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* Mar. 24.
* Apr. 21.

F. G. BRODIE AND G. C. BARRETT....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Criminal law—Indictment—Formal charge in writing setting forth offence —Description of offence—Insufficiency—Defects in matters of substance and essential averments omitted—Conspiracy—Overt act—Substantial wrong—Sections 852, 859, 873, s.s. 5, Criminal Code.

Held insufficient a count in a formal charge in writing (replacing in Quebec, a bill of indictment before a grand jury no longer required in that province) that the accused were parties "to a seditious "conspiracy in conspiring together and with (other persons named "and unknown), thereby committing the crime of seditious conspir-

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

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"acy," such a charge containing defects in matters of substance and essential averments having been wholly omitted.

Although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it is nevertheless necessary that a count charging conspiracy alone, without the setting out of any overt act, should describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged, or, in other words, in such a way as to specify in substance, the specific transaction intended to be brought against the accused.

Under the terms of section 852 Cr. C., which enacts an imperative requirement ("shall contain"), there must be in the charge a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement "in substance." It will not be sufficient to merely classify or characterize the offence; it is necessary to specify time, place and matter and to state the facts alleged to constitute the indictable offence. The statement "may be made in popular language, without any technical averments" or allegations; or it "may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence"; but the statement must contain the allegations of matter "essential to be proved" and must be in "words sufficient to give the accused notice of the offence with which he is charged" (ss. 2 and 3 of section 852 Cr. C.): the main object of such legislation being that an accused may have a fair trial and consequently that the indictment shall, in itself, indentify with reasonable precision the act or acts with which he is charged in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, sustaining the conviction of the appellants, on their trial before Belleau J. and a jury, on a charge of having been parties to a seditious conspiracy. The grounds of appeal, and the material facts of the case bearing on the points dealt with by this Court, are sufficiently stated in the judgment now reported. The appeal was allowed, the indictment and the conviction were quashed.

R. L. Calder K.C. and *Louis Lemay* for the appellants.

Gérard Lacroix K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The appellants were found guilty and convicted in the province of Quebec of having been parties to a seditious conspiracy. Upon appeal, the verdict and

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conviction thereon were unanimously affirmed by the Court of King's Bench (appeal side).

In the province of Quebec (as well as in the provinces of Manitoba, Saskatchewan, Alberta and British Columbia), it is no longer necessary to prefer a bill of indictment before a grand jury; but it is sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged (Cr. Code, subs. 5 of sec. 873).

In the present case, the charge was preferred by the Attorney-General and read as follows:

> The Attorney-General of the province of Quebec charges that: during the months of September and October in the year of our Lord one thousand nine hundred and thirty-three, at the city of Quebec, in the district of Quebec, and elsewhere in the province of Quebec, George H. Brodie, of Toronto, and G. C. Barrett, of Belleville, Ontario, were party to a seditious conspiracy, in conspiring together and with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown, thereby committing the crime of seditious conspiracy.

One of the grounds of appeal to the Court of King's Bench was that this indictment was, on the face of it, insufficient. That court, however, refused to entertain the objection and to quash the indictment.

The appellants, thereupon, alleging that the judgment appealed from conflicted with the judgment of the Court of Appeal of Ontario in a like case (to wit: *Rex* v. *Buck*) (1), were granted leave to appeal to this Court under section 1025 of the Criminal Code.

There can be no question of the existence of the conflict.

In the present case, the whole indictment, and in the *Buck* case (1), the count objected to in the indictment, charged the accused with being parties to a seditious conspiracy. In both cases, the time and place were mentioned, the accused were named and all that was charged was that, at such time and place, the accused were "parties to a seditious conspiracy." In the present case, the indictment adds:

> in conspiring together and with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown.

(1) (1932) 57 Can. Cr. Cas. 290.

It does not appear in the report of the *Buck* case (1) that the count there in issue contained a similar mention. But otherwise the form of the charge was identical. In the Quebec court of appeal, the indictment was held valid; in the Ontario Court of Appeal, the count in the indictment was held invalid. It is evident that the condition required by section 1025 of the Criminal Code is met; and, leave having been granted, an appeal lies to this Court.

It remains for us to decide whether or not a charge preferred in the form stated is sufficient under the provisions of the Criminal Code.

The general provisions as to counts and indictments are contained in ss. 852 & seq. of the Code; and the fundamental rule is laid down in s. 852 itself, which reads as follows:

852. Every count of an indictment shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence, or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Form 64 affords examples of the manner of stating offences.

This section has given rise to a diversity of interpretations, not only in the case immediately under discussion and in the judgment of the Ontario court in *Rex* v. *Buck* (1) already adverted to, but also in other decisions throughout the country. It has been stated by one court that the requirement that a count shall state in substance that the accused has committed some indictable offence therein specified has reference to the particular kind of offence, such as distinguished from other kinds of offences recognized by the law; that it was not directed to the specific acts and things which constitute the offence alleged to have been committed (Prendergast, J., in *Rex.* v. *Kelly* (2)); while another court (*Rex* v. *Trainor* (3) Appellate Division of the Supreme Court of Alberta) thought it was clear the enactment did not mean that it is sufficient to say that the accused did, on such a day, "commit theft," or

(1) (1932) 57 Can. Cr. Cas. 290. (2) (1916) 27 Can. Cr. Cas. 94 at 102.
(3) (1916) 27 Can. Cr. Cas. 232, at 235.

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"steal," or "did commit an assault with intent to rob," without specifying the thing stolen, or identifying the person assaulted, not necessarily by name, but in some way or other.

Such was decidedly the view of the Appellate Division of the Supreme Court of Ontario, as expressed in its judgment in *Rex* v. *Bainbridge* (1), where Magee, J.A., said (p. 222):

> It is evident from subsec. 2 (of sec. 852) that matter which is essential to be proved is not to be omitted, and from subsec. 3 that the accused is to have notice of the offence and not merely of the character or class of the offence; while subsec. 1 requires that there is to be a substantial statement of an offence which, not the class of which, is specified, and which must be an indictable one.

In the same case, Clute, J. said:

> This (subsec. 1 of sec. 852) does not mean merely naming an offence, as "murder" or "theft," but the offence itself must be specified.

And a little further:

> The indictment must contain a valid count identifying the charge.

The other judges of the court agreed either with Magee, J.A., or with Clute, J.

Following the same principle, the Chief Justice of Ontario, speaking for the Court of Appeal in the *Buck* case (2) and, as already mentioned, with reference to an indictment preferred in precisely the same wording as in the present case, said that the count failed for insufficiency; and the insufficiency was not cured by the furnishing of particulars showing matter which, if embodied in the count, would have rendered the count adequate. He expressed the view that the true functions of particulars was to give further information to the accused of that which it was intended to prove against him, so that he may have a fair trial; but it was not intended to be, in effect, the supplementing of a defective indictment by supplying that which ought to have appeared in the indictment itself. He added:

> This is very plain from the reading of sec. 859 of the Code (later to be referred to).

On the other hand, in the judgment now appealed from, Bernier, J., thought

> qu'il suffit que l'acte d'accusation contienne en substance une déclaration que le prévenu a commis quelque acte criminel et spécifié * * *

(1) (1918) 30 Can. Cr. Cas. 214.

(2) (1932) 57 Can. Cr. Cas. 290, at 293.

chaque chef d'accusation doit décrire les circonstances de l'infraction imputée, afin de permettre à l'accusé de reconnaître ce à quoi il se rapporte; néanmoins, ajoute l'article, l'absence ou l'insuffisance de ces détails ne vicie pas le chef d'accusation.

He further said, it is true:

Il est possible que l'acte d'accusation aurait pu décrire en détails la conspiration séditieuse reprochée aux appelants; chose bien certaine cependant, c'est que cette omission ne leur a causé, et ne pouvait leur causer aucun préjudice, aucun *substantial wrong;* ils savaient parfaitement ce dont ils étaient accusés et ce pourquoi ils allaient subir une enquête préliminaire suivie d'un procès.

And it is not possible exactly to surmise how far the latter consideration influenced the decision of the learned judge.

As for Walsh, J., who spoke on behalf of the other members of the Court, he held the indictment sufficient as the appellants were "charged in the words of the Criminal Code." The Crown had submitted and produced certain pamphlets distributed by the accused, expressive of the seditious intention, and although no specific passage in those pamphlets had been indicated by the Crown, this, in the learned judge's view, was not necessary in this case because no particular, but an *ensemble* constituted the offence.

The differences in the legal interpretation of sec. 852 might also be traced in, among other cases: *The Queen* v. *Weir* (No. 5) (1), Wurtele, J.; *Rex.* v. *Lemelin* (2), King's Bench (Quebec) appeal side; *Le Roi* v. *Beauvais & Montour* (3); *Hatem* v. *Rex* (4).

It has now become our duty to decide the question.

If section 852 be analysed, it will be noticed the imperative requirement ("shall contain") is that there must be a statement that the accused has committed an indictable offence; and such offence must be "specified." It will be sufficient if the substance of the offence is stated; but every count must contain such statement "in substance." In our view, this does not mean merely classifying or characterizing the offence; it calls for the necessity of specifying time, place and matter (Compare dictum of Channel, J., in *Smith* v. *Moody* (5)), of stating the facts alleged to constitute the indictable offence.

The manner of stating the matter is of no absolute importance, in view of subsections 2 and 3. The statement may be made in popular language, without any technical

(1) (1900) 3 Can. Cr. Cas. 499.
(2) (1912) 22 Can. Cr. Cas. 109.
(3) (1924) Q.R. 36 K.B. 347.
(4) (1927) Q.R. 43 K.B. 111.
(5) [1903] 1 K.B. 56, at 63.

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averments or allegations; or it may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence; but we think the latter parts of subsections 2 and 3 are indicative of the intention of Parliament: the statement must contain the allegations of matter "essential to be proved," and must be in "words sufficient to give the accused notice of the offence with which he is charged." Those are the very words of the section; and they were put there to embody the spirit of the legislation, one of its main objects being that the accused may have a fair trial and consequently that the indictment shall, in itself, identify with reasonable precision the act or acts with which he is charged, in order that he may be advised of the particular offence alleged against him and prepare his defence accordingly.

What Parliament intended by using the words "a statement * * * (of) some indictable offence therein specified," in subsection 1 of section 852 is, to our mind, clearly illustrated by the "examples of the manner of stating offences" given in Form 64, referred to in subsection 4 of section 852.

Under the *Interpretation Act* (Ch. 1 of R.S.C., 1927), by force of sec. 31 (*d*):

> wherever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them;

which obviously means that any substantial deviation might be sufficient to invalidate the form used. Now, a perusal of the examples given in Form 64 will be sufficient to indicate that in no case is the manner of stating offences limited to the mere naming of them, but in each case the act charged against the accused, though described in the words of the enactment, is identified by specifying the time, the place and the matter. We think the examples in Form 64 are referred to for the purpose of indicating that they ought to be followed in substance. It is not sufficient in a count to charge an indictable offence in the abstract. Concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment. An accused person may not be charged merely of having committed murder; the statement must specify the matter. In the same way, in the present case, the appellants could not be charged merely with having been "parties to a seditious conspiracy," or

having "committed the crime of seditious conspiracy." The particular agreement between each of them and "with one W. F. Greenwood, W. G. Brown, Mrs. Charles Alton and Mrs. A. M. Rose and also with other persons unknown" into which they are alleged to have entered and to which the Attorney-General gave the appellation of "seditious conspiracy" ought to have been specified in the charge prepared, either in popular language or in the words of the code, in such a way as to show on its face that "the matter charged" (subsection 2 of sec. 852) was an indictable offence and as to apprise the accused of the acts committed by them for which they were called upon to answer.

As a matter of fact, this requirement of an indictment is further embodied in sec. 853 of the Criminal Code, which enacts that

> Every count * * * shall contain so much detail of the circumstances of the alleged offence as is sufficient to give to the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to.

Such is the rule of the Criminal Code.

Of course, it is qualified by the proviso

> that the absence or insufficiency of such details shall not vitiate the count,

and it must be granted that these words are very strong. It should be noticed, however, that the proviso, as well as the section itself, relates only to the "absence or insufficiency of details." It does not detract from the obligation resulting from sec. 852 that the substance of the offence should be stated in the indictment.

Again do we find in sec. 855 the confirmation of the construction which must be put on sec. 852, in accordance with the views now expressed by us.

Sec. 855 is an enumeration of instances where, notwithstanding the omission of certain statements, the law says that

> no count shall be deemed objectionable or insufficient for the reason only

of this omission. A mere perusal of the instances there given will show conclusively, to our mind, that the requirements of sec. 852 with regard to the ingredients which "every count of an indictment shall contain" may not be restricted to the mere naming of the offence charged, without specifying the substance of the particular act complained of. If sec. 852 were to be construed in accordance

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with the contentions of the Crown in the present case, the enumeration in sec. 855 of special exceptions wherein certain omissions are not to be deemed objectionable, or to render the counts insufficient, would have been quite unnecessary.

Perhaps, in the premises, it should be added that the Crown was unable to bring the indictment within any of the enumerated exceptions, which makes it still clearer that the indictment under discussion is insufficient. For example: Subsection (*d*) of sec. 855 enacts that no count shall be deemed objectionable for the reason

> that it does not set out any document which may be the subject of the charge.

In our view, this assumes that a document made the subject of a charge should be referred to in the count, but that it will not be necessary to "set out" the document itself. In the present case, although apparently the Attorney-General intended to charge against the accused the distribution of certain pamphlets, no reference in the indictment is made to these pamphlets, or, indeed, to any pamphlet at all. *A fortiori,* was there no "setting out," in whole or in part, of the pamphlets in question; although the omission to "set out" the document is alone stated as being the omission which shall not be deemed objectionable or shall not render the count insufficient.

The same reasoning may be made in respect to subsection (*e*) of sec. 855, that the count

> does not set out the words used where words are the subject of the charge.

Under subsections (*f*) and (*g*), a count is not insufficient for the reason

> that it does not specify the means by which the offence was committed,
>
> or
>
> that it does not name or describe with precision any person, place or thing.

It seems to us that the very terms in which the exceptions are expressed underline the minimum of ingredients which a valid count of an indictment should contain. It must contain, in substance, a statement of the specific act which is charged, although it is not necessary that it should "specify the means" by which the act was committed, or that it should name, or describe, "*with precision*" any

person, place or thing. In the latter provision, the essential words are the words: "with precision."

That this is the correct interpretation of sec. 855 is strengthened, in our view, by comparison with sec. 859 enumerating the cases in which particulars may be ordered.

Subsection (*d*) of sec. 859 deals with the charge of selling, or exhibiting, an obscene book, pamphlet, newspaper, printing or writing. If the court is satisfied that it is necessary for a fair trial, it may order the prosecutor to furnish particulars stating what passages in the book, pamphlet, newspaper or other printing or writing are relied on in support of the charge. Which presupposes that the book, pamphlet, newspaper, printing or writing has already been referred to in the charge.

This is made still clearer in subsections (*e*), (*f*) and (*g*) relating to "any document or words the subject of a charge"; to "means by which any offence was committed"; or to "any person, place or thing referred to in any indictment." Each of these subsections begins by the words: "further describing," which obviously contemplates indictments already describing the document or words the subject of a charge, the means by which any offence was committed, but requiring a "further" description which, in the view of the Court, "is necessary for a fair trial."

As for the "person, place or thing" dealt with in subsection (*g*), the point is made doubly clear, since the subsection speaks of a "person, place or thing (already) referred to in any indictment"; and it is stated that a particular may be ordered "further describing" them.

The evident relation between the matters dealt with in subsections (*d*), (*e*), (*f*) and (*g*) of sec. 855 and the corresponding subsections of sec. 859 is, we think, illuminating on the subject-matter of the present discussion. Clearly the result flowing from the two sections read together is: that some statement of the particular circumstances of the offence charged is assumed to be already contained in the count; that there may be omissions which, on account of sec. 855, are not sufficient to make the count objectionable; that the count will not be deemed insufficient by reason only of those omissions; and that if the court is satisfied that it is necessary for a fair trial, it may order particulars to describe further, or with more precision the matters in question.

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It need not be added that we are speaking now of counts in general, without reference to special cases such as are: libel, perjury, false pretence, or other cases which are the objects of special provisions with regard to indictment in the Criminal Code.

Applying the above principles to the present appeal, it follows that the indictment must be found insufficient. It is not the case where an offence is imperfectly stated; it is a case where essential averments were wholly omitted. The so-called indictment contains defects in matters of substance. To use the apt words of counsel for the appellants: "it does not describe the offence in such a way as to lift it from the general to the particular."

Of course, we are dealing with a case of conspiracy; and we are not unaware of the fact that in stating the object of the conspiracy the same certainty may not be required as in an indictment for the offence conspired to be committed (Archbold's Criminal Pleading, 29th ed., at p. 1419).

On a charge of conspiracy, the agreement is itself the gist of the offence (*Paradis* v. *The King* (1)). The mere agreement to commit the crime is regarded by the law sufficient to render the parties to it guilty at once of a crime (Kenny, Outlines of Criminal Law, 13th ed., p. 81).

And we need only recall the often cited passage of Lord Chelmsford in *Mulcahy* v. *The Queen* (2):

> It cannot exist without the consent of two or more persons; and their agreement is an act in advancement of the intention which each of them has conceived in his mind.

In other words, to borrow the expression of Mr. Justice Willes (*Mulcahy* v. *The Queen* (2) at p. 317): "The very plot is an act in itself." It follows that a person may be convicted of conspiracy as soon as it has been formed and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose (Kenny, Outlines of Criminal Law, 13th ed., p. 289; *Belyea* v. *The King* (3)). Hence the overt acts need not be set out in the indictment (Archbold's Criminal Pleading, 29th ed., p. 1420. *The King* v. *Hutchinson* (4)).

(1) [1934] S.C.R. 165, at 168.
(2) (1868) L.R. 3 E. & I. App. 306, at 328.
(3) [1932] S.C.R. 279.
(4) (1904) 8 Can. Cr. Cas. 486.

The conspiracy is the offence. It is not necessary to show that the accused went on to commit some overt act towards carrying out the conspiracy. The actual accomplishment of the crime agreed upon will not cause the original offence of conspiracy to become merged in it (Kenny, pp. 289 and 290).

But although conspiracy to commit a crime, being in itself an indictable offence, may be charged alone in an indictment and independently of the crime conspired to be committed, it does not follow that the count charging conspiracy alone, without the setting out of any overt act, must not describe it in such a way as to contain in substance the fundamental ingredients of the particular agreement which is charged, or, in other words, in such a way as to specify, in substance, the specific transaction intended to be brought against the accused.

These averments were omitted and these necessary ingredients were lacking in the indictment preferred against the appellants. Their absence constitutes defects in matters of substance; and we are of opinion that these defects were not cured by the so-called incomplete particulars verbally given by the Crown when, at the outset of the trial, objection was taken to the indictment by counsel for the accused. The Crown, it may be added, in the argument before us did not rely on these particulars, and took the stand that the indictment was sufficient as it stood. Nor can we accede to the argument that, in the circumstances, no substantial wrong or miscarriage of justice has actually occurred and that we should exercise the powers given to us by sec. 1014 of the Criminal Code. In our view, it was a substantial wrong towards the appellants to have compelled them to plead to an illegal indictment.

The motion to quash the indictment made by the accused at the beginning of the trial, and before pleading, ought to have been granted. The appeal will, therefore, be allowed. The indictment and the conviction must be quashed, the Crown being at liberty to prefer a fresh indictment, if so advised.

We do not want to part with this appeal, however, without saying that our decision is strictly limited to the points in issue. We would not like to be taken as subscribing to certain generalities contained in some of the judgments to

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which we have been referred and which would tend to convey the idea that, notwithstanding the coming into force of the Criminal Code, the criminal law in this country should continue to be administered as though there were no Code.

Appeal allowed; conviction quashed.