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declared that she will be entitled to redeem on payment to the defendants 1-3 of a sum of Rs. 100 only within three months from this date, that on her failure to do so, the suit will stand dismissed with costs. Each party is to bear its own costs throughout in the event of payment being made by plaintiff within the three months. It is represented that the plaintiff has deposited in the trial court a sum of money in accordance with the decree of that court. If so, and if there be no other objection to her doing so, she will be entitled to take the sum back from the court.

The appeal be decreed by consent on the above terms. The decrees of the courts below will be set aside and the suit decreed as directed above.

MULLICK, J.—I agree.

Appeal decreed.

APPELLATE CRIMINAL.

Before Ross and Kulwant Sahay, J.J.

FARMAN KHAN

v.

KING-EMPEROR.*

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March, 15, 16, 17, 18, 23.

Penal Code, 1860 (*Act XLV of* 1860), *section* 96, et seq—*Right of private defence, when open.*

Where the parties to a dispute collect and arm men to vindicate their rights or supposed rights and a conflict ensues, no question of the right of self-defence of the person arises.

Queen v. *Jeolal*(1), *Kalee Baparee*, In the matter of (2), *Kabiruddin* v. *Emperor*(3) and *Queen-Empress* v. *Prag Dal*(4), referred to.

* Criminal Appeal no. 25 of 1926, from a decision of Damodar Prasad, Esq., Sessions Judge of Purnea, dated the 1st of February, 1926.

(1) (1867) 7 W. R. 34.
(2) (1878) 1 Cal. L. R. 521.
(3) (1908) I. L. R. 35 Cal. 368.
(4) (1898) I. L. R. 20 All. 459.

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Circumstances in which homicide caused in the exercise of the right of private defence is justifiable, discussed.

When a person charged with causing injury to another pleads the right of private defence of property the onus lies on him to show that the property was his. It is not enough to show that neither he nor the injured party was in peaceful possession.

The facts of the case material to this report are stated in the judgment of Ross, J.

Manuk (with him *Md. Yunus*, *S. P. Varma* and *Bhagwat Prasad*), for the appellants.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

Ross, J.—This case had an unfortunate course, largely the result of an order passed by the District Magistrate of Purnea directing the Public Prosecutor to appear on behalf of the Government before the committing Magistrate and that his fees should be paid by the parties and he should receive instructions from the Court Inspector. This order is to be deprecated. It has resulted in a trial in which forty-seven witnesses were examined for the prosecution and which lasted for thirty-six days. Day after day the prosecution presented to the court evidence which was false, evidence which has been rejected by the assessors and the Sessions Judge, and which the learned Assistant Government Advocate has not attempted to support here. The case which the trial court found to be proved and which rests on a first information given by Lodhi chaukidar, is supported by the evidence of a dafadar and three chaukidars only. It differs from the official case of the prosecution in every respect and there can be no question that this trial has involved a great waste of public time and money. *March, 23.*

The three appellants have been sentenced to three years' rigorous imprisonment under section 304 read with section 149 of the Indian Penal Code and to concurrent terms of one year under each of the sections

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148 and 324. I do not propose to discuss the case upon which the prosecution relied and which has been found to be false. I shall confine myself to the case upon which the appellants have been convicted.

The occurrence took place at 7.30 A.M. on the 22nd of May, 1925. Information was given at the police station, six miles distant, at 9.30 A.M. on the same day by Lodhi chaukidar to the effect that the morning about 6 A.M. two or three Muhammadans whom Gour Babu zamindar's men had brought from Bengal for cutting lac and forty or forty-two peons on behalf of Gour Babu were getting lac gathered. At about 7 A.M. twenty or twenty-five peons on behalf of Muhammad Bukhsh Chowdhry, zamindar, came from the direction of Manshahi Kothi armed with lathis, spears and axes. The peons of Gour Babu were similarly armed. Durga Singh, the jamadar of Chowdhry, said to Mahadeo Singh, the jamadar of Gour Babu:

"Why do you cut lac"?

On this Mahadeo Singh said:

"The bankar belongs to my master Gour Babu, I will cut the lac".

When this talk was going on, Durga Singh was trying to appease them saying that

"There is no need of quarrelling; give up gathering lac; the landlords will settle among themselves."

In the meantime three peons of Gour Babu began to shout.

"Beat, beat!"

and came forward jumping and the peons of both sides closed and began to use lathis, axes and spears. The dafadar and three chaukidars tried to stop the fight, but without success. When a peon of Gour Babu fell, the mob dispersed and a man was found to be dead. This was Misri Gope; and later it was found that Mahadeo Singh had also been killed. There was some discussion about the side to which Misri Gope belonged. The question is immaterial; but, in my

opinion, the evidence that he was a peon of Gour Babu ought to be believed. The only reason for doubting it is that no one was able to identify the man; but as the peons were collected from the outlying villages, there was nothing necessarily suspicious in this.

The accused were charged under section 302 read with section 149, the common object of the unlawful assembly being to beat the men of Gour Babu. There was also a charge under section 148 and minor charges against the individual accused under section 324.

The defence was that the lac of mauza Narainpur had been settled on behalf of Chowdhry Sahib with Sheikh Kalu; and on the day of the occurrence peons of Gour Babu were getting this lac cut without any right or possession and that a riot occurred in which Gour Babu's men were the aggressors. It thus appears that the appellants raised a plea of private defence both of property and of person; and that is the defence that has been urged in this court. There was also a general argument on behalf of the appellants that the common object of assaulting the peons of Gour Babu alleged by the prosecution arose out of a dispute over the cutting of trees; that this was the case which the prosecution put forward as true and which the accused were called upon to meet; and that when that case broke down, the prosecution were not entitled to substitute what was really a different intention, though included within the same words, of assaulting the peons of Gour Babu over a dispute about lac. In my opinion there is no substance in this argument. The whole case was presented against the accused—both the allegation about the tree cutting and its sequel and the allegation about the lac cutting and its sequel. There was no embarrassment or prejudice to the accused as is shown by their written defence; and the fact that they were able to destroy the case for the prosecution about the tree cutting is no reason for acquitting them of rioting in connection with the lac cutting.

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On the plea of private defence of property, the burden of proof is on the accused. If they assert that they injured the deceased in the defence of their property, they must show that it was their property. Learned Counsel relied on the finding of the Sessions Judge that it was not proved that either side had peaceful possession; but this is a finding which is fatal to the defence. It was also argued that the defence on the question of possession of the lac had been prejudiced by the fact that the prosecution had set up as their substantive case an occurrence arising out of tree cutting, and that the cutting of lac was only a subsidiary element. But the evidence was there and there was no question of prejudice. The accused had ample notice (as their written statement shows) and if they had any proof of possession of the lac they ought to have given it. Learned Counsel admitted that the proof of possession on behalf of the defence was meagre; and on the evidence it must be held that the possession of the party of the accused has not been proved.

The evidence is chiefly documentary. The dispute is between Muhammad Bukhsh Chowdhry who purchased three or four years ago the Manshahi concern from Mr. Shillingford and who claims the right to settle the trees in mauza Narainpur for the growing of lac on them; and Gour Chandra Roy, who has a 14-annas interest in the Bankar mahal of this and other villages, the remaining 2-annas being in the zamindar. The title deeds to the bankar are Exhibits A and B, leases of the year 1868, which demise to the predecessor of Gour Chandra Roy

" Bankar ", that is, " all sorts of kukatha and all sorts of jalkar jangli and grass and kharhi and trees used for fuel and pasturage and honey mahal ".

In the deed the following passage occurs :

" Let it be known that after excluding all the rights, only pasturage mahal, and bankar mahal and fuel wood in Taraf Mansahi and Taraf Narayanpur.....have been given in patni settlement."

As Mr. Shillingford's name was in the record-of-rights, a suit was brought by Gour Chandra Roy for declaration of his bankar rights and for correction of the record; and in that suit he was successful (Exhibits 26 and 27). This litigation terminated in 1917, but there was no decision as to the meaning of bankar; as the learned Subordinate Judge pointed out,

> "No issue was raised as to what bankar includes. So I cannot in this suit decide the question. It certainly includes kukatha which is used as fuel. It may also be remarked that the plaintiff's pleader says that they do not claim mango, jamun and seesam tress."

In 1924 there was a criminal case about the cutting of two jamun trees in which the accused were convicted by the trial court but were acquitted on appeal on the ground that it was not shown that they were the men of Gour Babu or that they knew of the admission that jamun was not claimed as bankar. This judgment was delivered on the 5th of February, 1925, and it is argued that it shows that Gour Babu was gradually extending his claim under his bankar lease. With regard to the settlement of lac there is Exhibit 2, a petition dated the 2nd of Jeth, 1331 (16th of May, 1924), in which one Haro whom the prosecution has set up as the lessee of the lac, applied to Gour Chandra Roy for settlement of the lac mahal from 1331 to 1333. This settlement was sanctioned. This document is on an ordinary piece of country paper and is not registered. Exhibit 3 is the hukumnama following upon this order for settlement and is dated the 13th of Jeth, 1331 (27th of May, 1924). On the 27th of March 1925, comes Exhibit 4, the first registered document in this connection, a kabuliat executed by Haro in favour of Gour Chandra Roy taking settlement of the lac mahal from 1331 to 1333. Exhibit 5 purports to be a rent receipt granted on the 31st of Chait 1331; but the learned Sessions Judge has doubted the genuineness of this document on the ground that there was no 31st of Chait in 1331. Then there are documents showing settlements with Haro by tenants, of trees on tenants' lands. Thus Exhibit 9

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is a kabuliat executed by Ala Bux, who is set up as Haro's partner, in favour of Phuhi Khan and Nasiruddin on the 12th of Kartick 1329 Mulki which would correspond to the 29th of October 1921. Doubt has been thrown upon this document by reason of the fact that it bears a postage stamp of a chocolate colour which was not issued before August 1922. Similarly Exhibits 7 and 8 were kabuliats by Ala Bux in favour of Phuhi Khan and Nasiruddin. Exhibit 10 is a receipt granted by Nasiruddin to Ala Bux, while Exhibit 14 is a receipt granted by Jaykishun Mandal to Haro on the 28th of Chait 1332. It appears that the settlements made by the tenants are of two kinds—individual settlements such as were made by Phuhi Khan and Nasiruddin; and what are called dastgarda or collective settlements on behalf of numerous tenants, such as that made by Jaykishun Mandal. The lac which was being cut on the day of occurrence was lac on trees standing on the ridges of plots nos. 102, 103 and 108 belonging to Phuhi Khan, Babulal and Munsahi Gope. On the side of the defence there is a petition (Exhibit J) by Kalu and Haro, dated the 29th of March, 1918, to Mr. Shillingford, asking for settlement of the "Jhuri Mahal" from 1326 to 1328, and the settlement was ordered on deposit of Rs. 10 as rent. Exhibit Q is a petition by Sheikh Ismail and Kalu, dated the 24th of June, 1918, for settlement from 1326 to 1328 of other villages in Taraf Mansahi. Exhibit P is a registered kabuliat executed by Kalu on the 6th of June, 1922, taking settlement from 1330 to 1332 from Chowdhry Muhammad Bux. Exhibit K is a registered kabuliat for the years 1333 to 1337. This document was not registered until after the occurrence, but it was presented for registration on the 14th of April 1925.

Besides this documentary evidence there is some oral evidence and in particular the evidence of Haro who is prosecution witness no. 2, but his evidence does little to strengthen the case for the prosecution.

He deposes as having taken settlement both from Gour Chandra Roy and from tenants, but he seems to be concealing the fact of his partnership with Kalu in the time of the factory and his evidence of present possession is vague. Thus he says:

"I cannot say whether I grafted lac in 100, 500 or 1,000 trees."

Last year he and Ala Bux divided the lac in their home in Murshidabad district, but he could not say how much lac was produced nor to whom he sold nor for how much. His evidence as to the tenants from whom he had taken settlement is confused and contradictory. Thus in one place he says

"On Friday morning I was cutting lac of Phuhi Khan, Musahi Gope, Babulal Singh and none else"

Again he says:

"On Friday morning I was cutting lac of the trees taken in settlement from the above persons", namely Karamchand, Srilal and Jaykishun Mandal and others.

It can hardly be said that Haro is a satisfactory witness. Debiprasad Singh, Patwari, also speaks about Haro's possession; but his evidence is unreliable and has been generally disbelieved. On the other hand Lodhi chaukidar says that Haro was formerly a labourer under Kalu who is the thikadar of lac on behalf of Chowdhry; and Abdul, prosecution witness no. 42, admits that he knows Kalu who works in lac at Marungi from the time of Mr. Alexander Shillingford and takes thika of lac.

Now there seems little doubt on this evidence that the tenants had settled their trees with Haro and that Gour Chandra Roy had also settled his lac mahal, so far as it appertained to the bankar right, with him. A settlement had also been taken by Kalu from Chowdhry; but the evidence does not, in my opinion, prove which of these lessees had actually grown the lac, though so far as the tenants' trees are concerned, there is no reason to doubt that the lac was grown by Haro, because the landlord has no right in the tenants'

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trees. At one time the factory had claimed this right, but the claim was abandoned at the time of the non-co-operation, as appears from Exhibit 21 and the deposition of Jaykishun Mandal. There are no rent receipts nor factory papers to show that Kalu had actually been growing lac and there is a total absence of evidence of his present possession. All that can be concluded from the evidence is that rival claims were being made by Gour Chandra Roy and the tenants, who were in league with him, on one side, through their lessee Haro, and by Chowdhry Muhammad Bux, the proprietor of the village, on the other side, through his lessee Kalu. But it is not proved that Kalu was in possession or that the accused were defending his property. The plea of private defence of property therefore fails.

I now turn to the plea of defence of person. It was strongly contended on behalf of the appellants that the prosecution evidence, from the first information onwards, proves that the accused had the right of private defence of person and that this is clear when the sequence of events is closely examined. The learned Assistant Government Advocate contended that the evidence of the dafadar and the chaukidars is partial to the accused because these witnesses are tenants of Chowdhry. I have considered the evidence of these witnesses at the different stages at which it was given; and, in my opinion, it is fairly consistent throughout and makes the sequence of events sufficiently plain. I have already given the substance of the first information; and from that document it would appear that the sequence of events was this. Lac cutting was going on from about 6 A.M. At 7 A.M. Chowdhry's men came armed from the direction of the factory. Some of the men of Gour Babu went near the door of Phuhi Khan and some hid themselves in the jungle. Then there was a conversation between the leaders, Durga Singh, the jamadar of Chowdhry, and Mahadeo Singh, the jamadar of

Gour Babu, in which Durga Singh took up a pacific attitude; but the peons of Gour Babu shouted "Beat, beat" and then a conflict ensued. In his statement before the committing Magistrate Lodhi made a few additions to his statement. He then said that he asked Chowdhry's men not to riot. He also said that Chowdhry's men rushed towards Gour Babu's men. That apparently was before the conversation between the leaders. With regard to the conversation he then stated that he did not hear what was said. Then he added that Rupan Singh, peon of Gour Babu, was beaten and thereafter there was intervention by the chaukidars and dafadar after which both sides dispersed. Then Debi Singh taunted Gour Babu's men and the riot ensued. Some parts of this statement are apparently untrue in points that bear against the defence, especially, that Chowdhry's men rushed towards Gour Babu's men at an early stage and that Rupan Singh was beaten. In the Session Court he returned to his original statement, giving slightly fuller details. Thus after the talk between the leaders he says that half an hour elapsed before the dafadar came. He changes his statement with regard to Rupan Singh and says that he with others shouted "Maro". He speaks of the intervention of the chaukidars and dafadar and the incitement by Debi Singh. Behari is a more common-place witness. He agrees with Lodhi about the arrival of the two parties and then he was sent to fetch the dafadar. On his return he says that the men of Gour Babu abused the men of Chowdhry Sahib and began to fight them. This was before the committing Magistrate. He amplifies this statement in the Court of Sessions and says that Gour Babu's men raised the alarm "Mar, mar" and the chaukidars and dafadar entreated Gour Babu's men not to commit rioting, but they did not listen. He also adds that Debi Singh instigated and that Mahadeo Singh struck the first blow. The evidence of Jalil dafadar is to the same effect and his statement has not varied. He also speaks about the

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intervention of the chaukidars and himself and the withdrawal of both sides thereafter and the instigation by Debi Singh.

The argument on behalf of the appellants based on this evidence is that the appellants did not fight until they were compelled to; that they adopted a pacific attitude; that Gour Babu's men were the first to attack; and that they acted in self-defence. The learned Assistant Government Advocate on the other hand in his very able argument contended, and I think rightly, that this is not a case of the private defence of person at all. Both parties went out armed on account of the dispute about the right to cut lac. Apparently the peons of Gour Babu had been collecting for some days though they may not have arrived on the scene till the morning of the 22nd; the chaukidar says that they had not arrived the previous evening; and the twenty or thirty men who were on the side of Chowdhry were not collected in a moment either. There was therefore ample time to have recourse to the authorities, the police-station being only six miles distant; and it was the clear duty of Muhammad Bukhsh Chowdhry when he heard that armed peons were being collected on behalf of Gour Chandra Roy, to inform the authorities instead of raising an armed force on his own account.

"Homicide upon chance medley (or chaude mêllée) borders very nearly upon manslaughter, and in fact and experience, the boundaries in some instances are scarcely perceivable, though in consideration of law they have been fixed.....In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could to avoid the violence of the assault before he turned upon his assailant; and that

not fictitiously, or in order to watch his opportunity but from a real tenderness of shedding his brother's blood.....The party assaulted must therefore flee, as far as he conveniently can, either until prevented by reason of some wall, ditch or other impediment or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, and then, in his defence he may kill his assailant instantly. Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it and that it was necessary to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified" (Russell on Crimes, Eighth Edition, pages 769-770). "And it may be further observed that a man cannot, in any case, justify killing another by pretence of necessity unless he were wholly without fault in bringing that necessity upon himself" (ibid, page 777). This statement of the law is based upon authority [1 Hale, 440, 441, 481, 483; *R.* v. *Smith* (1)] which is as valid in India as in England. Now the accused in this case had no notion of retreating. They actually advanced to meet the attack. There can be no doubt that this was a free fight for which both sides had come prepared. In *Queen* v. *Jeolal*(2) it was said, "In such a case there could be no private defence either to one side or the other. Both sides were evidently aware of what was likely to happen, for they both turned out in force and were armed with deadly weapons". In *Kalee Baparee*(3), where the appellants had been concerned in an affray in which a man was killed, their Lordships observed as follows:

(1) (1837) 8 C. & P. 160. (2) (1867) 7 W. R. 34.
(3) (1878) 1 Cal. L. R. 521.

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"There is good reason to believe that on both sides there was irritation and also determination to resort to force to support the rights and wishes of the parties; and the Judge expressly says that it appears from the evidence (and it must be taken therefore that he believes it in that respect) that there had been preparation on both sides for an armed encounter." It was held that under these circumstances it made no difference who was the attacking party where both parties were armed and prepared for battle. The leading case in *Kabiruddin* v. *Emperor*(1) where it was laid down that according to the Penal Code no right of private defence arises in circumstances such as those of that case when both parties armed themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle. And in *Queen Empress* v. *Prag Dat*(2) the opinion of Sir John Edge was quoted with approval "That when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself but each side is trying to get the better of the other".

There can be no doubt in the present case that if Chowdhry's men had wanted to get away from the fight, they could have done so. The evidence of the chaukidar makes it clear that after the leaders had had their discussion both parties continued to stand their ground for a considerable time and it was in these circumstances that the fight took place. No right of private defence, therefore, arose; and, in my opinion, the appellants were rightly convicted.

The appeal must be dismissed and the appellants will surrender to their bail to undergo their sentences.

KULWANT SAHAY, J.—I agree.

(1) (1908) I. L. R. 35 Cal. 368. (2) (1898) I. L. R. 20 All. 459.