

1935

*Present : Maartensz J.*

GOONESEKERE v. APPUHAMY.

1,155—P. C. Dandagamuwa, 15,676.

*Public servant—Offering obstruction to discharge of duties—Using force to prevent discharge of duty—Legality of public servant's act—Penal Code, ss. 183 and 344.*

Where a public servant, who was obstructed, was not acting with lawful authority, a person who resisted him cannot be convicted under section 183 of the Penal Code of obstructing a public servant in the discharge of his public functions or under section 344 of using force with intent to prevent him from discharging his duty as public servant.

A person cannot be convicted under these sections unless the act of the public servant was strictly legal.

**A** PPEAL from a conviction by the Police Magistrate of Dandagamuwa.

*Siri Perera*, for accused, appellant.

*Weerasooria* (with him *Eric de Soysa*), for complainant, respondent.

*Cur. adv. vult.*

March 12, 1935. MAARTENSZ J.—

This is an appeal by the first accused in this case who was convicted of (1) obstructing R. S. Goonesekere, Additional Deputy Fiscal, a public servant, in the discharge of his public functions, to wit, the execution of an order of delivery of possession issued in the District Court of Negombo case No. 6,478, an offence punishable under section 183 of the Ceylon Penal Code; (2) using force on the said public servant by pushing him with intent to prevent or deter him from discharging his duty as such public servant, to wit, the execution of the said order of delivery of possession, punishable under section 344 of the Ceylon Penal Code.

In case No. 6,478 of the District Court of Negombo the plaintiff, Natchiappa Chettiar, obtained a mortgage decree on July 29, 1932, against R. A. Appusingho Appuhamy as principal and Peter Wickramanayake as surety for the recovery of a sum of Rs. 3,000 and interest. The decree provided that in default of payment the hypôthecated properties should be sold by Messrs. M. P. Kurera & Co., auctioneers.



The mortgaged properties were sold in due course as payment was not made, and they were purchased by the decree holder on November 10, 1932.

On May 17, 1933, the District Judge of Negombo issued the order referred to in the charge addressed to the Fiscal, North-Western Province, Kurunegala, directing him to put the plaintiff in possession of the lands sold under the decree, of which the defendants were in possession, and, if need be, to remove any person bound by the decree, who may refuse to vacate the same.

On September 8 Mr. Goonesekere went with his assistant Mr. Dahigomuwa to place the plaintiff's attorney in possession of one of the lands called Kahatagahawatta; there is a house on this land on the roadside with a portico in front extending almost up to the road reservation. The house cannot be entered except through the portico. The Deputy Fiscal first explained to the first accused that he had come to execute the order for delivering possession, to which the first accused replied that the house was his and that he would not "allow anyone to come here"; behind him in a line were the other 10 men who were made accused and acquitted. Mr. Dahigomuwa then stepped on to the portico and was pushed out by the first accused and Mr. Goonesekere was also pushed out when he entered after Mr. Dahigomuwa. Mr. Goonesekere got the impression that further violence would be used if he persisted in trying to execute the order and he and his assistant left the place.

At that time the first accused did not take up the position he did at the trial that he was the watcher of R. A. Appuhamy's sister, Punchihamy.

The learned Magistrate has accepted the evidence of Mr. Goonesekere and Mr. Dahigomuwa, and I see no reason to dissent from his findings on the facts.

I entirely agree with the Magistrate for the reasons given by him that the first accused obstructed the execution of the order with a view to rendering the plaintiff's decree in the mortgage action ineffective.

In appeal a new line of defence was taken by Counsel for the first accused, namely, that the District Court of Negombo had no jurisdiction to issue the order for delivery of possession and that the first accused could not therefore be convicted of either obstructing or assaulting the public servant who sought to execute it. He also contended that even if the Court had jurisdiction to issue the order the Fiscals officers had no authority to execute it against the first accused who was neither a defendant in the mortgage action nor bound by the decree.

The first accused was certainly not bound by the decree nor was he a defendant and I am of opinion that the order could not be executed against him, whether it issued in terms of section 287 of the Civil Procedure Code or under the provisions of section 12 (1) of the Mortgage Ordinance, No. 21 of 1927. Now under section 12 of this Ordinance property declared bound and executable by a mortgage decree may, in default of payment, be sold by the Fiscal in like manner as if it had been seized by the Fiscal under a writ of execution for the amount of the mortgage, in which case section 287 of the Code is, *inter alia*, applicable to the sale; or it may be sold by a person designated for the purpose in the decree, in this case the sections of the Code applicable to a sale by the



Fiscal are not applicable but the Court "may, if it thinks fit, in the decree or subsequently give such directions . . . as to the delivery of possession to the purchaser and as to the removal of any person bound by the decree from the property as it thinks fit".

Section 12 superseded section 201 of the Civil Procedure Code, which enacted as follows :—

"When the action is to enforce a right of sale under a mortgage, and the court finds for the plaintiff, the decree shall specify a day on or before which the money decreed to be due on the mortgage with interest thereon from date of action to date of payment and costs of action shall be paid, and shall direct that in default of such payment within the period so prescribed the mortgaged property shall be sold, and the court may in such decree for sale give such directions as to the conduct and conditions of the sale (including the terms on which the plaintiff shall be allowed to purchase), and the person who shall conduct it, and as to the terms of the instrument of conveyance and the party or parties by whom it shall be executed, as it may think fit."

There is no provision in this section for the Court to give directions for the delivery of possession to the purchaser, and it was held in the case of *Allis Appu v. Anderson*<sup>1</sup>, that an order for delivery of possession under section 287 of the Civil Procedure Code cannot be made in favour of a purchaser of property sold by an auctioneer under the provisions of section 201 of the Civil Procedure Code. The headnote does not correctly summarize the decision, for it was not held that an order under section 287 could be made against the defendant in the mortgage action. Akbar J. merely pointed out that the decision of Wood Renton J. in the case of *Abeyeratne v. Perera*<sup>2</sup> did not apply as the person against whom the order under section 287 was made was not the defendant in the action. Wood Renton J. did not in that case hold that an order under section 287 could be made in favour of a purchaser of property sold under a mortgage decree entered in terms of section 201 of the Civil Procedure Code against a defendant; on the contrary he held that it could not.

The appellant was the purchaser of property sold by an auctioneer in execution of a mortgage decree. He appealed from the District Judge's refusal to grant him an order for the delivery of possession under the provisions of section 287 of the Code. With regard to the order of the District Judge, Wood Renton J. said "I agree with the learned District Judge that section 287 is concerned only with Fiscals' sales" and deprived the appellant of the costs of appeal. But he sent the case back for certain further proceedings as he was of opinion that the Court had an inherent power to render a sale effectual against a defendant in possession who was bound by the decree in execution of which the sale took place.

The Soundness of this proposition was expressly questioned by Garvin J. in the case of *Fernando et al. v. Kadiravelu*<sup>3</sup>.

It may possibly be argued now that the inherent power invoked by Wood Renton J. is expressly conferred on the Court by the provisions of section 12 of the Mortgage Ordinance which I have cited ~~above~~.

<sup>1</sup> (1930) 31 N. L. R. 426.

<sup>2</sup> (1912) 15 N. L. R. 347.



The order (P 1) which the Deputy Fiscal sought to execute does not quote the authority in pursuance of which it was issued. But whether it is treated as an order issued by virtue of the provisions of section 287 of the Civil Procedure Code, or as an order in the nature of directions given under the provisions of section 12 of the Mortgage Ordinance the order was not one which could be executed against the first accused as he was not bound by the decree in execution of which the land Kahatagahawatta was sold. Respondent's Counsel submitted that the accused was nevertheless liable to be convicted of the offences with which he was charged by reason of the provision in section 92 of the Penal Code that "There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law".

This argument is not equally applicable to both charges. As regards the charge of obstruction under section 183 of the Penal Code it has been held in a series of cases, of which the earliest was a decision of a Full Bench in the case of *Canthapillai Odaiar v. Murugesu*<sup>1</sup>, and the latest *Fernando v. Silva*<sup>2</sup> that where the public servant who was obstructed was not acting with lawful authority section 92 of the Penal Code did not apply and a person who merely resisted him was not liable to be convicted under section 183 of the Penal Code. I am, as I said in the latter case, bound by the decision of the Full Bench and the appellant must be acquitted of the charge made under section 183 of the Penal Code. In the former case Burnside C.J. and Clarence J. expressed the opinion that section 92 might perhaps apply to a case where the accused had committed an assault on a public servant who was not clothed with lawful authority, in these terms:—Burnside C.J.: "I do not agree that section 92 of the Code touches the question before us. Had the complainant been suing for an injury to his person from any act of the accused, it perhaps would not lie in the accused's mouth to say 'I assaulted you in the exercise of the right of defence of my property which you had seized or were attempting to seize'". Clarence J.: "Had the officer then persisted in his attempt to seize, and had appellant in maintaining his resistance done anything amounting to an assault upon the officer, it may be that by the operation of section 92 the appellant would have been open to conviction if charged with the assault". These dicta were relied on by Counsel for the respondent in support of his contention that the appellant was liable to conviction on the charge laid under section 344 of the Penal Code. Another line of argument was that the accused was liable to conviction irrespective of the provisions of section 92, as the assault was committed before the Deputy Fiscal had done or attempted to do anything towards the execution of the order to deliver possession.

Beside the cases I have referred to there are no local decisions upon the exception to the right of private defence enacted in section 92 of the Penal Code in regard to an act done by a public servant or by the directions of a public servant acting in good faith under colour of his office though that act or direction may not be strictly justifiable by law. This section is, however, a verbatim reproduction of section 99 of the Indian

<sup>1</sup> 1 *Ceylon Law Reports* 90.

<sup>2</sup> 11 *Ceylon Law Recorder* 44.



Penal Code and Indian decisions on section 99 as to when a public servant would be held to be acting in good faith under colour of his office would be applicable to section 92. The effect of section 99 has been considered in cases arising from charges for breaches of sections 332 and 353 of the Penal Code. They correspond to sections 323 and 344 of our Code. Section 323 is applicable when hurt is caused to the public servant. Section 344 provides a penalty where the injury falls short of hurt but is sufficient to constitute "assault" or criminal force.

The Indian and local sections are identical in language.

Gour in his *Commentary* on sections 332 and 353 of the Indian Code refers to the numerous decisions of the Indian Courts on these sections and section 99. The effect of these decisions he sums up thus: "But the present trend of the case-law on the subject is anything but harmonious. For, . . . ., there are precedents which justify an assault to prevent an illegal act merely because it is illegal, there are others in which the illegality is held to be no justification, there are others in which the absence of good faith is inferred from the want of illegality, while there are those in which the most outrageously illegal acts are held to justify no assault. It cannot be said that the same Courts are throughout consistent with themselves"—*Gour, Vol. 2, p. 1656 (1925 ed.)*. The Indian decisions are therefore of very little, if any, assistance. But Gour on the same page lays down the following propositions of law as probably affording a good working rule:—

- " (1) That as a rule the two sections are intended only to apply to acts done by public servants in the lawful discharge of their duty;
- (2) That those who maintain the accused criminally liable under the two special sections must show that their act was legal;
- (3) That the accused cannot be convicted under *these* two sections unless the act was strictly legal;
- (4) That failing these sections, it does not follow that the accused may not be convicted under the general law. But in order to be exempted from its operation he may appeal to section 99 under which he may claim exemption—
  - (a) if he had reasonable apprehension of death or grievous hurt;
  - or
  - (b) if the act of the public servant was wholly illegal; or
  - (c) if his act was done otherwise than in good faith.

Lastly, the question whether an act is done in good faith is a question of fact dependent upon the proved circumstances of each case."

I venture to think these propositions do afford a good working rule and I would apply them to this case. The complainant was admittedly a public servant; he was armed with an order directing him to place the plaintiff in possession of Kahatagahawatta and if need be to remove any person bound by the decree who may refuse to vacate the same. He could not place the plaintiff in possession without evicting the person in possession if there was one in possession, but the right to evict is limited to a person bound by the decree. If the accused was bound by the decree the Deputy Fiscal would have been in a very strong position if he had been assaulted by him in resisting eviction.



The accused might have pleaded that the Court issuing the order had no right to do so. Such a plea would give rise to difficult points arising from the question of jurisdiction. It might be necessary to draw a distinction between an order which a Court has jurisdiction to make, for a Court can make an order for delivery of possession, but which in the particular case it had no right to make, and an order which the Court has no right to make in any case. Fortunately, there is no necessity for me to consider this question as the accused was not a person bound by the decree and it would have been unlawful on the part of the Deputy Fiscal to evict or attempt to evict him nor is it necessary for me to decide in this case whether the accused may appeal to section 90 of the Penal Code and claim exemption on the ground that the act of the public servant was wholly illegal. He cannot do so for he assaulted the Deputy Fiscal before the need to defend himself arose.

The accused is clearly guilty of committing an assault on the Deputy Fiscal. But there remains the question whether the accused was guilty of an offence under section 344 or only guilty of simple assault. If the Deputy Fiscal had not commenced executing the order the accused would not be guilty of assaulting him in the execution of his duty. Can he be said to be guilty of assaulting him with intent to prevent or deter him from discharging his duty.

I have already pointed out that the order did not authorize the Deputy Fiscal to evict the accused as he was not bound by the decree; it follows I think that the accused cannot be convicted of assaulting him with intent to prevent him from discharging his duty.

I accordingly alter the conviction to one under section 343 of the Penal Code and reduce the sentence to six weeks' rigorous imprisonment.

*Varied.*

