1946 *Present :* **Jayetileke J.**

SINNALEBBE *et al.*, Appellants, *and* THE POLICE, Respondent.

633–634—M. C. Kalmunai, 1,581.

Private defence—Wrongful arrest by public servant—Arrest wholly illegal—Arrested person's right of private defence—Penal Code, s. 92 (1).

Section 92 (1) of the Penal Code does not deprive a person of the right of private defence against an act done by a public servant if the act of the public servant is wholly illegal.

Goonesekere v. Appuhamy (1935) 37 N. L. R. 11 and *The King v. Simon Appu (1936) 38 N. L. R. 240*, followed.

APPEAL against two convictions from the Magistrate's Court, Batticaloa.

R. L. Pereira, K.C. (with him *C. T. Olegasegarem*), for the accused, appellants.

V. T. Thamotheram, C.C., for the Attorney-General.

Cur. adv. vult.

July 9, 1946. JAYETILEKE J.—

On the night of September 30, 1945, the accused were transporting some timber in six carts when they were stopped by two Forest Guards and questioned whether they had a permit. The 1st accused produced the permit P1 which is written in Sinhalese. The Forest Guards could not read the permit, and in order to get it read by the headman, they requested the accused to turn the carts and go with them to the headman's house. After going some distance the accused refused to go further. The Forest Guards insisted on their going, and this led to a quarrel in the course of which the 2nd accused struck one of them on the head with a club which caused a lacerated scalp deep wound. The medical evidence shows that the injury was non-grievous. Through fear, one of the Forest Guards fired a gun, which he had with him, into the air, whereupon, the 1st accused snatched the gun out of his hands and ran away. The 1st accused was convicted of robbery of the gun and sentenced to six months' rigorous imprisonment, and of voluntarily causing hurt and sentenced to three months' rigorous imprisonment, the sentences to run concurrently. The second accused was convicted of voluntarily causing hurt and sentenced to six months' rigorous imprisonment. On appeal it was urged that the refusal of the Forest Guards to allow the accused to proceed on their journey amounted to an arrest and that, in the absence of a warrant, the arrest was wholly illegal. At the trial the validity of the permit P1 was not questioned by the prosecution. Section 27 of the Forest Ordinance (Chapter 311) empowers a Forest Officer to stop and examine any timber during transit and to detain it if it is, in his opinion, being removed contrary to the provision of the Ordinance, and to deal with it as provided in Chapter VII. Sections

37 and 38, which are in Chapter VII., provide that a Forest Officer may seize any timber when he has reason to believe that a forest offence has been committed, and that, when he seizes any timber, he should place a mark on it indicating that it has been seized, and make a report of the circumstances to the Government Agent. The evidence in this case does not show that the Forest Guards exercised the powers conferred on them by sections 27, 37 and 38. On the contrary, it shows that they wanted to take the accused and the timber to the Village Headman's house in order to decide whether they should exercise these powers. There is nothing in the Ordinance which empowers a Forest Guard to stop a person who is transporting timber on a permit and take him several miles out of his way in order to get the permit read. Section 48 (1) gives a Forest Officer the right to arrest without a warrant any person reasonably suspected of having been concerned in any forest offence punishable with imprisonment for one month or upwards, only if such person refuses to give his name and residence or gives a name and residence which there is reason to believe to be false or if there is reason to believe that he will abscond. The Forest Guards had no warrant to arrest the accused and there is no evidence that they asked the accused for their names and residences or that they had reason to believe that they would abscond. In my opinion the detention of the timber and the arrest of the accused were illegal. Learned Crown Counsel sought to support the convictions under section 92 (1) of the Penal Code which reads :

> There is no right of private defence against an act which does not reasonably cause the apprehension of death or 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 is not strictly justifiable in law.

In *Goonesekere v. Appuhamy*[1] and *The King v. Simon Appu*[2] it was held that the exception was available unless the act was wholly illegal.

I think that the accused were exempted by section 92 and that they are entitled to be acquitted on count 2. So far as the conviction of the 1st accused on count 1 is concerned I see no reason to interfere with it. But in the circumstances of this case, I think that the sentence imposed on the first accused is too severe. Mr. Pereira suggested that the 1st accused snatched the gun from the hands of the guard and ran away through fear that he would be shot. There seems to be some force in that suggestion but there is no evidence to support it. If that is really what happened the 1st accused should have gone into the witness box and said so and should also have returned the gun. I think the ends of justice will be served if the 1st accused is sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 100 on count 1. If the fine is not paid he will suffer rigorous imprisonment for a further period of one month. The conviction and sentence on count 2 are set aside.

Appeal of 1st accused partly allowed.
Appeal of 2nd accused allowed.

[1] *(1935) 37 N. L. R. 11.*

[2] *(1936) 38 N. L. R. 240.*