

**APPELLATE CRIMINAL.**

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*Before Mr. Justice LeRossignol and Mr. Justice Fforde.*

MIR DAD AND OTHERS—Appellants

*versus*

THE CROWN—Respondent.

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Nov. 20.

**Criminal Appeal No. 638 of 1925.**

*Indian Penal Code, 1860, section 105—Private defence of property—whether the clause: “till the property has been recovered” is subject to the clause, “till the offender has effected his retreat with the property”.*

Under section 105 of the Indian Penal Code, as soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists. The owner is entitled to take the law into his own hands in order to maintain his possession and to prevent the completion of the removal of property from his possession, and so long as the thief has not completed his retreat, this right continues until the property has been recovered or the assistance of the public authorities is obtained; the reason being that during the retreat of the thief with the stolen property there is no doubt regarding the identity of the thief and the right to the property. But the right of private defence must be strictly confined within the limits fixed by statute.

Thus where the appellants followed up tracks purporting to be those of their stolen cattle, and, prior to the arrival of the police (for whose assistance one of their party had ridden away) proceeded to the complainants' village and fired at them.

*Held*, that the appellants' right of private defence of their property had been put an end to by the successful retreat of the thieves, and that their alleged re-discovery of the cattle in the complainants' possession could not revive that right.

Gour's Penal Law of India and Ratanlal's Law of Crimes, referred to.

*Jarha Chamar v. Surit Ram* (1), disapproved

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*Held also*, (per Fforde J.) that the duty of the owners when they failed to recover the animals in the course of the pursuit was to wait till the arrival of the police, and by taking the law into their own hands, though the present appellants might not have inflicted any of the injuries sustained by the opposite party, they were legally responsible for the violence of their associates.

*Appeal from the order of Rai Bahadur Lala Ganga Ram, Soni, Sessions Judge, Gujranwala, dated the 22nd May 1925, convicting the appellants.*

MUHAMMAD SHAFI, for Appellants.

D. R. SAWHNY, PUBLIC PROSECUTOR, for Respondent.

#### JUDGMENT.

LEROSSIGNOL J.

LEROSSIGNOL J.—In this appeal and the connected appeals 23 persons appeal against a sentence of transportation for life passed upon them on their conviction under sections 302/149 of the Indian Penal Code. These appellants come from Chak No. 12 in the Jhang district, where it marches with the boundary of the Gujranwala district. They are in the main *Assis* and *Kokaras*, whilst the complainant party belong to the *Sarganas*, *Bhattis* and *Chuchaks* dwelling just within the Gujranwala boundary, and it is both admitted by the parties, and found by the learned Sessions Judge, that by reason of cattle-thieving, the one from the other, the parties are old enemies.

In the fight with which this appeal is concerned the Gujranwala party lost one man, Rahman, killed by gun-fire, while four others, namely, Shahabli, Mughli, Jallu and Qaimi, were seriously injured, and the appellants have been convicted of the murder of Rahman and sentenced as mentioned above.

On the night of the 1st August 1924, eleven buffaloes belonging to Muhammad Shah were stolen

from Chak No. 12. The next morning a tracking party was organised which followed the tracks of the stolen cattle up to the villages of Chakkiwala and Shah Muhammad where a fight took place and the aforementioned casualties resulted. Of the tracking party five men were injured, namely, Sohani, Mehra, Mir Dad, Shams Din and Mali, but their hurts were not serious and, in the case of Sohani, at any rate, appear to have been self-inflicted.

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It is common ground that on reaching the village of Machhonika, some four miles from the complainants' village, the tracking party halted and their leader Karm Shah went off to the local *thana* of Pindi Bhattian to secure police aid. For reasons which have not been satisfactorily explained the police failed to supply him with help till about 4-30 in the afternoon, *i.e.*, more than two hours after his arrival at the *thana*, but at about that hour Karm Shah accompanied by two policemen, Pohle Khan and Sohan Singh, returned to Machhonika to find on arrival there that the tracking party had not waited but had gone on. The story for the prosecution is that Karm Shah being well-mounted galloped ahead in search of his tracking party, found them in Chakkiwala village, and seeing his further progress obstructed by the complainants opened fire with his gun and shot Rahman and another man. Other members of his party also are said to have used guns against the complainant party. Having wrought this mischief Karm Shah is said to have returned with the tracking party to Machhonika and to have met the policemen, Pohle Khan and Sohan Singh, on the road. At that time he still held his gun and reported that his party had been assaulted and was therefore retreating.

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The story for the defence is that on reaching Chakkiwala village the appellants other than Karm Shah saw their stolen cattle, attempted to seize them, were attacked by a very large number of the residents of that village, received some injuries and then retreated. Their story does not include any explanation of the manner in which Rahman was killed and the other members of the complainants' party received gunshot and other wounds.

The learned Sessions Judge finds that the appellants were admittedly members of the tracking party, and holds that the track party constituted an unlawful assembly, that they had come prepared to use force and to overcome any resistance that might be offered by the opposite party, and that each member of the tracking party knew that the prosecution of the common object of the party was likely to result in the causing of death or such injury as was likely to cause death.

On behalf of the appellants it has been contended, firstly, that Karm Shah was not present at the time of the fight, that the evidence that he was present is untrustworthy, being the evidence of interested persons or enemies, and secondly, that the remaining appellants though admittedly members of the tracking party deserved acquittal on the ground that in following up the tracks of the stolen cattle they were merely acting legally in defence of their stolen property which right of defence continued until the property stolen had been recovered.

I shall deal at once with this plea of the right of defence of property stolen. Section 105 of the Indian Penal Code supplies the statute law on the subject. That section runs:—"The right of private defence of property against theft continues till the

offender has effected his retreat with the property or, either the assistance of the public authorities is obtained, or the property has been recovered." This I take to mean that as soon as the offender has effected his retreat with the property, no right of private defence of that property against theft subsists, but that, until the offender has so completed his retreat the right of private defence of that property continues until the property has been recovered, *i.e.*, during the retreat of the offender, or until the assistance of the public authorities is obtained.

In order to avoid the conclusion that the successful retreat of the thief with the property puts an end to the right of private defence in respect of such property, it has been suggested that that right of defence may be revived and that the stolen property, whenever seen again in the possession of anybody, may be taken by the owner from that person by the use of all the violence, not extending to the causing of death, which may be found necessary. This theory to my mind receives no support from the statute law and, if true, it constitutes a very serious derogation from the principle that no man shall be his own justicer. I take it that the reason why a person is permitted to take the law into his own hands during the retreat of a thief with stolen property is that there is no doubt regarding the identity of the thief and the right to the property; also because the owner of the property is entitled to maintain his possession and to prevent the completion of the removal of the property from his possession. A very different state of things, however, arises if the owner of a stolen watch be permitted to take the law into his own hands at any subsequent time and to use violence against any person who may or may not be an innocent holder in order to retrieve from his possession a watch

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which may or may not be the stolen watch. If serious disorders are to be avoided the right of private defence must be strictly confined within the limits fixed by statute.

Now, in this case on the showing of the appellants the stolen cattle had been removed from the scene of the theft long before the tracking party set out from their Chak, and on their own showing if the complainants were the thieves the stolen cattle had reached the thieves' village; in other words, the thieves had effected their retreat with the stolen property, and even if the accused did see their cattle in the complainants' village they were not justified in using violence to recover those cattle, far less in inflicting death for the purpose of recovering them.

It is common ground that on reaching the village of Machhonika the tracking party came to know that the complainants were collected in large number in their village and were determined to bar their way. This knowledge notwithstanding, the tracking party armed with one gun, if not more, pushed on and came into collision with the complainants, and in that fight killed one man and wounded others of the complainant party. For these reasons I think that the appellants with the exception of Karm Shah, whose case I shall subsequently deal with, have been rightly convicted; but to hold that each member of the party had reason to know that death was likely to be caused to his opponents is to take an extreme view of the case. In my opinion the most that can be held on the established facts is that each member of the party knew that grievous hurt was likely to be inflicted as the result of their unlawful assembly, and the prosecution of the common object.

For the foregoing reasons I would accept the appeal of all the appellants other than Karm Shah and

alter their conviction to one under section 326/149 read with section 38 of the Indian Penal Code, and reduce the sentence in each case to seven years' rigorous imprisonment.

[*His Lordship then dealt with the case of Karm Shah and ordered his acquittal.—Ed.*]

FFORDE J.—I agree with the views expressed by my learned colleague and with the conclusions both of law and of fact at which he has arrived, and I will only add a few words as to the effect of section 105, Indian Penal Code.

Sir Muhammad Shafi has strongly argued that upon a true construction of this section no offence has been established against the appellants. He contends that at the time the affray took place the appellants were acting in the exercise of the right of private defence of property, and accordingly cannot be deemed to constitute an unlawful assembly, and therefore cannot be held responsible for any acts of violence which were not proved against them individually. He contends that even if the opposite party are found to have effected their retreat with the stolen animals, the pursuers were entitled to recover the animals by force until the assistance of the public authorities had been obtained, and that until such assistance had been obtained, or the property recovered, the pursuing party were entitled to use any force short of inflicting death for the purpose of getting the animals back from the thieves. In support of this proposition he has referred us to the case of *Jarha Chamar v. Surit Ram* (1), in which the Additional Judicial Commissioner of the Central Provinces in the course of his judgment expressed the view that in the case of theft "the right continues

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for the recovery of the property even after the theft has been accomplished." In illustration of his view the learned Judicial Commissioner gives the illustration which has been adopted by both Mr. Gaur and Mr. Ratanlal in their valuable works on the Indian Penal Code. According to this view if a thief steals a watch and makes good his escape with it, the owner may recover the watch from the thief—using for that purpose such force as the case allows—should he discover him in possession of it the next day, the next month, or the next year. With great respect to the learned Judicial Commissioner I can find no warrant for such a proposition either in the Indian Penal Code or at common law. This, in my opinion, is not a correct interpretation of the effect of section 105, Indian Penal Code. According to that section the right of private defence of property against theft, that is to say, the right of the owner of the property to recover the stolen article from the thief by violence only continues until—

- (1) the offender has effected his retreat with the property, or
- (2) either, (a) the assistance of the public authorities is obtained,
- or, (b) the property has been recovered.

In other words, if the thief has effected his retreat with the property, or if the assistance of the public authorities has been obtained, or if the property has been recovered, the owner of that property has no right to proceed with violence against the thief. To take the illustration given in the authority referred to. If A runs away with B's watch, B may chase him and seize his watch from him, using for that purpose such violence short of inflicting death as may be necessary for the purpose of recovering the



property stolen. But if B fails to capture A and recover his watch, his right to recover the article by violence has ceased. Similarly, if, instead of pursuing A, B invokes the aid of a policeman for that purpose and the policeman captures A, B cannot intervene with violence for the purpose of recovering his article; and, again, if B by any means whatsoever recovers his watch, he cannot then proceed to use violence to the thief.

In the present case it is clear from the evidence that the thieves had effected their escape with the stolen cattle, and the duty of the owners when they failed to recover the animals in the course of the pursuit was to wait until Karm Shah had returned with the police. Instead of doing this, the pursuing party took the law into their own hands, with the result that one of the opposite party was killed and several injured. For these acts all the persons taking part in the unlawful attempt to recover the animals by violence must be held liable, and though the present appellants may possibly not have inflicted any of the injuries sustained by the opposite party they are legally responsible for the violence of their associates, for there can be no doubt that the intent of all was to proceed to the length of inflicting at least grievous hurt in the endeavour to recover the stolen animals.

N. F. E.

*Appeal accepted in part.*

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