

APPELLATE CRIMINAL.

*Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice,
and Mr. Justice Spargo.*

PO MYE v. THE KING.*

1939

July 11.

Right of private defence—Accused defending another person from harm—Exercise of right of private defence, extent of—Causing of more harm than is necessary—Death of assailant—Intention of accused, to kill—Offence culpable homicide not amounting to murder—Penal Code, ss. 97, 99; Exception 2 to s. 306.

If a person in exercising the right of defending the body of another person against any offence affecting his body, in fact does no more than exercise such right he commits no offence; but if he exceeds that right and kills the offender when it was in fact unnecessary to kill, then under the 2nd Exception to s. 300 of the Code it is still a lesser offence than murder if the intention of the accused was to do no more harm than he believed necessary in the exercise of his right. Even though there was a reckless criminality in the act the case would fall within the Exception if the right of private defence was the only impulse operating in the mind of the accused, and he did not kill with a vengeful motive in the purported exercise of his right.

B. C. Paul for the appellant.

Myint Thein (Government Advocate) for the Crown.

ROBERTS, C.J.—The appellant, Nga Po Mye, was convicted by the learned Additional Sessions Judge at Bassein of the murder of Tun Sein at Ywathitkan village on the 2nd February last, and was sentenced to death under sections 300/302 of the Penal Code; we have quashed the conviction and set aside the death sentence; but we have substituted therefor a conviction for culpable homicide not amounting to murder under section 304, Part I, and a sentence of ten years' rigorous imprisonment. Having passed these orders, we have taken time to consider judgment giving our reasons.

The appellant is the brother of Po Myit, and on the evening of the 2nd February Po Myit called at the

* Criminal Appeal No. 460 of 1939 from the order of the Additional Sessions Judge of Bassein in Sessions Trial No. 12 of 1939.

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house of the deceased at about 8 p.m. and went away with him : according to Tun Sein's widow, they were apparently on friendly terms, but at about nine o'clock they were seen in the village by a man named Tin Gyi.

Po Myit and Tin Gyi give different versions of what then occurred.

Tin Gyi says Po Myit was drunk, but he does not know if deceased was drunk. Po Myit asked "Who are you?" and Tin Gyi replied "It is I" and Po Myit chased him with a knife.

Tin Gyi ran away but pulled a yoke pin from a cart near by with which to defend himself and he turned and struck Po Myit, and then turned again and ran up the steps on to the front verandah (or panachut) of the house of a neighbour Tun Myat. Po Myit pursued him again, and behind Po Myit was Tun Sein, pursuing Po Myit.

Tin Gyi climbed up to the house. As he got to the kitchen he looked round, and Tun Sein the deceased struck Po Myit with a cart prop from behind. Then the appellant rushed up and stabbed deceased.

Deceased's wife intervened saying "You will make a mistake : It is Tun Sein." The appellant retorted "Have you not seen beating" and stabbed deceased again.

Thus in this version Tin Gyi was being chased by appellant's brother Po Myit, and the latter in his turn was being chased by Tun Sein, the deceased. When the deceased struck down Po Myit, the appellant stabbed the deceased and killed him.

Po Myit's version is that he called at Tun Sein's house and found him having a dispute with Po Hlaing Gyi, who was asking for stone fees in connection with a wedding. Tun Sein was indignant, and after throwing Po Hlaing Gyi a rupee, which was not picked up, he followed Po Hlaing Gyi with a clasp knife. Po Myit

asked Tun Sein not to do this. Then they met Tin Gyi and Tun Sein asked him "Who are you?" and he said "It is I." Then Po Myit says he pushed Tun Sein and Tin Gyi struck the witness on the head and ran away.

Po Myit then says he chased Tin Gyi, and Tun Sein in his turn chased the witness Po Myit. He agrees that Tin Gyi ran up the stairs into this house and he says that as he reached the house he was struck again, he thinks by Tin Gyi, who was on the stairs. He fell into a sitting position and Tun Sein struck him from behind with a stick. Then he became unconscious. He admits he was drunk on that night, and says Tun Sein was also drunk.

Po Myit has not been entirely consistent in his statements and the learned Judge observed that he showed much hesitation in giving his evidence.

Now in the front room of Tun Myat's house just behind the middle door was Daw Ein Gywe, the sister-in-law of Tun Myat. She heard a noise and Tin Gyi came rushing up the steps shouting that he was chased with *dahs*. She saw Po Myit at the foot of the stairs: she did not see anything in his hand. Tun Sein was ten or twelve feet behind him and he had a cart prop and he struck Po Myit twice on the back of the head with force and using both hands. Po Myit dropped to the ground.

Tun Sein's wife was just behind. She is named Ma Mya Yin and Daw Ein Gywe says she pulled her husband away and appellant came up and pulled too: Daw Ein Gywe then says she did not see appellant strike deceased, but she says she heard deceased's wife say to appellant "This is Ko Tun Sein. You will make a mistake."

Next the evidence of deceased's wife must be considered. She denies Po Myit's evidence about

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Po Hlaing Gyi and the stone fees and her husband having followed Po Hlaing Gyi with a clasp knife. She says Po Myit merely called for her husband and they walked off together.

Then she says she heard Po Myit ask Tin Gyi who he was, and they talked and Po Myit pushed Tun Sein aside and followed Tin Gyi. She corroborates Tin Gyi that Tin Gyi struck Po Myit with a stick, but she says there were two blows. Po Myit then chased Tin Gyi. The witness did not see if Po Myit had any weapon.

She says she pulled her husband back because she did not wish him to help either of them. Then she says "I ran after my husband Tun Sein." But her story is that when they reached the house Po Myit was lying on the ground. She does not know why. And then she says appellant rushed up and stabbed Tun Sein on the forearm.

She says "I told Po Mye, 'You will make a mistake. This is Ko Tun Sein.'" He retorted, "How can I make a mistake? Don't you see the man here who has been beaten?". So saying he stabbed deceased twice in the chest.

In cross-examination the witness said that immediately she saw the appellant he stabbed Tun Sein. She persists that she did not see her husband do anything to Po Myit.

Tun Myat's wife, Ma Shwe Hte, gave evidence which was of little assistance for when she heard footsteps she ran to the inside of the house and saw nothing of what occurred outside. All she heard was the cry of Ma Mya Yin that appellant had stabbed deceased.

Po Hlaing Gyi entirely denies Po Myit's story that he was at Tun Sein's house at all, much less that there was a dispute about stone fees.

Now these are the material witnesses from whose evidence the nature of the quarrel must be ascertained.

The defence was a denial and an *alibi*. The accused in his examination said he was not at the place where Tun Sein was killed but he heard shouting that Po Myit and Tun Sein were dead and then went to the scene and attended to his brother. He is supported in this story by Maung Hla Din.

Maung Hla Din says "On hearing the shouts myself, Maung Thein, and accused Po Mye went there."

But Maung Thein was called as a defence witness. He says "Myself, Hla Din and Po The heard the shouts." He repeats Po The's name and does not include appellant in the party.

Now this Po The had called earlier in the evening at the house of Po Kun who says "At about 7-30 p.m. Maung Thein, Hla Din, Po The and the accused, Po Mye, came to my house for a visit, whilst Tin Gyi was there. They left together, leaving Tin Gyi behind."

This Po The is another witness for the defence. He says he was not with Maung Thein or Hla Din or the appellant: he went to another house alone to enquire for a sick child. When he came out he saw the meeting between the deceased, Po Myit, and Tin Gyi and he saw the chase, Tin Gyi being chased by Po Myit followed by the deceased. Then he heard shouts that Po Myit and Tun Sein were dead; and it was after this that he saw the appellant and Hla Din bringing Po Myit away.

As the learned trial Judge observed, none of these persons went and told the deceased's widow or anyone that the appellant was all the time with them and was not Tun Sein's assailant. The appellant's name was being shouted all over the village as being the assailant. The evidence that he did stab Tun Sein is quite conclusive. Numbers of villagers who gave evidence heard Ma Mya Yin's cry denouncing the appellant by

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name the moment he did the deed and he was plainly recognized by Tin Gyi and Daw Ein Gywe as well as by Ma Mya Yin. Not only was there bright moonlight but there was a "storm-king" lamp burning over Tun Myat's middle front door.

When Maung Po Saing, the ten-house-*gaung*, and U Sein Byaung, the headman, came, Tun Sein, who was not yet dead and was taken to the front of his house, became sufficiently conscious to complain of cold and ask for a blanket. The ten-house-*gaung* says he spoke well and said three times that he was stabbed by Po Mye. The headman also said, (in cross-examination): "I asked him who stabbed him and he answered three times that he was stabbed by Po Mye." There can be no doubt whatever as to the identity of the appellant with the person responsible for the death of Tun Sein.

Tun Sein was taken to Kyaunggon to the police station in a cart. He died on the way at about 8 a.m. The party reached Kyaunggon shortly before noon. The widow made a first information report to the police. Her version then was that the deceased tried to pacify Po Myit and Tin Gyi and Po Mye thought the deceased came not to pacify but to take part in the quarrel, and thus stabbed the deceased.

The injuries suffered by the deceased were:—
 First, a stab wound $1\frac{3}{4}$ " below the right nipple penetrating the abdominal cavity, piercing the liver with a rent measuring $1\frac{1}{2}$ " and also piercing the right auricle of the heart. This wound was necessarily fatal. The doctor added that it was possible that Tun Sein could speak after receiving his injuries. Secondly, the deceased was stabbed in the lower part of the right arm pit and this stab penetrated the chest and the surface of the right lung near the ribs: this injury was sufficient in the ordinary course of nature to cause death. There was also a minor wound on the forearm.

Since everyone is to be presumed to intend the natural and reasonable consequences of his acts, these injuries made the offence one of murder unless the appellant could raise in the mind of the Court a reasonable doubt as to whether he should not have the benefit of some one or other of the exceptions to section 300 of the Penal Code which reduces a *prima facie* case of murder to one of culpable homicide not amounting to murder.

Notwithstanding the failure of his *alibi*, the appellant is entitled to raise other defences at this stage. And we are indebted to his advocate, Mr. Paul, for the ability with which they were raised on his behalf. This advantage which we have had was not afforded to the learned Additional Sessions Judge. Even in the grounds of appeal which the appellant has submitted he persists in his *alibi* and adopts no other contentions; but we have to consider what in fact happened and the appellant must not be prejudiced by his failure to put forward at an earlier stage his best and, as we think, his true line of defence.

The line of defence, now, is two-fold. It is said, in effect, that here was a chase and first of all Tin Gyi was being chased, and he had reached the top of the steps and perhaps even the interior of Tun Myat's house, and it was the appellant's own brother, Po Myit, who was chasing him. But it is urged there is no evidence that when the appellant arrived on the scene Tin Gyi was appearing to be chased any longer: it looked as though Po Myit was being chased by Tun Sein and being chased for no lawful reason. And Tun Sein struck Po Myit down with the stick or cart prop he had in his hand. Daw Ein Gywe's evidence in this connection, say the defence, is of great importance.

The appellant would see what Daw Ein Gywe says took place at the foot of the stairs: and he would see

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no more, nor would he relate what happened there to any quarrel between his brother and Tin Gyi.

Although the deceased's wife, Ma Mya Yin, did intervene, what does that matter, says the defence? Accused was certain there was no mistake. His retort is in evidence: "How can I make a mistake? Don't you see the man here who has been beaten?" He had seen Po Myit felled to the ground with his own eyes, and the intervention of Tun Sein's wife on her husband's behalf could not explain away the spectacle he had witnessed.

Seeing his own brother struck down in this way, the defence contends that the right of Po Mye, the appellant, fell within section 97 of the Penal Code, which says:

"Every person has a right, subject to the restrictions contained in section 99, to defend his own body and *the body of any other person* against any offence affecting the human body."

Section 99 says:

"The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence."

Well, it is frankly and wisely admitted that far more hurt than was in fact necessary was inflicted here. The injuries show an intention to cause death, or at least such bodily injury that death must in all probability result. In the circumstances the appellant was obviously not justified in killing the deceased.

The defence therefore urges that, though the right of private defence was grossly exceeded, nevertheless it existed, and they cite the second exception to section 300, which runs as follows:

"Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the

death of the person against whom he is exercising such right of defence without premeditation and without the intention of doing more harm than is necessary for the purpose of such defence."

Now, what is the power given to such a person by law? Section 100 of the Penal Code says that the right extends to the voluntarily causing of death if the offence which occasions the exercise of the right is such an assault as may reasonably cause the apprehension of death or grievous hurt. That is to say, if the appellant reasonably apprehended that Po Myit might suffer such an assault, he could kill his brother's assailant, providing he was doing no more harm than it was in fact necessary (not in accordance with his mere belief necessary) to inflict for the purpose. If he did so, he would be exercising his undoubted right as a citizen and would be committing no crime at all.

Then what does this exception mean by describing what is done by an offender as culpable homicide? The answer must lie in the words "without the intention of doing more harm than is necessary for the purpose of such defence." If a person, who possesses this right of private defence, in fact does no more than exercise it, he commits no offence; but if he exceeds the right—if, in other words, it was in fact unnecessary to kill—it is still a lesser offence than murder if his intention was to do no more harm than he believed necessary in the exercise of his right.

The exception deals, in the concluding words, not with fact but with intention, and refers to circumstances in which a person does not take advantage of the right of private defence to kill with a vengeful motive, but exceeds that right by inflicting fatal injuries where their infliction was in fact unnecessary, and where there was a reckless criminality though the right of private defence was the only impulse operating in the mind. Those circumstances, I think, exist here.

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We have been referred to the words in the exception which state that the offender, to benefit by it, must act "in good faith", and then to section 52 which says "nothing is said to be done in good faith which is done without due care and attention." What is due care and attention depends on the position in which a man finds himself, and varies in different cases. The question here must be whether the offender acted honestly, or whether he used the opportunity to pursue a private grudge and to inflict injuries which he intended to be inflicted regardless of his rights. The section punishes a criminal act in excess of the right of private defence, and it is impossible to regard "due care and attention" in the sense which is usually ascribed to it as an element in such criminality.

The prosecution say, in reply to this defence, that there was no right of private defence at all. Section 97, it is pointed out, extends to a right to defend the body of any other person, *against any offence* affecting the human body. It is contended that Tun Sein was committing no "offence" against the human body. True, he was hitting Po Myit upon the head, but he was justified in so doing because he had the right of private defence in respect of a threatened assault by Po Myit against Tin Gyi which was altogether unjustifiable.

In my opinion, the prosecution have not shown this: the weight of the evidence seems against the contention that Po Myit was armed. Only Tin Gyi says he had a knife, and no one else saw him with any weapon. Tun Sein's action in felling him to the ground could not be a lawful one: it was more than was necessary in the circumstances. Tin Gyi had taken refuge and was himself armed with a stick; and therefore the contention of the prosecution on this point must fail.

We also think, however, that possessing that right, and acting under the impulse to exercise it, the appellant far exceeded that which any reasonable person would do. There is no evidence that Tun Sein had any weapon except a cart prop and he could have been overpowered from behind. At any rate it was in no way necessary to inflict these terrible stab wounds upon him.

Now the second line of defence was based upon exception 1 to section 300.

Exception 1 says "Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation" (these are the material words for our present purpose).

The defence contended that for the appellant to see his brother struck down in this way would cause him provocation which was both grave and sudden and would make him lose his self-control. And Tun Sein, they say, gave this provocation. Of course he gave it to Po Myit, but they say he gave it to the appellant also.

What is grave and sudden provocation is a question of fact in each case. It is urged that when a man sees his brother felled to the ground for no apparent reason, he may lose his self-control, being provoked thereby. I do not think that in every case he would be bound to do so, but in this case I think he might have done so and did do so. I think these terrible injuries were due to the lack of self-control apparent in the appellant when he saw his brother struck down suddenly, and that to the appellant in the circumstances the provocation was grave as well as sudden.

But then the prosecution say there is the third proviso to the exception. The exception is subject to this proviso, amongst others "that the provocation is

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not given by anything done in the lawful exercise of the right of private defence." And it is urged that Tun Sein was doing something in the lawful exercise of the right of private defence, that is of defence of Tin Gyi, when he gave that provocation to the appellant.

As I have already indicated, I cannot accept that argument. In my opinion Tun Sein was committing an unlawful act.

Holding, as I do, that the appellant has brought his case under each of the exceptions mentioned to section 300 he is guilty of culpable homicide. Since he was so provoked as to be deprived of the power of self-control the infliction of two wounds does not add to the heinousness of his offence.

Accordingly, whilst the conviction for murder has been quashed and the sentence of death set aside, the conviction substituted therefor under Part I of section 304 of the Penal Code for culpable homicide not amounting to murder must be followed by a sentence of ten years' rigorous imprisonment.

SPARGO, J.—I agree with my Lord the Chief Justice that the appellant had the right of private defence of the body. He had seen his brother struck on the head with a bamboo implement, described as a cart prop, and felled to the ground. It was suggested that the person who did this was himself acting in good faith in the exercise of the right of private defence of the body but there is a reasonable doubt whether the appellant saw anything which would suggest to his mind that this was so. Tin Gyi, whom the appellant's brother was said to be pursuing, had reached the inside of the house outside which the encounter between Tun Sein and Po Myit occurred and all that the appellant can be proved to have seen was Tun Sein's blows upon Po Myit. I agree that there is no reason to suppose that the

appellant was actuated by any impulse but that of exercising the right of private defence of the body and that Exception 2 to section 300 of the Penal Code applied. He is therefore guilty of culpable homicide because he exceeded the right of private defence and I agree to the sentence of rigorous imprisonment for ten years.

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