PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacEvoy*, 2023 NSPC 35

Date: 20230614
Docket: 8453776
Registry: Port Hawkesbury

Between:

His Majesty the King

v.

Ernest James MacEvoy

Judge:	The Honourable Judge Ross
Heard:	March 8 and 9, April 27, May 5, 2023 in Wagmatcook, Nova Scotia
Decision	June 14, 2023
Charge:	s.601 and s.244, of the *Criminal Code*
Counsel:	Keavin Finnerty for the Crown Kevin Patriquin for the Accused

By the Court:

Introduction

[1] This decision concerns a possible amendment to a charge under s.244(1) of the *Criminal Code* which, if not made, will result in an acquittal of the accused.

Background

[2] Ernest MacEvoy is on trial for multiple offences dating from June 21, 2020. A decision has been rendered on five of the six counts in the Information. He was found guilty on a charge "that he did wound Allister MacEvoy thereby committing an aggravated assault contrary to s.268 of the *Code*" (at 2023 NSPC 20). The evidence disclosed that he fired a shotgun at his brother Allister, wounding him in the legs. Four other charges were either stayed or dismissed. The remaining charge, which is the subject of this decision, is shown as Count 2 on the Information. It reads:

> And further on the same date and at the same place, *with intent to endanger the life* of Allister MacEvoy did discharge a firearm, to wit a shotgun, at Allister MacEvoy, contrary to section 244(1) of the *Criminal Code*

[3] When rendering the decision on the s.268 charge *et al* on May 5, 2023 I canvassed a possible amendment to Count 2. under s.601 of the Code. I indicated that I had some doubt whether the evidence proved a specific intent to endanger Allister's life. However, s.244 may be committed by discharging a firearm *with intent to wound*, and so the question before me was whether I ought to amend the count to conform to the evidence and proceed to a verdict on the charge as amended. Crown argued in favour of amending Count 2. which would read (if the amendment were granted):

> And further on the same date and at the same place, *with intent to wound* Allister MacEvoy did discharge a firearm, to wit a shotgun, at Allister MacEvoy, contrary to section 244(1) of the *Criminal Code*

[4] The mental element for aggravated assault is an objective foresight of bodily harm; it does not require proof of an intent to wound. In contrast, s.244 is a specific

intent offence; the Crown must prove the accused's purpose in clear and specific terms.

Legal Framework

[5] S.601(2) permits a court ("a court may") to amend a count to make it conform to the evidence heard at trial. The evidence heard at this trial established that the accused, just before firing the gun at Allister, lowered his sights from Allister's upper body to his legs. It is on this basis that an allegation of an intent to wound better conforms to the evidence than an allegation of an intent to endanger life.

[6] S.601(3) requires a court ("a court shall") to amend a count "as may be necessary" where, among other things, the count is "defective in substance" and the proposed amendment is "disclosed by the evidence taken . . . on the trial."

[7] In either case, s.604(4) applies to any proposed amendment. It reads:

> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
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> > (a) the matters disclosed by the evidence taken on the preliminary inquiry;
> >
> > (b) the evidence taken on the trial, if any;
> >
> > (c) the circumstances of the case;
> >
> > (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
> >
> > (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[8] Support for this is found in R. v. E.A.D.M., [2008] M.J. No. 465 (Man.C.A.) where the court states at para.15:

> . . . While there are differences between secs. 601(2) and 601(3) (principally that the former is discretionary and is limited to the duration of "the trial of an indictment," whereas the latter is mandatory and applies to any "stage of the proceedings"), there is nonetheless a substantial overlap between the two sections; in particular, both are subject to subsec. (4) of sec. 601 which specifically obliges the court in subsec. (d) thereof to consider whether an accused "has been misled or prejudiced in his defence" by any of the errors or omissions referred to in the earlier subsections.

[9] Section 244 sets out three ways the offence may be committed, i.e. discharging a firearm with intent to wound, maim or disfigure, with intent to endanger a life, and with intent to prevent the arrest or detention of any person. These modes of commission were clearly delineated in the predecessor section 228 which read:

> Every one who, with intent
>
> (a) to wound, maim or disfigure any person,
>
> (b) to endanger the life of any person, or
>
> (c) to prevent the arrest or detention of any person,
>
> (etc.)

[10] Amending count 2 from "intent to endanger life" to "intent to wound" is a substantive change. In *R. v. Angevine*, [1984] N.S.J. No. 292 (C.A.) at par.37 the court said this is regard to former s.228: "The intention to wound, maim or disfigure may be very different from the intention to endanger life. The former may be carried out without any intention that the latter should occur."

[11] There may be instances where a substantive element of a charge is missing but where it is nevertheless clear what was intended, where an accused knows the case they must meet. Curing such a defect is required under ss.(3). However it appears to me that the instant matter is best approached under ss.(2). Support for this may be found in *R. v. McConnell* [2005] O.J. No.1613 (Ont.C.A.) where the court says:

> (14) In my view, however one were to define a defect in form or substance, this information was not defective. It alleged offences known to law and complied with the sufficiency requirements of s. 581. On its face, there was nothing wrong with the information. In my view it was not defective in either form or substance. The only problem was that the prosecution expected that its evidence would not support the charges as alleged. In my view, that is not a defect. In considering the meaning of defect it is appropriate to look at the other parts of s. 601 and in particular subsection (2). That subsection deals exactly with the prosecution's problem in this case. It permits the court to amend a count in an information "where there is a variance between the evidence" and a count in the information.

[12] A defect in substance is not the same as a change in substance. Here count 2 was not defective, either in form or substance. The fact that the Crown is unable to prove the offence as described does not make the count 'defective' in this sense. Accordingly it appears the question of amendment arises under ss.(2), which states

that a court "may" amend a count in an information to conform to the evidence heard at trial. Arguably this wording preserves some residual discretion in the court, even after a consideration of the factors set out in ss.(4).

[13] There is authority for the proposition that a court may, by amending, "change the charge". In *R. v. Irwin* (1998) 38 O.R. (3d) 689 (Ont.) one reads:

> On a plain reading, the section contemplates any amendment which makes a charge conform to the evidence. The limits on that amending power are found, not in the nature of the change made to the charge by the amendment, but in the effect of the amendment on the proceedings, and particularly, on the accused's ability to meet the charge. The ultimate question is not what does the amendment do to the charge, but what effect does the amendment have on the accused?
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> I see no useful purpose in absolutely foreclosing an amendment to make a charge conform to the evidence simply because the amendment will substitute one charge for another. As long as prejudice to the accused remains the litmus test against which all proposed amendments are judged, it seems unnecessary to characterize the effect of the amendment on the charge itself. If the accused is prejudiced, the amendment cannot be made regardless of what it does to the charge. If no prejudice will result from the change, why should it matter how the change to the charge is described?
>
> . . .
>
> While the amendment changes the substantive offence from assault causing bodily harm (s. 267) to unlawfully causing bodily harm (s. 269), the amendment does no more than put a new label on the appellant's culpable conduct. The substance of the allegation remains unchanged.

[14] *Irwin* was relied upon in *R. v. Spilchen*, [2021] N.S.J. No. 163 where the court amended a robbery count on its own motion.

[15] However the matter of amendment is approached, fair trial principles are the paramount consideration. Reported cases focus on ss.(4)(d) and (e) – prejudice to the accused and avoiding an injustice. In T*he Queen v. Coté*, [1978] 1 SCR 8, Justice DeGrandpré of the Supreme Court of Canada stated:

> ‘‘ the golden rule is for the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial."

[16] In *R. v. Careen*, 2013 BCCA 535, the Crown was granted an amendment to a charge of sexual exploitation by a teacher by communicating with a student for

the purpose of having the young victim touch herself. The evidence showed that the text messages were intended to persuade the student to have sexual contact with the sender/accused, rather than to have her touch herself in a sexual way. The court concluded that it had been clear throughout the trial that the accused wanted to have sexual contact with the victim. It concluded that there was no indication his defence would have been conducted differently had the wording been correct from the beginning. It appears the amendment was made at the close of the Crown's case.

[17] In *McConnell*, above, one finds the following:

> (11) As this court said in *R. v. Irwin* [1998] O.J. No. 627, at para. 38, prejudice "speaks to the effect of the amendment on an accused's ability and opportunity to meet the charge". Thus, in deciding whether an amendment should be allowed, the court will consider whether the accused will have a full opportunity to meet all issues raised by the charge and whether the defence would have been conducted differently. The respondent was aware of the essential elements of the charges and was aware of the transaction being alleged against him from the Crown disclosure. There would have been no prejudice in this case and defence counsel in his submissions to the trial judge did not point to any relevant prejudice. In his submissions before us, counsel for the respondent conceded that there was no relevant prejudice.

[18] In *R. v. G.F.*, 2018 BCCA 81, the charge against GF was amended to substitute 'transmit' for 'distribute' in relation to the child pornography. This did not cause prejudice to GF, whose defence did not rest on the issue of distribution versus transmission, but rather on the private use exception. GF was not misled by the wording of the information.

[19] In *R. v. Ali*, 2008 ABCA 361 at para.3 the court states, with respect to an amendment made at the conclusion of a trial:

> . . . we see no error in the way in which the indictment was amended by the trial judge and therefore no error in his having convicted Ali of unlawfully confining Ganner (Count 11) and of unlawful use of a firearm (Count 9). The question for the trial judge, in deciding whether to permit the disputed Crown amendments under s. 601 of the Criminal Code, was whether Ali was, given the provisions of s. 601(4) of the Criminal Code, misled or prejudiced in his defence and whether, having regard to the merits of the case, the amendments could be made without injustice being done. Apart from a general allegation of prejudice, there was no suggestion that Ali's defence would have been conducted differently had the defence been aware that the challenged amendments would be made nor that Ali was unaware of the offences alleged: see R. v. McConnell (2005), 196 C.C.C.

> (3d) 28 (Ont. C.A.). Nor has Ali established the manner in which he was misled or prejudiced in his defence.

[20] Various cases have allowed amendments where, on a charge of breach of a court order, the form of release was incorrectly stated, e.g. an 'undertaking' instead of a 'recognizance'. The essence of the charge was violating the terms and conditions of a release and not the technical description of the release document. The amendment did not change the nature of the culpable conduct.

[21] In *R. v. Wallace* 2002 NSCA 52 a ruling to amend the charge from refusal of a demand for a blood sample to a demand for a breath sample was upheld because the entire trial had been approached on that basis, the evidence amply supported a conviction, and thus the accused had not suffered any prejudice.

Application to this case

[22] Mr. MacEvoy entered upon his trial charged with a s,244 offence that required the Crown to prove that he consciously and deliberately meant to put his brother's life in danger. The complainant testified that the accused first pointed the gun at his torso, then pointed the barrel down towards his lower body before firing it. The Crown's evidence may well have led the Defence to conclude that "endangering life" was not proven, and that the accused need not address it in his own evidence when he entered upon his defence. My own assessment is that the accused, in lowering the shotgun and aiming at the victim's legs, wanted to lower the risk and degree of ensuing harm.

[23] The accused spoke about his state of mind when he testified:

> "I shot him because he threatened me"
>
> "At the time I fired I was scared, I thought he was coming to kill me"
>
> "I lowered the gun and shot him in the leg"
>
> "I was thinking of saving myself"
>
> "I fired one shot then thought the threat was over"

[24] The main focus of the Defence was "defence of the person". Evidence about the accused's mental state and motives focused on that issue. Self-defence would apply as much to the s.244 offence as to the s.268. Defence nevertheless argues against the amendment, saying that if the accused had taken the stand charged with

discharging a firearm with an intention to *wound* his brother, the accused may have addressed the mental element of the s.244 charge more fully.

[25] While the two charges, 268 and 244, were tried together, the Defence may have concluded, at the end of the Crown's case, that it need only concern itself with the s.268 offence.

[26] The Crown had opportunities earlier in the proceedings, and well prior to the trial date, to effect a change in the wording of count 2. Mr. MacEvoy had originally been charged with attempted murder, later withdrawn in favour of the s.268 charge. A preliminary hearing was held on the six extant offences.

[27] Amending the count at the decision stage would shift the ground out from under the accused's feet with no opportunity for him to retrace his steps. An accused is entitled to know the case it must meet. If the amendment had been sought at the end of the Crown's case, before the Defence was called upon to give evidence, I would be more inclined to grant the motion. Doing so now appears to be unduly prejudicial, and contrary to the interests of justice.

[28] On the facts, there is no question that Mr. MacEvoy deliberately fired a shot at Allister's lower body. Bodily harm was objectively foreseeable. He ought to have realized that the action could cause serious injury, as indeed it did. He has been convicted of an aggravated assault after a finding that the act was not justified by self-defence. But a conviction on the s.244 charge would require proof of a specific intent (to either endanger life or to wound). Defence may reasonably have believed that it need not address that element, given the way the charge was framed and the complainant's testimony.

[29] On the evidence presented, it may well appear that the accused purposely intended to wound his brother. Had that been the allegation, however, the evidence and approach on the defence side may have been different. It is hypothetically possible that the accused thought (unreasonably) that he could fire the gun without causing serious injury, that the wounding was a foreseeable result but not one that the accused specifically intended.

[30] In the result, I decline to amend the Information to read "with intent to wound". I am entering a finding of not guilty on the s.244 charge, count 2., as worded in the charging document. The accused's action in lowering the sight-line of gun leaves me with some doubt that his purpose in firing it was to endanger Allister's life.

[31] The accused remains for sentence on the charge of aggravated assault.

A. Peter Ross, PCJ