1936 *Present :* **Soertsz A.J.**

THE KING *v.* SIMON APPU *et al.*

2-22 D. C. (Crim.) Trincomalee, 273.

Right of private defence—Seizure of fishing boats—Failure to produce coastwise clearances—Unlawful seizure of boats—Charge of being members of unlawful assembly and causing hurt—Customs Ordinance, No. 17 of 1869, ss. 25 and 108—Penal Code, s. 92.

The Assistant Collector of Customs, Trincomalee, imposed fines on the accused for not producing coastwise clearances. The accused were fishermen, who had set out from ports, at which it was not usual to grant clearances. On their failure to pay the fines, the Collector ordered the seizure of their boats. The accused resisted the seizure and were charged with being members of an unlawful assembly and with causing hurt.

***Held,* that the Assistant Collector of Customs had no authority to impose the fines and that the seizure was unlawful,—**

***Held, further,* that the accused were entitled to claim the right of private defence of property under section 92 of the Penal Code as the seizure was not at all justifiable in law and not merely "not strictly justifiable in law" within the meaning of the section.**

APPEAL from a conviction by the District Judge of Trincomalee.

H. V. Perera (with him *Sri Nissanka*), for accused, appellants.

D. S. Jayawickrema C.C., for Crown, respondent.

June 2, 1936. SOERTSZ A.J.—

The accused-appellants are twenty-one of the twenty-eight persons who were put upon their trial in the District Court of Trincomalee on an indictment containing eleven charges. On counts 1 to 6 they were charged with being members of an unlawful assembly armed with deadly weapons and with having caused grievous hurt and simple hurt to certain persons. Counts 7 to 11 were alternative charges against those of the accused who caused the grievous hurt and simple hurt complained of. The other accused were not involved in those charges as the charges were not framed on the basis of an unlawful assembly.

The trial Judge found the appellants guilty on counts 1, 2, 4, 5, and 6 and he sentenced the first accused-appellant to various terms of imprisonment on those counts aggregating to a period of eighteen months. The other appellants were sentenced to terms aggregating nine months' rigorous imprisonment.

On appeal, the facts were hardly contested but Counsel for the appellants contended that the appellants were entitled to be acquitted on the ground that the acts which constituted the offences alleged against them, were acts done in the exercise of the right of private defence.

In order to consider their defence, it is necessary to examine the facts that led up to the occurrences of this day. The accused men were fishermen who put into Trincomalee having sét out from Kottegoda and Gandara fishing villages on the Matara-Tangalla coast. They had come to Trincomalee to fish. When they reached Trincomalee, the Sub-Collector of Customs confronted them with a demand for their coastwise clearances. They had none to show, for although in the years 1933 and 1934, these fishermen came to Trincomalee with papers purporting to be "clearances" which they had obtained from the port of Galle to which they had repaired for the sole purpose of obtaining papers to show when they reached Trincomalee, this year "some village Hampden" had advised them that they were under no obligation to show clearances at Trincomalee. The Assistant Government Agent who is also Assistant Collector of Customs held several inquiries and ordered the seizure of the boats as a means of recovering the fines he had imposed. The accused men had taken time to pay their fines and as they failed to pay them, on this day, June 26, the Sub-Collector and some of his subordinates went down to the beach where the boats were lying, escorted by the Police. The Sub-Collector went up to the first accused's boat "to push it into the sea to bring it into the Back Bay Customs". When they "were about to push the boat, the first accused rushed to a boat took out a stick, and called out to the people "Why are you looking on, why don't you thrash these men?" Then the trouble began.

The learned Judge has accepted this account of the events on the day in question and, in my opinion, the charge in the first count of the indictment alleging an unlawful assembly is made out, for the men began to act in response to the first accused's summons to them "to thrash these men", and they were, therefore, acting together. But the defence carries the matter further. They say that even if it is assumed that these men were members of an assembly, their common object was not to do any of the things mentioned in section 138 of the Penal Code, but to protect their property in terms of section 90 (2) of the Penal Code. They say that the Assistant Collector of Customs had no power under the section under which he purported to act, namely, section 25 of Ordinance No. 17 of 1869, to impose the fines he did, because section 25 had no application to these boats. These boats had come admittedly, from Kottegoda and Gandara where, admittedly, it is not usual to grant "clearances". The defence, therefore, contends that the fines were imposed without jurisdiction, that the consequent seizure was illegal, and the attempted removal of the boats amounted to theft, or at least, mischief, and that acting as the accused men did. to defend their property, they are exculpated.

I will state at once that, in my opinion, the Assistant Collector had no authority under section 25 to impose the fines he did, once it is conceded that Gandara and Kottegoda are not ports and not places where it is usual to grant "clearances". It is true that for a year or two, these fishermen went to Galle, their nearest port, in order to put themselves in a position to comply with the demand for "clearances" which had recently begun to be made at Trincomalee. But they were under no obligation to do all they did.

The fines, then, were illegal and consequently the seizure made under section 17 A of the Ordinance was also illegal, and what was being attempted on this day under section 108 of the Ordinance was no less illegal. If section 90 of the Penal Code stood unqualified, the defence of the accused is entitled to succeed. But section 90 expressly enacts that the right of private defence is "subject to restrictions contained in section 92". Among these restrictions are the following :—

First.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done or attempted to be done by a public servant, acting in good faith, under colour of his office, though the act may not be *strictly justifiable* by law ;

Second.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or grievous hurt, if done or attempted to be done by the direction of a public servant, acting in good faith, under colour of his office, though the direction may not be strictly justifiable by law ;

. . . . . .

Fourth.—The right of private defence in no case extends to the inflicting of more harm than is necessary to inflict for the purpose of defence.

In this case, on the facts, it is impossible for the defence to contend that there was a reasonable apprehension of death or grievous hurt to these men as a result of what was being done or being attempted to be done by the Sub-Collector.

The only question left, then, under restrictions 1 and 2 is whether the accused are exculpated, on the ground that what the Sub-Collector was doing that day was something that was altogether illegal and that therefore, his case does not fall to be described as an act that was only 'not *strictly* justifiable by law'. The plea for the defence was that the act was not *at all* justifiable by law, and that these men were, therefore, entitled to defend their property, although there was no reasonable apprehension of death or grievous hurt.

This question is a very controversial one. My brother Maartensz J. in *Goonesekere v. Appuhamy*[1] cites a passage from Gour's commentary on sections 332, 353, and 99 of the Indian Penal Code. Section 99 of the Indian Code is identical with section 92 of our Code. The passage runs as follows :—"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.

[1] *37 N. L. R. 11.*

and there are others in which the absence of good faith is inferred from the want of legality, while there are those in which the most outrageous illegal acts are held to justify no assault ".

In that case, my brother adopted as a good working rule the proposition laid down by Gour that an accused is entitled to claim exemption under section 92 if—

A.—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.

I respectfully agree that is the correct view of section 92 ; that exemption is available where the act is wholly illegal, that it is not available where the act is not *strictly* justifiable.

In my opinion, in this case, although the Assistant Collector acted all along *in good faith*, the act of seizure was '*illegal*', not merely " not *strictly* justifiable ". In other words, it was altogether unjustifiable. Section 25 justifies a fine only when vessels arrive without a 'clearance' which it is usual to grant at the place or places from which the vessels have come.

I. therefore, hold that the accused were exempted by section 92 and are entitled to be acquitted if the matter stood there. But, it does not.

There is the further restriction which says : that " the right of private defence *in no case* extends to the inflicting of more harm than it is necessary for the purposes of self defence ".

I am clearly of opinion that it was not at all necessary for the accused to use a knife and clubs as they are proved to have done. Their convictions are, therefore, right and I affirm them.

But, in the circumstances of this case, I think the sentences imposed are much too severe. Some allowance must be made for ignorant folk like these men who had been rightly although, I must say, very indiscreetly, advised by a person in authority in their village that they were not liable to be asked for " clearances " and that they should resist the demand. Section 25 is quite explicit that " clearances " are due to be produced by vessels coming *only* from places where it is usual to grant " clearances ". The Assistant Collector admits that these vessels came from Kottegoda and Gandara where it is not usual to grant " clearances " but he appears to have been under the erroneous impression that in such a case, these men were bound to go to their next nearest port in order to obtain " clearance " to show at Trincomalee.

The fines imposed were, therefore, illegal and the attempted seizure was also illegal and must have given provocation to the accused. I, therefore, am of opinion that some concession should be made to them in the matter of sentence. They have been on remand at one stage of the case for about one month. They have had to face a long inquiry in the Police Court, and a long trial in the District Court. Their boats have been under seizure and they have suffered financially by not being able to ply their business for months. There is nothing against them before these incidents. I think the ends of justice will be served if the first accused is sentenced to two months' rigorous imprisonment on each

of the counts on which he has been convicted by the District Judge, the sentences to run concurrently, the twenty-third and twenty-fourth accused who caused the grievous hurt to Pachchimuttu Samy, also, to two months' rigorous imprisonment on each of those counts, sentences to run concurrently, and the other accused-appellants to one month's rigorous imprisonment on each of those counts, the sentences to run concurrently.

Affirmed.