

There is no force in this as by the original power of attorney the Pleader was given authority to file an appeal and to conduct it. It has been held by this Court in *Dyal v. Hirde Ram* (1) that a power of attorney authorising a Pleader to prosecute all the litigation of a suit impliedly confers upon him the power to lodge and conduct the appeal up to the Chief Court.

In the result this revision petition is accepted with costs and the order of the District Judge is set aside, and the appeal is returned to him for decision on the merits.

A. N. C.

*Revision accepted.*

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**REVISIONAL CRIMINAL.**

*Before Mr. Justice Harrison.*

ISMAIL—Petitioner

*versus*

THE CROWN—Respondent.

1925

May 15.

Criminal Revision No. 496 of 1925.

*Indian Penal Code, 1860, sections 103 (4), 442—“ Building ”—Unroofed wara—Private defence—Burglar killed in the dark by blows on the head.*

The accused, on being awakened in the middle of the night discovered the deceased in his *wara*, the latter having effected his entrance by scaling the wall, which surrounded it on all four sides. The *wara*, of which the small gate was locked, adjoined the room in which the accused had been sleeping, and was for practical purposes one of the rooms of the house, and an integral part of the building. In the scuffle the accused killed the deceased by striking him on the head with a stick.

*Held*, that though the *wara* was unroofed it was a “ building ” within the meaning of section 442 of the Indian Penal Code.

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*Kolmi v. Emperor* (1), and *Sundar v. Emperor* (2), distinguished.

*Shera v. Empress* (3), followed.

*Held also*, that the accused, not knowing in the dark, whether the burglar was armed or not, did not exceed his right of self defence under clause (4) of section 103 of the Indian Penal Code, by striking him 3 times and causing his death and his conviction under section 304 must be set aside.

*Application for revision of the order of S. L. Sale, Esquire, Sessions Judge, Ferozepore, dated the 23rd January 1925, affirming that of Lala Chanan Mal, Magistrate, 1st class, Ferozepore, dated the 27th November 1924, convicting the petitioner.*

TARA SINGH, for Petitioner.

ANANT RAM, for the Government Advocate, for Respondent.

#### JUDGMENT.

HARRISON, J.—The facts of this case are that one Ismail and Dula, his brother, were waked up in the middle of night by the sound of movement in the *wara* adjoining the room where they were sleeping. They got up and found a man Sardara inside the *wara*, and, in the scuffle which ensued, Ismail killed him by striking him on the head with his stick. He has been convicted under section 304 and sentenced to four years' rigorous imprisonment and his conviction and sentence have been upheld by the learned Sessions Judge, who found that he had exceeded the right of private defence of his person and property as three blows were found to have been inflicted on the head.

It was urged before the trial Court and the Sessions Judge that section 103, Indian Penal Code, applied as the man who was killed was committing or

(1) 208 P. L. R. 1915. (2) 56 P. L. R. 1919.  
• (3) 35 P. R. (Cr.) 1879.

had committed the offence of house-breaking. Both the lower Courts have held that the offence of house-breaking was not committed. The Sessions Judge has followed *Kohmi v. Emperor* (1) and *Sundar v. Emperor* (2), but his attention does not appear to have been drawn to *Shera v. Empress* (3) which ruling, it appears to me, exactly covers the facts of this case, while those relied on do not. The map and the evidence show that this so-called *wara* forms an indivisible part of the building, which constitutes the house of the accused. It fills up a corner, it is surrounded on all four sides by a wall, entrance and exit are effected through a small gate or *phalla* which is kept locked at night, and the thief Sardara must have effected his entrance by scaling the wall. Neither in *Kohmi v. Emperor* (1) nor in *Sundar v. Emperor* (2) did the enclosure in question form part of a building. In *Sundar v. Emperor* (2) the wall did not go the whole way round, and in the earlier ruling the *wara* was of the common type of an enclosure for cattle out in the fields. Here, the enclosure is for practical purposes one of the rooms of the house; from it other rooms open and, although it has no roof, it is an integral part of the building. The facts are identical with those of *Shera v. Empress* (3). Following the decision of the majority of the Judges, who decided that case, I hold that here also the enclosure in question is a part of a building.

While, however, it is clear that the man Sardara committed the offence of house-breaking, the question still remains whether section 103 or rather 103 (2) applies in its entirety: I think not. The right of private defence of property extends to the voluntary causing of death, if the offence, the committing of

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which occasions the exercise of the right, be one of certain offences including house-breaking by night. In this case that offence had been completed, once the burglar got over the wall, and it was past history. It could not be said to occasion the exercise of the right of private defence. It is, therefore, necessary to see whether the apprehension of what was going to happen justified the accused in acting as he did. All that he knew was that a burglar was in his house in the middle of the night in a dark room. He had every reason to suppose that the burglar had committed theft or was going to do so and that if he (the owner of the house) met him he would presumably strike him. He could not know in the dark whether the burglar was armed or not and taking everything into account I do not think that he exceeded his right of private defence by striking the burglar three times and rendering him incapable of doing any further injury to his person or property. I find, therefore, that the right of private defence was not exceeded and that the case fulfils the requirements of section 103 (4), though it does not fulfil the requirements of section 103 (2).

I accept the Revision and acquit the petitioner.

*N. F. E.*

*Revision accepted.*