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Present : Lyall Grant J.

THAMBYAH *v.* VANDERPUT.

675—*P. C. Trincomalee, 2,119.*

*Mischief—Shooting cattle trespassing—Licence from Government Agent—
Intent to cause wrongful loss—Cattle Trespass Ordinance, No. 9
of 1876.*

The accused, who obtained a licence from the Government Agent to shoot trespassing cattle when it is found impracticable to seize or identify them after reasonable exertion, was charged with mischief and convicted by the Police Magistrate on the ground that no steps were taken to seize or identify the cattle before they were shot.

Held, that the fact that the accused acted in the *bona fide* exercise of a legal right negated any intention to cause wrongful loss or damage.

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

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Soertsz, for appellent.

Subramaniam, for respondent.

November 13, 1929. LYALL GRANT J.—

The accused in this case was convicted of the offence of mischief by shooting an animal, viz., a cow, belonging to the complainant. The accused is the owner of an estate, and it appears that cattle were in the habit of trespassing on the estate. The accused accordingly obtained from the Government Agent an order to shoot cattle issued under the Cattle Trespass Ordinance of 1876. The order recited the fact that it had been shown to the Government Agent's satisfaction that stray cattle were in the habit of trespassing upon Medway estate and doing damage thereunto, and that such cattle could not be seized or identified so that the owners thereof may be ascertained and proceeded against. After this recital it directed the accused to proceed to the estate and if, after reasonable exertion, he found it impracticable to seize or identify the said cattle, then he was to cause the cattle aforesaid to be shot or otherwise destroyed in his presence.

The accused's watcher said that on the day in question there were four cattle straying on the estate when this animal was shot and that he did not know to whom they belonged. He said he used to see this animal almost every day with other cattle on the estate; that he tried to chase it but that it used to run into the jungle. He denied that it was in calf as averred by the complainant. He said there were some brandmarks on it but that he did not know what they were. On the day in question he said he chased the animal out of the premises, that it ran away into the jungle, and that it came back at about 8.30 the next morning. On this occasion he did not chase the animal but went and informed the clerk that he was unable to seize the animal as he got some thorns into his foot. On the clerk's suggestion he informed the accused that there was an animal trespassing and that he was unable to seize it. Thereupon the accused went with a gun and on seeing him the cow started to run; then the accused followed it and when the animal stood and looked at him he shot it.

The learned Magistrate in his judgment says that the question to be decided by the Court is whether the accused was justified in these circumstances in shooting the animal, and he comes to the conclusion that no reasonable exertion was made either by the accused or his watcher to seize the animal before it was shot. On this ground, and also on the ground that he did not take sufficient steps to identify the animal, the Magistrate comes to the conclusion

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that the accused was not justified in shooting it. He proceeds: "The accused thought that he had the right to shoot cattle when he was armed with an authority from the Government Agent, and the destruction of the animal caused in this case was wilful and intentional and it was done with a view to instil some terror and their authority into the mind of the villagers," and he says that the circumstances of the case clearly show that the intention of the accused was to cause wrongful loss to the owner of the animal.

It does not seem clearly proved to my mind that the accused had the intention to cause wrongful loss or damage to any person. It is quite evident that he had suffered very considerably from trespassing cattle, so much so that he had succeeded in convincing the Government Agent that stray cattle were damaging his property and that the cattle could not be seized or identified. In such circumstances the Ordinance permits an owner duly armed with the Government Agent's licence or order to shoot stray cattle if he finds it impracticable to seize or identify them after reasonable exertion. If such reasonable exertion had been proved, the act of the accused in shooting the cattle was quite legal and the question of wrongful loss or damage does not arise. The Magistrate, however, has held that in his opinion the exertion made by the accused was not reasonable, and that with a reasonable amount of exertion it would have been practicable for him to seize or identify the cattle. I do not think, however, that this concludes the case against the accused, as the point to be considered is whether the accused was acting in the *bona fide* belief that he was exercising the powers conferred upon him by the order to shoot. If he had such a belief, he had no intent to cause wrongful loss or damage, nor did he know that he was likely to cause wrongful loss.

Gour, in his *Commentary on the Penal Laws of India*, in section 4605 dealing with mischief, says: "An illegal act done in the belief that it is legal is a good defence to a criminal prosecution for an offence in which the criminality depends upon the presence of knowledge or intention," and in section 4606 he says, "The principle in such cases appears to be, was the act done out of malice or in the assertion of a *bona fide* claim of right. Of course, such a claim may be legal or illegal. If legal, the question of *bona fides* does not arise, for if the act was legal the question of intention is immaterial. It is only when the act is indefensible on the ground of its legality that the question of a *bona fide* belief arises. That plea has a place only in the case of a doubtful right or a right which a person may still believe in as his own."

In the present case there seems to me to be a presumption in favour of the accused in all the circumstances that he was acting in the *bona fide* exercise of a right and that accordingly he did not intend to cause wrongful loss or damage.

I cannot find any evidence to justify the Magistrate's finding that the act was done with a view to instil terror and an idea of the accused's authority into the minds of the villagers. It seems to me to have been done with the primary object of preventing damage to his own property in a manner which he believed to have been authorized by the Government Agent.

The appeal is allowed and the accused acquitted.

Set aside.

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