1870.
June 13.

REG. v. KA'DIR valad BA'LU.

Evidence—Wife's Evidence against Husband—Mofussil Law.

The evidence of a wife is admissible against her husband in a criminal case in the Mofussil.

Reg. v. Khyroollah (*a*) followed.

(*a*) 6 Calc. W. Rep., Cr. R. 21.

THIS was a reference made by G. F. Sheppard, Magistrate of the District of Thán̤á, for the orders of the High Court.

Mr. Pearson, First Class Subordinate Magistrate in the Thán̤á district, dismissed a complaint of causing the death of a child, on the ground that the evidence of the complainant was inadmissible against the accused, who was her husband.

The reference was heard before WESTROPP, C. J., and LLOYD, J.

PER CURIAM:—Following the case of *Reg.* v. *Khyroollah and others* (*ubi suprà*), the Court reverses the order of the Subordinate Magistrate, Mr. Pearson, and directs him to proceed with the investigation of the case, and to take the evidence of the wife of the accused.

Order accordingly.

June 15.

REG. v. VYANKATRA'V SHRINIVA'S.

Search without Warrant—Crim. Proc. Code, Sec. 135—*Ind. Pen. Code, Sec.* 99.

An officer, subordinate to an officer in charge of a police station, who was deputed by the latter to make an inquiry under Sec. 135 of the Code of Criminal Procedure, attempted without a search-warrant to enter a house in search of property alleged to have been stolen, and was obstructed and resisted:

Held (applying Sec. 99 of the Indian Penal Code) that, even though the police officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification of his obstruction, as it was not shown that that officer was acting otherwise than in good faith and without malice.

A Magistrate acting judicially should not import into the case before him his previous knowledge of the character of the accused, but should determine his guilt or innocence upon the evidence given in the case.

THE accused was tried and convicted before the Subordinate Magistrate of Bágalkot of the offences of voluntarily

obstructing a public servant in the discharge of his public functions, and intentionally offering resistance to the lawful apprehension of certain persons, and was sentenced to undergo rigorous imprisonment for three months and pay a fine of Rs. 200, or in default to suffer further rigorous imprisonment for twenty days, for the former offence; and to undergo six months' rigorous imprisonment and pay a fine of Rs. 200, or in default to suffer further rigorous imprisonment for a month and a half, for the latter offence. In appeal, the District Magistrate, Mr. Armstrong, upheld the conviction and sentences.

An application having been made to the High Court for the exercise of its extraordinary jurisdiction, the record and proceedings were sent for, and it was further ordered that the accused should be set at liberty on bail until the disposal of the application.

The record and proceedings having been sent up, the application was heard before GIBBS and MELVILL, JJ.

Anstey (with him *Nánábhái Haridás*) for the applicant.

Dhirajlál Mathurádás (Government Prosecutor) appeared in support of the conviction.

The judgment of the Court, from which the facts sufficiently appear, was delivered by

MELVILL, J. :—The prisoner has been convicted, 1*st*, under Sec. 186 of the Penal Code, for obstructing the police in the search of a house; and, 2*ndly*, under Sec. 225, for resisting the lawful apprehension of certain persons.

The acts which the prisoner is found to have committed undoubtedly amount to obstruction and resistance.

But it has been submitted to us, as a question of law, that such obstruction and resistance were justified, inasmuch as the police had no right to search a house without a search-warrant, nor to arrest persons who had really committed no offence.

It appears that the constable who conducted the search was a subordinate officer deputed by the officer in charge of the

1870.
REG. v. VYANKATRA'V SHRINIVA'S.

police station to make an inquiry under Sec. 135 of the Code of Criminal Procedure. Such a subordinate officer does not seem to be empowered without a warrant to enter a house in search of property, though he may certainly do so in search of a person who is charged with having committed an offence for which he is liable to be arrested without a warrant (Crim. Proc. Code, Secs. 106 and 107). In the present case it would be difficult to say that the police were not as much in search of persons as of property. But it is not necessary to draw any such fine distinctions. Sec. 99 of the Penal Code provides that there shall be no right of private defence, either of person or property, against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by a public servant acting in good faith under colour of his office, *though that act may not be strictly justifiable by law.* It has not been shown to us that the police were acting otherwise than in good faith, and, therefore, it must be held that, even though they were not strictly justified in searching a house without a search-warrant, yet the prisoner cannot set up the illegality of their proceeding as a justification of the obstruction which he offered to the search.

As regards the resistance offered by the prisoner to the apprehension of certain persons, it is sufficient to say that the police charged those persons with theft, an offence for which the police may arrest without warrant; and that, whether or not a theft had been really committed, any resistance to their apprehension was illegal if the police were acting *bonâ fide* and without malice; and it has not been shown to us that they were not so acting.

The Court must decide, then, that, if the facts be as found by the courts below, the conviction recorded against the prisoner is good.

This court is bound to accept the finding on facts by the courts below, unless it appear that any material evidence was improperly admitted or rejected. The prisoner has put in an affidavit in which he declares that the Subordinate Magistrate of Bágalkot rejected the evidence which he ten-

dered in his defence. A reference to the prisoner's petition of appeal to the Magistrate of the District shows that the improper rejection of evidence was one of the grounds of appeal; but there is nothing in the Magistrate's finding to indicate that this allegation of the appellant received any consideration. On turning to the examination of the prisoner, as recorded by the Subordinate Magistrate, the Court finds that it does not bear out the statement contained in the prisoner's affidavit, and they must, therefore, reject that statement if they accept the examination as correct; but this the Court is unable to do. Sec. 205 of the Code of Criminal Procedure requires that the examination of an accused person shall be attested by the signature of the Magistrate, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person. Now the examination recorded in this case certainly bears such an attestation and certificate as is required by the above section; but from the papers in the case it appears that the attestation and certificate were added by direction of the Magistrate of the district after the appeal had been disposed of. This was a most irregular proceeding. When the case was before the Magistrate in appeal the recorded examination of the prisoner was an incomplete document. The want of the Subordinate Magistrate's attestation and certificate was not necessarily fatal to it; but the Magistrate was bound, before acting on it, to take evidence to show that it contained accurately the whole of the statement made by the prisoner: *Reg* v. *Kallá Lakhmáji* (*a*). As it is, the Court must conclude that the Magistrate either rejected the appeal without any consideration at all of the appellant's statement that his evidence had been refused, or else that he rejected that statement solely on the strength of a document which was legally incomplete and inadmissible. On either supposition the prisoner has been prejudiced, and has a right to demand that the case should be reopened and reconsidered; and, as this court, sitting as a court of revision, cannot deal with questions of fact, but only

(*a*) 2 Bom. H. C. Rep., p. 419 (p. 395, 2nd. ed).

1870.
REG.
v.
VYANKATRA'V SHRINIVA'S.

with questions of law, the only course open to them is to direct that the appeal be reheard.

But there are circumstances in the case which seem to the Court to render it desirable that the appeal should not be reheard by the same officer. The finding of the Magistrate of the District in appeal, equally with that of the Subordinate Magistrate of Bágalkot, indicates the strongest prejudice against the prisoner. There may, or may not, be good reason for such prejudice. It is quite right that a Magistrate should be acquainted with the character of persons living within his district, and that he should look unfavourably upon those whom he believes to be turbulent and dangerous. But when called upon to decide judicially as to the truth of a specific charge brought against such a person, he ought to endeavour to divest his mind of all prejudice, and certainly ought not to assign, as a reason for believing the accused to be guilty, his own previous knowledge of the character of the accused. Such passages as the following in the Magistrate's finding indicate a want of judicial impartiality :—

"From the Magistrate's intimate acquaintance with the character of the accused, he is quite satisfied that the petitioner got up the charges in the petition, to create a diversion in his favour.

"The constable has stated in this case that the accused threatened that, if he tried to arrest him, he would collect some fifty men and beat him; and the Magistrate believes the accused to have been just the man to carry out the threat."

And at the end of his finding the Magistrate has made the following remark :—

"The Magistrate, from a personal knowledge of some years, knows the accused, Vyankatráv, to be a man of a turbulent disposition."

The Court thinks it fair, not only to the accused, but to the Magistrate, that the latter should not again be required to perform so difficult a task as that of deciding without prejudice a charge brought against a person against whom the Magistrate admits that he entertains a strong prejudice.

1870.

REG. v. VYANKATRA'V SHRINIVA'S.

The order of the Court will be that the Magistrate's decision in appeal be reversed, and that the appeal be transferred, for rehearing on its merits, to the Session Judge of Belgám. The appellant should continue at large on bail till the appeal is disposed of.

It should be pointed out to the Subordinate Magistrate that the examination of the complainant, on which the warrant for arresting the accused was issued, was not signed by the complainant, as required by Sec. 66 of the Criminal Procedure Code, and that the warrant of arrest was informal, inasmuch as it purported to authorise the police to take bail, but did not specify the amount.

District Magistrate's order reversed, and appeal remanded to the Session Judge of Belgám for retrial.

REG. v. DURGA'RA'M MA'DHAVRA'M.

June 16.

Fine by a Pound-keeper—Act XXVI. of 1850—*Act III. of* 1857, *Sec.* 6.

A fine levied by a pound-keepertis not a punishment imposed on conviction for an offence, and it is an error to hold that a person cannot be tried for an offence under Act XXVI. of 1850 because he has paid a fine under Sec. 6 of Act III. of 1857.

THE accused was tried before Máṇikji Kávasji Enti, Magistrate F. P. at Broach, for the offence of having, in violation of Sec. XXXVIII., cl. 16, of the Broach Municipality Rules, allowed his cow to stray about the City without a keeper. He was acquitted, for the following reasons recorded by the Magistrate:—

"He (the accused) admits the truth of the complaint, but objects to being convicted of the offence after having paid a fine under Sec. 6 of Act III. of 1857. The complainant himself admits that the fine was actually paid by the accused."

The Magistrate, being of opinion that the payment of poundage exonerated the accused from any further proceedings, acquitted him.

The Magistrate of the District, J. G. White, being of opinion that the acquittal of the accused could not be supported, referred the case to the High Court for its orders.