[IN THE COURT OF CRIMINAL APPEAL]

1963 *Present:* Basnayake, C.J. (President), Abeyesundere, J., and G. P. A. Silva, J.

THE QUEEN *v.* J. A. A. BRAMPY APPUHAMY

Appeal No. 137 of 1962, with Application No. 417

S. C. 14—M. C. Kandy, 26232

Right of private defence of property—Question whether it was exceeded—Question of fact for jury to decide—Non-direction—Misdirection—Penal Code, ss. 90, 96, 97.

The question whether on the facts of a given case an accused person has exceeded his right of private defence of property is a question of fact for the decision of the jury.

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

F. W. Obeyesekere, with *Hanan Ismail* and *K. Viknarajah* (assigned), for Accused-Appellant.

E. R. de Fonseka, Crown Counsel, for Attorney-General.

February 13, 1963. BASNAYAKE, C.J.—

The accused-appellant was arraigned on an indictment containing two counts. On the first count he was charged with the offence of murder by causing the death of Ranpati Arachchige Wimalasena, and on the second count with the offence of attempted murder by shooting Victor Hettiarachchi with a gun. The jury by their unanimous verdict found the appellant guilty of culpable homicide not amounting to murder on the first count and guilty of attempting to commit culpable homicide not amounting to murder on the second count. The learned Judge sentenced the appellant to two years' rigorous imprisonment on the first count and one year's rigorous imprisonment on the second count, the sentences to run concurrently.

Shortly the facts are as follows :—It would appear that on the day of the shooting the two injured persons along with some others after bathing in the river proceeded to Rajawatte Estate of which the accused was the watcher and plucked young coconuts from a tree standing there and they were in the process of drinking them when Wimalasena and Victor Hettiarachchi were injured by a gun-shot. Wimalasena died in consequence of the injury.

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The evidence for the prosecution consists mainly of the evidence of witness Hettiarachchi and Punchi Banda. Witness Hettiarachchi says that when he looked around he saw this accused coming down with a gun in hand. Witness Punchi Banda says that he met this accused about 12 or 12.30 p.m. that day with a gun, and that shortly after that he met witness Hettiarachchi coming from the direction of the estate pressing a piece of cloth to his chest. On being asked what had happened to him he said that the Rajawatte Estate watcher had shot him. Learned counsel for the appellant sought to attack the evidence of identity of the accused, but we are unable to uphold that submission as the jury appears to have believed that evidence.

The only question that arises for consideration in this appeal is whether the jury have been properly directed on the right of private defence of property, It has been submitted that the following direction of the learned Judge is wrong in law :—

> "If you are satisfied beyond reasonable doubt that he fired the shot, then the next question is—what offence did he commit, and on the view that I take of this case, I am going to tell you that if you are satisfied you are convinced beyond reasonable doubt that the accused fired the shot, then the only possible verdict on the first count is guilty of culpable homicide not amounting to murder, and on the second count guilty of attempted culpable homicide not amounting to murder, and that is a direction of law that I mean to give you, and that would be a direction that I will give you when I explain to you why I give that direction."

In the course of his explaining the direction, the learned Judge addressed the jury as follows :—

> "There is no question in this case, that on the law the accused has exceeded the right of private defence of property. What then is the position ? If he had not exercised the right of private defence, then you might have well to consider whether this was not a case of murder. Because, when a man uses a deadly weapon like a 12-bore gun loaded with S. G. slugs, such as you can see here, quite enough to kill a man, then you might well think that a man who acts like that and fires at persons unawares, was intending to cause their deaths. But here you have this circumstance that the accused was a watcher. He had detected a theft and he thought wrongly as it turns out to be that he was entitled to fire. Under those circumstances the law says that what is otherwise murder is not murder but is culpable homicide not amounting to murder, where you exceed the right of private defence of property without premeditation. To that extent—I am now addressing you gentlemen, remember, on the assumption that you are satisfied that it was the accused who fired—if it was the accused who fired then he has the benefit of the fact that he was the watcher and that he saw these four young thieves and fired, wrongly thinking, but no doubt bona fide, that he was entitled to fire at them. Then, the offence is

not murder but culpable homicide not amounting to murder. And, for the same reason the second count, if you are satisfied beyond reasonable doubt that it was the accused who fired, he would be guilty of not attempted murder but attempted culpable homicide not amounting to murder."

Finally, the learned Judge directed :

"If that burden has been discharged by the Crown, then you will find the accused guilty of culpable homicide not amounting to murder on the first count and attempted culpable homicide not amounting to murder on the second count."

The intention or knowledge of a person are questions of fact which are questions for the jury to decide. Similarly whether on the facts of a given case an accused person in the exercise in good faith of the right of property has exceeded the power given to him by law is a question of fact for the decision of the jury. The learned Judge's directions amount to a withdrawal of those questions of fact from the jury. The right of private defence of property is stated in section 90 of the Penal Code as follows :—

"Every person has a right, subject to the restrictions contained in section 92, to defend the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass."

Section 96 of the Penal Code states the limits within which that right may be exercised. Subsection fourthly of that section reads :

"Theft, mischief, or house-trespass under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised."

Section 97 states :

"If the offence the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 92, to the voluntary causing to the wrong-doer of any harm other than death."

The jury were not given a direction on this aspect of the law. They returned a verdict in terms of the learned Judge's direction that if they were satisfied beyond reasonable doubt that it was the appellant who shot, then there was no other verdict possible except the verdict of culpable homicide not amounting to murder. As stated above the direction

given by the learned Judge was wrong in that he usurped the functions of the jury in directing them on questions of fact without stating that those were questions which they had to decide. His omission to give the jury proper directions on the law of defence of private property did not give the jury an opportunity of examining the facts in the light of the law. In our opinion the conviction should be quashed on the ground of non-direction and mis-direction. The next question is whether there should be a retrial. It appears from the typescript that there had been a previous abortive trial which resulted in a four to three verdict. In our view, the appellant should not be subjected to the expense and jeopardy of a third trial especially as this offence was committed as far back as 1961.

We accordingly quash the conviction and direct that a judgment of acquittal be entered.

Accused acquitted.