

1961

Present : Sansoni, J., and T. S. Fernando, J.

SIMON APPUHAMY *et al.*, Appellant, and
THE QUEEN, Respondent

S. C. 59-60—D. C. (Crim.) Kegalle, 2820

Explosives Act—Section 25—Inspector of explosives—Power to search a house for explosives—Legal position of constables who accompany the inspector—Penal Code, ss. 32, 92 (2), 323, 324—Police Ordinance, s. 68—Criminal Procedure Code, s. 32.

Although a Sub-Inspector of Police, in his capacity as an inspector of explosives, is entitled under section 25 of the Explosives Act to enter and search a house for explosives, neither that Act nor section 68 of the Police Ordinance authorises him to take police constables to assist him in his entry and search. The constables who so assist him would not be acting in the discharge of their duty as public servants within the meaning of section 323 or section 324 of the Penal Code. However, if the Sub-Inspector is attacked by occupants of the house, the constables are entitled to arrest them under the powers arising from section 32 of the Criminal Procedure Code.

APPEAL from a judgment of the District Court, Kegalle.

Colvin R. de Silva, with *K. Sivasubramaniam*, for the Accused-Appellants.

Shiva Pasupati, Crown Counsel, for the Crown.

Cur. adv. vult.

November 2, 1961. SANSONI, J.—

The two accused in this case have been convicted of voluntarily causing grievous hurt to Sub-Inspector Fernando, a public servant, while in the discharge of his duty, an offence punishable under section 324 read with section 32 of the Penal Code. They have also been convicted of voluntarily causing hurt to the Sub-Inspector and to police constables Gajanayake, Rajapakse and Peter while in the discharge of their duty as public servants, offences punishable under section 323 read with section 32 of the Penal Code.

The case for the prosecution was that at 9.25 a.m. on the day in question one Noris Singho informed S. I. Fernando that he had a short while previously been to the boutique of the 1st accused, where he heard the 1st accused asking another man to take away some hand bombs. The information, which was recorded by S. I. Fernando, was also to the effect that if the Police were to go there immediately the bombs could be

detected. Accordingly S. I. Fernando went to the 1st accused's boutique along with police constables Gajanayake, Rajapakse and Peter in a jeep, reaching the boutique at 9.45 a.m. The 1st accused was said to be sitting at a counter when Fernando went inside and explained the purpose of his visit and the information he had received. According to Fernando, the 1st accused consented to his searching the boutique, and he accordingly ordered the three constables to search it, while Fernando stood near the counter.

Fernando said that the 1st accused then stretched his arm and tried to take a cardboard box which was on the counter; he held the 1st accused's hand to prevent him touching the box. At that stage he was hit on his head by the 2nd accused, who is a son of the 1st accused, with a club. The medical evidence showed that this blow caused a fracture. Fernando lost his grip on the 1st accused as a result of the blow. Gajanayake and Rajapakse came up to the 2nd accused and tried to disarm him. The 1st accused then hit Gajanayake on his head, and when Fernando seized the 1st accused the latter bit him on his forearms. Peter then struck the 1st accused who bit Peter and hit him with a club, while the 2nd accused hit Rajapakse with a club. The accused are said to have run away at this stage and the Police party returned to Alawwa Police Station, with the cardboard box. It had four hand-made bombs in it. The medical evidence shows that the three constables and both accused had also received injuries.

The 1st accused in giving evidence said that he was standing outside the entrance to the boutique when the Sub-Inspector came with some police constables and tried to enter the boutique; when the Sub-Inspector informed him that he wanted to search the boutique, he asked him whether he had a search warrant. The Sub-Inspector then seized him, and the constables assaulted him. While they were assaulting him he cried out, and his son, the 2nd accused, came up with a club and hit the constables. He denied that he had any explosives in his boutique, or that the police party entered his boutique, or took anything away from it. He attributed the visit of the police party that day to an earlier complaint that he had made against Peter, that he had taken bribes. He said that he had given evidence before the A. S. P. at an inquiry held into that petition.

Mr. de Silva urged that the prosecution story was unsatisfactory, and that the evidence of certain prosecution witnesses should not have been accepted. In particular he referred to the evidence of Rajapakse who contradicted the other witnesses when giving a description of the cardboard box. He also pointed out that Peter had contradicted the evidence he gave at the magisterial inquiry in regard to the petition sent against him by the accused. The learned Magistrate has considered

these and other matters, which seem to have been pointed out to him at the trial, and he has chosen to believe the prosecution version as to what happened on that morning. I do not think we should upset the findings of the learned Magistrate who was impressed, in particular, by the evidence of Sub-Inspector Fernando.

It is clear that Fernando was entitled to enter, inspect, and search this boutique under the provisions of section 25 of the Explosives Act, No. 21 of 1956. He is deemed to be an Inspector of explosives for the purposes of the Act and he had the right to do what he did, as he had reason to believe explosives were to be found there. The accused therefore had no right to obstruct or attack him when he entered the boutique. The 2nd accused who struck him on his head and caused the grievous injury is therefore guilty under count (1), while the 1st accused is guilty under count (2). It is not possible to find both accused guilty on each of these counts because the evidence does not show that they were acting with a common intention, but rather that each was acting independently when he attacked the Sub-Inspector.

The difficult question arises as to whether Fernando was entitled to take the three constables with him into the boutique, and whether they were entitled to search the boutique. No doubt they were acting in order to assist Fernando, and the indictment alleges that they were public servants acting in the discharge of their duty as public servants in assisting Sub-Inspector Fernando in the entry, inspection and search of the boutique. But the Explosives Act does not authorise an Inspector of explosives to take others to assist him in his entry and search. We were not referred to any other Act or any decided case according to which Fernando could have lawfully called upon these constables to enter the boutique and search it with him. Section 68 of the Police Ordinance Cap. 53 authorises any police officer without a warrant to enter and inspect "all premises of persons suspected of receiving stolen property, and any locality, vessel, boat or conveyance in any part whereof he shall have just cause to believe that crime has been or is about to be committed". The significant change of wording, which draws a distinction between "locality" and "premises", seems to me to deny a police officer the right to enter and inspect houses where a crime, outside the categories earlier specified, is to be investigated. It would seem, therefore, that the constables were not acting in the discharge of their duty as public servants.

The question remains, however, whether the accused were entitled to cause hurt to the three constables who were obviously assisting Fernando and acting under his directions. I have no doubt that they knew that the constables were acting under Fernando. Had they the

right of private defence against the acts of the constables which were being done by the direction of S. I. Fernando? Under section 92 (2) of the Penal Code, 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 the direction of a public servant acting in good faith under cover of his office, though that direction may not be strictly justifiable by law. The accused obviously knew that the constables were acting by the direction of Fernando, within the meaning of explanation (2) to section 92.

Even if some doubt arises as to whether the accused did or did not reasonably apprehend grievous hurt to themselves at the hands of the constables who were armed with batons, any question of apprehending any kind of hurt at the hands of the constables could have arisen only after the 2nd accused had unlawfully hit S. I. Fernando on the head with a club. At that stage the constables were lawfully entitled to come, as they did, to the rescue of their Inspector and to protect him from further attack. When the 1st accused attacked P. C. Gajanayake at that stage, the constables were entitled to arrest both accused under the powers arising from section 32 of the Criminal Procedure Code. The constables were at that stage acting in the exercise of the right of private defence, and it is not open to either accused to claim that he was entitled by law to attack or resist persons lawfully exercising such a right.

I am therefore of opinion that the convictions on the charges of causing hurt to the constables were justified. As I have held already that the accused were acting independently of each other and not in furtherance of a common intention, only the 1st accused can be dealt with for the hurt caused to Gajanayake and Peter, and only the 2nd accused can be dealt with for the hurt caused to Rajapakse. The convictions on the 3rd, 4th and 5th counts of the indictments must be altered to convictions of the offence of voluntarily causing hurt punishable under section 314 of the Penal Code.

Accordingly, the 1st accused will stand convicted on count (2) of the indictment, and on counts (3) and (5), with the charge in each of the latter counts altered to one of voluntarily causing hurt. The 2nd accused will stand convicted on count (1) of the indictment and on count (4), with the charge on the latter count altered also to one of voluntarily causing hurt. The sentences imposed by the trial Judge on the several counts will, however, stand.

T. S. FERNANDO, J.—I agree.

Charges on certain counts altered.