APPELLATE CRIMINAL.

Before Mr. Justice May Oung.

1923
Dec. 3.

MAUNG PO HMYIN AND ONE
v.
KING-EMPEROR.*

Penal Code (XLV of 1860), Sections 420, 511—Attempt to cheat—Sending notice of a fire to an Insurance Company—Claims made for damage by fire accompanied by declarations deliberately false—Attempt and preparation.

The first accused insured his paddy in certain godowns with three Fire Insurance Companies and, on the godowns being burnt down, he first sent the Insurance Companies notices informing them of the fire and subsequently presented his claims in which he deliberateley made false statements as to the quantity of paddy stored in the godowns and destroyed by the fire.

Held, that the sending of the notices was an act of preparation but when the accused followed up these notices with the actual claim papers, he committed himself to a representation of fact which being false to his knowledge must be regarded as an overt-act towards the commission of the offence of cheating—an act which had gone beyond the stage of preparation.

In the matter of R. MacCrea, 15 All., 173—*referred.*

De Glanville.—for the Appellant.
Higinbotham, Government Advocate—for the Crown.

MAY OUNG, J.—On various dates in the month of February, 1922, the 1st appellant, Po Hmyin, effected three fire insurances on his stock of paddy said to be lying in the mill premises at Impalwe belonging to the 2nd appellant, Tun Aung, and his father. These insurances were as follows:—(*a*) one for Rs. 50,000 in the West of Scotland Insurance Office, Limited; (*b*) one for Rs. 75,000 in the Yorkshire Insurance Company; and (*c*) one for Rs. 25,000 in the Sphere Marine and Fire Insurance Company, Limited.

At the time of making his proposals, the 1st appellant produced cover notes, issued by Messrs.

* Criminal Appeal No. 985 of 1923 from the Court of the District Magistrate, Rangoon, in Criminal Regular Trial No. 155 of 1923.

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Gillanders Arbuthnot and Company, showing that the mill premises themselves were insured against loss by fire. These cover notes were issued to the 2nd appellant and his father, and were, doubtless, lent to the 1st appellant to enable him to prove that the buildings in which he had stored his stock were protected.

On the 3rd March, 1922, the mill buildings and everything therein were burnt down and this fact was communicated by the mill-owners to their insurance company. This was by letter, Exhibit J, which is dated Rangoon, the 5th March, 1922.

On the same date, Po Hmyin wrote Exhibits V and Y to the Sphere and the West of Scotland Companies respectively, communicating the same information regarding the stock of the paddy in the mill.

A significant point with regard to these two letters is that they are typewritten on paper of the same size and quality as Exhibit J; the entire method of typing, including the dating, is also exactly similar.

There is no such letter on the file addressed to the agents of the Yorkshire Company, but in all probability one was sent to them as well.

Exhibits U, Z and DD are fire or loss claims on the three companies, signed and forwarded by Po Hmyin. They are on printed forms and all contain a declaration to the effect that 75,040 baskets of paddy, valued at Rs. 1,72,558, were destroyed or damaged by the fire which consumed the mill.

These declarations formed the basis of three charges of attempted cheating against Po Hmyin, the case for the prosecution being that the declarations were false. The 2nd appellant was charged with abetment of the three offences. Both were convicted and sentenced to suffer two years' rigorous imprisonment on each charge, the sentences to run concurrently. Both appeal.

The first point taken is one of law, *viz.*, that, even assuming the falsity of the declarations, there was no "attempt" as contemplated by section 511, Indian Penal Code. That section provides that whoever attempts to commit an offence and in such attempt *does any act towards the commission of the offence* shall be punished. It has been judicially held that a mere act of preparation for the commission of an offence is not such an act towards its commission as amounts to an attempt. Learned Counsel contends that Po Hmyin's acts in this case did not amount to more than preparation for an attempt to cheat.

Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation is a question of fact in each case—*In the matter of R. MacCrea* (1).

In the same case, Knox, J., said :—"It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit an offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon

(1) (1893) 15 All., 173.

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his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act of the series."

These weighty and apposite observations exactly fit the case before me. It is urged that the act of Po Hmyin in approaching the Insurance Companies with his claim represented only another stage in his preparation to cheat them and that the real attempt would have begun when, the companies having called upon him to produce his evidence in support of his claim, he proceeded to do so. In support of this contention Counsel points out that insured persons who have suffered loss or damage by fire often put forward exaggerated or inflated claims, that insurance companies do not admit such claims forthwith but invariably institute inquiries with a view to assessing the damage, and that therefore an atempt to deceive them does not take place until false testimony in support of the claim is adduced.

This argument would, I have little doubt, carry considerable weight in cases where the insured has merely over-valued his property in his claim. But the allegation in the present case was not that the claimant had grossly misrepresented the *value* of his stock in the mill, but that his statement as to the quantity of paddy he had stocked before the fire was false. According to him, he had 75,040 baskets; according to the prosecution he could not possibly have had one-fifth of that quantity, since the mill godowns could not contain much more. Hence, if the Crown has succeeded in establishing its case, Po Hmyin, when he presented his claims to the insu-

rance companies, made a deliberately false statement. This was an act done in pursuance of the preparations he had made for committing a fraud and it was an act which was brought to bear upon the mind of the persons to be deceived. The appellant might have held back after he had sent Exhibits V and Y, the notices regarding the fire; the sending of these notices was another act of preparation. But when he followed up these notices with the actual claim papers, he, in my view, definitely "crossed the Rubicon" and committed himself to a representation of fact which, if proved to be false to his knowledge, must be regarded as an overt act towards the commission of the offence of cheating—an act which had gone beyond the stage of preparation.

I hold therefore, provided the necessary facts are established, that Po Hmyin attempted to cheat the insurance companies.

As to the facts, one of the outstanding features of the case, one which was strongly relied upon by the appellants, was the assessor's report. When the claim papers were presented, the companies acting in consultation, appointed an assessor to proceed to the scene of the fire and to report on the loss caused. He did so and his firm submitted the report, Exhibit O, which contains the following passage:—"On our arrival there we found the mill and godowns completely gutted and the paddy still blazing. The paddy was in three different piles and in our opinion must have been well over 65,000 baskets." There is also a quotation from the owner's "Stock Book" showing a total of 75,040 baskets, which the assesor valued at Rs. 1,58,632

I am unable to place any reliance on this report. The evidence shows that the inquiry, if it can be called an inquiry, was most perfunctory, and it is

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more than probable that the assessor's estimate of the quantity of burnt and burning paddy was based very largely on what he saw in the Stock Book. In any case, the estimate was that of a person whom I cannot, on the evidence, regard as expert. He does not give any satisfactory explanation as to how he arrived at his figures. He took no measurements himself, either of the heaps of burning paddy or of the godowns, the outlines of which he saw; and he made no notes of what he observed. Only two hours were spent at the place; part of this was taken up in making inquires as to the origin of the fire.

The next important point is in connection with the godowns, of which there were three. The 2nd appellant admitted that he had handed a ground plan of the mill buildings to Messrs. Gillanders Arbuthnot at or about the time he insured them, and Mr. Griggs of that firm deposed that Exhibit A is the plan. Tun Aung denied it but I see no reason to disbelieve the witness, who is in no way interested, seeing that the cover notes for the mill were cancelled before the fire. The plan shows two godowns, each measuring 50 feet by 10 feet, and a third measuring 61 feet by $35\frac{1}{2}$ feet. Elevations are not given, but the evidence establishes the fact that the godowns were not more than 12 feet high, while the two smaller ones sloped down to 9 feet. Taking these measurements and judging by the estimates given by Mr. Thorn, an engineer, of Messrs. Steel Brothers and Company, who has had long experience of mill godowns, the capacity of the Impalwe godowns could not have been much more than 15,000 baskets. There is a considerable body of evidence in support of this estimate, the most notable of the witnesses being Po Hlaing and Ba Gyaw, the former owners of the mill. They

both swear that the two small godowns could not hold more than 3,000 baskets each, and in this they are corroborated by others. As to the large godown, the most liberal estimate places it at 10,500 baskets.

We have it then that the three godowns, when full, were capable of holding some 15 or 16 thousand baskets of paddy. Of these, there were at least 4,000 baskets belonging to various small traders, thus leaving some 12 thousand as Po Hmyin's, as compared with his claim of over 75 thousand.

The latter figure appears, it is true, in Po Hmyin's Stock Book, but there is no entry in this of the place where the paddy was stored, and, since Po Hmyin is a resident of Daiku, which is far away from Impalwe it is more than possible that a large portion of his stock was at the former place. Be that as it may, I am unable, in the face of the conclusive evidence as to the size of the godowns, to accept the statement that such a large quantity of paddy was stored in a small out-of-the-way mill.

For the same reason I must reject the evidence for the defence relating to alleged extensive purchases of paddy made by Po Hmyin. Rebutting evidence has been adduced to show the falsity of much of this defence evidence, but, in the circumstances, it is in my view, unnecessary to consider it.

I should mention here that the defence, at a very late hour, deputed a trained surveyor to prepare a plan of the mill buildings; this was done in January, 1923, about nine months after the fire, and no weight can be attached to it.

On the evidence I hold it fully proved that Po Hmyin had less than 15,000 baskets of paddy at the mill when the fire took place and that he must have known this. His declaration that he had 75,040

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baskets was therefore deliberately false and I must confirm the convictions.

The second appellant was held guilty of abetment in that he (1) let Po Hmyin use his mill for storing paddy, (2) lent him his cover notes on the mill, (3) stated to witnesses that 75,000 baskets of Po Hmyin's paddy were in the mill when it was burnt, and (4) stocked 'kauk-hmaw' (refuse) in the godowns and pretended it was paddy. Of these points, it is unnecessary to deal with any besides the third. It is quite clear that Tun Aung told several persons that Po Hmyin had stored 75,000 baskets; and to the police he said (when reporting the fire)—"over 60,000 and about 70,000". Knowing the capacity of his godowns as he must have done, it must be held that he also was stating what he knew to be false. Remembering also the remarkable similarity between Exhibits J, V and Y, as pointed out above, I am irresistibly led to the conclusion that he engaged with Po Hmyin in a conspiracy to cheat the insurance companies; and, since an act (*i.e.* the making of the claim by Po Hmyin) took place in pursuance of the conspiracy, and in order to the cheating, he was guilty of abetment under the second clause of section 107. The convictions in his case also will therefore be confirmed.

As to the sentences, the claim was an impudent one for a very large sum of money, and there can be no doubt that a substantial sentence of imprisonment was called for. I have been asked to consider the facts that the appellants were for a long time under trial, that they have suffered mentally, and that they have incurred much expense; they were, however, on bail during the trial and their sufferings were brought on themselves by their own act.

At the same time, I take into consideration the circumstances that this appears to be the first prosecu-