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February 2.

MUDIYANSELAGE HAMI *v.* APPUHAMI *et al.*

D. C., Kandy, 973.

Indictment—Quashing it after conclusion of case for prosecution—Amendment—Ceylon Penal Code, ss. 442 and 427—House-breaking—Criminal trespass—Intention to intimidate, insult, or annoy.

In a criminal case it is too late to quash the indictment after it has been once accepted by the Court, and the case for the prosecution is closed.

If at that stage the case for the Crown warrants a conviction for an offence, but is not entirely in conformity with the indictment, the Judge should alter the indictment and call on the accused for his defence.

In a charge under section 442 of the Ceylon Penal Code it is not necessary to allege specifically that the offender had any of the intentions which enter into the definition of criminal trespass under section 427.

IN this case eight persons were put upon their trial on the following indictment :—

"That they, on or about the 1st day of November, 1897, at "Ududeniya, in a building used as a human dwelling, did commit "house-breaking by night after the hours of sunset and before the "hour of sunrise, to wit, by breaking open the door of Samarakoon "Mudiyanselage Hami's dwelling-house, and thereby committed "an offence punishable under section 442 of the Penal Code."

The accused claiming to be tried, the trial went on, and, upon the case for the prosecution being closed, the counsel for the accused took the objection that the indictment did not disclose any offence, in that it omitted to aver that the alleged criminal trespass was committed with an intent to commit an offence, or to intimidate, insult, or annoy any person.

The District Judge (Mr. J. H. de Saram) sustained the objection and quashed the indictment, by the following order :—

"The indictment does not disclose an offence, in that it omits "to aver that the criminal trespass embodied in the house-breaking "was committed with intent to commit an offence, or to intimidate, "insult, or annoy any person. Section 431 explains 'house-breaking' "ing' to be house trespass if entrance into house or any part of "it is effected in any of the six ways described therein ; section 428 "explains 'house-trespass' to be criminal trespass by entering "into or remaining in any building, tent, or vessel used as a human "dwelling, or any building used as a place for worship or as a place "for the custody of property. Then section 427, the governing "section, describes 'criminal trespass' to be the entering into or "upon property in the possession or occupation of another "with intent to commit an offence, or to intimidate, insult, or

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"annoy any person in possession of such property, or lawfully "entering into or upon such property, unlawfully remaining "there with intent thereby to intimidate, insult, or annoy any "such person, or with intent to commit an offence. It is essential "that these averments should be in the indictment, and if the "intent was to commit an offence, the offence should be stated "(see P. C., Colombo, 490, *2 C. L. R. 203*). The indictment "does not contain any of the necessary averments. It also charges "the accused with committing house-breaking by night, by "breaking open the door of Samarakoon Mudiyanselage Hami's "dwelling-house. That does not constitute the offence of house-"breaking. The offence is effecting entrance into a house or any "part of it in any of the six ways described in section 431.

"Mr. Siebel has suggested that I might amend the indictment "as indicated in D. C., Colombo, 18, *7 S. C. C. 51*, but as it is bad "in so many respects, I consider the better course would be to "quash it. That procedure was not discountenanced by the "Supreme Court in the case referred to. On the contrary, it was "recognized.

"I quash the indictment."

The Attorney-General appealed.

Walter Drieberg appeared for the appellant.

Dornhorst, for respondent.

Cur. adv. vult.

2nd February, 1898. LAWRIE, J.—

This indictment was accepted when presented in the District Court. The accused pleaded to it, and all the witnesses for the prosecution gave evidence, and the case for the prosecution was closed. It was too late then to quash the indictment. Both parties, the prosecutor and the accused, were entitled to demand a final decision; if the Crown had not made out a sufficient case against the accused, they were entitled to an acquittal; if, on the other hand, the Crown had made out a sufficient case for a conviction for an offence, but a case not entirely in conformity with the indictment, the District Judge should have altered the indictment and have called on the accused for the defence. The learned District Judge seems to say he might have amended the indictment if it had not been defective in not alleging that the house was broken in any of the six ways set forth in the 431st section of the Ceylon Penal Code, but surely breaking open a door falls both under the third and the sixth descriptions.

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I therefore set aside the order quashing the indictment, and I send the case back in order that the trial be resumed at the stage where it was interrupted, for further proceedings according to law.

On the question whether the indictment needed amendment, I refer the learned District Judge to the decision of the Calcutta High Court pronounced in October, 1894, in *Balmakand Ram v. Chainsam Ram* (reported in *22 Calcutta Rep. 391*), and referred to by Mayne in his *Indian Criminal Law, pp. 199, 223, 733, 971*, always with approval. There it was held that it is not necessary in a charge under section 456 of the Indian Penal Code (which is the same as 442 of ours) to allege specifically that the offender had any of the intentions which enter into the definition of criminal trespass by section 444 (which is 427 of our Code). It was added obiter that the intention must be alleged in charges under the next section 457 (443 of our Code).

Until the question comes before our Full Court I follow that decision of the Calcutta High Court, and hold that the indictment in this case is sufficient.

I say nothing as to whether the evidence adduced was credible or whether it warranted a conviction. That is the function of the Judge who heard the evidence. He will now resume the trial and do justice according to law.