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April 27.

REG. V. DALSUKRA'M HARIBHAI.

Local Nuisances—Crim. Proc. Code, Ch. xx.—Act XVIII. of 1850.

The Magistrate of a district issued an order, under Sec. 308 of the Code of Criminal Procedure, calling upon the petitioner to remove a building, on the ground that it was an unlawful obstruction upon a highroad. A jury of five persons was appointed by the Magistrate's successor, under Sec. 310, to report, within fifteen days, whether the order was reasonable and proper. The jurors, being without instructions, took different views as to the performance of their duties; but four of them visited the premises, and were unanimous in finding that the building complained of was not on a highroad at all. Five days after receiving reports to this effect, the Magistrate issued another order to the petitioner, requiring him to pull down his house within fifteen days, as the jurors had made no report *within the time prescribed*. The petitioner showed cause under Sec. 313, but without effect; and the order was repeated. The Session Judge, meanwhile, upon application of the petitioner, called for the proceedings, under Sec. 434; but the Magistrate wrote, questioning the Judge's authority to interfere; and, without waiting for a reply, proceeded to try the petitioner for disobedience to an order duly promulgated by a public servant, and sentenced him to twenty-five days' imprisonment, under Sec. 188 of the Penal Code. His house was also pulled down. The proceedings were ultimately forwarded to the Session Judge, whose successor in office returned them with the remark that nothing appeared to have been done contrary to the law for the removal of nuisances.

Held (reversing the conviction) that the Magistrate ought at once to have complied with the precept of the Session Judge, under Sec. 434; and that he was not warranted in convicting and imprisoning the petitioner for disobeying an order, the legality of which was then properly under the consideration of an appellate court.

Held, also, that the petitioner had shown sufficient cause to satisfy the Magistrate, under Sec. 313, that the order to pull down the house was "not reasonable and proper."

Query, whether Act XVIII. of 1850 would protect a Magistrate in such case from being sued for damages.

THE record and proceedings in this case had been called for, under Sec. 404 of the Code of Criminal Procedure.

The case was heard before SAUSSE, C.J., and TUCKER, J.

Dhirajlál Mathurádás for the petitioner.

The facts are fully stated in the judgment of the Court, delivered this day by

SAUSSE, C.J. :—We consider that a conviction under Sec. 188 of the Indian Penal Code cannot be supported under the circumstances which have been disclosed by the reports

of the Magistrates, and the explanatory evidence directed to be taken in this case.

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It was the duty of the Magistrate F.P., Mr. Theodore Stewart, to have complied at once with the precept of the Session Judge, who, under Sec. 434, had called for the proceedings of the Magistrate of the district under the Local Nuisance clauses in the Criminal Procedure Code; and, pending that Judge's investigation into the legality of what had been done, the Magistrate, Mr. Stewart, was not warranted in convicting and imprisoning a person charged with disobeying an order of the Magistrate of the district, the legality of which was then properly under the consideration of an appellate court. Upon this ground alone we reverse this conviction, and regret that the petitioner has had to undergo an imprisonment of twenty-five days, which cannot be recalled.

There were some circumstances, however, connected with this case, which call for serious comment and animadversion at our hands, not only with respect to the imperfect state of the law upon this head, but also, we regret to say, with reference to the conduct of the Magistrates concerned.

The facts require to be stated at some length.

In 1864, the Magistrate of the District of Kheda, Mr. J. W. Hadow, acting under Sec. 308 of the Criminal Procedure Code, by notice, called upon the petitioner to remove a building erected by him at Kapadvanj, on the ground that it was an unlawful obstruction upon a highroad.

The petitioner called for a jury, under the provisions of Sec. 310. Two members of it were appointed by the petitioner, and three (including the President) by the Magistrate. The Code directs that the execution of the order shall be suspended pending the inquiry; and that its execution shall depend upon the *opinion of the majority of the jury*.

The Code further enacts that, if the petitioner shall, by neglect or in any other way prevent the appointment of a jury, or if the jury, from any cause, shall not decide and

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report within a reasonable time, to be fixed in the order, their functions shall cease from the date of the expiration of such period, unless they be continued by special order of the Magistrate ; and if, from any such cause, no decision shall be arrived at by the jury, the order of the Magistrate shall be carried into effect, unless, after a notice to obey it (Sec. 313), the person shall appear before and satisfy the Magistrate that the order is not " reasonable or proper," in which case no further proceedings shall be taken upon it.

Thus, for the exercise of this very summary and arbitrary dealing with the rights of property, the Legislature has, for the protection of owners of property, provided two checks :— (1) The report of the majority of a jury composed of not less than five members ; (2) Where no report shall have been made within the proper period, an appeal to the conscience and discretion of the District Magistrate.

An order was made, on the 7th of February 1865, by the then Third Assistant Magistrate (Mr. Stewart), who, it is to be presumed, was in temporary charge of the Office of the Magistrate of the District, upon five persons by name : ordering them, within fifteen days from that date, report to him at Kheda, " whether, in their opinion, an order that had been made for the removal of the petitioner's building, on the ground that it was an encroachment on the highroad, was reasonable and just, or not."

It does not appear that any instructions were given to any of the jurors as to what they were to do. They appear to have taken different views of how their duty was to be performed : some thinking it was by a separate report from each ; and others that it was optional to send a separate or a joint report ; and one only that the report was to have been joint.

Four jurors, including the President, personally visited the premises. The President states that he considered the jurors were to send in separate reports to him ; that the two jurors appointed by the petitioner did send in their reports to him before the expiration of the time fixed (the 22nd of February 1865) ; but that one of the others, after viewing the premises

in company with the President, fell ill of fever, and sent in no report until the 13th of March following; that the President also did not send in any report until the 14th of March, as he had gone to a marriage at a neighbouring village; and that the fifth juror did not make any report at all. The juror last named, who was one of those nominated by the Magistrate, states that he was in expectation of being sent for by the others, and took no steps in the matter.

These four reports were unanimous in finding that the building complained of was not on a highroad at all; and the President, at least, expressly finds that it was erected on the petitioner's own ground. The fifth juror, in his evidence, taken by direction of this court, makes a similar statement.

These reports appear to have reached the Magistrate of the District, Mr. James Walker Robertson, on the 15th of March; and, on the 20th of the same month, that Magistrate issued an order to the petitioner, requiring him to pull down his house within fifteen days, as the jurors had made no report within the time prescribed. The petitioner showed cause against this order, under Sec. 313, but without effect; and on the 30th of March, on another application of the petitioner, Mr. Robertson repeated his previous injunction. Subsequently Mr. Robertson appears to have left the district, and Mr. Stewart to have assumed charge of the Office of District Magistrate; and he, on further applications from the petitioner, issued orders similar to those which had been given by his predecessor.

At the same time when these orders were given, both Mr. Robertson and Mr. Stewart must have known that a majority of the jurors had reported that the building erected by the petitioner was not an encroachment on a highroad, and that all ground for removing the building by this summary process had failed; and, further, that whatever had been defective in the proceedings of the jury had not been caused by any act of the petitioner or of his nominees. With all these facts before him, Mr. Stewart paid no heed to the petitioner's remon-

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stances ; but proceeded to try him for disobedience of one of Mr. Robertson's orders.

The Session Judge, being then in Kheda, upon the application of the petitioner on the 8th of May, sent his precept to Mr. Stewart, calling on him to send forward all the papers and proceedings, that the legality of the previous orders by Mr. Robertson might be determined. On the 11th of May, Mr. Stewart writes to the Session Judge, questioning that officer's authority to interfere in the matter ; and on the 12th of May, without waiting for the Session Judge's reply, he proceeds to try the petitioner for disobedience of Mr. Robertson's order ; and sentences him to twenty-five days' imprisonment. On the 15th a report is received that the house is pulled down.

The papers and proceedings were ultimately forwarded to the Session Judge, Mr. Down, and that officer's successor, Mr. Grant, returned them, after Mr. Down's departure, with the remark that nothing appeared to have been done contrary to the law for the removal of nuisances.

But if the letter of the law had not been departed from, it seems to us that its spirit has not been complied with. The framers of Chap. xx. of the Code of Criminal Procedure evidently contemplated that considerations of justice and equity should form the rule of a Magistrate's conduct in dealing with alleged nuisances or unlawful obstructions. Unhappily, no provision has been made in the Code for compelling the attendance of the jurors, or for securing the correct performance by them of the functions intrusted to them ; and thus important rights of property are left in a measure dependent on the caprice and activity or inactivity of private persons. The Legislature apparently relied on the sense of justice and discretion of the District Magistrate to remedy any failure of duty on the part of the jury, either by an extension of the term fixed for their decision, or by a further reconsideration of the subject. This case, however, affords an illustration of how feeble a safeguard the discretion of a Magistrate may be ; and demonstrates the

necessity of an amendment of the law in that particular at least.

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We conceive that any Magistrate, who possessed conscience or discretion, should, with the information before him that was before Mr. Robertson and Mr. Stewart, have shrunk from adopting the violent course of pulling down a house stated to be valuable, which had been reported, by persons nominated by themselves, not to be any encroachment upon a highroad, and to have been built upon the petitioner's own ground ; and we also think that no Magistrate ought, under the circumstances, to have proceeded to enforce such an order in the manner that Mr. Stewart has done, and to have sentenced the owner of the house to almost the maximum of punishment which the Penal Code allows him to inflict for disobedience to an order duly promulgated by a public servant lawfully empowered to make such order.

We regret to feel ourselves obliged to characterise the conduct of both Mr. Robertson and Mr. Stewart as inconsiderate and oppressive. Had either of these Magistrates reflected, as he should have done, he would have found abundance of reason to lead him to think, in the words of Sec. 313 of the Code of Criminal Procedure, it would not be "reasonable and proper" to carry out the original order.

We regret, too, that we must further refer to the tone which appears to pervade Mr. Stewart's explanation to this court, wherein, with the knowledge of all these facts, he calls upon this court to treat the petitioner's allegations of complaint as "worthless and groundless."

The exercise of these summary powers requires both experience and discretion in a Magistrate, and a careful consideration of the rights of property.

We are not now in a position in which we can decide ; and we, consequently, give no opinion, whether Act XVIII. of 1850 will protect a Magistrate from being sued for damages, on account of the injury which may have been occasioned by arbitrary acts, of the character of those which have elicited

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our present comments; but if it be found that that enactment deprives a person in the position of this petitioner of all remedy, it becomes a question for consideration, whether an alteration of the law has not become necessary.

That the present state of the law, and the reckless manner in which it is sometimes administered, may be brought under the notice of the executive government, we direct that the papers and proceedings which have come before us be forwarded to His Excellency the Governor of Bombay in Council, with a copy of our observations in this case.

Conviction reversed.

NOTE.—The following sections of the Code are material:—

“308. Whenever the Magistrate of a District or of a division of a District may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place; or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed, or should be removed to a different place; or that the construction of any building, or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented; or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary; or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public; he may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on such person, within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove, such building, or to alter the disposal of such substance, or to fence such tank or well (as the case may be), or to appear before such Magistrate within the time mentioned in the order, and show cause why such order should not be enforced.”

“310. The person to whom such order is issued shall be bound, within the time specified in the order, to obey the same, or to appear before the Magistrate to show cause as aforesaid, or he may apply to the Magistrate by petition for an order for a Jury to be appointed to try whether the order is reasonable and proper. On receiving such petition, the Magistrate shall forthwith appoint a Jury, which shall consist of not less than five persons, whereof the President and one-half of the Members shall be nominated by such Magistrate, and the remaining Members by the party petitioning. The Magistrate shall suspend the execution of the order pending such inquiry, and be guided by the decision of the Jury, which shall be according to the opinion of the majority. If the petitioner shall, by neglect or in any other way, prevent the appointment of a Jury, or if, from any cause,

the Jury so appointed shall not decide and report within a reasonable time, to be fixed in the order for the appointment, their functions shall cease from the date of the expiration of such period, unless they be continued by special order of the Magistrate; and if, from any of the above causes, no decision be made by the Jury, the order of the Magistrate shall be carried into effect, as hereinafter provided."

" 312. If in a case referred to a Jury, the Jury shall find that the order of the Magistrate is reasonable and proper, the Magistrate shall give notice thereof to the person to whom the order was issued, and shall add to such notice an order to obey the order first mentioned, within a time to be fixed therein, under the penalty provided by the Indian Penal Code as aforesaid. If such latter order shall not be obeyed, the Magistrate may proceed as in the last preceding section.

" 313. If the person to whom the order of the Magistrate is issued shall appear and show cause against the same, and shall satisfy the Magistrate that the order is not reasonable and proper, no further proceedings shall be taken in the case."

REG. V. VINA'YAK TRIMBAK *et al.*

June 27.

*Conviction of several offences—Sentence—Crim. Proc. Code,
Secs. 46, 426, and 434.*

Two prisoners, having been convicted by an Assistant Session Judge of forgery and other offences, were sentenced each to an aggregate amount of punishment, which the Court was competent to inflict, but without specifying the several penalties awarded for each offence.

On a reference by the Session Judge, under Sec. 434 of the Criminal Procedure Code:—

Held that it was an irregularity, on the part of the Assistant Session Judge, not to pass a separate sentence under each independent head of the charge; but that it was not an error or defect in consequence of which the High Court could reverse or alter the sentence, under Sec. 426 of the Code.

THE prisoners were convicted, at one time, by N. M. W. Daniell, Assistant Session Judge of Puná, of forgery and other offences punishable under the Indian Penal Code; and sentenced, the first to rigorous imprisonment for three years and to pay a fine of Rs. 500, and in default to suffer further imprisonment for one year; and the second prisoner to rigorous imprisonment for two years; the amount of punishment awarded, in each case, being stated only in the aggregate; without specifying "the several penalties," to which the Court should have sentenced each person, under Sec. 46 of the Criminal Procedure Code, for the offences of which he had been convicted.

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