building?* All these questions were obviously asked in order to convey to the jury the impression that the accused had set fire previously to another building, and to establish the possibility that he committed the offence for which he is now charged. The accused cannot be cross-examined on other criminal acts supposed to have been committed by him, unless he has been convicted, or unless these acts are connected with the offence charged and tend to prove it (*Paradis* v. *The King* (2)), or unless they show a system or a particular intention as decided in *Brunet* v. *The King* (3). It is clear to my mind that this cross-examination may have influenced the verdict of the jury and caused the accused a substantial wrong.

I would allow the appeal and direct a new trial.

Appeal allowed and new trial ordered.

Solicitor for the appellant: *J. W. Maddin.*

Solicitor for the respondent: *M. A. Patterson.*

(1) [1935] A.C. 309.

(2) [1934] S.C.R. 165, at 169.

(3) (1918) 57 Can. S.C.R. 83.