1949 [COURT OF CRIMINAL APPEAL]

Present : **Windham J. (President), Basnayake J. and Gratiaen J.**

THE KING *v.* WANNAKU TISSAHAMY

Appeal No. 53 of 1949 with Application No. 146

S. C. 25—M. C. Badulla, 12,571

Court of Criminal Appeal—Private defence against act of public servant—Scope of section 92 (1) of Penal Code—Summing up—Criminal Procedure Code, s. 23—Penal Code, ss. 89, 90, 92 (1), 93.

An accused person is not entitled to plead the right of private defence against an act of a public servant which caused him reasonable apprehension of death or grievous hurt if the act of the public servant did not constitute any offence and was justified in law. In such a case there is no necessity for the presiding Judge to make any reference to section 92 (1) of the Penal Code in his summing-up.

APPEAL, with leave to appeal, against a conviction in a trial before a Judge and Jury.

C. E. Jayewardene, with *G. F. Sethukavalar*, for accused appellant.

R. R. Crossette-Thambiah, Solicitor-General, with *Douglas Jansze, Crown Counsel*, for Attorney-General.

Cur. adv. vult.

October 20, 1949. WINDHAM J.—

The appellant was convicted on 14th September, 1949, at the Kandy Assizes, of attempted murder, and sentenced to 18 months' rigorous imprisonment. The charge was that the appellant, on 6th December, 1932, shot and injured Police Constable H. D. S. Appuhamy with a gun in circumstances amounting to attempted murder. The appellant escaped arrest and since the commission of the offence he appears to have lived in the jungle in the Veddah country and it was only upon his giving himself up some seventeen years later that he was charged.

The story of the prosecution witnesses, Police Constable Appuhamy (the injured man) and Sub-Inspector Dissanayake established that the accused was reasonably suspected of having committed a cognizable offence, namely murder, and that police search had been made for him. On the day of the incident, a police party went in search of him, among whom were the witnesses police constable Appuhamy, who carried a cartridge gun, and sergeant (later sub-inspector) Dissanayake, who carried a rifle. They found the accused and his son in a chena

Constable Appuhamy approached him. What then happened is related by Appuhamy in the following words :—" On hearing the rustling of dried Indian corn leaves the accused looked in my direction. At that time he was about 25 to 30 yards away from me. At the time accused looked at me his son was close by him. When they saw me both of them took to their heels and ran down the chena. I asked them to stop and gave chase and while running I fired one shot in the air saying ' Don't run. If you run I will shoot '. The accused and his son ran in two different directions and I chased after this accused. I do not know in which direction his son ran. I watched this accused who got down a slope of that chena, turn round and pointing a gun at me he squatted near a 'kandura '—stream. Accused had the gun even when he was plucking Indian corn. I thought accused would shoot at me and therefore I took cover behind a tree close by. I did not see Police Sergeant Dissanayake at that time. I took cover and could not see accused but accused was also there. I was frightened to advance and in order to make him fire I spread out my rain-coat which I was wearing to invite the accused to shoot. I waited a while but accused did not discharge his gun and I then advanced. Accused then fired. *Q.* Did you see who fired ? . . . I did not see accused fire, but this accused got up from where this shot came and took the gun and ran away. I got the shot and ran a short distance and collapsed ".

Sub-Inspector Dissanayake's version of the occurrence was as follows :—" We entered the chena and there were some dogs near this accused and the other person who was there with the accused. As we scaled over the fence we heard the dogs barking and this accused and the young man who was by the accused looked and the other man ran away. I do not know where that man ran. Then I saw this accused running and getting into a ditch and we chased and Appuhamy took cover behind a tree close by and I took cover behind a bush. I then heard a shot fired from the direction where accused was hiding. I yet kept silent. Then P. C. Appuhamy fired one shot with his gun. After that another shot was fired from the direction where this accused was hiding and that shot struck Constable Appuhamy who fell and was seriously injured. Thereafter this accused got out of his hiding place and started running ".

The accused made an unsworn statement from the dock in which he stated that—" We fired and the other party fired. Thereafter we ran into the jungle. I cannot say whether any one was injured and if any one was injured, how many were injured ". Later he stated that his son received a gun-shot injury.

The jury, accepting the evidence of two police witnesses, brought in a verdict of attempted murder. Counsel for the accused relied on the defence that the accused fired at police constable Appuhamy in exercise of the right of private defence.

Two points have been argued in appeal. The second point, which it will be convenient to dispose of first, was that the evidence was insufficient to show that constable Appuhamy was wearing police uniform at the time of the shooting, and that with regard to Sub-Inspector Dissanayake, while he was admittedly wearing police uniform, his evidence that the accused looked at him, thereby becoming aware that at least

one of his pursuers was a member of the police force, ought not to have been accepted, in view of certain proved discrepancies in Dissanayake's evidence. It is not, however, necessary to consider what the legal position would have been had the accused been unaware that his pursuers, or any of them, were police officers in lawful exercise of their duty, for we consider that there was sufficient evidence, direct and circumstantial, to enable the jury to conclude that the accused must have known, or had reason to believe, that the party in pursuit of him was a police party. In these circumstances the "explanations", given at the end of section 92 in the Penal Code, would not apply so as to preserve his right of private defence against them.

The other point argued before us raises a question, which to our minds admits of no serious doubt, regarding the scope of section 92 (1) of the Penal Code. Section 92 (1) reads as follows:—"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 a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law". It is contended that under this section an accused person is entitled to plead the right of private defence against an act of a public servant which causes him reasonable apprehension of death or grievous hurt, even where that act did not itself constitute an "offence". Applying this contention to the facts of the present case it is argued that, even if the police party, in order to prevent the accused from evading arrest, would have been justified if necessary in causing him grievous hurt or even killing him, and even if therefore their acts did not constitute any offence and their threats to shoot were not threats to commit any offence, nevertheless the accused was entitled to fire at them in self-defence because their acts and their threats, whether justified or not, did in fact put the accused in a reasonable apprehension of death or grievous hurt.

This in our view is a misreading of section 92 (1). That section merely states that in certain circumstances an accused, who but for the section might have pleaded the right of self-defence, shall not be entitled to do so. It does not itself confer any right of private defence, nor does it enlarge the right of private defence which is conferred by other sections in the Penal Code. The section which allows an accused to plead the right is section 89, and the sections which confer the right of private defence of the body are sections 90, which does so in general terms, and section 93, which sets out the circumstances where the right may extend to the causing of death. Both sections 90 and 93 clearly lay down that the act occasioning the exercise of the right of private defence must be an "offence". Nothing in the purely negative section 92 takes away from this positive requirement of sections 90 and 93. Section 93 requires that the act must not only be an assault causing reasonable apprehension of death or grievous hurt, but must itself have constituted an offence.

Accordingly in our view the learned trial Judge was right in pointing out to the jury that if what the police party did was not an offence, then the accused (who on the evidence must have known that they were a police party attempting to arrest him) could not avail himself of the right of private defence. Nor was there any necessity for the learned

Judge to make any reference to section 92 (1), whose negative provisions were inapplicable in the present case, where the acts and threats of the police did cause apprehension of death or grievous hurt. Regarding the question whether the police were themselves committing any offence the learned trial Judge rightly referred to the evidence that the accused was reasonably suspected of having committed a murder, to the evidence that he was evading arrest and that the police were endeavouring to arrest him, and to the provisions of section 23 of the Criminal Procedure Code, whereunder in such circumstances the police, in effecting the arrest, would be justified if necessary in going even so far as to cause the death of the accused. In these circumstances it was clear that the police were committing no offence in shooting or threatening to shoot the accused (who was armed), after warning him, and that accordingly the accused was not entitled to plead the right of private defence.

For these reasons we would dismiss the application and the appeal.

Application and appeal dismissed.

1949 *Present :* **Gunasekara J.**

WICKREMEWARDENE *et al.*, Appellants, *and* ABEYESINGHE (P. S. 644), Respondent

S. C. 920-921—M. C. Nuwara Eliya, 4,149

Unlawful possession of tea leaf—Common possession in motor car—Conscious control of one person only—Inference of guilt—Protection of Produce Ordinance (Cap. 28), section 4.

Where property is found upon premises of which several persons are in common occupation, it cannot be said to be in the possession of any one of them in particular, unless there are facts pointing to the property being in the conscious control of that person.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

H. V. Perera, K.C., with *Kingsley Herat*, for accused appellants.

A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.