IGNATIUS McNEIL, WILLIAM McNEIL AND DENNIS McNEIL..... APPELLANTS;

AND

HIS MAJESTY THE KING..... RESPONDENT.

1931
* May 12
* May 20

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Criminal law—Charge of shop breaking by night with intent to assault—Cr. C., s. 461—Omission in charge of essential allegation to constitute the crime—Power of amendment (Cr. C., s. 889(2))—Evidence—Conviction quashed.

Appellants were convicted, in the County Court Judge's Criminal Court, on a charge of breaking and entering by night the shop of C. P. "with intent to commit an indictable offence, to wit, to assault one C. P. contrary to the form of statute in that behalf made and provided". The trial judge's finding against each appellant was "[appellant] tried this day on a charge of shop breaking by night with intent.

* PRESENT:—Newcombe, Rinfret, Lamont, Smith and Cannon JJ.

1931

McNEIL
v.
THE KING

Found guilty." On appeal it was objected that in the charge the word "therein" was omitted (after the word "offence") and therefore the charge as laid did not come within s. 461, *Cr. Code,* and constituted no offence in law. The Crown contended that the objection was not open, as an amendment could have been made under s. 889(2), and, under s. 898, every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment, before pleading.

Held: S. 889(2), by its terms, provides for amendment only where "the matter omitted is proved by the evidence"; and there was no evidence to indicate that appellants broke or entered with any intent to assault C. P., "therein" or elsewhere, although there was evidence possibly justifying an inference of breaking in with intent to assault her son A. P. The charge, intended to be of an offence under s. 461, lacked an allegation essential to constitute the crime, namely, that the intent was to commit the assault (that is, on C. P., as charged) in the shop that was broken into; and there was no evidence that supplied this omission, so as to give foundation for an amendment under s. 889(2) that would make it in reality a charge under s. 461. Without amendment, and without proof of the crime intended to be described, there was a finding of guilty of the charge, as set out, which did not describe any crime. The conviction must therefore be quashed.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc,* sitting as a Court of Appeal under the provisions of the *Criminal Code,* dismissing (Mellish and Ross JJ. dissenting) the present appellants' appeal from their conviction by Crowe, Co. C.J., at a sittings of the County Court Judge's Criminal Court for District No. 7, sitting at Sydney, in the county of Cape Breton, Nova Scotia, on the charge for that they "at New Waterford in the county of Cape Breton on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the shop of Selina Passerini, there situated with intent to commit an indictable offence, to wit, to assault one Celina Passerini contrary to the form of Statute in that behalf made and provided".

The material facts of the case and the issues in question are sufficiently stated in the judgment now reported. The appeal was allowed and the conviction quashed.

J. W. Maddin, K.C., for the appellants.

Neil R. McArthur, K.C., for the respondent.

The judgment of the court was delivered by

SMITH, J.—The three appellants were tried in the County Court Judge's Criminal Court of District No. 7,

county of Cape Breton, Nova Scotia, on the following charges:

* * * for that they, the said Ignatius McNeil, William McNeil and Dennis McNeil, at New Waterford in the county of Cape Breton on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the shop of Celina Passerini there situated with intent to commit an indictable offence, to wit, to assault one Celina Passerini contrary to the form of Statute in that behalf made and provided.

That they, the said Ignatius McNeil, William McNeil and Dennis McNeil, at New Waterford in the county of Cape Breton, on or about the 22nd day of November, A.D. 1930, did wrongfully and unlawfully break and enter by night the dwelling house of Celina Passerini, there situated with intent to commit an indictable offence, to wit, assault upon one Celina Passerini contrary to the form of Statute in that behalf made and provided.

The accused elected to be tried by the judge without a jury, and the trial proceeded on the charges as above set out. The minute of election, as set out at page 34 of the record, is as follows:—

The accused having been brought up for election on the charge that they did, on or about the 22nd day of November, A.D. 1930, at New Waterford in Cape Breton county, unlawfully break and enter by night the dwelling house of Mrs. Celina Passerini with intent to commit an indictable offence therein contrary to the form of Statute in that behalf made and provided;

Elected to be tried under the "Speedy Trials Act".

It is to be noted that the word "therein" appears in this minute after the words "indictable offence", but does not appear in the two charges set out. The record contains no minute of election as to the first charge.

The minute of trial sets out that the accused, on being arraigned on the following accusation, each pleaded not guilty, and the accusations are then set out in the same language as stated above.

The finding of the trial judge is as follows:—

Ignatius McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

William McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

Dennis McNeil tried this day on a charge of shop breaking by night with intent. Found guilty.

Ignatius McNeil was sentenced to six months in the common gaol, William McNeil to two years in the Dorchester penitentiary, and Dennis McNeil to two years and six months in the Dorchester penitentiary.

The accused appealed to the Supreme Court of Nova Scotia against the conviction, and the appeal was dismissed by a majority of three to two.

1931

McNEIL v. THE KING

Smith J.

The intention evidently was to charge the accused parties with an offence under sec. 461 of the *Criminal Code*, and with an offence under sec. 462 of the *Criminal Code*, which read as follows:—

461. Breaking Shop, etc., with Intent.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, either by day or night, breaks and enters any of the buildings, or any pen, cage, den or enclosure mentioned in the last preceding section with intent to commit any indictable offence therein.

462. Being Found in Dwelling-House at Night.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who unlawfully enters, or is in, any dwelling-house by night with intent to commit any indictable offence therein.

The ground of appeal is that in each charge the word "therein" is omitted, and that therefore the charges as laid do not come within the sections referred to, and constitute no offence in law.

The Crown contends that this objection is not open to the accused, because an amendment could have been made under sec. 889(2) of the *Criminal Code*, and that under sec. 898 every objection to any indictment for any defect apparent on the face thereof must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards; and, under subs. 2, no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under authority of this Act.

Section 889(2) reads as follows:

If it appears * * * that there is in the indictment, or in any count in it, an omission to state or a defective statement of anything requisite to constitute the offence, or an omission to negative any exception which ought to have been negatived, but that the matter omitted is proved by the evidence, the court before which the trial takes place, if of opinion that the accused has not been misled or prejudiced in his defence by such error or omission, shall amend the indictment or count as may be necessary.

It is contended that this section does not authorize an amendment that would change a charge that does not allege or describe any crime into a charge describing a crime, and that, in any case, there was no amendment here; so that the conviction is really on the charge as laid, that does not constitute a crime.

It is not necessary here to determine the extent to which this section goes in the matter of allowing amendments, because, by its terms, the amendment is only to be made where the matter omitted is proved by the evidence. It

therefore becomes necessary to examine the evidence to ascertain if the matter omitted has been proved; that is, to ascertain whether or not it has been proved that the accused broke into the shop "with intent to commit therein an indictable offence, to wit, to assault Celina Passerini", or did enter the dwelling-house "with intent to commit an indictable offence therein, to wit, assault upon one Celina Passerini".

I have perused the evidence very carefully from beginning to end, and I find no evidence whatever that suggests any such intent. The evidence establishes that the three accused broke in the door of Celina Passerini's shop a little after midnight, when some members of her family and some visitors were sitting in the dining-room, which is connected with the shop by a doorway, and when Celina Passerini, her son Angelo and some boarders were in bed upstairs. Celina Passerini came downstairs, and the following is her evidence as to what happened when she was standing on the step:—

Q. What happened when you were standing on the step?

A. Dennis McNeil was there with beer bottles in his hand, and he said, "Where is your - - - son? He won't live more than five minutes if I get him." And he make a spring to get by me and then he took a top off the stove and struck me on the leg.

On cross-examination, she states that when she came downstairs the three McNeils, her daughter Irene, Peter Guthro, one Dickson and Jack McKeigan were there in the dining-room. The other McNeil boys were right behind, one leaning against the wall.

The examination proceeds as follows:—

Q. Who was leaning against the wall, which one was it?

A. Iggy, Ignatius there.

Q. Where were the other fellows?

A. Trying to get upstairs.

Q. Did they have bottles?

A. Yes, when they came in.

She states that they had a lot of bottles; that Dennis had one in each hand, and some in his pockets, and that he placed two on the table. Then we have the following:—

Q. You say they have two bottles?

A. Not all; and they attempt to come upstairs. I tells him he is not going upstairs and then he pick up the piece of the stove and throw at me, the iron.

Irene Passerini is asked what accused came for, and answers, "Looking for Angelo". This is all there is in reference to an assault.

1931

McNEIL
v.
THE KING

Smith J.

I think it is not possible to infer from this evidence that the premises were entered with the intention of committing an assault upon Celina Passerini. It indicates, I think, quite the contrary, namely, that the accused Dennis McNeil for the first time formed in his own mind alone an intent to assault Celina Passerini at the time she prevented him from going upstairs, because she so prevented him. Although she says "they attempted to come upstairs", it appears that only Dennis McNeil made such attempt, because she goes on to say, "I tells him he is not going upstairs"; and she has said just before that Ignatius was leaning against the wall; and in her examination in chief she referred to Dennis only as having tried to go upstairs. There is nothing to indicate that there was in the mind of any of the accused, at the time of breaking in, an intent to assault Celina Passerini, in the shop or elsewhere.

The enquiry addressed to her by the accused Dennis McNeil as to the whereabouts of her son, the threat made in reference to him, and the spring made to get past Celina Passerini on the stair, which she swears to, is evidence of an intent on the part of Dennis McNeil at that time to make an assault on her son, Angelo Passerini, and possibly might justify an inference that he broke in with that intent, and might possibly also justify the further inference that all three were acting with a common intent; but this is not a matter that arises for consideration here.

The meaning of the learned judge's finding, as I read it, is that all three accused broke into the shop with the intention of committing an assault as charged, that is, on Celina Passerini. He could not have had in mind an intent to commit an assault on anyone else, because there is no suggestion in the charges of an attempt to commit an assault on anyone but Celina Passerini. The particular place where accused intended to make the assault is not involved in the finding of guilty, because no particular place was alleged in the charge, and the finding is simply "guilty". We therefore have what was intended to be a charge of an offence under sec. 461 of the *Criminal Code* which lacks an allegation essential to constitute the crime

described in that section, namely, that the intent was to commit the assault in the shop that was broken into. There was no evidence that supplies this omission. It was after midnight, and the shop was closed. The accused first rapped at the back door of the dwelling part of the premises. There is nothing to warrant an inference that the intent at the time of breaking in was to assault Celina Passerini in the shop so as to give foundation for an amendment pursuant to sec. 889 (2) that would make it in reality a charge under sec. 461.

Without any amendment of this charge, which really does not describe any crime, and without any evidence that would amount to proof of the crime intended to be described in the first charge, there is a finding of guilty of this charge, as set out, that does not describe any crime.

If it is attempted to uphold the conviction on the ground that the accused might have been held guilty, on the evidence, of a charge under sec. 462, that is, of unlawfully entering or being in a dwelling house by night with intent to commit an indictable offence therein, to wit, an assault on Angelo Passerini, the obvious answer is that, even if an amendment to that effect could have been made under sec. 889 (2), there is no conviction for that offence.

If the learned judge's finding as recorded can be construed as a conviction under sec. 461 of the Code, there was in reality no charge before him under that section, and no evidence that proved an offence under that section. The appeal must therefore be allowed, and the conviction quashed.

Appeal allowed; conviction quashed.

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

Solicitor for the respondent: *Neil R. McArthur.*