

[IN THE COURT OF CRIMINAL APPEAL]

1962 Present: Basnayake, C.J. (President), Herat, J., and
G. P. A. Silva, J.

THE QUEEN *v.* A. O. RODRIGO

APPEAL No. 95 OF 1962, WITH APPLICATION No. 104

*S. C. 299—M. C. Colombo, 47,227/B**Right of private defence—Misdirection—Penal Code, s. 92 (3).*

Section 92 (3) of the Penal Code which provides that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities" does not apply to a case where a person is set upon by his assailant and there is imminent danger of death or grievous hurt, but to a case where the attack is known beforehand and the time is sufficient to have recourse to the protection of the public authorities.

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

M. M. Kumarakulasingham, with *J. V. C. Nathaniel* (assigned), for Accused-Appellant.

T. A. de S. Wijesundera, Crown Counsel, for Attorney-General.

October 31, 1962. BASNAYAKE, C.J.—

The appellant was indicted with the offence of murder of Appu Arachchige Edmond Perera *alias* Lasan Perera. The jury returned a unanimous verdict of guilty and he was sentenced to death.

The deceased and the appellant were neighbours and the houses in which they lived were on either side of the same road and opposite each other. The appellant lived with his father. There appears to have been displeasure between them over the killing of a fowl belonging to the deceased by the appellant's father. On the day on which the deceased was fatally injured his son, Pearl Kumar, a boy of 13 years was engaged in his studies when he heard a noise in the front of his garden. He rushed in that direction with a bottle lamp accompanied by his younger brother and saw the appellant dealing repeated blows on the deceased. As the neighbours rushed to the scene the appellant went away. There is no other evidence for the prosecution as to the circumstances in which the deceased met with his death.

It is common ground that the appellant tended his father's bull and was in the habit of going to cut grass for it every evening. On the day in question the appellant states that he was on his way home with grass in a gunny bag on his shoulder when the deceased who appeared to have taken liquor came towards him with a knife in hand saying, "You have killed a fowl belonging to us. I will stab you with this knife and kill you." The appellant says that he dropped the bag of grass and pulled out a stick from a fence and struck the deceased. The deceased rushed into his garden abusing him. The spot at which this incident took place was closer to the deceased's house than the appellant's. The appellant denied that he followed the deceased into his garden and struck him further blows. The appellant's version is the only evidence as to the events that preceded the attack. The main difference between the version of the prosecution and the version of the defence is that according to the former the deceased was struck in his own garden and according to the latter he was struck on the road.

The learned Commissioner directed the jury on the exceptions of private defence and grave and sudden provocation. Learned counsel for the appellant complains that the direction on the exception of private defence is wrong in law. He particularly draws our attention to two passages in the summing-up which are as follows :—

"The learned counsel for the defence read out a passage to you from Ratanlal where a person attacked while doing a lawful act is entitled to stand his ground and defend himself and the law does not intend that he should run away to have recourse to the protection of the public authorities. That I notice comes under the portion relating to the right of private defence of property. I have examined one of the cases referred to in that passage and it relates to this : the law does not require that when a person is being wrongfully deprived of property of which he is in possession he should leave the thief alone and run to the police at a distance. You see now, supposing somebody is removing your money or removing something from your house, then of course you are entitled to act in the exercise of the right of private defence and prevent the man from depriving you of the property. Now, there is this passage also in it : 'No man has the right to take the law into his own hands for the protection of his person or property if there is reasonable opportunity of redress or recourse to the public authorities. The right of self-help when it causes or is likely to cause damage to the person or the property of another person must be restricted and recourse to the public authorities must be insisted on. If a person prefers to use force in order to protect his property when he could for the protection of such property easily have recourse to the public authorities, his use of force is made punishable. The natural tendency of the law of all civilized states is to restrict within constantly narrowing limits the right of self-help and it is certain that no other principle can be safely applied to a country like India.'"

He proceeded to address the jury further—

“ Even if this man was not fully drunk, a man of 45 or 55 years according to the postmortem report, before he could advance that distance, was it not possible for the accused to have turned back and run ? If he could have done that, and if he could have had recourse to the public authorities for protection, then did he have the right to act in the manner he says he acted ? Then the question would also arise, if the man was 12 feet away, was there reasonable apprehension that he would be killed or grievous hurt would be caused to him ? I have not referred to the evidence of both Pearl Kumar and Johanis regarding the accused being seen going in the direction of the house about 5 p.m. by Juwanis about quarter of a mile away with a gunny bag of grass and by Pearl Kumar that the accused actually turned towards his compound with a bull.”

The direction in the words underlined is wrong in law. According to appellant's version, there was no legal obligation on him to have run away. He was justified in law in holding his ground and defending his body. Section 92 (3) of the Penal Code does not apply to a case where a person is set upon by his assailant and there is imminent danger of death or grievous hurt, but to a case where the attack is known beforehand and the time is sufficient to have recourse to the protection of the public authorities. We are unable to hold that the wrong directions of law contained in the passage underlined did not lead the jury to reject the appellant's version. There was been a wrong decision of law and the conviction must be quashed.

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

Accused acquitted.
