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pre-emptor who has placed himself in the position occupied by the plaintiff here and by the pre-emptor in the case of *Muhammad Wilayat Ali Khan* v. *Abdul Rab* (1) must be considered to have, by his own act as a matter of law, forfeited his right to pre-empt any portion of the property. We follow the rule of law laid down in that case and for the reasons given above, and not because we agree with the lower appellate Court, with whose judgment, as a matter of fact, we disagree, we dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

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November 18.

Before Mr. Justice Knox, Acting Chief Justice and Mr. Justice Banerji.

QUEEN-EMPRESS *v.* TIMMAL AND OTHERS.*

Act No. XLV of 1860 (*Indian Penal Code*), *Sections* 96 *et seqq.*—*Right of private defence*—*Act No. I of* 1872 (*Indian Evidence Act*), *Section* 105—*Presumption*—*Pleadings.*

Held that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. *Queen-Empress* v. *Prag Dat* (2) referred to.

THE facts of this case are fully discussed in the judgment of the Court.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the appellant.

Babu *Bishnu Chandar*, for the respondents.

KNOX, ACTING C. J. and BANERJI, J.—This is an appeal presented under directions of the Local Government from an appellate order of acquittal passed by the Sessions Court of Mirzapur. The Magistrate of the 1st class at Mirzapur, before whom the case originally came, had found five persons guilty of offences under sections 147 and 325 read with section 149 of the

* Criminal Appeal No. 1007 of 1898.

(1) (1888) I. L. R., 11 All., 108. (2) (1898) I. L. R., 20 All., 459.

Indian Penal Code; but had passed sentences upon the five only for offences under section 147. The learned Sessions Judge arrived at the following conclusions upon the evidence, namely, first, that the appellants before him had acted in exercise of the right of private defence of property; secondly, that there was no evidence that the same accused formed an unlawful assembly. He accordingly acquitted them of the charge under section 147, and apparently omitted to take any notice of the conviction under section 325 read with section 149 of the Indian Penal Code. Holding the views he did, the learned Sessions Judge should have in terms recorded an acquittal upon this charge also.

The facts found by the Magistrate were that Timmal, one of the respondents before us, considered he possessed a right to gather the fruit of certain mahua trees. That fruit was being peaceably gathered by certain persons on behalf of one Altaf Husain. With a view of enforcing Timmal's right or supposed right the five accused came upon the spot and with clubs assaulted five men. The injury caused to two was, according to the medical evidence, which has not been rebutted, "grievous hurt." The Magistrate added to the above recital of facts the words:—"Timmal's party cannot claim that they were defending the enjoyment of a right actually in possession." The appeal as presented sets out that the respondents have not made out their defence that they acted within their right of private defence of property. This ground is not happily worded. We have, with the assistance of the learned vakil who appeared for the respondent, examined the defences raised by the various respondents before the Magistrate. Timmal says that he never beat any one and that he saw no assault. Badan does not say, so far as he is concerned, that he hit any one; he says, on the contrary, that he was hit. The other three respondents all say that they were not on the spot at the time when the disturbance took place. The only hint that such a plea was ever in contemplation as a plea in defence

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is to be found in the examination of Badan, and of Badan alone. We need not go into the question whether Badan, an accused, can, in his statement, raise a plea on behalf of the co-accused, which those co-accused never raised for themselves, and which they virtually repudiated in the statements made by them. In appeal before the Court of Session all the five respondents, who were then appellants, did put forward as one of the grounds of appeal that they had acted as they did in exercise of the right of private defence of property.

The learned Government Advocate contended that the respondents were precluded from raising this plea by the very nature of the defences which they had set up. He drew our attention to an unreported case, and further to the case of *Queen-Empress* v. *Prag Dat* (1). It was laid down in both these cases, more particularly in the latter case, that the law in India is that, when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, is upon the accused, and it is directed by that law, as enacted in section 105 of the Indian Evidence Act, 1872, that the Court shall presume the absence of such circumstances. He pointed out that not only had the accused not set up the plea that they had acted in the exercise of the right of private defence of property, but further that there was no evidence on the record upon which any circumstance could be inferred which would substantiate such a plea.

We followed the learned vakíl very carefully in his answer to this part of the Government case. Taking all that he said as being matter proved, we found it amounted to this, namely, that Timmal and his party had been put into possession of the mahua trees in dispute before any lease of the same trees had been given to the persons on whose behalf the persons assaulted were on the day in question collecting the mahua fruit, and that the fact of possession having been given to

(1) (1898) I. L. R., 20 All., 459.

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Timmal and his party had, at the time possession was given, been proclaimed in the village. At this point the learned vakíl stopped, and rightly stopped; he had no evidence upon which to set up a case that any one of his clients had struck a single blow or committed any assault. No blows having been struck and no assault committed, the exercise of the right of private defence fell at once to the ground. The learned vakíl made some attempt to show that a conviction under section 147 was not justified by the evidence, and he referred us to the case of *Pachkauri* v. *Queen-Empress* (1), and *Queen-Empress* v. *Narsang Patha Bhai* (2). Neither of those cases is in point here. In *Pachkauri* v. *Queen-Empress* the accused were at the time the assault was committed on the spot, and exercising their rights over the property claimed by them. In the present case the circumstances were the very reverse; the persons before us, who were assaulted, were picking up the mahua fruit peaceably and under cover of a lease; the assailants came upon them while so employed, and commenced the attack with a view of enforcing the right which they considered rested with them. In *Queen-Empress* v. *Narsang Patha Bhai* the assault was commenced by the complainant and not by the persons assaulted by the complainant. In the case before us the respondents did form an unlawful assembly, and in using force committed rioting; they could not plead as a justification for their act that the persons picking the mahua were in so doing guilty of theft, mischief or criminal trespass. They were acting throughout in the *bonâ fide* belief that they had a right to the mahua, and the element of dishonesty was wanting. Hence there could be no theft or mischief. When they went upon the land they did not go on it with the intention of committing any offence, hence there was no criminal trespass. From every point of view the plea of private defence of property was one which could not have been raised in this case, and was in fact never raised by the accused until they went before the appellate Court. There being no evidence on the

(1) (1897) I. L. R., 24 Calc., 686. (2) (1890) I. L. R., 14 Bom., 441.

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record, the learned Sessions Judge was distinctly in error, and that error an error of law, when he presumed the presence and not the absence of circumstances which would form any basis for the plea of private defence of property.

The learned vakíl, probably feeling the weakness of this portion of his argument, commenced his defence by urging that the appeal before us was one which should never have been put forward by the Local Government. He referred us to the cases of *Queen-Empress* v. *Gayadin* (1), *Queen-Empress* v. *Chotu* (2), and *Queen-Empress* v. *Robinson* (3). All these cases were considered by this Court in the recent case of *Queen-Empress* v. *Prag Dat*, to which we have already referred. It is true that the right vested in the Local Government is a right which should be advanced with care and caution. In two of the cases cited by the learned vakíl the errors which the Local Government sought to have rectified were errors on questions of fact. In the case before us the learned Sessions Judge erred upon a question of law, and he was at the time sitting as a Court of Appeal, and his error of law led him to set aside the conclusion of the Magistrate upon facts that he himself would probably have accepted but for the error of law into which he had fallen. A riot in the jungles of Mirzapur, where it is not easy to have recourse to the protection of the police, is an offence which wounds public security, and very often leads to fatal results. We cannot therefore agree with the learned vakíl in holding, as he wishes us to do, that we ought not to exercise the powers vested in us in this particular case. We set aside the finding of acquittal, restore the conviction recorded by the Magistrate, and pass the sentence which was in the first instance passed by him. In computing the term of imprisonment any portion of the imprisonment already undergone will be deducted. Subject to the above the sentences will run from to-day's date.

(1) 1881) I. L. R., 4 All., 148. (2) (1886) I. L. R., 9 All., 52.
(3) (1894) I. L. R., 16 All., 212.