

[IN THE COURT OF CRIMINAL APPEAL]

1961 Present : Basnayake, C.J. (President), de Silva, J., and Tambiah, J.

THE QUEEN *v.* SUNDARAM

*Appeal 226 of 1960, with Application 249*

*S. C. 7—M. C. Nawalapitiya, 6,583*

*Charge of murder—Plea of accident—Existence of circumstances showing exercise of right of private defence—Summing-up—Misdirection—Penal Code, ss. 73, 89—Criminal Procedure Code, s. 245.*

Where, in a trial for murder, the accused expressly pleads the general exception of accident (section 73 of Penal Code) but there are circumstances which make it necessary for the jury to consider the general exception of the right of private defence (section 89 of the Penal Code), the trial Judge must not withdraw from the jury the consideration of the exception of private defence.

APPEAL against a conviction in a trial before the Supreme Court.

*A. H. C. de Silva, Q.C.*, with *A. Deva Rajah* and *F. X. J. Rasanayagam* (Assigned), for Accused-Appellant.

*H. B. White*, Crown Counsel, for Attorney-General.

March 6, 1961. BASNAYAKE, C.J.—

The accused has been convicted of the offence of murder. Learned counsel for the appellant has urged that the existence of circumstances which brought the accused's case within the general exception of section 89

of the Penal Code were withdrawn from the jury by the learned trial Judge when he directed them as follows :—

“ Now, you were told by defending Counsel about the right of private defence that a person has. He began his speech with the right of private defence and he ended it by referring to the right of private defence. Now on the evidence in this case, gentlemen, I really do not see what the right of private defence has to do with the matter. You see a person has the right of defending himself and to defend other people when there is any attack threatened or any injury threatened or attempted and you can even cause death if there is a reasonable fear that death or grievous hurt would be the result of that attack. Nobody disputes those propositions. But for the right of private defence to arise at a particular point of time, and I am now only dealing with the relevant time in this case, that is at the time of the firing of the first shot, the question is when that first shot went off—whether it was deliberately or accidentally is for you to decide—when that first shot was fired and struck this man Sandanam what was the accused’s position ? Of course, his position in evidence is that it went off accidentally. Well then if it was accidental the right of private defence does not come in at all. The defence then is accident, not private defence. Private defence only comes in if the position is that he fired deliberately, if he fired deliberately. But then private defence only comes in not only if the shot is fired deliberately but if the shot was fired at somebody who was attacking him, or if somebody else was attacking him at that time and he fired at the attacker and where the attacker or somebody else got injured as a result of that firing. On the evidence before you no such position arises. Neither Mariammal nor Rasalingam says that when the accused fired anybody was attacking him or that there was anybody near him from whom he could have feared injury. So certainly on the prosecution evidence there is no question of private defence. Then on the accused’s evidence he says : ‘ I never fired that first shot deliberately, it went off accidentally ’. So then there is no right of private defence arising in regard to that first shot and that is the only shot we are concerned with in this case because that is the shot which, whether you take the prosecution evidence or the accused’s evidence, caused the fatal injury—not the other shots. Accused says : ‘ I fired the other shots ; I fired them deliberately, but I fired those in such a way that nobody was anywhere in the direction in which I fired ’. And he is not charged with regard to those shots at all. So we really do not care what was happening when he fired those shots and that is why I think it is important for you to ask yourselves : Then what were the circumstances under which that first shot came to be fired ? There is no question of a private defence or shooting in exercise of the right of private defence so far as that first shot was concerned—neither on the prosecution nor on the defence evidence. And the only point you have to decide is : was the first shot fired deliberately or not ? ”

Under the law (section 245 Criminal Procedure Code) it is the duty of the jury—

(a) to decide which view of the facts is true and then to return the verdict which under such view ought according to the direction of the Judge to be returned,

(b) to decide all questions which according to law are to be deemed questions of fact.

Although in the instant case the accused expressly pleaded the general exception of accident (section 73 Penal Code) there were circumstances which made it necessary for the jury to consider the general exception of the right of private defence (section 89 Penal Code). The fact that an accused person chooses to plead specifically one of the general exceptions in the Penal Code does not absolve the jury from the duty of considering whether the facts and circumstances proved bring the accused within any of the other general or special exceptions in the Penal Code. The version of the accused is that on the day in question a hostile crowd armed with batons and sticks converged on the lines he occupied and attacked his line room with a rain of stones, in consequence of which his roof was damaged and the frontside planks of his room were broken. His wife and children were also injured in the attack. He says that when he saw his wife injured by the falling stones he loaded his gun and came out. Although he stated that in the first encounter with the members of the mob the gun went off accidentally it would appear from the sum total of his evidence that there were sufficient facts and circumstances narrated by him which merited a consideration of the exception of the exercise of the right of private defence in relation to those facts and circumstances. The jury were wrongly precluded from doing so by the direction of the Judge.

We therefore quash the conviction and direct a new trial.

*Case sent back for a new trial.*

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