1896.
July 24.

SILVA *v.* CHARLES.

P. C., Colombo, 42,677.

Ceylon Penal Code, s. 449—Possession of implement with intent to break into building—General intent to break into buildings.

To support a conviction under section 449 of the Ceylon Penal Code, which makes it an offence for a person to have in his custody or possession any implement with intent unlawfully to break into any building, it is necessary that the person should be proved to have had the intent of breaking into some particular building, and proof of a general intent to break into buildings is insufficient.

IN this case the accused had been convicted by the Police Magistrate of Colombo with being in possession of an implement with intent unlawfully to break into any building. There was no evidence that the accused intended to break into any particular building. The case was sent for in revision.

Templer, Acting S.-G., for the Crown.

Cur. adv. vult.

24th July, 1896. LAWRIE, J.—

On the suggestion of the Chief Justice, who is now presiding in the Colombo Criminal Sessions, where he had before him an associate of this prisoner, we sent for the record, and having examined it and having heard the Solicitor-General, we set aside the conviction passed on Vitanege Baron on the 11th June, 1896, by the Police Magistrate of Colombo, and we order the prisoner to be released.

The charge and the conviction were, that the accused on the day and at the place specified had in his possession a house-breaking jemmy with intent to break into buildings.

We did not read the evidence on which the Magistrate held the possession and the intent proved.

We took for granted that the proof was of the facts alleged in the charge, proof of these, of nothing more and of nothing less.

We therefore take it for granted that there was no evidence that the accused intended to break into any building known to the prosecutor, that the proof was that the accused intended to break into buildings the names and position of which were not known. The general rule of criminal law is that a mere intention unaccompanied by an overt act is not punishable for these reasons, that as yet no harm has been done, and that there is a *locus penitentiæ*, a chance or hope that the evil intent will be abandoned.

In some cases, however, of which section 449 is an example, if the intent be accompanied by the possession of an instrument which can be used to carry out the intent, the intent plus the possession is punishable.

Neither the possession by itself nor the intent by itself is an offence; when both are proved, the possessor with intent is guilty. But it must be possession with intent to do a particular unlawful act.

Take the present case. Until a particular building was selected to be broken into, can it be said that the accused intended to commit house-breaking?

I think it is the reasonable construction of the 449th section that there must be proof of intent to do a particular illegal act before the intent becomes an offence. But is it not sufficient to prove the kind of crime the accused intended to commit? Is it necessary or possible to prove the exact spot or the very building at or in which the crime is to be committed?

It is an offence to commit house-trespass with intent to steal; it is not necessary to prove an intent to steal a particular article.

The possession of false weights and measures with intent to use them fraudulently is an offence, although there be no intention to defraud any particular man; the shopkeeper will be guilty who, having a false weight, intends to use it whenever a stupid or unobservant customer comes in to buy. The possession of a gun or snares with intent to kill game without a license is an offence, although it is quite impossible to allege or prove what particular bird or animal the offender expected or intended to kill.

So it may be argued that a man with a jemmy intending to break into the first house which looks well furnished and ill protected is guilty of the offence punishable under section 449.

He certainly is guilty so soon as by leaving the highway and by approaching the house he manifests his intent to get into that house by the help of the instrument he is carrying, but is he guilty so long as with vacant mind be walks along the road?

I think that the question is not free from doubt. I do not regret having given to the accused the benefit of the doubt.

WITHERS, J.

I quite agree with my brother in thinking that the judgment brought up in revision should be quashed and the man released from any further imprisonment. The 449th section of the Penal Code, which enacts that whoever has in his custody or possession any implement with intent unlawfully to break into any building, is so like the section 58 of 24 and 25 *Vict. c. 96*, that

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WITHERS, J.

I think we are bound to follow the judgment in the Crown case reserved of *Queen v. Jarrald* and another (*32 L. J., M.C. 258*). The headnote, which is supported by the judgment of the Judges who took part in that case, is as follows :—" To support a conviction " under the statute 24 and 25 *Vict. c. 96*, section 58, which renders " it a misdemeanour for a person to be found at night armed with " intent to break or enter into any house or building and to commit " any felony therein, it is necessary that the person should be " proved to have the intent of breaking into or entering some " particular building, and proof of a general intent to break into " houses will be insufficient. The indictment must, as in " burglary, allege the ownership and situation of the premises " intended to be broken into."

The charge and conviction in the case before us does not specify whose and what building the prisoner intended to break into.