APPELLATE CRIMINAL.

Before Mr. Justice Thein Maung.

1947
Oct. 24.

TUN KYAING (APPELLANT)

v.

THE KING (RESPONDENT).*

Right of private defence—How long exists—Existing right—Error of judgment.

When the deceased struck the appellant with a wooden yoke pin and the latter wrenched it from his hand and both were struggling and the appellant gave a blow on the head of the deceased with it as a result of which the other man died.

Held: That as parties were struggling—right of private defence was not gone and he must have inflicted the blow not only on grave and sudden provocation but also in exercise of the right of private defence. It is not possible for a person under such circumstances to weigh what maximum amount of force is necessary to keep within that right. The sentence was therefore reduced to one of one year's rigorous imprisonment.

The King v. *Hla Maung*, (1946) R.L.R. 50 at p. 55; *Bhut Nath Dave* v. *King-Emperor*, 13 C.W.N. 1180; *Radhey and others* v. *Emperor*, 24 Cr.L.J. 735; *Queen* v. *Fuzza Meeah*, (1866) 6 W.R. (Cr.) 89; *Queen* v. *Shunker Sing*, (1864) 1 W.R. (Cr.) 34, followed.

Tun Maung for the Crown.

THEIN MAUNG, J.—The appellant Tun Kyaing has been found guilty of having caused the death of Tun Yin while he was deprived of the power of self-control by grave and sudden provocation, and he has been sentenced to undergo seven years' rigorous imprisonment under section 304 of the Penal Code.

He has appealed to this Court for reduction of the sentence on the ground that he acted in self-defence while he was terror-stricken; and his appeal has been admitted by my brother Mr. Justice Ba U with the remark "On the facts found I am not sure whether the sentence is not somewhat severe."

* Criminal Appeal No. 1782 of 1947 being appeal from order of Special Judge of Henzada, dated the 15th August 1947, passed in Special Judge Trial No. 36 of 1947.

The facts which have been found by the learned Special Judge are that the appellant made a report against the deceased to the village elder Maung Sint (P.W. 2) one day before the date of the incident as the deceased had removed a post from his fencing. On the day of the incident, the appellant, the deceased and some other villagers were having tea in Maung Sint's house after they had helped Maung Sint in roofing his house. While they were having tea there, the deceased picked a quarrel with the appellant for having made the said report, picked up an untrimmed wooden yoke pin and went towards the appellant in a threatening manner "uttering deadly threats." As the deceased struck at the appellant with the yoke pin, the latter wrenched it from his hand and gave him a blow on the head with it. Thereupon the deceased fell on the ground and the appellant ran away with the stick.

Dr. John (P.W. 8) found two contused wounds on the right side of the head of the deceased with fractures of the skull bone underneath and, according to him, each injury by itself was sufficient in the ordinary course of nature to cause death.

Although the doctor found two injuries as stated above, the eye-witnesses Maung Sint, Po Nyan, May Doe, Gan Gaw and Tun Thin (P.Ws. 2, 3, 4, 5 and 6), are unanimous that the appellant delivered only one blow and the doctor also has stated "If the weapon used was of irregular shape, both injuries could have been caused by the infliction of one blow." Under these circumstances, the learned Special Judge has found that only one blow was delivered by the appellant.

The learned Special Judge has also found that the provocation given by the deceased to the appellant was grave and sudden ; but he has held that the appellant's plea of self-defence is clearly untenable. He has observed in the course of his judgment "After he had

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deprived the deceased of the use of the stick, the accused was no longer in danger of being grievously assaulted by the latter and with several friends looking on close by, there was really no threat of danger to his life when he yielded to the sudden impulse of delivering the murderous blow on the deceased's head."

The plea of self-defence may be untenable in the sense that the appellant has exceeded his right of private defence ; but it is not quite correct to say that the appellant after he had deprived the deceased of the yoke pin was no longer in danger of being grievously assaulted by him. The appellant who has given evidence on oath in his own defence has stated that he struck the blow as the deceased tried to snatch the yoke pin back from him, and the probabilities are that the deceased did try to get the yoke pin back from him with a view to further assault on him. Besides, nothing turns on there having been "several friends looking on close by" since none of them has given evidence of any attempt having been made by anyone of them to restrain the deceased, or to prevent him from assaulting the appellant any further.

In his judgment in *The King* v. *Hla Maung* (1), Mr. Justice Ba U has quoted with approval the eminent jurist Mayne who said :

"But a man who is assaulted is not bound to modulate his defence step by step, according to his attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger ; and if, in a conflict between them, he happens to kill, such killing is justifiable. And, of course, where the assault has once assumed a dangerous form every allowance should be made for one, who, with the instinct of self-preservation strong upon him, pursues his defence a little further than to a perfectly cool bystander

(1) (1946) R.L.R. 50 at p. 55.

would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger."

So the question really is not whether there was an actually continuing danger but whether there was a reasonable apprehension of such danger ; and I am of the opinion that the appellant was not out of danger so long as the deceased was struggling with him for possession of the yoke pin [cf. *Queen* v. *Fuzza Meeah* (1) and *Farida* v. *Emperor* (2)].

So the appellant must be held to have inflicted the blow not only on grave and sudden provocation but also in exercise of the right of private defence although he has exceeded the right of private defence in delivering the blow with such force as to cause fractures of the skull.

With reference to the question of sentence, the Court must take into consideration not only the grave and sudden provocation and the right of private defence but also the facts that the appellant struck the deceased with the very yoke pin with which the deceased was going to strike him, that he struck the deceased only one blow and that the yoke pin is only 1½ cubits long. In this connection the Court must also bear in mind the remarks of Jenkins C.J. and Ryves J. Jenkins C.J. observed in *Bhut Nath Dave* v. *King-Emperor* (3) :

"A man in the predicament of the accused could not be expected to judge too nicely."

Ryves J. observed in *Radhey and others* v. *Emperor* (4)—

"When exercising the right of private defence it is difficult to expect the person to weigh 'with golden scales' what maximum amount of force is necessary to keep with that right."

(1) (1866) 6 W.R. (Cr.) 89.
(2) 35 Cr.L.J. 174.
(3) 13 C.W.N. 1180.
(4) 24 Cr.L.J. 735.

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My brother Mr. Justice Ba U has also remarked in *The King* v. *Hla Maung* (1) :

"Every allowance should in my opinion be made for the stress, danger and excitement under which he labours."

So I am of the opinion that the sentence of seven years' rigorous imprisonment is too severe. I find that, in *Queen* v. *Fuzza Meeah* (2), the facts in which are more or less similar to the facts in the present case, the sentence was reduced from three years' rigorous imprisonment to one year's rigorous imprisonment. I also find that in *Queen* v. *Shunker Sing* (3), which is a case of an affray respecting land wherein one party was the aggressor and the other party (had the affair not ended fatally) would have been in the legal exercise of the right of defence of property, the sentence was reduced to one year's rigorous imprisonment.

I accordingly reduce the appellant's sentence from seven years' rigorous imprisonment to one year's rigorous imprisonment only.

(1) (1946) R.L.R. 50 at p. 55. (2) (1866) 6 W.R. (Cr.) 89.
(3) (1864) 1 W.R. (Cr.) 34.