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SHADI LAL C.J.

Chief Court held that no custom was proved entitling a daughter and a daughter's son to exclude a brother and nephews from succession to acquired immoveable property. It is, however, clear that the parties to the case, though *Awans* by tribe, were *Jhiwars* (water-carriers) by occupation, and that they lived in the town of Rawalpindi. The property, which was the bone of contention, was a water-mill and not agricultural land. Moreover, this judgment was adversely commented upon in *Wazira* v. *Mussammat Maryan* (1).

Upon an examination of the entire material before us I have reached the conclusion that the presumption arising from the entry in the *riwaj-i-am* has been sufficiently rebutted, and that the plaintiffs are not entitled to succeed to the self-acquired property of Sharaf Khan. I accordingly confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

JOHNSTONE J.

JOHNSTONE J. I concur.

A. N. C.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Addison and Mr. Justice Coldstream.

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May 9.

THE CROWN—Appellant

versus

SHIB CHARAN—Respondent.

Criminal Appeal No. 292 of 1928.

Indian Penal Code, Act XLV of 1860, sections 511 and 420—Attempt to commit offence—acts necessary to constitute—Attempt to cheat—where offence of cheating could not be completed.

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(1) 84 P. R. 1917.

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Held, that the view that an attempt to commit an offence is not punishable under section 511 of the Indian Penal Code, unless the final act short of actual commission of that offence has been accomplished, is an erroneous one.

A man may attempt to cheat although the person whom he attempts to cheat is forewarned and is, therefore, not cheated.

MacCrea, In the matter of (1), and *The Government of Bengal* v. *Umesh Chunder Mitter* (2), followed.

Queen-Empress v. *Kalyan Singh* (3), and *Abdulla* v. *Crown* (4), referred to.

Queen-Empress v. *Dhundi* (5), and *Data Ram* v. *Empress* (6), distinguished.

Appeal from the order of Sheikh *Ata Ilahi, Magistrate, 1st class, Gurgaon, dated the 19th December 1927, acquitting the respondent.*

GOVERNMENT ADVOCATE, for Appellant.

RAMA NAND, for Respondent.

JUDGMENT.

COLDSTREAM J.

COLDSTREAM J.—This is a Crown appeal against the acquittal of an accused Shib Charan who was tried on a charge under section 511 read with section 420 of the Indian Penal Code for having attempted to cheat by dishonesty and fraudulently attempting to recover the value of two currency notes from the Currency Offices at Bombay and Madras.

The story for the prosecution was that, in October, 1925, in a letter Ex. P. F. Shib Charan informed the Currency Office, Madras, that he had lost one-half of the Rs. 100 currency note No. DE/42-31436 during a journey to Delhi on the 10th of September, 1925, and asked to be informed of the procedure for

(1) (1893) I. L. R. 15 All. 173: L. R. 20 I. A. 90.
(2) (1889) I. L. R. 16 Cal. 310.
(3) (1894) I. L. R. 16 All. 409.
(4) 14 P. R. (Cr.) 1914.
(5) (1886) I. L. R. 8 All. 303.
(6) 45 P. R. (Cr.) 1882.

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recovery of the value of the note. He addressed the Bombay Currency Office in the same manner in the letter P. B. in respect of the Rs. 100 currency note No SD/92-90321. In compliance with instructions received in reply to his enquiries he forwarded to the Madras and Bombay offices the halves of these two notes still in his possession with the prescribed application forms and affidavits testifying that he was the owner of the notes.

The Currency Officer had, however, already paid the value of these notes to the firm Amba Lal-Gobind Lal on representation by that firm that the halves of the notes had been stolen from Lal Bhai, one of the partners who was carrying them from Delhi to Ahmedabad.

Shib Charan was prosecuted under section 511 read with section 420 of the Indian Penal Code. His defence was that one Johri Mal, the writer of the two letters, Exs. P. B. and P. F. had taken his signatures upon two, three or four blank papers. He was unable to identify his signatures on these two documents without spectacles which he had not brought with him. His signatures on the subsequent communications with the Currency Offices had also been made upon blank papers. The affidavits (Exs. P. E. and P. K.) had been produced for attestation before the Tahsildar of Nuh by Johri Mal at whose instance he had signed them before, when the forms had been filled up. He denied that he had attempted dishonestly to recover the value of the currency notes sent to Madras and Bombay.

The Magistrate, without recording any clear finding as to the dishonest intention of the accused in endeavouring to recover the value of the currency notes acquitted him on the ground that it was the practice

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of the currency offices not to make payments in such cases until the claimant had executed an indemnity bond, and as no such indemnity bond had been executed by Shib Charan his conduct had not amounted to an attempt to cheat but had remained within the stage of preparation for the offence. He cited *Queen-Empress* v. *Dhundi* (1), and *Data Ram* v. *Empress* (2).

On behalf of the Crown the learned Government Advocate has contended that the evidence in the case, if believed, was sufficient to establish clearly the charge of attempt as defined in section 511 of the Penal Code. He has referred us to *The Government of Bengal* v. *Umesh Chunder Mitter* (3), a case which appears to be virtually on all fours with the one now before us.

After hearing what Mr. Rama Nand has to say in opposing the appeal, I find myself in no doubt that the Magistrate's view of the law was incorrect.

The intention of section 511 of the Penal Code was fully discussed by the Allahabad Court in the case, *MacCrea, In the matter of* (4), where Blair J. remarked that section 511 of the Indian Penal Code appeared to use the word "attempt" in a very large sense, making punishable any one act of a series of acts conducive to the commission of an offence and excluding the notion that the final act short of actual commission is alone punishable; the definition of what is punishable as an "attempt" under the Indian Penal Code being thus markedly differentiated from what is a criminal attempt according to the accepted English doctrine. The same

(1) (1886) I. L. R. 8 All. 303.
(2) 45 P. R. (Cr.) 1882.
(3) (1889) I. L. R. 16 Cal. 310.
(4) (1893) I. L. R. 15 All. 173.

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view was expressed emphatically by Knox J. in the same case. After a review of a number of Indian rulings on the point he held, without hesitation, that "section 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission. * * * * The question is not one of mere proximity in time or place. * * * * Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed."

MacCrea's case came ultimately before the Privy Council, where the correctness of the interpretation put upon section 511 by the Allahabad Court was questioned (1). In refusing leave to appeal the Lord Chancellor remarked that their Lordships saw no reason to believe that there was any misdirection on the part of the learned trial Judge who had laid down in his charge to the jury that in order to convict the prisoner they must be satisfied not only that he intended to cheat but that he had done an act towards that cheating. "The learned Judge" (to quote the words of the Lord Chancellor) "clearly had in view the distinction between preparation to commit an offence and acts done towards the commission of the offence."

In *Queen-Empress* v. *Kalyan Singh* (2), Burkitt J. citing MacCrea's case held that an accused at whose instance a petition-writer had commenced the writing

(1) (1893) L. R. 20 I. A. 90. (2) (1894) I. L. R. 16 All. 409.

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out of a fraudulent and fictitious bond in favour of the accused upon a stamped paper purchased by the accused under the name of the person by whom the bond was to be payable had been rightly convicted of an attempt to commit the offence defined in section 467, Indian Penal Code.

In *The Government of Bengal* v. *Umesh Chunder Mitter* (1), referred to by the learned Government Advocate the accused against whose acquittal the Crown had appealed had, as here, sought to recover from a currency office, upon the halves of two currency notes, the value of the notes, declaring that the halves not in his possession had been lost by him. In reply to a communication from the currency office, who were aware that the amount of the notes had been paid to the holder of the other halves, he had submitted a formal claim applying for the payment of the money and stating that he was the proprietor of the entire notes. The application by the accused was dishonest. It was argued for the accused, as it has been argued before us for Shib Charan, that his act at the most amounted to preparation to commit an offence and that, as the officer in charge of the Currency Office knew that the matters stated by the accused in his application were untrue and would not have paid the money, the offence of cheating could not be completed and, therefore, the attempt to cheat could not have been committed. The Court in rejecting this proposition pointed out that a man may attempt to cheat, although the person whom he attempts to cheat is forewarned and is, therefore, not cheated. In that case also, as here, it was further argued on behalf of the accused that as it was usual to take a bond of indemnity from applicants before payment of the

(1) (1889) I. L. R. 16 Cal. 310.

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value of currency notes of which halves had been lost, the attempt had not been completed because such an indemnity bond had not been executed. It was, however, held that the application for the money was the attempt, or at any rate sufficient to constitute an attempt. "The execution of the bond of indemnity", the learned Judges went on to remark, "is not a portion of the application, and is an act which would ordinarily take place before the act of cheating is completed. As far as the applicant is concerned he would be willing to take the money without an indemnity bond and by his making a false attempt in asking for the money the offence would be just as complete, whether an indemnity bond was or was not insisted upon."

The question how far preparation for an offence must be carried to be punishable as an attempt under section 511 came before the Punjab Chief Court in *Abdulla* v. *Crown* (1). There, after referring to certain suggested definitions of the word "attempt" to be found in legal commentaries, the learned Judges expressed their opinion that cases can and do arise in which the offence of "attempt" to commit an offence has been committed, even though, in order to the completion of the offence, something more remained to be done by the offender. The attention of the learned Judges had been drawn to *Queen-Empress* v. *Dhundi* (2), which, as already stated, was relied upon by the Magistrate in acquitting Shib Charan. The facts in *Queen-Empress* v. *Dhundi's* case (2), are not on all fours with the one before us for, as pointed out in the judgment by the Allahabad Court in MacCrea's case, the person upon whom the fraud had to be per-

(1) 14 P. R. (Cr.) 1914. (2) (1886) I. L. R. 8 All. 303.

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petrated had not been approached in any way by the accused.

The facts in *Data Ram* v. *Empress* (1), were also entirely different from those of the present case. There, the Punjab Chief Court, remarking that mere preparation was not sufficient to complete the offence of an attempt, held that the mere act of bringing a sword was not an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt.

Following the interpretation of section 511 adopted by the learned Judges in MacCrea's case and in *The Government of Bengal* v. *Umesh Chunder Mitter* (2). I am satisfied that the view that an attempt to commit an offence is not punishable under section 511 unless the final act short of actual commission of that offence has been accomplished is an erroneous one.

Holding that the judgment appealed against is manifestly wrong and being of opinion that the interests of justice require a redecision of the case, I would accept this appeal, set aside the acquittal, order the respondent to surrender to his bail-bond and return the case to the Magistrate for redecision upon the merits in view of the interpretation of the law set forth above. The Magistrate has, of course, still to decide upon the evidence whether, in acting as the Magistrate finds it proved that he acted, the accused had a fraudulent or dishonest intention.

ADDISON J.

ADDISON J.—I agree.

N. F. E.

Appeal accepted.
Case remanded.

(1) 45 P. R. (Cr.) 1882. (2) (1889) I. L. R. 16 Cal. 310.

APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

SHAHDARA-SAHARANPUR LIGHT RAILWAY COMPANY (DEFENDANT) Appellant

versus

SULTAN AHMAD (PLAINTIFF) Respondent.

1928

May 9.

Civil Appeal No. 2122 of 1924.

Indian Railways Act, IX of 1890, section 72 (2)—Risk Note 'B'—Loss of goods consigned under—Burden of proof—'Wilful neglect'—meaning of.

Held, that in a suit for compensation for loss of goods consigned under Risk Note 'B' the *onus* is upon the plaintiff to prove that the loss was due to 'wilful neglect' on the part of the defendant Railway.

And, that the expression 'wilful neglect' is to be interpreted as meaning something done deliberately and intentionally, and not by accident or inadvertence, so that the mind of the person who does the act goes with it.

Tamboli v. *G. I. P. Railway Co.* (1), followed.

Second appeal from the decree of Bhagat *Jagan Nath, District Judge, Delhi, dated the 1st July, 1924, reversing that of* Lala *Jeshta Ram, Subordinate Judge, 3rd Class, Delhi, dated the 31st March 1924, and decreeing the plaintiff's suit.*

NAWAL KISHORE, for Appellant.

DIN DAYAL, KAPUR, for Respondent.

JUDGMENT.

BHIDE J.

BHIDE J.—Civil Appeals Nos. 2122 and 2123 of 1924 arise out of two suits based on similar facts and will be disposed of together. Plaintiffs in both the suits sued for recovery of compensation for loss of goods consigned to the defendant railway company, which the latter failed to deliver at the destination.

(1) (1928) I. L. R. 52 Bom. 169 (P. C.).

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It has been found by the Courts below that the goods were consigned under Risk Note 'B'. It was therefore for the plaintiff to prove that the loss of goods was due to 'wilful neglect' on the part of the defendant railway. The trial Court held that no such neglect was proved and dismissed the suits. The learned District Judge on appeal reversed the decision and decreed plaintiff's claim in both the suits. From this decision the railway company has filed second appeals.

The learned District Judge has recorded his finding in the following terms :—

"My finding therefore under the circumstances is that in the first place the loss has not been satisfactorily proved and even if this be taken to have been done, the circumstances show that the theft was either committed by the *chowkidars* or other railway employees, or if it was at all committed by some outsiders it was certainly made possible by the wilful neglect of the said *chowkidars* who did not keep a proper watch as they should have done."

This finding seems to be based on a misconception of facts and law. The loss of the goods was not in dispute and there was no issue on the point. The Risk-notes having been proved, the burden of proving 'wilful neglect' on the part of the appellant was on the plaintiffs, but the learned District Judge appears to have thought that the burden was on the railway company and has proceeded on conjectures. The mere fact that the *chowkidars* were dismissed by the railway company cannot be taken as any evidence of '*wilful neglect*' on their part. It is not known when the *chowkidars* were dismissed and for what

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reason. Even if there was negligence on their part there is nothing whatever to indicate that it was '*wilful.*' The expression 'wilful neglect' has been interpreted in a recent Privy Council ruling *Tamboli* v. *G. I. P. Railway Co.* (1) as meaning that the 'act is done deliberately and intentionally and not by accident or inadvertence, so that the mind of the person who does the act goes with it.' No such conduct on the part of the *chowkidars* or any other railway servants has been proved in these suits.

I would accordingly accept both appeals with costs throughout and restore the decrees of the trial Court.

ADDISON J.

ADDISON J.—I agree.

N. F. E.

Appeal Accepted.

APPELLATE CIVIL.

Before Mr. Justice Addison and Mr. Justice Bhide.

MUSSAMMAT DURGI (PLAINTIFF) Appellant

versus

SECRETARY OF STATE (DEFENDANT) Respondent.

1928

May 10.

Civil Appeal No. 2673 of 1927.

Criminal Procedure Code, Act V of 1898, sections 87 and 88—Absconder—attachment and sale of property—validity of, as against wife's right of maintenance.

Held, that both under Customary and Hindu Law the maintenance of a wife by her husband is a matter of *personal* obligation which is liable to be defeated by the attachment and sale of his property under sections 87 and 88 of the Criminal Procedure Code.

(1) (1928) I. L. R. 52 Bom. 169 (P. C.).