

Jan Ali Vs. Emperor

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Court : Allahabad

Decided On : Apr-30-1934

Reported in : AIR1934All833; 152Ind.Cas.804

Appellant : Jan Ali

Respondent : Emperor

Judgement :

Bennet, J.

1. This is a Criminal revision on behalf of one Jan Ali against his conviction under Section 457-511, Penal Code; and sentence of one year's rigorous imprisonment. The Magistrate had sentenced the accused under Sections 456, 457 and 381, I.P.C., and the conviction was altered on appeal by the Sessions Judge, Jan Ali is a barkandaz appointed to guard the opium factory at Ghazipur and his duty was to stand, at a certain post No. 12 at night which is outside the enclosure. The Sub Inspector of the factory guard one Rambhuj Singh gave evidence which was accepted by the Sessions Judge. The evidence was that he found the accused absent from his post at night and on making a search for him he found him coming from the east and he saw that the accused had taken off his turban, his belt, his shirt, his shoes and his patti and was clad only in a lungi and his uniform coat. The Sub Inspector saw two pattis hanging tied on the top of the bars of the enclosure and the other articles of clothing of the accused were lying on the varandah close

by. The Sub-Inspector arrested the accused. Mr. Hales, the Factory Superintendent, was called, and the accused admitted to Mr. Hales that the patts belonged to him, and Mr. Hales found that on the fingers of the accused there was a strong smell of opium. The next morning when the enclosure was entered some opium was found tied in a piece of cloth stated to be a portion of a cloth recovered from a box belonging to the accused, The Magistrate considered that the circumstantial evidence proved that the accused had entered the enclosure and stolen the opium. The Sessions Judge considered that the circumstantial evidence did not prove this and that there was a possibility that the opium tied in a piece of cloth might have been placed inside the enclosure by some enemies of the accused. The attention of the Sessions Judge was not invited to illustration (a), Section 445, Penal Code, which 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 the housebreaking

2. In the present case the Sessions Judge believed the evidence that the patts belonged to the accused and drew the conclusion that the accused had tied those patts on the top of the enclosure. It appears to me that following the illustration the offence of house-trespass would have been completed by the accused putting his hand across the top of the railing. It also appeals to me that in tying the patts on the top of the railings the accused must have put his hand across the top. The offence therefore of Section 457 would have been technically completed by the accused tying the patts on the top of the fence and in doing so placing his hand across the top of the fence. The argument of the Learned Counsel was that the finding of the Sessions Judge does not amount to a finding of an attempt to commit burglary but merely a preparation for committing burglary. The theory of Learned Counsel is that on the first occasion on which the accused climbed the wall and placed the patts on the top of the wall or fence the accused was not making any attempt to commit an offence, but it would only have been on the second occasion when the accused would have again climbed the wall that the accused would have been guilty of any offence. I see no reason to require that the accused should climb the wall twice before the attempt to commit burglary would have been committed. It appears to me that the first time that the accused climbed

the wall he attempted to commit burglary. Learned Counsel referred to various rulings which laid down various stages leading to the committing of an offence, The first stage is mere intention; the second stage is preparation. in which the accused arranges the means necessary to carry out the offence and the third stage of an attempt to commit the offence arises when the accused makes a movement towards committing an offence. On this division it appears to me that the accused made the movement towards committing the offence at the time when he began to move up the wall by climbing it. Various rulings have been referred to but no reference has been made to any ruling on an attempt to commit burglary which would support the argument of Learned Counsel. I therefore find that I am unable to accept his argument on this point.

3. The remaining argument was in regard to the amount of sentence which is one years rigorous imprisonment. The accused was a barkandaz employed to prevent persons from committing a burglary in the factory. He himself made an attempt to commit burglary. The sentence of one year's rigorous imprisonment does not appear to me excessive. I therefore dismiss this application in revision. The accused must surrender to his bail and undergo the unexpired portion of his sentence.