

1929

Present : Akbar J.

TISSERA v. EDWIN.

52—P. C. Chilaw, 25,775.

Right of private defence—Shooting a thief at night—Theft of coconuts—Assault by thief—Penal Code, s. 92 (4).

Where the accused, a watcher on an estate, shot at a thief below the knee in the act of running away with stolen coconuts and then struck the thief with the gun in self-defence, when assaulted by the latter,—

Held, that the accused had not exceeded the right of self-defence.

A PPEAL from a conviction by the Police Magistrate of Chilaw.

The accused, who was the watcher of an estate, was convicted under section 315 of Penal Code and sentenced to a fine of Rs. 25 and bound over in Rs. 100 to keep the peace for one month. It would appear that the complainant crept through the wire fence of the estate and took some coconuts. When he was challenged by the accused he ran away, and the accused shot him below the knee. The complainant then stopped, and when the accused went to seize him flung a coconut at him. The complainant tried to escape whereupon the accused hit him with the gun. Accused was convicted as stated above.

Rajapakse, for accused.—The accused has committed two assaults, both of which can be justified by law. The first assault relates to the act of shooting that was done in defence of property against a thief (the complainant). See section 90 and 97, Criminal Procedure Code. The injury that was caused to the complainant did not exceed the limits prescribed by law. See section 92 (4). For the accused first challenged the thief, and when the latter tried to run away only did he shoot him below the knees causing simple hurt.

The second assault was by striking him with the gun. That act was done primarily in defence of the person. See sections 90 and 94. Complainant had defiantly attacked the accused with the coconuts.

Counsel also cited *Gour*, Vol. V, pp. 583, &c.

Weerasinghe, for respondent.—The Police Magistrate has not disbelieved the complainant's version entirely. He finds that the accused has, in fact, exceed his right of private defence. There was no necessity for the complainant to be shot at; and even if

there was, the subsequent assault with the gun was unnecessary for the right of private defence, and is not justified by law. See section 92 (4).

1929
 Tissera
 v.
 Edwin

February 27, 1929. AKBAR J.—

The appeal is from a conviction under section 315 of the Ceylon Penal Code and a sentence of a fine of Rs. 25 and an order to be bound over in Rs. 100 to keep the peace for one month. On the authority of *Broome v. Carolis*¹ the accused has the right to appeal on the facts. I have heard the evidence read, and the conclusion to which I have come is that the accused's version appears to be true.

According to the accused, who is a watcher on the estate of one Mr. Fernando, owing to frequent loss of coconuts on the estate he lay in wait for the thief. About midnight he saw the complainant creeping through the wire fence and taking some coconuts. He challenged him, when, the complainant getting excited, came fast towards him. As the complainant was going away with the nuts he shot him below the knee. The complainant then stopped, and when the accused went to seize him the complainant flung a coconut at him. The complainant then tried to escape, and the accused had to hit him with the gun to get hold of him.

According to the doctor's evidence there were twelve pellet wounds in the complainant's right leg and some contusions; all the injuries were non-grievous, and the injured man was eleven days in hospital.

The complainant's story is that he went to pick medicinal herbs in the estate at midnight. Strange to say this medicinal herb does not grow on the estate, but it actually grows in his own garden.

The proprietor, Mr. Fernando, says that the injuries were slight and that the complainant had a black span cloth on and that he begged pardon from him because he had taken only two coconuts. The headman corroborates the proprietor by saying that the complainant was dressed in a black span cloth. I have no doubt that the complainant's explanation of how he came to be in the estate is false.

Thus the question resolves itself into one of law, namely, whether taking the accused's story as true, he has exceeded the right of private defence. Under section 97 of the Penal Code the accused has, in the exercise of the right of private defence, the right to cause any harm other than death, but, of course, the harm used is subject to the restriction contained in section 92, clause 4, of the Penal Code, that is to say, the harm must be proportionate to the purpose for which the right of private defence is exercised. Under section 98 this right of private defence continues till the property is recovered or till the assistance of the public authorities is obtained, which, I think, can only mean till the thief has been arrested.

¹ 19 N. L. R. 276.

1929
AKBAR J.
Tissera
v.
Edwin

It will be seen from Volume I. of Gour's *Indian Penal Law* (3rd ed.), p. 583, that the Indian Courts allow some latitude when property has been frequently stolen at night. What the Court has to consider is, not the weapon used, but the injury actually inflicted. The injuries inflicted here were non-grievous, and the fact that they were caused with a gun does not take away the right the accused had of causing hurt to the complainant to prevent him from taking away the nuts or till he was arrested. I do not think the accused has exceeded his right of private defence and therefore set aside the conviction and acquit the accused.

Set aside.

