Before Mr. Justice Glover and Mr. Justice Mitter.

THE QUEEN *v.* DOYAL BAWRI.

1869
Sept. 1.

Penal Code, ss. 511 & 436—*Attempt to commit an offence, Acts sufficiently indicative of—Possession of a Fire-ball.*

Held, by GLOVER, J., that incendiarism having, on several occasions, occurred in a village, produced by a ball of rag with a piece of burning charcoal within it, and the prisoner one evening being discovered to have a ball of that description concealed in his dhoti, which contained burning charcoal, he is, under section 511 of the Penal Code, guilty of an attempt to commit mischief by fire. The possession of the instrument to commit mischief by fire, and the going about of the person with it, are sufficient to raise a presumption that he intended to commit the act, and had already begun to move towards the execution. These facts are sufficient to constitute an attempt.

Held, by MITTER, J., that the possession of a fire-ball and moving about with it cannot support a conviction under sections 436 and 511 of the Penal Code. These facts are not sufficiently indicative of an intention to destroy a building used for human dwelling. To constitute an offence under section 511 of the Penal Code, it is not only necessary that the prisoner should have done an overt act towards commission of the offence, but that the act itself should have been done in the attempt to commit it.

GLOVER, J.—I think that this conviction should be affirmed. I had at first some doubts as to whether there had been a sufficient commencement of an act tending towards the commission of the offence; but, on further consideration, I am of opinion that the prisoner has been properly convicted.

I see no reason to disbelieve the evidence for the prosecution that the prisoner had the fire-ball in his possession when laid hold of by the villagers. I admit that it might, as alleged by the prisoner in his defence, have been very easily placed there by persons determined to get up a case against him; but the evidence, in support of the prosecution, is that of respectable persons, with whom the prisoner has no enmity; whilst the prisoner does not attempt to support his side of the story.

The case for the Crown is that there had been one or two attempts (which had more or less succeeded) at incendiarism in the village, the active agent of which was a ball of rag enclosing a piece of burning charcoal, and that the villagers were, on the evening of the prisoner's arrest, discussing the sub-

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ject amongst themselves, and saying that it must have been the "Bawris" who had done it. The prisoner, himself one of that caste, defended himself and brethren from the charge and abused the villagers; and they at last threatened to take him to the Thanna. Whilst they were hustling him about, a ball of rag of a similar description to the one already found to have caused the previous fires fell from his dhoti, which, on being opened, was found to contain a piece of burning charcoal. Had this ball contained a piece of unlighted charcoal only, I should have considered that there had been no sufficient commencement of any act which tended towards the commission of mischief by fire, and that the prisoner would have been in the same position as a person who, intending to murder some other person whether by shooting or poisoning him, buys a gun or poison and keeps the same by him, such acts being ambiguous, and not so immediately connected with the offence as to make the parties punishable under section 511 of the Penal Code.

But, in this case, the instrument for causing mischief by fire was completely ready and was not used, only because the party carrying it had no opportunity. It must, I think, be assumed, that a person going about at night provided with an apparatus specially fitted for committing mischief by fire, intends to commit that mischief, and that he has already begun to move towards the execution of his purpose, and that is sufficient to constitute an "attempt." The appeal must be rejected.

MITTER, J.—The prisoner in this case has been convicted of "attempting to cause mischief by fire, knowing that he would thereby destroy a building used as a human dwelling," and sentenced to rigorous imprisonment for five years, under the provisions of sections 511 and 436 of the Indian Penal Code. I am of opinion, that this conviction ought not to stand. The only fact proved against the prisoner is that he was apprehended with a ball of rag containing a piece of lighted charcoal in his possession; but this fact is no more consistent with the intention of setting fire to a human dwelling than with that of setting fire to a stack of hay or to something else. There is not a particle of evidence on the record to show that the prisoner

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intended to destroy any particular object by fire, and in the absence of such evidence it is impossible to say that he intended to destroy a building used as a human dwelling. The conviction under section 436 is clearly bad, and I am at a loss to understand how and upon what evidence the Sessions Judge has come to the conclusion that that Section is applicable to the present case. But be this as it may, I am clearly of opinion, that the mere fact of being in possession of a ball, like the one which was found with the prisoner, is by no means sufficient to warrant a conviction for attempting to cause mischief by fire. In order to support a conviction for attempting to commit an offence of the nature described in section 511, it is not only necessary that the prisoner should have done an overt act "towards the commission of the offence," but that the act itself should have been done "*in the attempt*" to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball which was found in his possession, was an overt act, "towards the commission of the offence," but the question is, was there any attempt to commit a particular offence, and if so, was the act done "in such attempt." I am of opinion, that both these questions ought to be answered in the negative. Suppose a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show that he did so with the intention of shooting Z. If Z is not found in the street, or when found no attempt is made to shoot him either from fear or repentance, or from any other cause, can it be said that the man is guilty of attempting to murder Z? The going out of one's house with a loaded gun and with the intention of shooting a particular individual might be in one sense considered as an act done towards the shooting of that individual; but so long as nothing further is done, so long as there is no attempt to shoot him, and no overt act done "*in such attempt*," it is impossible to hold that there has been an attempt to murder. There can be no doubt that the man, who goes out of his house in such a manner and with such an intention, does an act which is highly reprehensible and improper, and the Legislature might have, if it thought fit, declared it punishable as an offence; but in the absence of such a

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declaration, it is not for us to say that the author of that act ought not to go unpunished. At any rate, it is perfectly clear that the act is not tantamount to an attempt to commit murder. The distinctions made by the Legislature between the offences of "attempting to commit dacoity," "making preparations for dacoity," and "assembling together for the purpose of committing dacoity," seem to support this view very strongly. The first offence is punishable under the provisions of section 393; the second, under those of section 399; and the third, under those of section 402. It will be further seen that there is a material difference in the punishment prescribed for the first and third offence, and that prescribed for the second. Now, in order to constitute an offence punishable under any of the three sections above referred to, it is absolutely necessary that the prisoner should have done some overt act or acts, and it may be said that in each case the act done is in one sense an act done towards the commission of dacoity. Why then do we find that the Legislature has treated three offences as distinct from one another, and why is it that a different punishment has been prescribed for the first and third offences from that which is prescribed for the second. Making preparations for the purpose of committing dacoity, or assembling together with the object of committing dacoity, requires an overt act just as much as attempting to commit dacoity; but the act required in the first two cases need not be one directly approximating to a dacoity, whereas the act required in the third case must be one of that description. "In many cases, however," says Mr. Russell in his work on Crimes and Misdemeanors, volume 1, page 84, "acts in furtherance of a criminal purpose may be sufficiently proximate to an offence "and may sufficiently show a criminal intent to support an indictment for a misdemeanor, although they may not be sufficiently proximate to the offence to support an indictment for an attempt to commit it; as where a prisoner procures dies for the "purpose of making counterfeit foreign coin, or where a person "gives poison to another and endeavours to procure that person "to administer it." The cases referred to in this passage, when contrasted with the illustrations of section 511, given in the Code, leave no doubt in my mind that the facts of the present case

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are wholly insufficient to support an indictment for attempting to commit mischief by fire. It may be said that the prisoner had some mischievous object in view when he secured the possession of a ball like the one which was found with him, but there is nothing to show what was the particular mischief which he contemplated, or that he attempted to commit any such mischief.

For the above reasons, I am of opinion that the judgment and sentence passed by the Sessions Judge ought to be set aside, and I would therefore direct the immediate release of the prisoner.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

THE QUEEN *v.* RADHU JANA AND OTHERS.*

1869 *Aug.* 7.

Criminal Procedure Code, ss. 205, 366, 367—*Examination of Prisoners—Attestation by Magistrate—Postponement of Trial for Evidence of a Witness—Discretion of Judge—New Trial.*

A Deputy Magistrate committed certain prisoners for trial on a charge of dacoity. Some of the prisoners had confessed before the Deputy Magistrate, but he failed to record the examination of the prisoners, or to attest it as required by section 205 of the Code of Criminal Procedure The Sessions Judge therefore refused to admit the examination of the prisoners by the Deputy Magistrate in evidence, and also refused to postpone the trial for the purpose of summoning the Deputy Magistrate and taking his evidence in the matter.

Held (1), the examination of the prisoners was inadmissible in evidence, (2), that it being wholly within the discretion of the Judge under section 366, to say whether or not he should postpone the trial or summon any witness to give his evidence, the High Court as a Court of Revision would not interfere or order a new trial.

The prisoners, Radhu Jana, Nitai Das, Lakhi Jana, and Madu Das, were committed by the Deputy Magistrate of Tamlook, for trial by the Sessions Judge of Midnapore, on a charge of dacoity. Three of the prisoners confessed before the Deputy Magistrate, and their examination was recorded, but not in such a way as is required by the Criminal Procedure Code, the questions asked the accused not being included in the examination, nor was their examination attested by the Deputy Magistrate

* Application on the part of the Government of Bengal, under section 404, Code of Criminal Procedure, through the Government Pleader.