

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Benson.

1905. ALINGAL KUNHINAYAN AND ANOTHER*(ACCUSED), APPELLANTS,
January 11.

v.

EMPEROR, RESPONDENT.*

*Penal Code, Act XLV of 1860—Right of private defence of body—
Extent of right.*

The view that a person should not exercise his right of self-defence if by running away he can avoid injury from his assailant, places a greater restriction on the right of private defence of the body than the law requires. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger.

CHARGE of murder. The appellants (with two others who were acquitted) were convicted by the Sessions Judge of South Malabar of the murder of one Raman and of causing grievous hurt to the first witness for the prosecution. It appeared from the evidence for the prosecution that while the first accused was the aggressor inasmuch as he beat the deceased, yet the latter was the first to use a knife with which he inflicted a serious wound upon the first accused; and it was apparently, with the knife which the first accused wrested from the deceased that he stabbed and killed him.

In the Sessions Court, it was contended for the defence that the deceased attacked the accused with a knife and that he had been killed by the accused in exercise of their right of self-defence.

The learned Sessions Judge in dealing with the plea of the accused observed as follows:—“It is urged on behalf of the first accused that he was justified in the exercise of his right of private defence of his person in stabbing deceased when he attacked him with a knife. First accused had undoubtedly a right to defend himself but I think it is clear that he exceeded the right of private defence which he possessed. First accused was certainly not justified in wresting the knife from deceased and inflicting a dangerous wound in the chest. There is no reason, I think, to suppose that first accused could not have escaped further injury

* Criminal Appeal No. 678 of 1904, presented against the sentence of L. G. Moore, Esq., Sessions Judge of South Malabar Division, in case No. 81 of 1904.

by resorting to less violence or by running away. It was not necessary for first accused's own preservation that he should have inflicted such grievous bodily harm."

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The first and second accused preferred this appeal.

Mr. *T. Richmond* and *M. Govindan Nair* for appellants.

The Public Prosecutor in support of conviction.

JUDGMENT.—In this case, although as the Sessions Judge points out, the prosecution witnesses Nos. 1-4 were all anxious to make it appear that the accused were the aggressors and that the deceased and his brother Chathu (the first prosecution witness) acted on the defensive, the evidence of these witnesses makes it clear that although the first and second accused began the fray by striking the deceased Raman with their hands, Raman was the first to use the knife, and that he inflicted a very serious wound, which might well have proved fatal, on the first accused, and also wounded the second accused, before he received from the first accused the wound which caused his death. It is also clear that the first prosecution witness Chathu, the brother of the deceased, although he denies it in his evidence, used his knife and stabbed the second accused.

It would seem from the evidence of the prosecution witnesses that both Raman and Chathu used their knives before either the first or second accused used theirs. At any rate, there can be no doubt, from the evidence of the sixth prosecution witness, that Chathu stabbed the second accused before the second accused stabbed Chathu in return.

Further, it seems clear that the fight took place at the house of the fourth accused and not as Chathu stated in exhibit A, at Raman's house. It seems not unlikely that the quarrel, in the first instance, was provoked by the deceased and his brother Chathu going to the house of the fourth accused.

On the facts of the case, we cannot agree with the view of the law taken by the learned Judge. We do not think it can be said that the first accused exceeded the right of private defence. The learned Judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But, this is placing a greater restriction on the right of private defence of the body than the law requires. The principle applicable to a case like this is that laid down by Mayne "But a man who is assaulted is not bound to modulate his defence step by step,

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according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool by-stander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

The all important facts in connection with the question whether the first accused exceeded the rights of private defence of his body when he gave the stab with his knife which proved fatal to the deceased, are that the deceased was the first to use the knife and had inflicted a wound on the first accused which might well have proved fatal.

On the facts we are of opinion that the first accused did not exceed the right of private defence and that his conviction under sections 304 and 326 of the Indian Penal Code cannot be upheld.

As regards the second accused the evidence shows that although he no doubt used his knife to Chathu, before he did so, he had been stabbed by Chathu.

We are of opinion that the second accused did not exceed his right of private defence and that his conviction under section 326, Indian Penal Code, cannot be upheld.

In the case of both the accused the appeals are allowed and the convictions set aside.
