1940

Present : **Moseley S.P.J.**

MEDIWAKE *v.* DE SILVA.

646-8—M. C. Matara, 31,531.

Criminal trespass—Failure to specify intent—Fatal irregularity—Right of private defence.

In a charge of criminal trespass failure to specify the offence which was intended to be committed is a material omission which cannot be cured under section 425 of the Criminal Procedure Code unless such offence was obvious from the evidence.

An act, which is justified as being within the limits of the right of private defence, cannot give rise to a right of private defence in turn.

Mendis v. Silva (1 C. W. R. 124) followed.

Wijeysinghe v. Carolis (1 C. W. R. 207) : and *Karthelis Hamy v. Francis (7 C. W. R. 184) distinguished.*

APPEAL from a conviction by the Magistrate of Matara.

J. E. M. Obeyesekere, for accused, appellants.

Nihal Gunasekera, for complainant-respondent.

Cur. adv. vult.

October 24, 1940. MOSELEY S.P.J.—

The appellants were charged with two others on seventeen counts, the first seven of which were based on the allegation that the accused were members of an unlawful assembly. The learned Magistrate was not satisfied that the allegation was proved and acquitted the accused on all counts dependent thereon. He proceeded to convict all the accused on counts 13 and 14 and the 3rd accused on count 15. The first three accused have appealed. Counts 13, 14 and 15 are as follows:—

"13. You are hereby charged, that you did within the jurisdiction of this Court at Fort, Matara, commit criminal trespass by entering the excise station with intent to commit an offence and thereby committed an offence punishable under section 433, Chap. 15.

14. At the same time and place aforesaid you, being the 1st, 2nd, 3rd and 4th accused did use criminal force on Excise Inspectors Swan and Redlich of Matara Excise Station on grave and sudden provocation and thereby committed an offence punishable under section 343, Chap. 15.

15. At the same time and place aforesaid you, being the 3rd accused, did voluntarily caused hurt to Excise Inspector Swan with a closed fist and thereby committed an offence punishable under section 314, Chap. 15."

The facts briefly are as follows:—A crowd had collected outside a house some thirty yards from the Excise Station. Excise Inspector Swan happened to pass on the way to the Station. Actuated no doubt by some creditable motive, although it would not appear to be his concern, he told the crowd to move on. The crowd appears to have resented the interference and followed him to the Station, where he was joined by Excise Inspector Redlich. Stones were thrown by the crowd generally,

some of which hit and caused some damage to the Station premises. The Excise party then drew their batons and tried without success to disperse the crowd. Inspector Swan, at the suggestion of Inspector Redlich, brought out the Station revolver and was proceeding to load it, when the three appellants and others grappled with him in an apparent attempt to disposses him of the revolver. Inspector Swan then threatened to shoot if the crowd did not disperse, whereupon after a little hesitation they dispersed.

The appeal of the 3rd accused against his conviction on count 15 was not pressed.

Count 13 charged the accused with committing criminal trespass " by entering the excise station with intent to commit an offence ". The offence which it is alleged that the accused intended to commit is not specified. In *Mendis v. Silva*[1] Shaw J. observed that the offence which the accused intended to commit was " not stated in either the conviction or the charge as it should be. Indeed it does not even appear from the Magistrate's judgment what the offence was that he thought the accused intended to commit . . . . " Those observations would appear to apply with equal force to the case before me.

Crown Counsel cited a case, S. C. No. 332—P. C. Tangalla, No. 13,461[2] in which it was held that an omission to specify the common object of an unlawful assembly is not material unless the accused was thereby misled. This view was followed in *Wijesinghe v. Carolis*[3], in which it appeared to Wood Renton C. J., that it was " obvious that the common object of the unlawful assembly relied on by the prosecution was to commit an assault, and that the accused was himself aware of the fact. No other common object is capable of being deduced from the evidence . . . . " Again, in *Karathelis Hami v. Francis*[4] de Sampayo J. observed that it was clear that the accused intended to intimidate or annoy the complainant, and he added " the Magistrate in his judgment finds it so. ".

These three last mentioned cases seem to me to be clearly distinguishable from the present case. Crown Counsel has submitted that the obvious intention of the appellants in entering the premises was to commit mischief *or* cause hurt. There is no evidence, from which intention might be inferred, that they did either. Indeed the principal witnesses for the prosecution seem to have thought that their intention was to disposses Inspector Swan of the revolver. In any case it does not seem to me that the intention was obvious, and the learned Magistrate has made no finding on the point. In my opinion, therefore, the omission to specify in the charge the offence intended to be committed is a material omission and one which cannot be cured under the provisions of section 425 of the Criminal Procedure Code.

The other ground of appeal is that the attempt to wrest the revolver from Inspector Swan does not amount to an act of criminal force. To come within the meaning of section 341 of the Penal Code the act must be " in order to the committing of any offence, or intending illegally by the

[1] *1 C. W. R. 124.*
[2] *Koch's Rep. 40.*
[3] *1 C. W. R. 207.*
[4] *7 C. W. R. 184.*

use of such force to cause, or knowing it to be likely that by the use of such force he will illegally cause injury, fear or annoyance to the person to whom the force is used ".

Counsel for the appellants contended that the appellants, in attempting to wrest the revolver from Inspector Swan, were acting in the exercise of the right of private defence. It is clear from the evidence of Swan and Redlich that the actual threat by the former to shoot was not made until after the appellants had tried to dispossess him of the revolver. Nevertheless there may have been reason on the part of the appellants to believe that the mere bringing out of the revolver was tantamount to a threat to use it. The question is, had the appellants any right of private defence?

It appears from the evidence that, while the incident had its origin in the well-meaning but interfering action of Inspector Swan, the actual aggressors were the crowd, of whom the appellants formed a part. When the Excise Station was attacked by the crowd throwing stones, the right of private defence on the part of Inspector Swan commenced. Crown Counsel referred me to a passage in *Gour's Penal Law of India (5th edition)*, where at page 362, paragraph 849, it is observed that "when an act is justified as being within the limits of the right of private defence, it could give rise to no right of private defence in return." It would be difficult to argue that an attack, such as was described by the Inspectors and was accepted by the Magistrate, would not reasonably cause apprehension that grievous hurt would be the consequence. The action of Inspector Swan in producing the revolver, although at that moment he may have had no intention of using it, seems to me, as it did to the Magistrate, to be justified and within the limits of the right of private defence, and could give rise to no right of private defence in return. The appellants must have known that their action was likely to cause fear, injury or annoyance to the Inspector. The convictions on count 14 are therefore affirmed, as is the conviction of the 3rd appellant on count 15.

The convictions of all three appellants on count 13 and the sentences imposed in respect thereof are set aside. The fines, if paid, will be refunded to the appellants.

Varied.