APPELLATE CRIMINAL.

Before Bartley and Rau JJ.

NURAL AMIN

v.

EMPEROR.*

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Jan. 23.

Evidence—Evidence of successive burning of insured shops of the same person, if relevant to prove design—Witness not divulging knowledge of intended crime, if an accomplice—Notifications—Indian Evidence Act (I of 1872), s. 15, Ill. (a)*—Code of Criminal Procedure (Act V of 1898), s. 269* (1).

Under Ill. (*a*) to s. 15 of the Indian Evidence Act, the fact that the shops of the same person insured against fire were successively burnt down on different occasions is relevant to prove that the incidents were not accidental but part of a design.

The mere fact that a witness did not reveal his knowledge of an intended crime to the proper authorities is not sufficient to make him an accessory or accomplice so as to vitiate his evidence.

The anomaly created by notifications under s. 269(*1*) of the Code of Criminal Procedure in omitting to make an offence of conspiracy triable by jury when the offence agreed upon is so triable was commented upon and revision of the notifications recommended.

CRIMINAL APPEAL.

The material facts of the case and the arguments in the appeal appear sufficiently from the judgment.

Narendra Kumar Basu and *Nurul Huq Choudhury* for the appellant.

The Officiating Deputy Legal Remembrancer, Debendra Narayan Bhattacharyya and *Anil Chandra Ray Chaudhuri* for the Crown.

RAU J. The appellants in this case, Nural Amin, Gannu Meah and Kabir Ahmad, were convicted by the Assistant Sessions Judge of Chittagong (*i*) of an offence under s. 436 read with s. 34 of the Indian Penal Code, and (*ii*) of an offence under s. 120B of

*Criminal Appeal, No. 611 of 1938, against the order of Upendra Chandra Majumdar, Assistant Sessions Judge of Chittagong, dated Aug. 15, 1938.

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the Indian Penal Code, the trial of the former being by jury and of the latter with the aid of the same jurors as assessors. Briefly, the prosecution story is that the appellants and others (*i*) in furtherance of the common object of all, committed mischief by fire by setting fire to certain timber shops on February 7, 1938, and (*ii*) agreed with one another to do an illegal act, *viz.*, to cheat various insurance companies by (*a*) causing the aforesaid shops to be burnt down and (*b*) obtaining money from the insurance companies on fraudulent misrepresentations as to the cause of the fire and the amount of the damage done.

To deal with the second charge first. The evidence against the appellants consists mainly of the statements of the approver, P. W. 14 Furrok Ahmed, and of P. Ws. 9, 11, 15, 16, 17, 19, 20, 21, 22, 27, 36 and 40.

The approver P. W. 14 states that one day, some time before the occurrence, Nural Amin took him to the shop of Amir Ali (P. W. 15) and there talked to him about setting fire to the shops and getting the insurance money. Then on the date of the occurrence itself, Nural Amin's brother Eshaque took witness to Nural Amin's shop, where appellants Gannu Meah and Kabir Ahmad and others were already assembled. Some time later, Nural Amin arrived with two tins of petrol. Then, after the party had had some tea, Nural Amin said "I had spoken to you of insurance "before. To-day the shop-houses are to be burnt "down". Witness at first refused to help, but was prevailed upon by Gannu Meah and Kabir Ahmad. So witness, Eshaque, and some others went first to Gannu Meah's shop, then to Kabir Ahmad's shop, and then to various other shops, in each of which they tied some kerosene-soaked gunny bags to beams and rafters and also spread some over the timber. Witness then returned to Gannu Meah's shop where, after a while, Nural Amin, Gannu Meah, Kabir Ahmad and others arrived by car. All of them

inspected the gunny bags and other arrangements and asked witness and others to pour petrol over the timber, which they did in Gannu Meah's shop and other shops. Finally witness and Eshaque set fire to the shop of Haji Amin Shariff, while others did the same to Gannu Meah's shop.

This story has been amply corroborated by other testimony. We have first of all the important and significant circumstance that successive shops of Nural Amin, each of them insured, have been burnt down, in 1935, 1936 and now in 1938. P. W. 9 Nanuram Tewari speaks to the events of 1935, when Nural Amin got Rs. 589-8 from the New Zealand Insurance Company on account of loss by fire. P. W. 11, Jitendra Nath Sen, speaks to the fire of 1936 when Nural Amin got Rs. 9,500 from Lloyds. The shop burnt down on the present occasion was also insured with Lloyds. These successive fires indicate, as indeed has been said in Ill. (*a*) to s. 15 of the Indian Evidence Act, that they were not accidental, but part of a design in which Nural Amin must necessarily have had a share.

Secondly, we have the evidence of P. W. 15, Amir Ali, who says that six or seven days before the occurrence the appellants and others were at his tea stall and talked about setting fire to their insured shops. The mere fact that this witness did not reveal his knowledge of the intended crime to the proper authorities is not sufficient to make him an accessory or accomplice so as to vitiate his evidence, which certainly goes to show that all the appellants (amongst others) were in the conspiracy.

Thirdly, there is the evidence of P. W. 16 Ebedur Rahaman, P. W. 20 Haji Ala Mea, P. W. 21 Fazar Rahaman and P. W. 22 Kabir Ahmad Sowdagar showing that a day or so before the fire the appellants were busy selling off their timber at a low price and having it removed from their shops. This action shows that they were aware of what was going to happen.

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Fourthly, there is the evidence of P. W. 27, Naju Mea, that on the morning before the fire he drove Nural Amin in his carriage to Lâl Dighi where Nural Amin purchased two tins of petrol, after which he was driven to a timber shop in Asadganj—the locality where the fire occurred.

Fifthly, we have it from P. W. 16, Ebedur Rahaman, that immediately after the fire he saw the appellants going away by car from near Gannu Meah's shop. P. W. 20, Haji Ala Mea, heard the car immediately before the fire. P. W. 36, Azgar Ali, saw the appellants arrive by car at Gannu Meah's immediately before the fire, then there was a blaze in Gannu Meah's shop and immediately after, the appellants left by car, Nural Amin pushing witness into a ditch with the words "Why are you raising "an alarm?"

Sixthly, there is the evidence of P. W. 17, Mostafizar Rahaman, that on seeing the blaze of fire he went to the shops of Gannu Meah and Kabir Ahmad, where he found kerosene-soaked sacks hanging from the ceiling. P. W. 20, Haji Ala Mea, and P. W. 21, Fazar Rahaman, also saw them in Gannu Meah's shop. All three witnesses speak to having smelt petrol. It is hardly probable that kerosene-soaked sacks could be hung from the ceiling of timber shops without the knowledge of the owners.

Lastly, we have, from P. W. 16, Ebedur Rahaman, and P. W. 14, Amin Shariff Mistri, evidence of the conduct of the appellants after the fire. These witnesses had uninsured shops which were destroyed by the fire. P. W. 16, Ebedur Rahman, filed a complaint in Court but was dissuaded by the appellants from proceeding with it on a promise that they would compensate him for his loss. A similar promise was held out to P. W. 14, Amin Shariff Mistri, by Gannu Meah.

All this amounts to a mass of corroboration—by proof of conduct before the fire, at the fire, and after

the fire—which might indeed have justified a conviction of the appellants, even apart from the statements of the approver. The assessors and the learned Assistant Sessions Judge who had an opportunity of seeing and hearing the witnesses that gave this evidence have accepted it and there is no sufficient reason why it should be disbelieved.

The conviction and sentences under s. 120B of the Indian Penal Code must therefore be upheld.

Turning to the charge under s. 436 read with s. 34 of the Indian Penal Code, which was tried by jury, we are unable to find any misdirection by the learned Assistant Sessions Judge, such as would justify any interference with the verdict. Nor, having regard to the nature of the offence, can the sentence be said to be severe.

In the result this appeal must be dismissed. The appellants must now surrender to their bail and serve out the remainder of their sentences.

Before parting from this case, we should like to invite attention to an anomaly resulting from the present state of the notifications under s. 269(*1*) of the Code of Criminal Procedure. Under this subsection, the Provincial Government is competent to notify from time to time what offences, before any Court of Sessions, shall be triable by jury, the offences not so notified being triable with the aid of assessors by virtue of s. 268. We are informed that under the notifications now in force, whereas certain offences are triable by jury, a mere conspiracy to commit any of them is not so triable. Thus, if two persons are charged with arson jointly designed, the trial has to be by jury; the jury has to decide, and is considered competent to decide, not only whether there was a common design to commit arson, but also whether the arson was actually committed in furtherance of the design. If, however, they are charged with a mere conspiracy to commit arson, the trial has to be with the aid of assessors; a jury is

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apparently incompetent to decide whether there was a mere agreement to commit the offence. In other words, a jury is good enough to decide two questions but not only one of the two; this seems hardly logical. Where, as in the present case, a charge in respect of the completed offence is combined with a charge of conspiracy, other complications result. Thus in appeal, this Court has to go into the facts as regards the conspiracy, but cannot do so as regards the other charge. If the Court should find on the facts that there is no satisfactory proof of conspiracy, the appellants have to be acquitted on that charge; but their conviction in respect of the completed offence may have to stand in the absence of any misdirection to the jury. To hold that there was no agreement amongst the appellants to commit the offence and at the same time to maintain a conviction on the footing that they did commit the offence in furtherance of the common intention of all of them is hardly a consistent position. Fortunately, in the present case, this situation has not arisen, for we have found on the facts that there was a conspiracy; but the possibilities of an anomaly are still there and some sort of revision of the notifications under s. 269(*1*) of the Code of Criminal Procedure appears to be called for.

BARTLEY J. I entirely agree.

Appeal dismissed.

A. C. R. C.