1872.
Aug. 28.

[APPELLATE CRIMINAL JURISDICTION.]

REG. *v.* NA'RA'YAN BA'BA'JI and others.

Arrest—Police—Illegal arrest—Intention—Malice—Ind. Pen. Code, Sec. 220.

Proof of an unlawful commitment to confinement, will not of itself warrant the legal inference of malice. Knowledge that such commitment is contrary to law is a question of fact and not of law, and must be proved in order to satisfy the requirements of Sec. 220 of the Indian Penal Code.

THIS was a reference from R. H. Pinhey, Session Judge of Púna, under Sec. 434 of the Code of Criminal Procedure.

The facts and circumstances of the case were as follows :—

Early in the month of October 1871, a member of the Púna Police Force received an anonymous petition addressed to the "Chief Constable, Púna." It stated that some time previously a robbery had been committed in the house of one Moropant Jog; that one Náráyan Bidkar had some of the stolen property in his possession; that he was in the habit of taking his meals at the messhouse of one Atheevale; that he would be visible there any day at 11 o'clock in the morning; and that, if cautiously arrested, he would be found with a part of the stolen property about him. This petition being shown by one Akbar Ali, Chief Constable, to Trenn, an Inspector of Police, the latter ordered accused Nos. 1 and 2, Náráyan Bábájee and Gyanu Ramjee, head constables, to institute inquiries as to the whereabouts of the man Bidkar mentioned in the anonymous petition. They reported among other things that his correct address could not be obtained from him. Inspector Trenn, on the morning of the 12th October, gave a verbal order to Akbar Ali, in the presence of the two accused and other policemen, to arrest Bidkar. The accused Nos. 1 and 2 in consequence arrested Bidkar, and placed him in the Farashkhana, where he remained in confinement for 23 or 24 hours. While in the Faraskhana the accused No. 3, Nánekhan, who was not shown to have had

any knowledge of or connection with the previous arrest, took Bidkar to a separate room and questioned him as to whether he was concerned in the robbery at the house of Jog. Bidkar also alleged that he had been ill-treated, but this he was not able to substantiate. He was subsequently released on his own recognizance by Inspector Trenn.

Under these circumstances a charge was laid before Dr. Frazer, Magistrate F. P., against the three policemen and another of "confinement by a person having authority who knows he is acting contrary to law" and "wrongful confinement for the purpose of extorting confession," under Secs. 220 and 348 of the Indian Penal Code.

The Magistrate discharged the accused under Sec. 225 of the Criminal Procedure Code. An application was then made to the Session Judge, Mr. Pinhey, under Sec. 435 of the Code, and he, on the 17th of January 1872, directed the three accused to be committed for trial. The trial took place before Mr. Murphy, the Assistant Session Judge, and the accused were acquitted.

An application was again made to Mr. Pinhey, who referred the case for the orders of the High Court.

The reference was argued before LLOYD and KEMBALL, JJ.

Leith and *Shántáram Náráyan* appeared in support of the reference.

Anstey and *F. S. Hore* appeared for the accused.

Leith :—The question is whether the Police were justified upon receipt of an anonymous petition in arresting the complainant. There was no suspicion whatever in the minds of the Police except what had been raised by the anonymous petition. This petition could not raise a reasonable suspicion within the meaning of Sec. 100, Cl. 2, of the Criminal Procedure Code. A reasonable suspicion must, as laid down by Markby, J., in the *Queen* v. *Behary Sing* (*a*), be at least founded on some definite act tending to throw suspicion on the person arrested and not on mere vague surmise

(*a*) 7 Calc. W. R. Cr. R. 3.

1872.

REG. v. NA'RA'YAN BA'BA'JI.

or information. Mr. Trenn, the Inspector, would not have been justified therefore in himself making an arrest upon this petition ; much less was he justified in deputing another to make it. If it be assumed that Mr. Trenn was so justified he has not adopted the proper procedure. Sec. 140 requires that when an officer in charge of a Police Station requires any officer subordinate to him to make an arrest without a warrant, he shall deliver an order *in writing*. No written order has been delivered in this case. Were then the accused Nos. 1 and 2, who arrested Bidkar, justified in acting on the verbal illegal order of Mr. Trenn ? I submit they were not. They knew that the inquiry as to the whereabouts of Bidkar was made upon an anonymous petition, they were present when that inquiry was ordered ; it was they who made that inquiry ; and it was upon the information which they themselves had supplied that Mr. Trenn made his verbal order for arrest. We have proved an illegal act on their part, and although we do not allege express malice, legal malice may be presumed. So also knowledge that they were acting contrary to law may be presumed too. Every man is bound to know the law ; much more a policeman who deprives another of his liberty. Section 220 of the Indian Penal Code, which provides that if a person in office commits any person to confinement, *knowing that in so doing he is acting contrary to law*, he shall be punished, makes no exception to this general rule. Here is a case of distinct violation of the law on part of the accused Nos. 1 and 2, and knowledge that they were acting contrary to law must be presumed against them.

Shántárám Náráyan :—The Legislature could not have intended in Sec. 220 to exempt the Police from the obligation of knowing the law of the land ; for it would be simply impossible in many cases to prove such knowledge. It cannot be denied that the Police had reasonable means of procuring this knowlege and that the illegality was brought to their notice. The Police could have proceeded to arrest only under Secs. 100, 101 or 140. If it be once conceded that Mr. Trenn's order was verbal, the case is taken out of

the protecting influence of those sections. It may then be said that the accused were bound under the provisions of the Police Acts to obey the orders of their superior; but the express provisions of the Code of Criminal Procedure are not superseded by the general provisions of the Police Acts. Section 100 requires that a reasonable suspicion must exist in the mind of the policeman before he makes an arrest. The anonymous petition may have created a suspicion in the mind of Mr. Trenn; it could not have created in his mind a reasonable suspicion. It could not therefore have with any possibility raised a reasonable suspicion in the minds of the accused.

Anstey, contra :—The Police may well act upon suspicion. Under Sec. 108 of the Procedure Code they can detain a suspected person if he refuses to give his correct address. I submit even the action of Mr. Trenn was quite legal. He receives an anonymous petition in which a charge is made against a person of being concerned in a robbery. He inquires about his whereabouts. The person is unable to give his address. Mr. Trenn, therefore, suspects him and issues an order for his arrest. Mr. Murphy has correctly held that in Sec. 220 the Legislature has waived, in favor of the Police, the general obligation that every one is presumed to know law. If there is any fault it is the Legislature that is to be impeached for making the exception. Under certain circumstances a common rumour will be sufficient to justify an arrest: *Nicolson* v. *Hardwick* (*b*); *Perryman* v. *Lister* (*c*); Hillyar on Torts p. 237. The Police may be liable to an action for damages but they are not criminally responsible: Indian Penal Code Sec. 81. Section 21 of Bombay Act VII. of 1867, the provisions of which and of the Code of Criminal Procedure are cumulative, protects the accused.

Leith, in reply :—Section 108 does not apply. The Police must show before they proceed to act under that Section that the offence for which they were arresting was one for the alleged commission of which they could not arrest without a

(*b*) 5 Car. & P. 495.
(*c*) L. Rep. 3 Ex. 197; 4 Eng. & I. Ho. Lo. Ca. 521.

1872.

REG. v. NA'RA'YAN BA'BA'JI.

warrant. No other offence was suggested to the minds of the Police than that mentioned in the anonymous petition, and this does not allude to such an offence. Neither the English cases nor Sec. 81 of the Penal Code nor again Sec. 21 of the Bombay District Police Act has any application. The present case is analogous to that of a soldier who fires upon a mob in obedience to the commands of his superior officer but contrary to the provisions of the law. Here is an overt act committed by the Police and intention must be presumed on their part: Broom's Legal Maxims, p. 303.

PER CURIAM :—The proceedings in this case have been referred by the Session Judge of Púna for the orders of the High Court under Section 434 of the Code of Criminal Procedure.

1. Náráyen Bábájee, Head Constable of the 4th class,

2. Gyánu bin Rámjee, Head Constable 2nd class,

3. Nanekhán, Chief Constable, all belonging to the Púna Police Force, were charged before Dr. Fraser, Magistrate F. P., under Sections 220 and 348, Indian Penal Code, with maliciously committing the complainant, Náráyen Nágesh Bidkar, to confinement, knowing that in so doing they were acting contrary to law; and with wrongfully confining the said complainant for the purpose of extorting from him confession or information which might lead to the detection of an offence.

The whole of the circumstances of the case are fully set forth in the proceedings of the Courts below, and it is unnecessary to recapitulate them here further than to state that the Magistrate, finding there were not sufficient grounds for committing the accused to take their trial before the Court of Session, discharged them under Sec. 225, C. P. C., whereupon the complainant petitioned the Court of Session under Section 435, C. P. C., and the Session Judge, Mr. Pinhey, directed the Magistrate to commit the accused for trial under the heads of charge above referred to on the ground that Bidkar was arrested by the accused Nos. 1 and 2, and committed to custody in the Faraskhana on the anonymous

petition above described alone, and "I have no hesitation in saying as at present advised (proceeds Mr. Pinhey) that this act or these acts of the accused Nos. 1 and 2 were wholly illegal and improper, as the anonymous petition was not a reasonable complaint" and did not disclose "a reasonable suspicion against Bidkar within the meaning of Section 100, C. P. C.;" and with respect to accused No. 3 Mr. Pinhey continues: "He is the superior officer of accused Nos. 1 and 2, and therefore unless, and until, he shows that he was ignorant of the circumstances under which Bidkar was arrested, he is responsible for the illegal confinement of Bidkar from the time that he saw Bidkar in the Faraskhana and took him into the separate room to be questioned. Immediately he discovered that Bidkar had been illegally arrested and placed in wrongful confinement by the accused Nos. 1 and 2, he was bound to release him. Instead of doing this he suffered Bidkar to remain (as Bidkar says starving) for 23 or 24 hours until he was released by the Inspector Mr. Trenn."

In accordance with the Session Judge's direction the accused were committed to the Court of Session, and the trial, which took place before Mr. Murphy, Acting Assistant Session Judge of Poona, resulted in the acquittal of the accused.

Mr. Murphy found the ill-treatment complained of not proved. With reference to accused Nos. 1 and 2, he remarks: "Before I can convict Náráyen and Gyánu, I must be satisfied that they knew that in arresting complainant and subsequently confining him, they were acting contrary to law; or, in other words, that they knew no reasonable suspicion existed against him," and then he goes on to the effect that this fact is not, to his satisfaction, established; and with regard to accused No. 3, he says: "It does not appear that accused Nanekhán had any thing to do with the arrest, and I do not consider that his knowledge of an arrest and confinement which had been ordered, there is no doubt, by an authority at the least equal to his own, renders him liable under the first (second ?) head of the charge."

1872.

REG. v. NA'RA'YAN BA'BA'JI.

Still dissatisfied, the complainant made the application to the Session Judge under Section 434 C. P. C., in consequence of which the proceedings now come before the High Court.

In handing them up, Mr. Pinhey observes: "I am of opinion that the Assistant Session Judge's finding is wrong in law. The facts proved at the trial are as stated by me in my judgment in the case on the 17th January last."

It must be observed, however, that in remarking—"the facts proved at the trial are as stated by me in my judgment in the case on the 17th January"—Mr. Pinhey has overlooked the very important circumstance that whereas he (Mr. Pinhey) was at that time of opinion that the accused had acted "on the anonymous petition alone," Mr. Murphy at the trial found "the grounds then which the accused Náráyen and Gyanu had to go upon were—

1. The anonymous petition..

2. The imperfect information given by complainant as to his place of residence.

3. An order from the Chief Constable, or from Mr. Trenn through him, to arrest the complainant and bring him up."

In his minute of the 17th January, Mr. Pinhey laid particular stress on the absence of an atom of evidence that the accused received any order for the arrest of Bidkar, and, therefore, the difference between what he had supposed the facts of the case to be, and the real facts as established by evidence on the trial, should have attracted his notice. It is true that the order referred to is not found to be a written order, as, it has been contended for the prosecution, was essential to render it legal, but the fact that an order existed, albeit it should be held to be an illegal order, must necessarily have great weight in considering the bearing of Section 220, I. P. C., in which knowledge that the act is contrary to law is part of the definition of the offence, on the conduct of the accused.

1872.

REG. v. NA'RA'YAN BA'BA'JI.

The case has been argued before us at considerable length by Mr. Leith in support of the Session Judge's reference, and by Mr. Anstey on behalf of the acquitted persons.

Mr. Leith's argument put shortly amounts to this, that an illegal arrest is a violation of the criminal law, subjecting the offender to punishment under Section 220 of the Penal Code, malice being presumed on proof of the unlawful act; that the accused were not justified in arresting the complainant upon the order of Mr. Trenn, because that order was not in writing as required by Section 140 of the Criminal Procedure Code; and that the circumstances within their knowledge were not such as to warrant the existence of a reasonable suspicion against the complainant upon which alone, under Section 100 of the Procedure Code, the accused could spontaneously have made the arrest.

It has been found in clear terms by the Assistant Session Judge that the accused were acting under the orders of their superior, Mr. Trenn; and it is not suggested that they corruptly or (apart from the alleged illegality of their act) maliciously arrested the complainant, or that, in making the arrest, they actually knew they were acting contrary to law. Indeed, it was pressed upon us more than once that only a nominal punishment was desired as a lesson to the Police to be more circumspect in future in making arrests.

The main point we have then to consider is the construction to be placed upon Section 220 of the Penal Code; for on the determination of that depends the question, not only of the correctness of the Assistant Session Judge's order, but of our power to review that order. If malice is to be presumed, then no doubt this reference is on a matter of law; but if, on the other hand, express malice or actual knowledge must be proved, then the finding of the Assistant Session Judge which is objected to was on a matter of fact. The words of the section, so far as they are applicable to the present case, run thus:—"Whoever being in any office which gives him legal authority * * to keep persons in confinement * * maliciously * * keeps any person

1872.

REG. v. NA'RA'YAN BA'BA'JI.

in confinement in the exercise of that authority, knowing that in so doing he is acting contrary to law," &c. Mr. Pinhey holds that "malice is to be presumed when an unlawful act was clearly committed unless the absence of malice is proved," though in another part of his remarks he observes that he did "not, of course, mean to imply * * * that policemen are liable to a prosecution for a criminal offence, whenever in the discharge of difficult duties they commit mistakes, which well-meaning men may commit without intending to break the law. Indeed it is quite posssible that they may commit mistakes for which they would be liable in a Civil Court, and which yet would not constitute a criminal offence;" but if guilty knowledge is not to be taken as the very essence of the offence against the criminal law, we fail to understand the distinction which exists in the Session Judge's mind between a civil action and a criminal prosecution for false imprisonment. In either case, given the unlawful character of the confinement, it would be for the defendant to prove the justification, or excuse; and, failing that, the law would imply that he had acted maliciously, or with a criminal intent, so that whether his purse or his liberty were in peril, unless the defendant could establish, as a matter of fact, reasonable and probable cause, he would stand condemned, as a matter of law, of an illegal confinement. Mr. Murphy has ruled that the penal enactment under consideration contemplates some wilful excess of authority; in other words, a guilty knowledge superadded to an illegal act: and in coming to this conclusion we think that he has rightly interpreted the intention of the Legislature. Whether or no that knowledge exists, must of course be inferred from the circumstances of each case, but that question is one of fact and not of law, and any finding thereon in a case of acquittal, whether right or wrong, must be conclusive. In the course of argument the existence of an analogy was much insisted on between the case of a soldier under the English law, and that of a policeman under this Section 220; and the following passage in Mayne's Commentary on the Penal Code, speaking of the soldier, was read out to us—"His mis-

take, if he labours under one, must be a mistake of fact and not a mistake of law. If he erroneously supposes his superior officer to be authorized to issue orders which are illegal, he will be guilty, and his mistake can only go in mitigation of punishment or as a ground for an absolute pardon."* No doubt the soldier under the English law is placed in a very hard position "a fronte præcipitium, a tergo lupi"; but assuming Mr. Mayne's interpretation generally of the view taken by the framers of the Code to be correct, we think, with the Assistant Session Judge, that in this particular instance the law has provided that the command of superior authority must be manifestly illegal, and will not infer a guilty knowledge. In concluding our remarks on this case, we must observe that, supposing we had the power to interfere with Mr. Murphy's finding on the evidence, it is to our minds justified by the facts, a point which was not disputed by the learned Counsel who ably argued the case in support of the Session Judge's reference; and we cannot but express our surprise at the persistent course pursued by the complainant against these police subordinates long after their superior, Mr. Trenn, had come forward to claim the whole responsibility of their acts.

The second head of the charge depends on the first.

We direct that the papers be returned.

* p. 47—(6th edin).