1891

JWALA DEI v. PIRTHU.

in this case in consequence of my order of the 20th April 1891, I only wish to add that when the case was before me in the Single Bench upon that day, there appears to have been some confusion in the argument on behalf of the petitioner when it assailed the concurrent ruling of my brother Straight and myself in *Sarat Chandra Chakarbati* v. *Forman* (1). That was an application under a totally different statute to the one in this case, namely, the application here appears to be such as is contemplated by Chapter II of Act VIII of 1890. I may say therefore, that, the ruling to which I have referred has no application to this case. If it had, it would be a matter for serious consideration for me, so far as I am concerned, to alter the view and the rule of law which was laid down in that case. There are some circumstances in this case which amply go to indicate that it has no relation to questions of custody in the sense which Act IX of 1861 would involve. As a matter of fact, there is no such question, and as my brother Straight has said enough to show that, at any rate, the ruling in *Sarat Chandra Chakarbati* v. *Forman* (1) is not one which applies here, I agree also in the decree which my brother has made.

APPELLATE CRIMINAL.

1891
August 5.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* NIDDHA.

Attempt to commit murder—Facts necessary to constitute such attempt—Act XLV of 1860, *ss.* 299, 300, 307, 511.

Section 511 of the Indian Penal Code does not apply to attempts to commit murder which are fully and exclusively provided for by s. 307 of the said Act.

A person is criminally responsible for an attempt to commit murder when, with the intention or knowledge requisite to its commission, he has done the last proximate act necessary to constitute the completed offence, and when the completion of the offence is only prevented by some cause independent of his volition.

The facts of this case sufficiently appear from the judgment of Straight, J.

(1) I. L. R., 12 All., 213.

1891
QUEEN-EMPRESS
v.
NIDDHA.

Mr. *C. Ross Alston* (at the request of the Court), for the appellant.

The Government Pleader, Munshi *Ram Prasad*, for the Crown.

STRAIGHT, J.—This is an appeal from a judgment and sentence of the learned Judge of Agra, dated the 10th January 1891, under the following circumstances. Ram Lal and Niddha, Chamár, were absconding criminals against whom a warrant had been granted for their arrest upon a charge of dacoity. On the 8th November 1890, certain chaukidárs having received information of the whereabouts of these persons went to a field accompanied by some other persons for the purpose of taking them into custody. The following facts are found by the learned Judge, and they are amply proved by the evidence. He says:—"As soon as Ram Lal and Niddha perceived the men advancing they jumped up, and Ram Lal fired a gun straight at them. This missed. Niddha then brought up a sort of blunderbuss he was carrying, a sort of half carbine, half horse-pistol with a bell-mouth, known as a karabin, to the hip and pulled the trigger. The witnesses swear that the cap exploded but the charge did not go off." Thereupon, after some struggle into which I need not go, Niddha was arrested and was subsequently tried for attempted murder. It is in regard to that trial that this appeal has arisen, and it will be convenient to set out fully what the learned Judge had to say with regard to the legal aspects of the evidence against Niddha. He remarks:—"As to Niddha, the point is raised that even conceding the facts to be correctly stated, they cannot amount to attempted murder under s. 307, Indian Penal Code. * * * * As to Niddha, the question is, did he, by pulling the trigger of a gun or pistol which he knew to be loaded, commit an offence which amounts to an attempt to murder? The witnesses swear that the hammer fell and there was a distinct detonation of the cap. It is proved that the karabin was loaded when captured. No cap was found, but the hammer fitted very imperfectly on the nipple, and in the scuffle the exploded cap might easily have been knocked off. There is a case in the Bombay High Court Reports, Vol. IV, p. 17, Crown Cases, (*Regina* v. *Francis*

1891

QUEEN-EMPRESS v. NIDDHA.

Cassidy), in which it was held that in order to constitute the offence of attempt to murder under s. 307, Indian Penal Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events. In that case, Francis Cassidy presented an uncapped rifle, believing it to be capped, at the Drum Major of his corps, but was prevented from pulling the trigger. The Court held that he could not be convicted under s. 307, Indian Penal Code, but that a conviction would hold good under s. 511 read with ss. 299 and 300 of the Indian Penal Code. In this case I have no doubt that the accused Niddha pulled the trigger knowing the gun to be loaded and intending it to go off. There is doubt as to whether it was capped, as the cap was not found, and the snap of the hammer on the nipple might be mistaken for a detonation. The Court concurs with the assessors, who find that the accused Niddha fired, or rather tried to fire, the carbine with intent to cause death or grievous hurt, but, altering the section from s. 307, Indian Penal Code, to s. 511 read with ss. 299 and 300 directs that Niddha be rigorously imprisoned for five years."

When this appeal came before me and I had looked into the case of Cassidy, I asked Mr. *Alston* to argue it on behalf of the appellant, who was unrepresented, and on a subsequent date I had the great advantage of hearing an admirable discussion of the points involved on both sides and have now taken time to consider what view I ought to adopt.

Although in one aspect the case of *Queen* v. *Cassidy* (1) does not necessarily interfere with the conclusions upon the merits at which I have arrived in this case, in another it is necessary for me to consider whether, having regard to the language of the Indian Penal Code, it is competent for me, as the learned Judges who decided that case held it was competent for them, to convict of attempted murder upon s. 511 taken in connection with ss. 299 and 300 of the Indian Penal Code. It will be convenient to consider that portion of the judgments of the Bombay Court which deals with that

(1) 4 Bom. H. C. Rep. 17.

matter first. I am of opinion that s. 307, Indian Penal Code, is exhaustive and that within the four corners of that section are to be found the whole provisions of the law relating to attempts to murder. I am led to this conclusion by an examination of the terms of s. 511, Indian Penal Code. They are as follows:—

"Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence." Now it appears to me that the attempts which are limited by s. 511 are attempts to commit offences, which by the Code itself are punishable either with "transportation or imprisonment." It cannot properly be said that the offence of murder is punishable with either of those things. In my opinion, if murder, as mentioned in ss. 299 and 300, was intended to be included, the Legislature would before the word transportation have inserted the word "death." But, again, the section goes on and says that, certain things being done, the person who does those acts shall, "where no express provision is made for the punishment of such attempt," be punished in a particular way. As I have pointed out, by s. 307, Indian Penal Code, there is express provision made in the Code itself for the punishment of an attempt to murder. It seems therefore to me that when the framers of s. 511 drew it up in the terms that they have drawn it up, they especially meant to exclude those attempts to commit offences which in the various preceding sections of the Code were specifically and deliberately provided for with punishments enacted in the sections themselves. I have therefore for these reasons come to the conclusion that s. 307 is exhaustive and that no Court has any right to resort to the provisions of ss. 299 and 300 read with s. 511 for the purpose of convicting a person of the offence of attempted murder, which, according to the view of the Court, does not come within the provision of s. 307, Indian Penal Code. I need only add that the maxim *expressio unius, &c., &c.*, should be applied in construing a penal statute of this kind, and, apart from that, it is obvious that any other view would introduce the greatest possible inconvenience and a vast con-

1891

QUEEN-EMPRESS v. NIDDHA.

flict of opinion as to what would constitute an attempt to commit murder within the meaning of the Penal Code.

So far, therefore, I am constrained to say that I differ with the view expressed by the learned Judges in the case of *Queen* v. *Cassidy* (1). But I have before remarked upon the facts as disclosed in that case, and in this case I do not think that the view of the learned Judges formed on those facts would in any way preclude me from adopting the view that I am about to take in this case, *viz.*, that there was a good attempt to commit murder within the meaning of s. 307, Indian Penal Code. In the case of *Cassidy* the man presented an uncapped gun at another, he believing it to be capped. He never pulled the trigger, because he was prevented from doing so, and in reference to what I am about to say as to the facts of this case and the view I take of the law bearing upon it, I do not feel called upon to say, one way or the other, whether upon those facts there was a sufficient attempt. But in the present case the matter is wholly different. The appellant was an absconding criminal in the company of another absconding criminal. It is obvious, upon the evidence and the finding of the learned Judge, that he was determined in conjunction with that person to resist his lawful apprehension, and that for the purpose of doing so he was armed with a loaded blunderbuss, and that in the direction of the persons who were seeking to arrest him, he presented the weapon, pulled the trigger, the hammer fell on the nipple, and it was only owing to the circumstance that the cap did not explode, that the gun failed to go off and consequently no harm was done.

Now the difficulty is made in the Bombay case to which I have referred by the words of s. 307 which say :—"whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder." The learned Judges of Bombay lay very great stress upon the words "under such circumstances." With the utmost respect for them, I think they have attached too much importance to those words. The words "under such circumstances" have in my opinion no other

(1) 4 Bom. H. C. Rep. 17.

meaning than this, that the act must be done in such a way and with such ingredients that if it succeeded, and death was caused by it, the legal result would be murder according to ss. 299 and 300. The same words are used in the section dealing with the attempt to commit culpable homicide, and I cannot read them as requiring me to go the length of Sir Richard Couch in the second paragraph of the judgment delivered by him in the case of *Cassidy*. Still it may be that the learned Judge's remarks were applied to the particular facts of that particular case, and possibly they ought not to be read as having any application beyond the facts that were then before the Court.

For the purpose of constituting an attempt under s. 307, Indian Penal Code, there are two ingredients required, first, an evil intent or knowledge, and, secondly, an act done. I guard myself by saying that not every act done would be sufficient, as has been pointed out in the well known case of *Regina* v. *Brown* (1). No one would suggest that if A intending to fire the stack of B, goes into a grocery shop and buys a box of matches, that he has committed the offence of attempting to fire the stack of B. But if he, having that intent, and having bought the box of matches, goes to the stack of B and lights the match, but it is put out by a puff of wind, and he is so prevented and interfered with, that would establish in my opinion an attempt.

It seems to me that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind, he is not entitled to pray in his aid an obstacle intervening not known to himself. If he did all that he could do and completed the only remaining proximate act in his power, I do not think he can escape criminal responsibility, and this because, his own set volition and purpose having been given effect to to their full extent, a fact unknown to him and variance with has own belief intervened to prevent the consequences of that act which he expected to ensue, ensuing.

(1) L. R. 10 Q. B. D. 381.

1891

QUEEN-EMPRESS v. NIDDHA.

For my own part, I think any other doctrine would be a most dangerous one to lay down, and it is some satisfaction to know that similar views have been expressed in the Crown Cases Reserved, *Regina* v. *Brown* (1), in which it was shown that the case of *Queen* v. *Collins* (2), which all criminal lawyers long doubted as sound authority, has been discarded as no authority, and further that the cases of *Regina* v. *St. George* (3) and *Regina* v. *Lewis* (4), which have also been seriously questioned, will in all probability be at the very first opportunity overruled.

In the present case, looking to all the facts, I have no doubt that the appellant had had his carbine capped; that at the time he pulled the trigger and the hammer fell he believed it to be capped; that, whether it was or was not capped at that time, the failure to discharge the weapon was wholly independent of any action of his; and that not only did he have the intent to shoot the chaukidár and his party who were attempting to arrest him, but that he did the last proximate act that he could do to the completion of the full act that was within his intention and knowledge.

It is of course obvious that one might refer to many instances and examples, some of which would be within this rule and some would not, but I do not myself think that any useful purpose will be served by my prolonging this judgment. I have very carefully considered the words I have used above, and I think, as far as I am competent to put the matter into a clear and explicit form, that they lay down the true legal rule by which the determination of a question of this sort should be guided. I am of opinion therefore that the learned Judge might properly have convicted this appellant upon s. 307, and that he wrongly convicted him under ss. 299 and 300 read with s. 511.

I direct that the conviction be recorded under s. 307, Indian Penal Code, and I order that the sentence of five years' imprisonment stand.

(1) L. R. 24 Q. B. D. 357.
(2) L. and C. 471; S. C. 33 L. J. M. C. 177.
(3) 9 C. and P. 483.
(4) 9 C. and P. 523.