

APPELLATE CRIMINAL.*Before Fletcher and Beachcroft JJ.***HARSHA NATH CHATTERJEE***v.***EMPEROR.***

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Nov. 12.

Misjoinder of Charges—Joint trial for offences under s. 120B of the Penal Code and ss. 19 (f), 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898) s. 239—Joint possession of arms—Mere keeping of fire-arms not an offence “Fire-arms” whether inclusive of parts of the same—Arms Act (XI of 1878) ss. 4, 5, 14, 19(a) (f), 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss. 109, 116, 120B.

A charge of criminal conspiracy to manufacture arms, under s. 120B of the Penal Code read with section 19(a) of the Arms Act (XI of 1878), may be tried jointly with charges of offences under ss. 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy.

As long as the conspiracy continues the transaction which began with the forming of the common intention continues, and the offences under ss. 19 (f) and 20 of the Arms Act are committed in the course of the same transaction.

Legal Remembrancer, Bengal v. Mon Mohan Roy (1) followed.

Where two persons rented a house and lived in it, and parts of arms were found in one of the rooms :—

Held, that both being in joint occupation of the house, were in joint possession of the articles so found.

The word “fire-arms” in s. 14, read with the meaning of “arms” in s. 4 of the Arms Act, includes parts of fire-arms. “Fire-arms” means only arms fired by gunpowder or other explosives.

Ahmed Hossein v. Queen-Empress (2), *Emperor v. Dhan Singh* (3) followed.

* Criminal Appeals Nos. 591 and 592 of 1914, against the order of E. Panton Additional Sessions Judge of 24-Parganas, dated June 15, 1914.

(1) (1914) 19 C. W. N. 672 ; (2) (1900) I. L. R. 27 Calc. 692.

21 C. L. J. 195,

(3) (1907) 5 Cr. L. J. 435 ; 3 N. L. R. 53.

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The offence under ss. 5 and 19 (a) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale.

In cases of conspiracy, the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts of the case. Where two persons took a house in which a considerable number of pieces of fire-arms was found with tools and implements, and work had been actually done to some of the parts of fire-arms, the Court may and ought to infer a conspiracy to manufacture arms.

Per CURIAM : Where there is only a conspiracy to manufacture arms, without an actual manufacture, the sentence should be imposed under s. 120B of the Penal Code read with s. 19 (a) of the Arms Act and s. 116 of the Penal Code, and the maximum term of imprisonment awardable under these sections is 9 months' rigorous imprisonment.

Per BEACHCROFT J. The punishment awardable under s. 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed, the punishment is that provided by s. 109 of the Penal Code, though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment. If it has not been committed, the punishment is governed by s. 116 of the Penal Code.

APPEAL by Harsha Nath Chatterjee and another.

The appellants were tried before the Additional Sessions Judge of the 24-Parganas with the aid of Assessors charged under (i) s. 19(f) of the Arms Act (XI of 1878); (ii) s. 20 of the same; and (iii) s. 120B of the Indian Penal Code. The Assessors found them guilty of offences under the Arms Act, but acquitted them of criminal conspiracy. The Sessions Judge, however, convicted them of all the three offences, and sentenced them to one year's rigorous imprisonment under the first, and to three years' rigorous imprisonment under the second and third charges, the sentences running concurrently.

On the 2nd December 1913, the two appellants went to the house of one Bhutnath Sil, a travelling agent of Messrs. Osler & Co., who lived in Victoria Road, Baranagore, for the purpose of renting a house in the same road belonging to one Nanda Lal De, the brother-

in-law of Bhutnath. The appellant, Khagendra, represented to Bhutnath that they were students of the Medical College, and gave his name as Khitindra Nath Roy. He paid Rs. 7 rent in advance and received a *kutchu* receipt for the sum. The balance, Rs. 4, was paid subsequently, and a fresh receipt for the whole amount was given by N. L. De, the *kutchu* receipt being returned to him. Another month's rent was also paid and a receipt given for the same. The two accused lived in the house. It appeared that they used to keep the door and windows of the house abutting the road constantly closed.

On the 25th January 1914, Mr. Denham, Deputy Commissioner of Police, received certain information in consequence of which he proceeded to Baranagore with Mr. Buller, Inspector-General of Police, Mr. Lowman and other police officers. They reached the house in Victoria Road early next morning, burst open the door and entered the premises. Harsha Nath was found in the room abutting on the road and was arrested. Two search witnesses were called from the road and the police officers proceeded to search the place. In a room on the north of the court-yard were found the two rent receipts and, among other articles, certain parts of two double-barrelled breech-loading guns, *viz.*, double-barrelled breech-loader action, trigger guard, trigger plate with triggers, trigger plate screw, double bolt part of a gun action, top lever part of a gun, barrel pin, guard or fire-end screws, guard pin, parts of a top lever spring broken, nipples of a breech-loader and another complete gun action without the stock and locks. A search list was drawn up and the above were entered therein as items IX to XI, XIV to XVI, XIX, XX, XXI to XXXI. In addition, implements for the repairs of guns were also found in the room.

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Constables in plain clothes were then stationed in the vicinity of the house with instructions to arrest every one who entered. The first to do so was one Chinibas Neka, a waterman, who used to supply the inmates of the house daily with water. At 10 or 10-30 P.M., Khagendra was arrested as he entered the house. On being questioned by Mr. Denham next morning, he explained that he had gone to the house by invitation to see a friend named Dinobaudhu Bhattacharji.

After a preliminary inquiry held by Babu P. C. Chatterjee, Deputy Magistrate, Alipore, the accused were committed to the Sessions on 4th March 1914. The trial came on before Mr. Panton, Additional Sessions Judge, with the aid of two assessors, on 4th June. The appellants were charged as follows—

First, that you, on or about the 26th January 1914, at Baranagore, had in your possession and under your control the arms Exhibits IX to XI, XIV to XVI, XIX, XX, XXII to XXXI, in contravention of s. 14 of the Arms Act . . . an offence punishable under s. 19 (f) of the Act.

Secondly, that you, on or about the 26th January 1914, at Baranagore, had in your possession and control the arms enumerated above in contravention of s. 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant . . . an offence punishable under s. 20 of the Act.

Thirdly, that you, during a period from the 2nd December 1913 to 26th January 1914, conspired to manufacture or keep fire-arms in contravention of the provisions of s. 5 of the Arms Act, and thereby committed an offence under s. 120B of the Penal Code read with s. 19 (a) of the Arms Act.

The accused, who were convicted and sentenced as stated above, appealed to the High Court.

Mr. N. Sen, Mr. S. C. Roy, and Babu Khitish Chandra Neogi, for the accused, in appeal No. 591.

Mr. S. C. Roy, and Babu Ramani Mohan Chatterjee, for the accused, in appeal No. 592.

The Advocate-General (Mr. G. H. B. Kenrick, K.C.), Mr. N. Gupta, Babu Hemendra Nath Mitter, and

Babu Nirode Chunder Chatterjee, for the Crown in both cases.

Cur. adv. vult.

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FLETCHER J. These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 24-Parganas.

The two accused were charged before the learned Sessions Judge with having committed offences under three heads. The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions of section 14 of the Indian Arms Act (Act XI of 1878). The second charge was that they had in their possession or control such arms in contravention of section 14 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant. The third charge was that during a period from the 2nd of December 1913 to the 26th January 1914, they conspired to manufacture or keep fire-arms in contravention of the provisions of section 5 of the Indian Arms Act. The two Assessors who assisted the learned Judge at the trial, were of opinion that both the accused were guilty of the offences charged against them under the first two charges, but that they were not guilty of the offence charged under the third charge. The learned Judge, however, convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment, namely, under the first charge one year's rigorous imprisonment, and under the second and third charges three years rigorous imprisonment, the sentences to run concurrently.

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The facts of the case lie in a narrow compass. On the 25th of January last, Mr. Denham, Deputy Commissioner of Police, received certain information. In consequence of this information Mr. Denham accompanied by the Inspector-General of Police and certain other superior officers proceeded to a one-storied house in Victoria Road, Baranagore. Early in the morning of the 26th January they arrived at the house. The door of the house having been forced the party entered. The first accused Harsha Nath, *alias* Moti Lal, was found in the room that abuts on the road. In a room on the other side of the courtyard, portions of fire-arms and certain tools were found. Two receipts for the rent of the house were also found. The accused Harsha Nath was arrested. He declined to make any statement with reference to the things found in the house. A search list was then drawn up in the presence of witnesses and the party left. Constables in plain clothes were posted at the house with instructions to arrest any one who might come to the house. The first person to do so was the water-carrier, Chinibas Neka, who has been called as a witness for the prosecution. About 10 or 10-30 of the same night—the accused Khagendra in his statement fixes the hour as 8 or 8-30—the accused Khagendra arrived at the house and was arrested. The first question that we have to decide is what was the connection of the two accused with the house at Baranagore.

That they have some connection with the house is not denied, nor could it be since both of them were arrested there. The case for the prosecution is that on the 2nd of December last the two accused rented from the witness, Bhut Nath Sil, this house which is the property of his brother-in-law Nanda Lal De. The accused represented that they were students at the Calcutta Medical College and that owing to the high

prices ruling in Calcutta they found it convenient to live at Baranagore. The accused Khagendra gave the name of Khitindra Nath Roy. The rent of the house was fixed at Rs. 11 per mensem, and on the 2nd of December Khagendra paid Rs. 7 on account of the rent for that month and received the *kutchu* receipt Ex. 11. The balance of the rent for that month was subsequently paid and a formal receipt Ex. 2 was handed over. Another month's rent was subsequently paid and the receipt Ex. 1 was given. The *kutchu* receipt is said to have been returned by Khagendra when the formal receipt Ex. 2 was given to him. The two receipts Exs. 1 and 2 were found at the search on the 26th of January. The witnesses who depose to this part of the case are first Bhutnath Sil. He is employed as travelling agent of Messrs. Osler & Co. His pay is Rs. 90 per mensem, plus a commission which amounts to Rs. 1,000 to Rs. 1,500 per annum. He is, therefore, apparently a man of respectability. The next witness is Bhutnath's son, Bhupendra, a lad of 14 years of age, and the third witness is Nanda Lal De, a sub-engineer employed in the Public Works Department and brother-in-law to Bhutnath Sil. He is also apparently a man of respectability. The house at Baranagore belongs to Nanda Lal De but is let out and looked after by Bhutnath Sil who or whose family receives the rent.

The witness Bhutnath Sil states that on the 2nd of December last two men came to him and after certain negotiations took the house at a rent of Rs. 11 per mensem. A payment of Rs. 7 was made on account of the first month's rent and the *kutchu* receipt Ex. 11 was given. The man who carried on the negotiations gave the name of Khitindra Nath Roy. The witness is positive that this man is the accused Khagendra and he believes, although he is not certain,

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that the man who was with him is the other accused Harsha Nath. On that night Bhutnath left Calcutta for the United Provinces and did not return until the 28th of February on which day he gave his evidence before the Enquiring Magistrate. Counsel has attempted to throw doubt on the evidence of Bhutnath on the ground that before his return to Calcutta he was interviewed by a police officer. But in the ordinary course if the police intended to avail themselves of the evidence of Bhutnath they would have to interview him before calling him as a witness in order to find out what he would be able to prove. I see no reason to doubt the evidence of Bhutnath.

The boy Bhupendra states that on some date in December Khagendra came and paid to him the balance of the rent for that month. The witness states that he handed to Khagendra Ex. 2 and received in return the receipt Ex. 11. Further, this witness states that in January the two accused came to him and paid the rent for that month and received the receipt Ex. 1. Bhupendra at a subsequent date identified the two accused at the Alipore Jail. This identification took place in the presence of a Magistrate and it is not suggested that the witness did not identify the accused. The witness states that he did not see the accused at the thana previously. The Sub-Inspector Dwijendra Nath Adhya says he does not remember whether Bhupendra saw the accused at the thana. But even if Bhupendra's identification cannot be wholly relied upon, there is a body of evidence that shows conclusively that the house was rented and occupied by both the accused.

Nanda Lal De was called chiefly to prove the receipts for rent. The two receipts Exs. 1 and 2 were found at the search. Before the learned Judge a good deal of the cross-examination of some of the witnesses

was directed to show that the name Khitindra Nath Roy appearing on these two receipts was written in a different handwriting and with a different ink to the rest of the writing on the receipts. Mr. Denham, however, is positive that these names appeared there when the receipts were found on the search and the search list supports his evidence.

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Then the evidence as to the occupation of the house shows clearly that these two accused were in occupation of the same.

The witness Chinibas Neka states that he took water to the house every day at 9 o'clock in the morning. He used to shake the chain and call out, when one of the accused would come and open the door for him. On his leaving, the door would be closed again.

The witness Bagwan Biswal, who is a *mali* in a garden opposite the house, states that he has seen Khagendra both entering and leaving the house. He further states that the doors and windows of the house were always kept shut. The evidence of Jagabandu Das which was given before the Committing Magistrate states that the windows and doors always remained shut. He further states that two men lived in the house in the latter part of Aghran and they did not mix or talk with the neighbours. Jagabandu died before the trial took place, but his deposition before the Committing Magistrate was put in.

As against this body of evidence showing the taking and occupation of the house by the two accused there are the statements of the accused. The accused Khagendra, in a written statement that he filed before the learned Judge, stated that one night about 15 or 16 days before his arrest he met one Dinabandhu Bhattacharjee who, he says, was with him at the Dacca Imperial Seminary in the Municipal Market. He

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states he asked Dinabandhu where he lived and that Dinabandhu said he lived at Baranagore where he worked for a contractor. On Dinabandhu asking a similar question of Khagendra the latter stated that he had no fixed place of abode as the police were trying to connect him with the Barisal conspiracy case. Dinabandhu then asked Khagendra if he would like to come with him for a day or two, and he said he would come next day. Next day accompanied by Dinabandhu he went to the house at Baranagore where he saw the other accused. He left after staying there two or three hours. On the 26th of January he returned to Baranagore at 8 or 8-30 A.M. and was arrested and taken to the police-station. This story is wholly improbable and does not cast any doubt on the direct evidence connecting Khagendra with the house. No trace of this Dinabandhu has been found, and there can be little doubt that he does not exist. Further the statement of Khagendra that he was in a public place like the Municipal Market when the police were searching for him is highly improbable. On the other hand, his statement that the police were searching for him may furnish a good reason why he should take this house at Baranagore to escape from the police. The evidence shows that he was successful in so doing between the 2nd of December and the 26th of January.

The statement of the accused Harsha Nath is that he came to Calcutta about the end of December to seek employment. He used to walk near the Gole Dighi and having a fine voice he used to sing. In this way he made many acquaintances including the aforesaid Dinabandhu. Dinabandhu hearing of the position of Harsha Nath forthwith invited him to come and stay in his house in Baranagore. Harsha Nath says he went to stay there on the 5th or 6th January. Some two or three days before his arrest Harsha Nath, says

Dinabandhu, left for "somewhere" on business expecting to return in three or four days. It is remarkable that Harsha Nath who was, according to his story, on terms of intimacy with Dinabandhu did not know the "somewhere" to which Dinabandhu had gone on business.

The whole story of this accused, commencing with Dinabandhu who is alleged to be a resident of and employed at Baranagore taking his walks in College Square, Calcutta, down to Dinabandhu's departure for "somewhere" two or three days before Harsha Nath's arrest is manifestly untrue.

The evidence leaves no doubt in my mind that the two accused rented this house on the 2nd of December, and that they were jointly in possession of it, on the day of their arrest, *viz.* the 26th of January last.

It is not open to doubt that the tools and portions of fire-arms were found in the house at the time of the search. But it has been argued that the evidence does not establish in whose possession such articles were. Counsel has argued that there is some rule of law that in circumstances such as the present the Court cannot impute possession to either of the accused. There may, however, be joint possession of the articles and the fact as to whose possession the articles were in at the date of the search must be decided on the evidence in the case.

Now, the evidence establishes that both the accused were in joint possession and occupation of the house. They took the house falsely representing that they were medical students. The evidence on behalf of the prosecution also proves that during the occupation and possession of the accused, the doors and windows of the house were always kept closed. Why should the doors and windows of the house be kept closed? And can any one doubt that in that state of things

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both the inmates of the house must have been fully aware of what was going on in the house? The evidence leaves no doubt in my mind that both the accused were in fact in possession of these articles.

I will now proceed to consider the case under the three charges that have been framed against the accused. But before doing so I will dispose of an objection raised by counsel as to the whole trial. It was argued that the whole trial was illegal owing to misjoinder of charges. That, however, clearly is not so. The offences charged in this case were committed in the same transaction and section 239 of the Code of Criminal Procedure authorises such charges to be tried together. If authority be wanted for the course adopted in the present case the very recent judgment of this Court in *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy* (1).

Coming then to the particular charges, the first charge against the accused is framed under section 19 (f) of the Indian Arms Act, namely, of having in their possession or under their control arms in contravention of the provisions of section 14 of the Act. The arms of which section 14 prohibits the possession without a license are "fire-arms." Section 4 of the Act says that the word "arms" as used in the Act shall include "parts of arms." That being so, unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Act it has got to be read as including "parts of arms". Moreover, by section 4 of the Act the words "arms" also includes "fire-arms." That being so, it seems to me obvious that the word "fire-arms" as used in section 14 includes parts of the "fire-arms."

(1) (1914) 19 C. W. N. 672 ; 21 C. L. J. 195.

Section 4 clearly means that the whole includes the part, and when the Act deals with a particular class of arms such as fire-arms the section means that parts of fire-arms are included in the word "fire-arms." The word "fire-arms" only means 'arms that are fired by means of gunpowder or other explosive.'

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If section 14 prohibits the possession of arms that are fired by means of gunpowder or other explosive then clearly, having regard to section 4, the possession of parts of such arms is prohibited. That the possession of parts of fire-arms is prohibited by section 14, was decided by this Court in the case of *Ahmed Hossein v. Queen Empress* (1). A similar view was also taken by the Court of the Judicial Commissioner for the Central Provinces in the case of *Emperor v. Dhan Singh* (2).

In my opinion the learned Judge rightly convicted both the accused of being in possession of fire-arms in contravention of section 14 of the Act. The second charge against the accused was one of being in possession of fire-arms in contravention of the provisions of section 14 in such manner as to indicate an intention that such act may not be known to any public servant. Under the provisions of section 20 of the Act, this constitutes a different offence to that mentioned in section 19 (f). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant. The evidence of concealment in the present case is clear and conclusive. The evidence proves that the two accused falsely representing themselves as medical students took the house at Baranagore and that the accused Khagendra gave a

(1) (1900) I. L. R. 27 Calc. 692.

(2) (1907) 5 Cr. L. J. 435 ;

3 N. L. R. 53.

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false name. Further, the door and windows of the house were kept closed and also a very important fact—the accused Khagendra was wanted by the Police and, therefore, would wish to conceal himself and what he was doing. On this evidence an offence under section 20 is proved against both the accused. The third charge against the accused was one of conspiring to manufacture or keep fire-arms punishable under section 120B of the Indian Penal Code read with section 19 (a) of the Indian Arms Act. The learned Judge has convicted both the accused of being parties to a conspiracy both to manufacture and keep arms. The learned Judge, however, is clearly wrong in treating the keeping of arms as an offence under section 19(a) of the Indian Arms Act. The offence is keeping for sale not keeping only. Does then the evidence prove a conspiracy to manufacture arms? Now, in cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from other facts proved in the case. The facts proved in this case leave no doubt that such a conspiracy to manufacture arms existed between the two accused. First, there is the taking of the house. Next, the finding of a considerable number of pieces of fire-arms on the premises. To what use were these articles to be put? Then there is the fact of the finding of the tools at the premises. The evidence also shows that there is reason to believe that work had actually been done to some of the portions of fire-arms found at the search. From these facts the Court can and ought to infer that the two accused had conspired together to manufacture arms. On this charge the learned Judge sentenced each of the accused to undergo 3 years' rigorous imprisonment. That sentence, however, appears to be illegal. Section 120 B of the Indian

Penal Code provides "that the accused in a case of criminal conspiracy shall be punished in the same manner as if he had abetted such offence." The learned Judge found that there was only a conspiracy to manufacture without an actual manufacture. The learned Judge has, however, sentenced the accused under the 3rd charge on the footing that the punishment was provided for by section 109 of the Indian Penal Code. But in that view the punishment for a conspirator is much more severe than the punishment for an abettor. Section 120B provides that they shall be punished the same. The sentence on the accused on the third charge ought, on the findings made by the learned Judge, to have been imposed under section 120B of the Indian Penal Code read with section 19(a) of the Indian Arms Act and section 116 of the Indian Penal Code. Under these sections the maximum sentence that can be imposed on the accused under the 3rd charge is one of nine months' rigorous imprisonment. I think we ought, therefore, to reduce the sentence passed on each of the accused under the third charge to one of nine months' rigorous imprisonment. I see no reason to interfere with the sentences passed under the other two charges. The two appeals will, therefore, subject to the reduction of the sentences passed under the third charge, be dismissed.

BEACHCROFT J. I agree. As I was a member of the Bench which decided *Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy* (1), it is perhaps sufficient to say that nothing that I have heard in argument in this case leads me to alter the opinion which I then formed as to the legality of trying together charges of conspiracy and of offences

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committed in carrying out the object of the conspiracy. But it will be as well to indicate shortly the line of argument taken and the fallacy which underlies it.

The argument was that the possession of fire-arms is a totally distinct offence from the offence of conspiracy to manufacture arms, and as the offence of conspiracy is complete so soon as the persons conspiring have formed a common intention, the two offences cannot be said to have been committed in the same transaction. The fallacy in this argument is that it assumes that the transaction is complete as soon as an offence is committed, in other words, that the term transaction is synonymous with the term "offence." It is clear that, so long as the conspiracy continued, the transaction, which began with the forming of the common intention, continued, and the first two offences charged were committed in the course of this transaction.

The punishment that may be awarded on a conviction under section 120B, seems to vary according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed the punishment is provided by section 109 of the Indian Penal Code, if an offence has not been committed punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for the abetment of the offence, for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. In the present case there has been no finding by the Judge, nor can it on the evidence be found as a fact that the offence was committed. The sentence that can be imposed is, therefore, that provided by section 116.

E. H. M.