

REG. V. FRANCIS CASSIDY.

1867.
Dec. 23.

Murder—Attempt to Murder—Loaded rifle—Surplusage—Charge—Ind. Pen. Code, Secs. 299, 300, 307, and 511.

In order to constitute the offence of attempt to murder under Sec. 307 of the Ind. Pen. Code, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events.

Aliter under Sec. 511 taken in connection with Secs. 299 and 300.

Therefore, where the prisoner presented an uncapped gun at E. G. (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger:—*Held* that he could not be convicted of an attempt to murder, upon a charge framed under Sec. 307 of the Indian Penal Code; but that, under the same circumstances, he might be convicted, upon a charge of simple attempt to murder framed under Sec. 511 in connection with Secs. 299 and 300.

Unnecessary allegations in a charge may be rejected as surplusage.

Apparent inconsistency between the English law, with reference to attempts, as laid down in *Reg. v. Collins*, and the provisions of the Indian Penal Code explained.

AT the Fifth Criminal Sessions of 1867, before WESTROFF, J., and a Special Jury, the prisoner was charged under the 307th section, and under the 299th, 300th, and 511th sections combined, of the Penal Code: (1) With having attempted to murder one E. G., by doing an act, with such intention and under such circumstances, that if he had by that act caused death, he would have been guilty of murder; (2) With having attempted to murder one E. G., by doing an act, with such knowledge and under such circumstances, that if he had by that act caused death, he would have been guilty of murder; (3) With having attempted to murder one E. G., by doing an act, knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being, and committing such last-mentioned act without any excuse for incurring the risk of causing such injury as aforesaid, and in such attempt with having done an act towards the commission of the said offence, to wit, with having presented a loaded rifle at the said E. G.

The prisoner was also charged (4) with an attempt to "voluntarily cause hurt," (5) with an attempt to "voluntarily cause grievous hurt," and (6) with an assault.

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Francis Cassidy was a private in Her Majesty's 45th Regiment of Foot. On the evening of the 29th of September 1867, he, being then quartered with his regiment at Puná, entered the regimental canteen, with his rifle in his hand, and presented it at the officer in charge of the canteen, Drum-Major Griffiths. Serjeant Bell, who was standing near the prisoner, observing this, pushed up the rifle. The prisoner was then taken into custody. On his way to the cell he expressed surprise and regret that there had been no cap on his rifle. On the morning of the day in question the prisoner had been intoxicated, and had been heard to utter threats against the Drum-Major; and although at the time of his presenting his rifle at the Drum-Major, he had partially recovered from the effects of his intoxication, yet he was still at that time under the influence of liquor. The rifle was subsequently examined, when it was found to be loaded with powder and ball, but there was no cap on the nipple.

In answer to questions put to them by the learned Judge, the jury found: (1) That when the prisoner presented the rifle, there was no cap upon the nipple; (2) That the prisoner did not pull the trigger; (3) That the gun was loaded with powder and ball; (4) That the prisoner presented the gun at the Drum-Major, (a) with the intention of murdering him, (b) with the intention of causing grievous hurt to him, (c) with the intention of causing hurt to him; (5) That the prisoner used criminal force to the Drum-Major, and in so doing assaulted him.

And generally the jury found the prisoner *Guilty* upon all the heads of charge, subject to the question of law reserved by the learned Judge (in accordance with Cl. 24 of the Amended Letters Patent), whether the prisoner could rightly, under the circumstances, be convicted upon all or any of them.

The case was argued on the 6th and 7th of December before COUCH, C.J., and WESTROPP, J.

COUCH, C.J.:—Following the English practice, counsel in support of the conviction should begin.

The Advocate General (Honourable L. H. Bayley) and Macpherson, in support of the conviction :—The prisoner may properly be convicted under all the heads of charge. The jury have found the intent; and the prisoner has done an act towards carrying that intent into execution.

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[COUCH, C.J. :—Under Sec. 307, must not the act be one that might cause death? an act capable of causing death? The words of the section are: “And under such circumstances,” &c. The merely presenting an uncapped gun could not possibly cause death.]

We contend that the act need not be the last in the series of acts that immediately precede the commission of the offence. The absence of a cap is immaterial, as the findings of the jury show that the prisoner believed the gun to be capped.

[WESTROPP, J. :—Do not the illustrations tend to show that such a finding does not bring the case within the meaning of the section?]

The cases put by the illustrations are extreme; intermediate ones are not excluded by them.

This objection does not, however, apply to the 3rd head. That is framed under Secs. 299 and 511 of the Penal Code. That a charge may be so framed is shown from Sec. 10 of Act XVIII. of 1862. Sec. 307 is not exhaustive. An act may amount to an attempt to murder, under Sec. 511 coupled with Sec. 299, which does not satisfy all the requirements of Sec. 307: Indian Penal Code by Morgan and Macpherson, p. 455. The law of England, as it stood at the time of the framing of the Code, does not govern the case, for that may be an attempt under Sec. 511 which is not one at home: see *illustration (b)*, and compare *Reg. v. Collins. (a)* Then as to the word ‘loaded rifle,’ the Court will not adopt the strict construction that formerly prevailed in courts in England; but even if they should do so, these words, as expressive only of the means, may be rejected as surplusage: *R. v. Jones. (b)*

(a) 33 Law J., M. C., 177.

(b) 2 B. & Ad. 611.

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[WESTROPP, J.:—Another difficulty arises in my mind from the use of the words: “knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being.” How can it be said that he knew it to be so imminently dangerous, &c., when there was no cap upon the gun?]

[COUCH, C.J.:—The difficulty may perhaps be removed by incorporating the 300th section. It may be said that the nature of the murder attempted to be committed is here defined; and that the prisoner is charged with the attempt to commit that murder.]

The difficulty is got rid of in the manner pointed out by the Chief Justice; or these words may also be rejected as surplusage. The charge stands, then, as one of a simple attempt to murder; and the presenting of the loaded gun under the circumstances is plainly, in the words of the section, an act done towards the commission of the offence. *R. v. Gill (c)*; *Reg. v. McPherson (d)*; *Schofield's Case (e)*. 1 Russell on Crimes, 4th Edn., pp. 83 and 975-981; 2 East. P. C. 1028; 7 Wm. IV. & 1 Vict., c. 95, s. 4; 24 & 25 Vict., c. 100, ss. 7, 14, and 19; and Indian Penal Code, Sec. 33, were also cited.

Taylor, for the prisoner, was requested to confine his argument to the 3rd and subsequent heads of charge. The only act complained of is the presenting an uncapped gun, a perfectly harmless instrument, at the Drum-Major. This is not an attempt to commit murder or any other crime. The English decisions show that clearly. “Presenting a gun is not enough,” says *Pattison, J.*, in *Reg. v. Lewis. (f)* See too *Reg. v. St. George (g)* and *Reg. v. Baker. (h)* In fact, the legal crime is not complete until the prisoner has done an act which he cannot recal, until he has left himself no *locus penitentiae*. It may be that he would not have pulled the trigger; and we must assume everything in his favour, certainly nothing against him. This reasoning applies to the 4th and 5th counts, as well as to the 3rd. The word

(c) 2 B. & Ald. 204. (d) 1. Dears. & B., C. C., 197. (e) Cald. 400.
(f) 9 C. & P. 523. (g) 9 C. & P. 483. (h) 1 C. & K. 254.

“loaded” vitiates the 3rd count. That means “completely loaded”—*R. v. Carr (i)*; *R. v. Harris (j)*; *Reg. v. James (k)*; *Reg. v. Baker (suprà)*. It was contended that portions of the 3rd head were surplusage, and might be rejected as such; but that rule must be confined to cases where the words rejected are not essential: *R. v. Ryan (l)*; and Starkie on Evidence, Vol. I., p. 398. There the words are essential. The prosecution must prove them, or, if they do not, the prisoner is entitled to an acquittal.

The Advocate General was heard in reply. He cited Indian Penal Code by Morgan and Macpherson, pp. 278 and 355; *Osborn v. Veitch. (m)*

Cur. adv. vult.

COTTELL, C.J. (after stating the questions that had been put to the jury, and their answers to them, proceeded):— Upon these findings I am of opinion that a verdict of guilty ought to be entered upon the 3rd head of charge.

The first two heads are framed under Sec. 307. The words of that section are:—“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, shall be punished,” &c. Now it appears to me, looking at the terms of this section, as well as at the illustrations to it, that it is necessary, in order to constitute an offence under it, that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this section.

The illustrations given bear out this view. One is that of a man firing a loaded gun; and another is that of a man placing food mixed with poison on another’s table. Both these acts are capable of causing death: but in the present

(i) R. & R. 377.

(j) 5 C. & P. 159.

(k) 1 C. & K. 530.

(l) 2 Mood. C.C. 15

(m) 1 F. & F. 317.

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case, although the act was done with the intention of causing death, and was likely in the belief of the prisoner to cause death; yet in point of fact it could not have caused death, and it, therefore, does not come within that section.

As to the 3rd head of charge, it was pointed out in the course of the argument that, if the whole of the averments are necessary to be proved, the facts found are not sufficient; for the act done was not so imminently dangerous, that it must in all probability have caused the death of a human being, the jury having found that the gun could not be discharged, owing to there having been no cap upon the nipple. Then there is the difficulty occasioned by the words "loaded rifle;" and if we follow the decisions of the courts at home, we must hold that in this case the rifle was not loaded. I must say that I am not disposed to hold that the rifle in this instance, though without a cap, was not loaded within the meaning of the averment. I should rather be disposed, considering that the Legislature at home has passed an Act (n) declaring that a gun shall be deemed to be loaded though there is no cap upon it, to put the natural construction on the term, and to hold that the gun in this case was loaded. It is not, however, necessary for me to come to that conclusion. Then also as regards the first part of the charge, it might perhaps be read, not as describing the act of the prisoner, but as describing the nature of the murder he attempted to commit. It is not, in my opinion, necessary to discuss that either; for the conclusion I have arrived at is, that these are averments not necessary to be made; that it would have been sufficient to charge the prisoner simply with an attempt to murder; and that these averments, being unnecessary, may be rejected as surplusage. In support of this I need only refer to the case of *R. v. Briggs* (o) as an authority to show that even in the courts in England, where indictments are more strictly construed than they are here, such averments as these may be regarded as surplusage, and as such be rejected.

(n) 24 & 25 Vict., c. 100, s. 19. (o) 1 Mood. C. C. 318.

What we have, therefore, to consider is, whether upon the findings of the jury the prisoner has been guilty of an attempt to murder within Sec. 511 taken in conjunction with Secs. 299 and 300 of the Penal Code. The words of Sec. 511 are: "Whoever attempts to commit an offence punishable by this Code * * * and in such attempt does any act towards the commission of the offence, shall be punished." Now the jury have found that the prisoner presented the gun at the Drum-Major with intent to murder him. There was, therefore, the intent and the belief of the prisoner that the gun was capable of effecting his purpose. And it appears to me that the presenting of the gun, under these circumstances, was an act of such an approximate nature as to bring the prisoner within the words of Sec. 511. The requirements of the section are,—the intent, and an act done towards the commission of the offence. Supposing the gun was capped,—loaded in the strict sense of the term—no one could for a moment doubt that presenting it at the Drum-Major with the intention of murdering him would be an act done by the prisoner towards the commission of the offence, bringing him within the terms of Sec. 511. Then the fact of there being no cap upon the nipple does not make any difference under this section, if there is the intent and belief before referred to, and the absence of knowledge that the gun is uncapped. The illustrations show that the circumstance that it is not possible to complete the offence makes no difference as regards the attempt. They are both cases in which an attempt to commit the offence could not have been successful. Looking, therefore, at the words of Sec. 511 and the illustrations to it, I am of opinion that the prisoner may properly, upon the findings of the jury, be convicted of an attempt to murder; and that a verdict of *guilty* should be entered upon the 3rd head of charge.

A case cited before us in the course of the argument, that of *Reg. v. Collins (ubi supra)*, appeared to show that in this latter respect there was an inconsistency between the English Law and the Indian Penal Code. I was surprised by this seeming inconsistency; but when the case came to be

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examined, it appears not to exist. Mr. Greaves has pointed out the grounds of the decision in that case in his last edition of *Russell on Crimes*, Vol. III., p. 643; and shows that the decision was come to in consequence of the form of the indictment, which was framed upon an Act which made the attempt to thieve a statutable offence. If the prisoner in that case had been indicted for the Common Law offence or misdemeanour of attempting to commit theft, although under the circumstances the offence could not be completed, the result would have been different; for the Common Law of England in this respect agrees with the law as passed for India and embodied in the Penal Code.

It is unnecessary for me to consider the remaining heads of charge. The sentence to be passed upon the 3rd head will be sufficient for the purposes of justice.

WESTROPP, J. :—I fully concur in the observations of the Chief Justice on the 1st and 2nd heads of charge; and in thinking that upon the findings of the jury these charges are not sustainable. The facts do not bring the case within the 307th section.

The form of the 3rd head of charge interposed difficulties; and the allegations which caused the difficulties are these:—“Knowing it to be so imminently dangerous, that it must in all probability cause the death of a human being.” As there was no cap upon the gun, that part of the charge was not sustained. Then as to the “loaded rifle,” upon the question, whether the evidence in this case would satisfy the words of that allegation I express no opinion, nor is it necessary to do so; for the case of *R. v. Briggs* enables us to discard these allegations as surplusage.

Discarding these two allegations, the charge stands simply as an attempt to murder; and then arises the question, whether the facts proved bring it within Sec. 511 coupled with Secs. 299 and 300. I agree with the observations of Macpherson, J., and Morgan, J., in their edition of the Penal Code, that that may be an attempt under Sec. 511 which does not come within Sec. 307; and upon the whole

it seems to me that the presenting the gun in this case, loaded as it was with powder and ball, and being in the belief of the prisoner capable of being discharged—for he was under the impression that the gun was capped—was an act sufficiently approximate to the commission of the offence to bring it within Sec. 511.

I have not arrived at this conclusion without difficulty, but I believe it to be consistent with common sense, and that Sec. 307 was not intended to exhaust all attempts to commit murder which should be punishable under the Code. I wish also to express my concurrence in the remarks of the Chief Justice in respect to the case of *Reg. v. Collins*.

Upon the other charges it is unnecessary to express an opinion.

Verdict of *Guilty* entered upon the 3rd head of charge.

REG. V. GANU BHA KRISHINA' GURAV and others.

March 6.

Obscene Songs—Láruí—Ind. Pen. Code, Sec. 294 —Crim. Proc. Code, Secs. 66, 257, and 265.

On a reference by a Session Judge, convictions and sentences by a Magistrate F. P., reversed, as the record of the case did not disclose that the accused had committed any offence.

GANU and four others appealed to the Court of Session at Tháná, from an order of Rámchandra Amrit Dugal, Magistrate F. P. at Ratnágiri, dated the 13th of October 1866, by which they were convicted, under Sec. 294 of the Penal Code, of singing obscene songs in a public place to the annoyance of others, and sentenced, No. 1 to pay a fine of Rs. 5, and Nos. 2, 3, 4, and 5 to pay each Rs. 3; and in default to suffer No. 1 five days', and Nos. 2, 3, 4, and 5 each three days' simple imprisonment.

The record and proceedings were referred for the orders of the High Court, on the 9th of February 1867, by R. II. Pinhey, Session Judge of the Konkan, with the following remarks :—