

(ASSIZE COURT OF NICOSIA.)

[TYSER, C.J., BERTRAM, J., HOLMES, P.D.C., IZZET EFFENDI
AND MITZIS, JJ.]

REX

v.

DERVISH HAJI OMER.

ASSIZE
COURT
OF
NICOSIA
1909

March 5

CRIMINAL LAW—HOMICIDE—HOUSEHOLDER PREVENTING ENTRY OF HIS PREMISES BY NIGHT—HOUSEHOLDER SHOOTING THIEF FOUND ON PREMISES AT NIGHT—OTTOMAN PENAL CODE, ART. 187.

Art. 187 of the Ottoman Penal Code, (which declares that a man is justified in killing another to prevent him from climbing or breaking into his dwelling house by night) does not apply to the case where a man kills a thief whom he finds by night on his premises and who has already effected an entry.

The accused in the middle of the night discovered a man, who had scaled the wall of his courtyard, engaged in stealing the sheep in the courtyard, and thereupon shot and killed him.

HELD: Not justified under Art. 187.

The accused was charged with homicide without premeditation.

It appeared from the evidence that one night he was roused by his wife and through the window of his room descried a man in his yard collecting his sheep apparently with a view to stealing them. He called to the man but receiving no answer fired and killed him. He then ran and reported the matter to the Mukhtar. It was then discovered that the deceased was a notorious thief and bad character; he was barefoot and was carrying a knife; he had effected an entrance into the yard by scaling the wall by means of a plough which he had rested against it.

Bucknill, K.A., for the Crown.

Paschales Constantinides for the Defence. This case is at least within the spirit of Art. 187. The corresponding article of the French Penal Code (Art. 322) is in practice interpreted as including this case.

Judgment. THE CHIEF JUSTICE: Art. 187 of the Ottoman Penal Code, literally translated, is as follows:—

“ Acts of wounding, striking and killing during the night are excused, if they take place for the purpose of preventing a person when that person takes and puts up a ladder to a man’s house or shop or room, or when he destroys by force places which are under key, or when he breaks the doors or pierces the walls of an inhabited house or places appurtenant to it.”

The killing in this case took place not for the purpose of preventing the man from entering, but after he had effected an entry, and is consequently not within the terms of the article.

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The question whether a man is justified in killing another under such circumstances as the present must depend upon the principles which we have already explained in the case of *R. v. Christodoulo Sava*, supra p. 99 and it is plain that the act of the accused in the present case is not capable of justification under those principles.*

Under the circumstances though we have every sympathy with the accused, we have no alternative but pass on him the sentence prescribed by Art. 174 of the Penal Code.

Sentence: Fifteen years hard labour.†

* The following case from the English books is here printed as indicating the principles observed in such cases in England.

R. v. JOHN SCULLY
(1 Car. & P. 319-320)
(April 2, 1824.)

A person set to watch a yard or garden is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if from the conduct of the party he has fair ground for believing his own life is in actual and immediate danger he is justified in shooting him.

This prisoner was indicted for manslaughter, in shooting a man whose name was unknown.

It was proved that the prisoner had been set to watch his master's premises, and that he came to a constable to surrender himself. He said he had unfortunately shot a man; and that he having seen the man on his master's garden wall in the night, hailed him; and the man said to another, whom the prisoner could not see, "Tom, why don't you fire?" That he (the prisoner) hailed them again, and the same person said, "Shoot and be d—d," whereupon he fired at the legs of the man on the wall, whom he missed and shot the deceased, whom he had not seen from his being behind the wall.

This confession was the only evidence against the prisoner; but it was proved, that when the deceased was found, he had three dead fowls and a housebreaker's crowbar lying near him, and a flint, steel, and matches in his pocket.

GARROW, B.: Any person set by his master to watch a garden or yard is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in actual danger he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.

Verdict: Not guilty.

† This sentence on the recommendation of the Court was afterwards reduced by the High Commissioner to one of six months imprisonment.