

HON. MR. JUSTICE KELLY.

JULY 26TH, 1912.

REX v. MARCINKO.

3 O. W. N. 1626.

Criminal Law—Disorderly House—Keeping—Code s. 228—Conviction by Magistrate—Weight of Evidence—Excess of Penalty—Amendment.

KELLY, J., *held*, on a motion to quash a conviction for keeping a disorderly house, that if there was any evidence upon which the magistrate might have convicted, he was the judge of the weight to be attached to it.

R. v. St. Clair, 3 Can. C. C. 551, followed.

That if the magistrate had no power to amend a conviction imposing a penalty in excess of that authorised by the Code for the offence, by substituting therefor an authorised penalty, the Court itself has under the Code such power.

Motion dismissed but without costs.

Motion by defendant, Georgina Marcinko, to quash a police magistrate's conviction under sec. 228 of the Criminal Code, for keeping a disorderly house.

D. D. Grierson, for the applicant.

J. R. Cartwright, K.C., for the Attorney-General.

HON. MR. JUSTICE KELLY:—On the argument the chief grounds relied upon by the appellant for relief were: (1) that there was no reasonable evidence on which the conviction could be made, and, (2) that the police magistrate imposed a penalty in excess of what is authorized by the Criminal Code, and that after service upon him of the notice of motion to set aside the conviction and requiring him to make a return of the conviction, information, etc., he amended the conviction by substituting a penalty provided by the Code.

The conviction was under sec. 228 of the Criminal Code, for keeping a disorderly house.

In *Reg. v. St. Clair*, 3 Can. Crim. Cas. 551, a case very much resembling the present one, Mr. Justice Osler, in delivering the judgment of the Court of Appeal, said: "If there was evidence upon which the magistrate might have convicted he was the judge of the weight to be attached to it." In that case, as in this, there was no evidence of disorderly conduct except on one single occasion, but there was, as there is in the present case, evidence of the bad reputa-