

## APPELLATE CRIMINAL.

Before Mr. Justice Scott-Smith.

GHULAM AND OTHERS—Appellants,

versus

THE CROWN—Respondent.

1923

Feb. 19.

Criminal Appeal No. 1176 of 1922.

*Indian Penal Code, 1860, section 445, illustration (a)—House-breaking—or attempt—hole made in wall but blocked by beams on other side—Section 458—whether applicable to companions of the house breaker who have not made preparation for causing hurt.*

*Held*, that when a hole is made by the burglars in the wall of a house but their way is blocked by the presence of beams on the other side of the wall the offence committed is one of attempt to commit house breaking and not actual house breaking, and illustration (a) to section 445, Indian Penal Code, does not apply.

*Held also*, that section 458, Indian Penal Code, only applies to the house-breaker who actually has himself made preparation for causing hurt to any person etc., and not to his companions as well who themselves have not made such preparation.

Section 34, Indian Penal Code, referred to.

*Appeal from the order of Khan Sahib Malik Zaman Medi Khan, Magistrate, 1st Class, exercising enhanced powers under section 30, Criminal Procedure Code, Montgomery, dated the 23rd November 1922, convicting the appellants.*

COOPER, for Appellants.

AMAR NATH, OHONA, for the Government Advocate,  
for Respondent.

SCOTT-SMITH J.—The three appellants have been convicted of an offence under section 458, Indian Penal Code, and have been sentenced, Ghulam, son of Mutalli, to seven years' rigorous imprisonment, Waryam, son of Mutalli, to five years' rigorous imprisonment, and Waryam, son of Beg, to two years' rigorous imprisonment.

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Mr. Cooper, who appeared for the appellants, did not argue on the facts but urged that the offence of house-breaking had not been committed because there was no proof that any of the appellants had effected an entry into any building within the meaning of section 442 of the Indian Penal Code. The evidence shows that the would-be burglars first of all attempted to break into the house of Bahadar Singh (P. W. 1), they made a hole in the wall but owing to the presence of some beams inside the shop they did not enter but proceeded to make a hole in the common wall of one Bahta (P. W. 5), and of Bahadar Singh. It was contended before the Magistrate that there could only be a conviction for an attempt to commit house-breaking. The Magistrate however, was of opinion that the case was analogous to that of illustration (a) to section 445 of the Indian Penal Code. The illustration in question is as follows :—

“ A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking.”

The learned Magistrate says that when the accused had made the hole, and with the assistance of their hands found that their way was blocked, the offence of lurking house-breaking was complete. I am unable to agree with this view. When the burglars had made the hole they found that their way was blocked by the presence of beams on the other side of the wall, these beams prevented them from entering the shop and we certainly cannot assume that any one of the culprits actually put his hand right through the hole. I am unable to agree with counsel for the Crown that the mere putting of a hand into a hole in the wall without putting it through the hole is an entry into the house within the meaning of section 442 of the Indian Penal Code. I thus hold that there was no complete house-breaking, but merely an attempt to commit house-breaking.

It was found by the Magistrate that two of the appellants, Ghulam and Waryam, sons of Mutalli, were armed with *lathis* at the time and that, therefore, they were guilty of house-breaking within the meaning of section 458, Indian Penal Code. With regard to Waryam, son of Beg, he said that even if it be admitted that he had no *dang* then according to section 34 he is

as much responsible for the actions of his companions in being armed with *lathis* as if he himself had been armed with a *lathi*. I am unable to accept this view of the law. In my opinion section 458 only applies to the house-breaker who actually has himself made preparation for causing hurt to any person or for assaulting any person or for wrongfully restraining any person and so on, and not to his companions as well who themselves have not made such preparation.

I, therefore, accept the appeal and alter the convictions of Ghulam and Waryam, son of Mutalli, to one under sections 458/511, Indian Penal Code, and the conviction of Waryam, son of Beg, into one under sections 457/511 of the Indian Penal Code. As Waryam, son of Mutalli and Ghulam, previous convicts, have been convicted only of an attempt at house-breaking, section 15, Indian Penal Code, is inapplicable. The fact, however, that Ghulam has been three times previously convicted may be taken into consideration in fixing his sentence. Waryam, son of Mutalli, has only been convicted once before this and that was eighteen years before the present offence.

I sentence Ghulam to three years' rigorous imprisonment, Waryam, son of Mutalli, to two years' rigorous imprisonment and Waryam, son of Beg, to one year's rigorous imprisonment. In the case of the first two the imprisonment will include three months' solitary confinement and in that of Waryam, son of Beg, one month's solitary confinement.

A. N. C.

*Appeal accepted.*

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