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MA MARY v. MA HLA WIN.

ROBINSON, C.J.

In my opinion in this case there was no unlawful possession until a formal demand for the return was made, and the appellant refused to return it. That being so, the suit is not barred by limitation.

BROWN, J.—I concur.

APPELLATE CRIMINAL.

Before Mr. Justice Lentaigne.

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Aug. 5.

NGA PO THAIK *v.* KING-EMPEROR AND NGA PO E *v.* KING-EMPEROR.*

Penal Code (XLV of 1860), section 307—Mutual infliction, in the absence of eye-witnesses, of injury in a fight—Plea of self-defence or provocation—Evidence Act (I of 1872), section 105—Conviction under section 326, Indian Penal Code, the appropriate one.

The two appellants in the course of a fight inflicted on each other injuries so serious that their dying depositions had to be taken in both cases. There was no eye-witness to the occurrence; and the evidence in each trial consisted of that of the complainant, the corroborative evidence of the wounds on the complainant and the admission of the accused that he was himself wounded in the occurrence. In separate trials, each was convicted of an offence under section 307 of the Indian Penal Code.

Held, that as either of the appellants would be entitled, in the event of the other dying of the wounds, to the benefit of a reasonable doubt and to plead that the case came within Exception 4 to section 300 of the Penal Code, neither appellant could be legally convicted under section 307 of the Penal Code.

Held, also, that under section 105 of the Indian Evidence Act, the burden of proof of self-de ence or provocation being in each instance on the accused, neither appellant could under the circumstances claim these defences and that section 326 of the Penal Code was the proper section for the conviction of each of the appellants.

LENTAIGNE, J.—It is clear that the above appellant, Nga Po Thaik, and Nga Po E had a fight with each other on the night of the 28th October, 1923, at

* Criminal Appeals $\frac{738}{739}$ of 1924 from the judgment of the First Additional Special Power Magistrate of Bassein in Criminal Regular Trials No. $\frac{68}{69}$ of 1924.

some time about ten or eleven p.m., and that one used a da, and the other used either a pointed knife, or some weapon of that description, but there were no other witnesses to the occurrence, and each appellant has been convicted on the evidence of his opponent, and the corroborative evidence of the wounds caused to the opponent, and the admissions of the appellant that he was himself wounded in the occurrence. Nga Po Thaik received about seven or eight wounds, and Nga Po E received at least five wounds, and each would have died if he had not received early medical attendance. In each case, the the condition of the wounded man was so bad that his dying deposition was taken. They were s tried by a Magistrate, who got into difficulties in attempting the impossibl. task of deciding which was the aggressor; but his orders of discharge were set aside by the Sessions Judge, and the appellants were then tried in two separate trials, each on the charge that he had committed the effence of attempt at murder under section 307, Indian Penal Code, in trying to kill the other. In each trial, the accused was convicted of that offence under section 307, Indian Penal Code, and each was sentenced to a term of five years' rigorous imprisonment. Each appellant now appeals against the conviction and sentence passed against him in his trial.

The first question for determination is whether either can be convicted of the offence under section 307, Indian Penal Code. In my opinion, the conviction for an offence under that section was not permissible in either case. That section provides for the punishment of an offender who—"does any act with such intention or knowledge, and under such circumstances that if he, by that act, caused death, he would be guilty of murder." Now if either of

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NGA PO THAIK v. KING-EMPEROR AND NGA PO E v. KING-EMPEROR.

LENTAIGNE, J.

the appellants had died in consequence of his wounds, it would not have been permissible to convict the other of murder on the facts as established, because he would be entitled to the benefit of a reasonable doubt and to plead that the case came within Exception 4 to section 300, and that the offence had been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. That being so, it is clear that neither appellant can be legally convicted under section 307, Indian Penal Code, having regard to the duty of the Court to accord to each the benefit of a reasonable doubt.

It is also clear that neither appellant can establish the defence that, what he did, was done in the exercise of the right of private defence, because, under section 105 of the Indian Evidence Act, 1872, the burden of proof would lie on the accused in each case to prove the necessary facts for such defence, and it is obvious that neither accused can prove the necessary facts for such defence in his case.

The same difficulties arise as regards the defence that, what each appellant did, was due to the fact that he had been deprived of the power of self-control by grave and sudden provocation. The burden of proof would lie on each appellant to establish this defence under section 105 of the Indian Evidence Act, 1872. It is, however, probable that one of the combatants would be entitled to raise such defence, though even that cannot be certain. Assuming, however, that one appellant could establish such defence, his case would come within the provisions of section 335 of the Indian Penal Code, which prescribes the penalty for voluntarily causing grievous hurt on grave and sudden

provocation. The term of rigorous imprisonment permissible under that section would be four years.

There can be no question that each appellant caused grievous hurt to the other by means of a dangerous weapon, such as a da or dagger, and I think that I am bound to convict each appellant under section 326 of the Indian Penal Code. In the case now before me, each appellant has already received a severe punishment in the shape of the wounds which he received from the other; but, nevertheless, it is necessary to teach men that they cannot fight in such a manner and escape imprisonment. Taking all the facts into consideration, I think that a sentence to a term of two and a half years' rigorous imprisonment would meet the ends of justice in each case.

APPELLATE CIVIL.

Before Mr. Justice Duckworth and Mr. Justice Godfrey.

MA MYAT GYI AND ONE
v.
MA MA NYAN AND FOUR OTHERS.*

1924
Aug. 8.

Limitation Act (IX of 1908), Article 134—Sub-mortgagee in possession—Article 148, the appropriate article—Right of sub-mortgagee to remain in possession till the sub-mortgage is redeemed.

Held, that as against sub-mortgagees *as such*, the proper article of the Limitation Act to apply was Article 148 and not Article 134.

Held, also, that a sub-mortgagee in possession was entitled to retain possession until his sub-mortgage had been itself redeemed and that a payment to the mortgagee, with notice of the sub-mortgage, could not affect the sub-mortgagee.

Drigpal Singh v. *Kallu*, 37 All., 660; *Nga Kye* v. *Nga Po Min*, 3 U.B.R., (1904-06), Sub-mortgage, 1; *Tairamaya* v. *Shibelizaheb*, 44 Bom., 614—*followed*.

Narain Das v. *Kazi Abdur Rahim*, 24 C.W.N., 690; *Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad., 1040—*distinguished*.

Lutter—for the Appellants.

Sanyal and *S. Mukerjee*—for the Respondents.

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* Civil First Appeal No. 84 of 1923 (at Mandalay) against the judgment and decree of the District Court of Kyaukse passed in its Civil Suit No. 23 of 1923.