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[377] REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

BHAWOO JIVAJI v. MULJI DAYAL.*

[22nd March, 1888.]

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Penal Code (Act XLV of 1860), ss 52, 79, 99, and 342—Act done by a person by mistake of fact in good faith believing himself justified by law—Right of private defence against acts of a public servant acting bona fide under colour of his office—Act XIII of 1856), s. 35—Reasonable suspicion—Obstruction to a police officer while acting in execution of duty—Arrest—Criminal Procedure Code (Act X of 1882), ss. 54, 435, 439—High Court's powers of revision.

On the 29th December, 1887, the accused, a police constable, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A.M. Between 6-30 and 7 A.M., he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the complainant and questioned him. In answer to one of the questions the complainant stated that the cloth was made in England. The accused, noticing that each piece bore Gujarathi marks, and not knowing that such marks are placed on English made goods, concluded that this statement was false and that the cloth had been stolen. He took hold of one of the pieces of cloth in order to examine it more closely. The complainant objected to this, and there was a scuffle between them for the possession of the cloth. The accused then arrested the complainant, and took him to a European Inspector, to whom he stated the facts, alleging that he had arrested the complainant, because he had assaulted him. The Inspector, seeing that the complainant was an old man, and on the accused saying he was not hurt, let the complainant go.

The complainant then lodged a complaint before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement, offences punishable under ss. 341 and 342, respectively, of the Indian Penal Code (XLV of 1860). The defence was that the complainant had assaulted the accused, and had been on that account arrested and kept in confinement until released by the Inspector of Police.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain; that there were no reasonable grounds for questioning the complainant about the cloth in his possession; and that the scuffle was caused solely by the action of the accused in treating the complainant, without any valid reason, as a suspected thief. The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code (Act XLV of 1860), and sentenced him to four months' rigorous imprisonment.

Held, by the High Court, that the conviction was wrong. The accused having, under the circumstances of the case, an honest suspicion that the cloth in the possession of the complainant was stolen property, was justified in putting questions to the complainant the answers to which might clear away his suspicions, and having received answers which were not, in his opinion, [378] satisfactory, he acted under a *bona fide* belief that he was legally justified in detaining what he suspected to be stolen property. The putting of questions to the complainant, not for the purpose of causing annoyance or from idle curiosity, but in order to clear up his suspicions, was an indication of good faith, as defined in s. 52 of the Indian Penal Code (Act XLV of 1860). He was, therefore, protected by s. 79 of the Code. Even though the act of the accused in detaining the cloth might not have been strictly justifiable by law,—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence under s. 99 of the Code, as the accused was a public servant acting in good faith under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt. The complainant was not justified in refusing to allow the accused to inspect the cloth, in snatching it from his hands, and in scuffling with him. He was, therefore, legally arrested, under s. 54, cl. 5 of the Criminal Procedure Code (Act X of 1882), for obstructing a police officer while acting in the execution of his duty.

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Held also, that the High Court will exercise its power under ss. 435 and 439 in the interests of justice, in exceptional cases, as where the enquiry in the lower Court has been faulty.

[R., 14 B. 331 (341); 28 B. 533 (549) = 6 Bom. L. R. 379; 31 B. 293 (298) = 9 Bom. L. R. 230; 22 C. 998 (1001); 21 M. 78 = 1 Weir 123 (126); Rat. Unr. Cr. Cas. 908 (914); D., 21 C. 324 (329).]

THIS was an application, under s. 439 of the Code of Criminal Procedure (Act X of 1882), for revision of the order of A. W. Crawley-Bovey, Acting Chief Presidency Magistrate.

On the 29th December, 1887, the accused, a police constable, was posted to do duty between 4 and 7 o'clock A. M. near the Arthur Crawford Market in Bombay. At about sunrise (between 6-30 and 7 o'clock) he saw the complainant, a cloth merchant, carrying three pieces of cloth under his arm. Suspecting that they were stolen property, he went up to the complainant and began to question him as to how he had obtained them, &c. The complainant replied that he had brought the pieces from his shop, and that they were of English manufacture. The accused was not satisfied with the answer given by the complainant, especially as two out of the three pieces bore a native name stamped in Gujarathi characters, and he took hold of one of the pieces of cloth to examine it more closely. The complainant resisted and snatched it from the constable's hand. A scuffle ensued, which ended in the arrest of the complainant. The complainant was then taken to a police station, where he was placed before a Police Inspector. The accused told the Inspector what had happened, stating that he had been assaulted by the complainant. The Inspector, finding that the assault was too trivial to notice, discharged the complainant without taking any [379] recognizance or bail and without framing any charges against him. The complainant was in police custody for upwards of four hours.

On the 3rd January, 1888, the complainant laid an information before the Acting Chief Presidency Magistrate, charging the accused with wrongful restraint and wrongful confinement under ss. 339 and 340 of the Indian Penal Code (Act XLV of 1860).

The defence was that the complainant had assaulted the accused, and was on this account arrested and kept in confinement until he was discharged by the Police Inspector.

In his examination the accused stated that he suspected the complainant² (1st) because he was dressed in dirty clothes, (2ndly) because one of the pieces of cloth which he was carrying under his arm was soiled, and (3rdly) because the cloth bore a Gujarathi stamp.

The Magistrate found that there was no justification for the suspicion which the accused professed to entertain, and that there were no reasonable grounds for suspecting or questioning the complainant at all. He considered that it was immaterial to determine whether the complainant had assaulted the accused, as the scuffle arose solely from the action of the constable in treating the complainant, without any valid reason, as a suspected thief.

The Magistrate convicted the accused of wrongful confinement under s. 342 of the Indian Penal Code, and sentenced him to four months' rigorous imprisonment. The Magistrate's judgment was as follows:—

Bhawoo Jivaji, a police constable, No. 1, C division, is charged with wrongfully restraining and confining Mulji Dayal, a Bhatia cloth-broker and shopkeeper. The material circumstances which have led to this charge were thus related by the complainant in his examination-in-chief

on the 6th January. (His Worship read a portion of the deposition.) The main facts of the complainant's story are substantially admitted by the accused constable in his examination recorded on the same day. I find it proved, (1) that the complainant was stopped and questioned by the accused regarding three pieces of cloth that he was carrying; (2) that an altercation occurred between them on the subject; (3) that the complainant was ultimately arrested and marched off in ignominy through the streets, first to the Girgaum Police station and then to Dhobi Talav; (4) that he [380] was in police custody for upwards of four hours before being finally discharged by Inspector Saunders without any recognisance being taken or charge framed against him.

The defence is that the complainant assaulted the police constable, who on this account arrested him, and kept him in confinement until he was ultimately discharged by his European superior officer. In his examination-in-chief, the complainant admitted that he had a scuffle with the accused:—"I said they (the pieces of cloth) were not stolen. He then commenced to snatch them. I pulled them on one side and he on the other. The sepoy got vexed and caught me by the collar of my coat and said 'I will take you away just now, and I will show you.'" In cross-examination the complainant was further pressed by Mr. Mehta about this struggle. He denied having struck the sepoy, but admitted that his hand might have gone against his body. (His Worship read the evidence on this point). For the defence two witnesses were called to prove the alleged assault. Police *ramosi* Ramlotun, No. 15, says:—"The accused said that something was written on the pieces in Gujarathi. The complainant got angry, struck the accused on his chest with his open hand, and caught him by the coat. The complainant was then excited. I said to the complainant:—"Let go, why do you altercation with the sepoy," He then let go the sepoy. The accused caught the complainant by the coat, saying 'You have not replied to my questions, and struck me; come with me to the *chauki*.'" Govind Gunsett, No. 16, a servant employed in the *pan-soopari* shop where the altercation took place, states as follows;—"The accused said they bore Gujarathi characters on them. Thereupon the complainant assaulted the accused. Complainant struck him on the chest with his open hand and caught hold of the accused. I was alone in the shop." All the accounts substantially agree about the circumstances under which the altercation between the complainant and accused took place. The police constable for some reason or another entertained, or pretended to entertain, suspicion that the three bundles of cloth carried by the complainant were stolen property.

It is contended for the defence (1) that the constable was bound to make enquiries and to act, if necessary, under s. 35 of Act XIII of 1856; (2) that the suspicion was reasonable (a) because it was unusual for persons to be carrying bundles of cloth about so early in the morning, *i.e.*, about 6-30 or 7 A.M.; (b) because the complainant, though dressed as an ordinary Bhatia merchant with turban and long white coat, had soiled clothes; (3) because the bundles of cloth, though said to be of English manufacture, bore native names stamped in Gujarati characters. My attention is also directed to Rules 1 and 2 on the subject of posts at p. 140 of the General Order Book.

The complainant replies that the grounds alleged were not reasonable grounds for entertaining any suspicion, or for subjecting a person of respectable appearance to a disagreeable cross-examination in the public

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streets regarding his own goods. Merchants and shopkeepers are, he says, habitually on the move before 7 A.M. The complainant was dressed in ordinary Bhatia dress very unlike the dress usually worn by the criminal classes. Cloth is habitually stamped at Manchester with native names in Gujarathi characters.

[381] On the evidence before me, I am bound to say that, even allowing for honest stupidity, I cannot see the slightest justification for the suspicion which the police constable professed to entertain. The proposition that no Bhatia merchants may carry their own goods in the streets of Bombay before 7 o'clock in the morning, without being subjected to the danger and annoyance of being treated as suspected thieves, seems scarcely worthy of serious consideration. Even the most stupid and ignorant constable in the force very well knows the difference between the dress and general appearance of the ordinary criminal classes and respectable Bhatia shopkeepers in their customary caste dress. The notion that a Bhatia shopkeeper becomes a legitimate object of police suspicion if he wears a soiled coat is also clearly preposterous. An ignorant police constable might doubtless be surprised to learn that cloth made in Manchester was stamped in England with Gujarathi characters; but ignorance of such facts can hardly be pleaded as an excuse for improper police action; and the public rights of the community cannot reasonably depend upon the ignorance or intelligence of particular native constables. Section 35 of Act XIII of 1856 does, no doubt, leave very much to police discretion; but when this discretion is challenged, each case has to be examined on its own merits, and in the present instance there were, in my opinion, no reasonable grounds for entertaining any suspicion or for questioning the complainant at all. Excluding the hypothesis of wilful misconduct suggested in the information, it would seem that the accused constable, either out of spite, curiosity, or officious inquisitiveness, took it into his head to ask some questions about the cloth that the complainant was carrying. The latter not unnaturally resented the questions as an insult and as a gratuitous imputation on his honesty. I have little doubt that angry words did pass between the parties, and that some kind of scuffle and altercation took place. The complainant and accused have both given their respective versions of what occurred. Whether the scuffle was caused by the constable seizing the cloth and both parties tugging at it; or whether the complainant pushed the constable or struck him a slight blow with the open hand is not, in my opinion, very material, for it is quite clear that the scuffle was caused simply and solely by the action of the constable in treating the complainant without any valid cause whatever as a suspected thief. The constable having provoked the scuffle by the proceedings described could, no doubt, say that he was technically assaulted, and could use this nominal assault as an excuse for arresting and confining a man with whom he had had a quarrel; but under the circumstances described, there was, in my opinion, no legal justification for the arrest; and the manner in which the complainant was confined, and was made to march in ignominy through the streets with his arms tied and the constable's hand on his collar, clearly shows the spirit in which the arrest was made. The complainant has further sworn that the constable kept saying to the passers-by that he had arrested a thief, and that terms of abuse "*salla*" and "*bhadwa*" were addressed to him by the constable in the public street while he was a prisoner in his custody. I see no reason to doubt the substantial truth of this evidence, which is confirmed in all material points by the witnesses.

for the prosecution. Even if there was any colourable excuse for arresting the complainant at all, there was certainly none for the manner in which the arrest was effected and [382] for the treatment of the complainant while a prisoner in the accused constable's custody. Sections 46 and 50 of the Code of Criminal Procedure, reproduced in Rules 3 and 4 of the Police Standing Orders, relating to apprehensions, lay down that—"in making an arrest the police officer should actually touch or confine the body of the person to be arrested unless there be submission to the custody by word or action. The person arrested should not be subjected to more restraint than is necessary to prevent his escape." In the present case there was apparently the fullest submission to the custody; yet notwithstanding this submission the complainant was subjected to the most humiliating treatment without any apparent reason or excuse. Police officers who offer unwarrantable personal violence to persons in their custody are punishable in the Mofussil by s. 26 of Bombay Act VII of 1867. I do not find in the General Orders of the Bombay City Police any special regulation on this important subject; but it is clear to me that the circumstances of this arrest were unusual and improper, and are susceptible of no legal justification. The Proceedings that took place at the police station appear to suggest one of two things—either that the alleged assault on the constable was in the first instance not believed at all, or that it was considered so trivial as not to warrant any further proceedings being taken. After hearing every thing that the constable and his witnesses had to say, Inspector Saunders discharged the complainant (1) without recognizance or bail; (2) without framing any charge against him under the Police Act; and (3) without even reporting the case for the information of the Commissioner of Police. Although the complainant is now said to have been arrested for the very serious offence of assaulting a public servant in the execution of his duty (s. 353, Penal Code), yet no action of any kind was taken to bring the case before the Court or to subject the constable's action to any formal enquiry. Mr. Mehta and the police officers concerned appear to be fully conscious that this summary discharge of the complainant after he had thus been ignominiously arrested, and kept in confinement for four hours, was a weak point in the case and one that plainly needed some justification. On this subject, Mr. Mehta was instructed to invite my special attention to Rule 2 of the Standing Police Orders on the subject of assault at p. 6 of the General Police Order Book. The rule runs as follows: "2—Charges preferred by constables of assaults on themselves are to be strictly investigated by the European police officer making the enquiry and discouraged as much as possible especially when the assaults are trifling, or the accused is known, so that a summons can easily be obtained."

It is obvious that if the complainant was really arrested, as Mr. Mehta now contends, for an offence under s. 353, Penal Code, for assaulting a public servant to deter him from doing his duty, this rule has no application at all. Offences under that section are serious offences, for which the police may arrest without warrant. In other words, they are cognizable. The rule quoted plainly relates to common assaults only, which are non-cognizable offences, and which can only be dealt with by a Magistrate on a summons duly obtained. This rule furnishes no justification whatever for the summary discharge of a person who is said to have been arrested for a serious cognizable offence. The evidence given by Inspector Saunders on this material point is important. (Reads evidence at close of examination-in-chief). It is clear from his evidence that the [383] alleged assault was considered too

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Applying these principles to the facts of the present case, I hold that the arrest and summary discharge of Mulji Dayal by the police constable was arbitrary and irregular. Having once taken the responsibility of arresting him for a serious cognizable offence, the constable was legally bound to go further and to submit the case to magisterial investigation. The responsibility incurred by constables in making arrests is very clearly laid down in Rule 5 of the Standing Orders relating to apprehensions at p. 4 of the General Order Book, and in Rules 6 and 7 of the Standing Orders relating to prisoners at p. 142. The rules referred to are as follows: Rule 5 (apprehensions)—" Police officers must be most careful in making arrests, as to deprive a person of his liberty is a very serious matter, and great discretion is necessary in all cases where one person charges another with having [384] committed a trivial offence." Rules 6 and 7 (prisoners)—" 6. When any person has been once placed in confinement, he is not to be discharged

except by direction of a Magistrate or the Commissioner or Deputy Commissioner, except in cases where soldiers arrested under s. 22 of Act XLVIII of 1860 are made over to the military authorities according to the Standing Orders." "7. The preceding order is not to prevent the detention of any person pending enquiries before a charge is taken. The accused should, if possible, be present when statements are made against him on which the charge is founded. An inspector or constable or any superior officer may on his own responsibility decline to place accused persons in confinement when the circumstances are, in his opinion, insufficient to justify him in doing so, and may permit them to depart, provided they have not been actually placed in confinement." These Standing Orders ought to have been present to the mind of the constable who arrested Mulji Dayal, and of Inspector Saunders who discharged him. In fact, the orders appear to have been entirely ignored. If any assault or other offence had really been committed by Mulji Dayal, nothing would have been simpler than to obtain his name and address and to proceed against him by summons in the legal and regular course. I am satisfied, from the circumstances of the case, that Mulji Dayal was arrested, not from any consideration of public justice, but solely to assert the power of arrest, and publicly to degrade and humiliate a man with whom the constable had quarrelled or whom the constable for other reasons may have wished to injure.

I have assumed so far that Mulji Dayal was arrested on the ground stated by the defence, but the complainant has from first to last asserted that he was really arrested because the constable suspected, or pretended to suspect, that three bundles of cloth were stolen property. There is a good deal of evidence on the record to support this view; but it is a fact to be noticed that, although the constable's suspicion, real or pretended, was the occasion of the whole dispute, yet no attempt was made at the police station either to enquire whether the suspicion was reasonable and well founded, or to found any charge against the complainant in respect of the three pieces of cloth. The counsel for the complainant has also drawn my attention to the fact that Inspector Saunders, when dismissing the accused, said nothing whatever about the alleged assault, but told him that he ought to have answered the sepoy politely. In the case of *Queen v. Behary Sing* (1), in which it was held that the police had abused their powers of arrest, the Calcutta High Court made the following remarks:—"What is a reasonable complaint or suspicion must depend on the circumstance of each particular case; but it must be at least founded on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information. Still less have the police any power to arrest persons, as they appear sometimes to do, merely on the chance of something being proved hereafter against them. Any wilful excess by a police officer of his legal powers of arrest is, by s. 220 of the Penal Code, an offence punishable by imprisonment for seven years." In another Calcutta case, that of *Queen v. Suprosunno Ghosaul* (2), the High Court held, on appeal, that a police officer is not empowered to detain, without question, any accused person for a period not [385] exceeding twenty-four hours, but rather he is in no case justified in detaining a person for one single hour except on some reasonable grounds warranted by the circumstances of the case. The time during which a person is wrongfully confined by a police officer is material only in fixing

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(1) 7 W. R. Cr. R. 3 (5).

(2) 6 W. R. Cr. R. 88.

1888 the punishment for the offence. The same doctrine is laid down in Mayne's
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I have entered at some length into the legal aspects of this case (1) because the subject of police arrest is intrinsically one of great public importance; (2) because the law relating to this subject in the city of Bombay is far less clear and distinct than the law laid down for Mofussil police officers by the Criminal Procedure Code. The special needs of great commercial cities require that the police should be invested with extensive powers of enquiry; and s. 35 of Act XIII of 1856 arms the Bombay City Police with enormous discretionary power in the case of goods which may reasonably be suspected of having been stolen or fraudulently obtained. This section is a very useful one for the general protection of the community; and it enables the police to act effectually against the habitual criminal class. But it is at the same time susceptible of very great abuse, as it may also be used at pleasure against all classes of the community alike, and leaves enormous power in the hands of native policemen of all ranks. I have had occasion several times to compliment native constables on their intelligence and dexterity in acting under this section; and I think it creditable to the Bombay City Police that this is the first case of serious abuse that has come under my notice; but when a respectable Bhatia shopkeeper can be treated in the public streets of Bombay as the complainant in the present case was treated, the public interest requires that serious notice be taken. It is to me a matter of satisfaction that the native police constable has received the benefit of the ablest advice, and has been very skilfully defended by Mr. Pherozshah Mehta. The case has thus received more exhaustive inquiry than would otherwise have been possible, and if my view of the law and of the standing police orders be correct, I trust that the inquiry will lead to useful results. For the reasons assigned in this judgment, I can entertain no reasonable doubt that the accused did wrongfully restrain and confine Mulji Dayal within the meaning of the Indian Penal Code. I find him, therefore, guilty of the charge, and I order him to be rigorously imprisoned for four months.

Against this conviction and sentence the accused applied to the High Court under its revisional jurisdiction. The Court sent for the record and proceedings of the case.

Farran and P. M. Mehta, for accused.

Jardine and Manekji B. Dadabhai (with *Ghanasham Nilkanth*), for complainant.

Latham (Advocate General), for the Crown.

Farran:—The accused constable was improperly convicted. [386] Section 35 of Act XIII of 1856 (1) by inference authorises the police to make such inquiries as the accused did on the occasion in question. By one of the police rules, framed under s. 8 of the Act, constables are expressly required to direct their attention to persons carrying parcels or bundles at unreasonable hours, and says that on sufficient grounds the property may be searched.

[BIRDWOOD, J.—Were these rules issued by the authority of the Commissioner of Police?]

(1) "35, Clause 1.—Whoever has in his possession, or conveys in any manner, any thing which may be reasonably suspected of being stolen or fraudulently obtained, shall, if he fail to account satisfactorily how he came by the same, be liable to a penalty not exceeding one hundred rupees, or to imprisonment, with or without hard labour, for any term not exceeding three months."

I cannot say, but I am instructed that they were sanctioned by Government. These rules impose on the police a delicate and difficult task, in the performance of which *bona fide* mistakes must sometimes occur. The question now is, was the action of the accused constable *bona fide* or not.

[BIRDWOOD, J. :—The accused was convicted of wrongfully restraining the complainant; and the question is, whether the arrest was legal.]

The Magistrate held that the inquiries made by the accused were entirely out of the province of the police, that the blow which the complainant struck was, under the circumstances, justifiable, and consequently the accused had no right to arrest him for that blow.

[BIRDWOOD, J. :—The Magistrate seems to have thought it was not a matter of much importance whether the blow was struck or not.]

Yes, because he thought that this was an inquiry such as the police had no right to make.

[BIRDWOOD, J. :—As far as I can understand, the defence of the accused was that he only arrested the complainant after he was struck.]

Yes, up to that time I submit that the accused was performing the duty which devolved upon him of making inquiries in [387] his capacity of a police officer. He found that the answers were not satisfactory, and when he was struck by the complainant he arrested him. The hour at which the occurrence, which gave rise to this case, took place is not clearly stated. But it could not have taken place much later than half-past six o'clock, and it was not yet daylight.

[BIRDWOOD, J. :—The question whether it was dark or not at the time,—that is, whether it was an unusual time for an honest man to be carrying a bundle,—is very material (1).]

The sun rose at 6-34 o'clock. According to the prosecutor himself, his shop did not open till about 8 o'clock. At the time when the arrest took place the prosecutor was loitering. One of the three bundles of grey piece-goods which he was carrying was soiled. The constable wanted to examine the bundle, and for that purpose he apparently laid his hand upon it, and thereupon the prosecutor struck him a blow more or less violent. The Magistrate found as a fact that there was a scuffle, but he did not find as a fact whether a blow was struck or not. The police constable himself said that he had arrested the prosecutor because he had struck him. The prosecutor's hands were tied with a handkerchief, and he was taken to the police station. On the way the accused was assured, on the evidence of independent persons, that he had made a mistake in arresting the man on suspicion, and the moment he received that assurance he removed the handkerchief from his arm. That is an important piece of evidence with regard to the *bona fides* of the accused. The complainant having been arrested under these circumstances, the accused had no power to release him, and for what the Inspector did when the complainant was placed before him, the accused cannot be held responsible. The question is whether the circumstances justified the accused in making the inquiries. The Court will have to consider whether there was a reasonable or proper cause for making inquiries. Whether the circumstances were such as justified the institution of inquiries is a question of law.

[BIRDWOOD, J. :—The case of *Panton v. Williams* (2) lays down that what is a reasonable and probable ground for suspicion is a [388] mixed question of law and fact. In *Johnston v. Sutton* (1) Term. Rep., 545, it

(1) See *Lawrence v. Hedger*, note *infra*, 12 B. 399.

(2) 1 G. & D. 504.

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was said: "Whether the circumstances alleged to show it probable, or not probable, are true and existed, is a matter of fact, but whether, supposing them true, they amount to a probable cause, is a question of law."]

The circumstances which would justify a constable in making inquiries are quite different from those which would lead him to arrest a person.

[BIRDWOOD, J., referred to *Davis v. Russell* (1).]

In *Hailes v. Marks* (2) it was held that the question of reasonable and proper cause was for the Judge and not for the jury. But the true view is taken by Mr. Pollock in his work on Torts, p. 192, where he says that the "reasonable cause for suspicion to justify arrest is—paradoxical as the statement may look—neither a question of law nor of fact. Not of fact, because it is for the Judge and not for the jury; not of law, because no definite rule can be laid down for the exercise of the Judge's judgment." See also *Lister v. Perryman* (3). In *Beckwith v. Philby* (4) the facts were very similar to the present case, and a distinction is laid down between action by a private individual and action by a constable. In order to justify an arrest by the former, it must be proved that felony had been committed, while the constable could detain a person on a reasonable ground for suspicion.

[BIRDWOOD, J.:—As to arrest by a constable, that is also the law here; and a reasonable suspicion is something more than a bare surmise. It must rest, as was said in *Queen v. Behary Sing*, (7 Calc. W. R., Cr. Rui. 5), on some definite fact tending to throw suspicion on the person arrested].

Jardine:—This case has been argued as if it were a regular appeal. The authorities show that there should be no revision by the High Court unless exceptional circumstances in the case call for intervention—*Queen Empress v. Shekh Saheb Badrudin* (5); [389] *Nobin Krishna Mookerjee v. Rassick Lall Laha* (6); *In re Juggut Chunder* (7); *Queen Empress v. Ala Bakhsh* (8). No case for review has been made out. It has been said that the Magistrate did not appreciate the evidence properly, but this is no ground for revision.

The evidence shows that the Magistrate's finding was perfectly correct. Section 35 of Act XIII of 1856, under which the accused acted, points out reasonable suspicion as the indispensable ground of action. There should be reasonable suspicion of theft or fraud before one can act under the section, and the point now is whether there was any reasonable suspicion in the mind of the accused. The evidence shows that the complainant, dressed as a respectable shopkeeper, walked along the streets with his own goods under his arm, between half-past six and seven o'clock in the morning. The time was not at all unusual. It was not midnight or early morning when thieves are said to commit their depredations and remove property.

JUDGMENT.

BIRDWOOD, J.—The Magistrate has found, on the evidence in this case, that the complainant, a Bhatia cloth-broker and shopkeeper, was stopped and questioned by the accused, a constable of the Bombay police force, regarding three pieces of cloth that he was carrying; that an altercation occurred between them; that the complainant was ultimately arrested

(1) 5 Bing. 354.
(4) 6 B. & C. 635.
(7) 2 C. 110.

(2) 7 H. & N. 56.
(5) 8 B. 197.
(8) 6 A. 484.

(3) L. R. 4 H. L. 521.
(6) 10 C. 1047.

and marched off in ignominy through the streets, first to the Girgaum Police station and then to Dhobi Talav, and that he was in police custody for upwards of four hours before he was finally discharged by Inspector Saunders without any recognizance being taken or charge framed against him. In his examination before the Magistrate, the accused said that he had taken the complainant into custody because he had assaulted him. The complainant denied that he had struck the accused, but admitted that he had a scuffle with him and that his hand might have gone against the body of the accused. It was contended for the accused, in the Court below, that he was within his rights in making enquiries about the cloth, as the complainant was carrying it at an unusual time, that is to say, at about 6-30 or 7 A. M., and that the circumstances were such as to justify a reasonable suspicion that the cloth was stolen [390] property; the complainant's clothes being soiled and the pieces of cloth having been described by him as of English manufacture, whereas they bore a native name, stamped in Gujarathi characters. The Magistrate, however, could not see the slightest justification for the suspicion which the accused professed to entertain, and was of opinion that the complainant not unnaturally resented the questions put to him as an insult and as a gratuitous imputation on his honesty. He was further of opinion that it was not a very material point in the case whether the complainant pushed the constable or struck him a slight blow with the open hand, as it was quite clear that the scuffle was caused simply and solely by the action of the accused in treating the complainant, without any valid cause whatever, as a suspected thief. Here, we think, the Magistrate erred in his view of the law; for, assuming for the moment that the action of the accused was quite illegal up to the moment when he put his hands on the cloth, on failing to receive what he considered satisfactory answers to the questions put by him to the complainant, still that would not justify the blow struck by the complainant, if he really did strike the accused, and not merely come in contact with his body or push him while scuffling with him in the endeavour to save his bundle of cloth. If the action of the accused was illegal, the complainant could legally struggle to free himself and his property; but s. 99 of the Indian Penal Code would not justify his voluntarily causing hurt to the accused. If the Magistrate had found, as a fact, that the complainant struck the blow described by two of the witnesses for the defence, then there would have been an end of the case; for the accused would, in that event, have been certainly justified in arresting the complainant.

It is only in very exceptional cases that this Court sitting as a Court of Revision deals with questions of evidence, and disturbs or supplements the finding of a lower Court on a question of fact—*Queen Empress v. Shek Sahab Badrudin* (1). It will do so, in the interests of justice, where the enquiry in the lower Court has been faulty—*Nobin Krishna v. Rassick Lall* (2). In the present case, if it were necessary to do so, we would ourselves be prepared to consider the evidence bearing on the particular circumstance [391] relied on at the trial as a justification of the arrest, because, in trying the case, the Magistrate has admitted a good deal of evidence on the record as to the respectability of the complainant which would have been admissible only if it had appeared that the complainant was known to the accused, and necessarily known to him as a respectable person, before the morning on which he was arrested. This evidence ought to have been

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rejected at once. The Magistrate seems to have become aware, as the case proceeded, that it was not relevant; but, after it had once been admitted, it is impossible to say that the impression made by it on his mind as to the character of the complainant may not have induced him to attach undue weight to some parts of his evidence relating to the conduct of the accused. Moreover, in referring to the question whether the alleged assault could have been serious or not, the Magistrate seems to have had regard rather to the opinion regarding the nature of the assault held by the accused's superior officer than to the evidence regarding it adduced at the trial, which ought to have furnished the only material for a decision on the point. However, we can dispose of the application before us without either deciding ourselves, or requiring the Magistrate now to decide the question whether, as a matter of fact, the complainant struck the accused in the manner alleged or not.

We think that, in dealing with the case, the Magistrate has been led to a wrong decision from failing to consider aright the question whether the accused acted in good faith in questioning the complainant and putting his hand on his bundle of cloth. The accused has been convicted, under s. 342 of the Indian Penal Code, of wrongfully confining the complainant, *i.e.*, of voluntarily obstructing him from proceeding in a direction in which he had a right to proceed, and preventing him from proceeding beyond certain circumscribed limits. Assuming, then, that the complainant did not strike the accused, but merely struggled with him in order to free his property, the arrest of the complainant would be an offence against the section if the complainant was, in law, justified in resisting the action of the accused in putting his hand upon his property. That the [392] complainant was justified in resenting the questions put to him, we cannot for a moment hold; for it is quite clear to us that the questions were put, not for the purpose of annoying the complainant, or from mere idle and officious curiosity, but in order to remove an honest suspicion in the mind of the constable that the bundle might be stolen property. The accused did not know the complainant, and could not, we think, have acted from any malicious motive. He was at his post, where he was required to be from 4 A.M. to 7 A.M., his special duty being to prevent the removal of stolen property by thieves attempting to evade the police. He saw the complainant, who was waiting for a tram-car, with the cloth under his arm, at about half-past six o'clock, or perhaps a little later, on the morning of the 29th December, *i.e.*, apparently about sunrise. We cannot say that the contention of the counsel for the accused in the Court below that that was an unusual time for persons to be carrying bundles is without weight. The accused himself said in his examination that he suspected the complainant, because he was dressed in dirty cloths, and because the uppermost of the three pieces of cloth was dirty. If he had an honest suspicion, as we think he had, then, even though the same facts might not have raised any suspicion in the mind of a police officer of higher grade, still he acted, we think, with due care in putting questions the answers to which might clear away his suspicions. The putting of questions under these circumstances was in itself an indication of good faith, as defined in s. 52 of the Penal Code. He said at the trial that he received no answers to his questions. It is to be regretted that he was not questioned further as to what he meant by saying so; whether he meant, for instance, that at first he received no answers or whether he meant that he received no answers at all; for he certainly told Inspector Saunders the answers which

were given him and adduced witnesses at the trial, who deposed to the conversation which took place. He certainly obtained answers to his questions, and was evidently not satisfied with those answers, and then he seems to have put his hand on the bundle and was resisted by the complainant. He may have shown a want of intelligence in not accepting as satisfactory the complainant's answer that [393] the cloth was of English manufacture, though it bore a name stamped in Gujarathi character; but we do not doubt that this answer did not satisfy him as to the honesty of the complainant. He himself, as we think, believed that he was legally justified in detaining the cloth; and though he was entirely mistaken as to the character of the complainant, we think that his belief as to his legal right was a *bona fide* belief, and that he is protected by s. 79 of the Penal Code (Act XLV of 1860).

We also think that, under the first paragraph of s. 99, the complainant had no right to resist the accused when he tried to detain the cloth. The decision of the case really turns upon the question whether the accused acted in good faith; and that question must be considered with reference to the position of the accused and the circumstances under which he acted. If he acted with due care and attention such as ought to be expected from a constable in his position, in the circumstances in which he was placed, then he acted in good faith; and even though his act might not have been "strictly justifiable by law,"—that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property,—still the complainant had no right of private defence, as the accused was a public servant acting under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt: see *Reg v. Venkatrao* (1). The question of good faith, as far as it is one of fact, we are prepared in this case to deal with ourselves. We think, as we have already said, that the accused was justified in questioning the complainant; and we think further that he is not liable to be dealt with as a criminal, because, after endeavouring to satisfy himself whether his suspicions were well founded or not, he was not satisfied by such answers as he received, though such answers might have satisfied a more intelligent man, or one in a higher position, and because he, thereupon, proceeded to put his hand on the property which he believed to be stolen, whether he did so with the intention of further inspecting it, or of arresting the accused for being in possession of it. We cannot hold that the [394] law exacts the same care and attention from all public servants regardless of the position they occupy. If the same intelligence were required from a constable as from a Commissioner of Police, it would be impossible to obtain the services of constables on the salaries which the State gives them for such duties as are performed by the accused. We are forced, therefore, to consider whether there was some ground for suspicion, and whether the accused, in the circumstances in which he was placed, acted with such care as is sufficient to shield him from a criminal prosecution. Though we think that there was very little ground, indeed, to justify a reasonable suspicion that the cloth was stolen property, yet we think that there was some ground which gave rise to an honest belief on the part of the accused, after such inquiry as he was able to make, that such a state of facts existed as would justify his action. We think, therefore, that the Magistrate ought to have found in this case that

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the accused acted in good faith, and that even though his act might not be strictly justifiable by law, the complainant had no right to resist him. As he obstructed the accused while acting in the execution of his duty, the arrest was legal under s. 54 of the Code of Criminal Procedure (Act X of 1882).

We therefore reverse the conviction and sentence, and acquit the accused of the offence of which he has been convicted, and direct that he be set at liberty. We express no opinion as to the legality of the action of Mr. Inspector Saunders in discharging the complainant without reporting the case to the Commissioner of Police, as we do not think that that question, though discussed by the Magistrate, is one which affects the legality of the arrest made by the accused.

PARSONS, J.—The admitted facts of this case are few and simple. The accused, a police sepoy, was on duty at a temporary post near the Arthur Crawford Market. His turn of duty lasted from 4 to 7 A. M. About 6-30, or between that time and 7, he saw the complainant there, carrying under his arm three pieces of cloth. Being suspicious as to whether these cloths might not be stolen property, he went up to the complainant and began to question him about them. The complainant answered the questions [395] apparently truthfully. One of the answers, however, was that the cloths were made in England. Now the cloths bore Gujarathi names on them, and the accused, who did not know (as well as he might not) that such names were placed on English-made goods, presumed from this that the answer was a false one, and that the goods were stolen property. He did not, however, at once proceed to arrest the complainant, but took hold of one of the pieces of cloth in order to look at it more closely. The complainant objected to this. He held the cloth and obstructed the accused, and there was a scuffle, each trying to obtain possession of the cloth. It was after this that the accused arrested the complainant. The after facts are not material, but it may be stated that the accused took the complainant to a European Inspector, to whom he narrated the facts, distinctly stating that he had arrested the complainant because he had assaulted him, and that the Inspector, on seeing that the complainant was an old man, and on the accused saying that he was not hurt, let the complainant go. The disputed fact in this case is, whether there was an actual assault, that is, whether the complainant struck the accused a blow. With this fact I shall, if necessary, deal later on, as well as with the competency of this Court to go into such a question of fact. The Magistrate considered that it was not material to decide the point, but, on the admitted facts, he convicted the accused of the offence of wrongful confinement, and sentenced him, under s. 342 of the Penal Code, to four months' rigorous imprisonment. The question before us is as to the legality of this order and sentence.

Now it is quite clear, from the judgment of the Magistrate itself, that he has erred in his mode of dealing with the case, inasmuch as he has not really considered, whether the accused was guilty of a criminal offence. In his judgment he has not alluded in any way to the protection that the law affords to an act done by a person who, by reason of a mistake of fact, in good faith, believes himself either to be bound by law to do it, or to be justified by law in doing it (ss. 76 and 79 of the Penal Code); nor, indeed, has he alluded to the provision of law that there is no right of private defence against an act [396] 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. (Section 99 of the Penal Code). The Magistrate has thus decided the case as if it were a civil action to recover damages instead of a charge of a criminal offence, and has convicted the accused, although he has nowhere found that the accused was not acting in good faith. The whole case really turns on this point, namely, whether the accused did act in good faith. If he did, then he is not criminally guilty, however wrong and civilly liable his action may be. If he did not, then he would be guilty of an offence, unless, of course, he arrested the complainant in consequence of a distinct assault upon himself. This, then, is the point which has first to be considered, whether the accused, in arresting the complainant, acted in good faith; in other words, with due care and attention. (Section 52 of the Penal Code). Complainant's counsel has argued that his client was a respectable tradesman, and at the time of his arrest well dressed and engaged in his ordinary occupation at a usual hour; that a police officer has no right whatever even to question such a person as to anything he might be carrying in his arms; that the accused in questioning him acted without the slightest possible shadow of a suspicion, and that therefore his client had a perfect right to use force and prevent the accused overpowering him and taking away his cloths. No doubt it is true that the law does not, in so many words, give a police officer power to question persons in order to ascertain if the goods they are in possession of are stolen. It, however, assumes, I imagine, that every person has the right to speak to another. It gives an officer in charge of a police station the power to arrest any person who cannot give a satisfactory account of himself. (Section 55, Criminal Procedure Code of 1882.) This presupposes some kind of questioning. The law also gives any police officer power to arrest any person in whose possession any thing is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing. (Section 54, Criminal Procedure Code, and ss. 86 and 35 of Act XIII of 1856). I do not think that it could [397] seriously be contended that, under either Code, a police officer, who has the power of arrest, must at once exercise the power, and that he has not the power, prior to the arrest, of asking any questions, the answers to which might serve to show him whether or not his previously aroused suspicions were correct. I should have thought that the very fact that such questions were put would go to show that the police officer was acting with care and attention, and not hastily and inconsiderately. The words "reasonably suspected" in s. 54 of the Criminal Procedure Code are of course important. If it could be shown that the accused knew the complainant before this to be a respectable tradesman; if the complainant was at the time well dressed, and if it is a fact that persons who carry stolen property are either not well dressed or dressed differently to the complainant, or if it appeared that the time at which the complainant was seen was usual and consistent with his business, then no doubt it might be plausibly argued that the accused could have had no reason to suspect him; but it is admitted that the accused did not know and had never seen the complainant before; it is not shown that possessors of stolen property are always badly dressed or wear any particular garb; and it is stated by the complainant himself that the time at which he was out was early for his business, from which I gather that it was not usual either for himself or other traders to be carrying about pieces of cloth at that time.

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It would not, however, be sufficient in this case merely to show that the accused had no reason for suspicion in the light of after events; for the accused can show that circumstances exist from which it can be seen that, in suspecting the complainant, he was acting in good faith, that is, with due care and attention. I have said that the accused was on duty at a temporary post. These posts are established from 4 to 7 A. M., "in order to prevent the removal of stolen property by thieves attempting to evade the police." One of the rules of the police force is that "constables must direct their attention to persons carrying parcels, bundles, &c., at unreasonable hours or under suspicious circumstances, and if there are sufficient grounds, such bundles are to be searched," and the police officer is instructed in the same rules that "he may stop, [398] search, and detain any person suspected of having anything stolen or unlawfully obtained." It would not, I think, be easy to hold that the accused acted without due care and attention by merely obeying these rules, which are framed and sanctioned by Government under s. 8 of Act XIII of 1856 and which have been in force for many years past. In the trial of the case itself, it has never been suggested that the accused was actuated by any malice. The complainant does, indeed, in his information say that the accused was instigated by other persons to arrest him in order to ruin his business, but this allegation was not supported, and there can be no doubt that it is false. It is not stated in the judgment of the Magistrate, nor, indeed, have I heard it stated in the whole course of the argument, that the accused did not honestly believe that he was justified in law in first questioning, then detaining, and subsequently arresting the complainant. The case of the complainant and the ground of the conviction are that the arrest was bad, because there never were any reasonable grounds to justify the accused in suspecting at the outset that the complainant was carrying stolen property; but as I have said above, that might justify an award of damages in a civil suit; it would not of itself be sufficient to justify a conviction of a criminal offence. If the accused can show that he was acting with due care and attention, and that he in good faith believed that his suspicion was a reasonable one, and that he was justified by law in questioning the complainant and searching his bundle, and in arresting him, he is entitled to an acquittal. This is so independently of the attempt of the complainant to prevent the accused looking at his bundle of cloths, for if the accused would not be criminally liable had he arrested the complainant before the complainant attempted to obstruct him in the exercise in good faith of his duty, how much more is the accused protected when it is found that he did not arrest the complainant until after the complainant had so obstructed him. No doubt the complainant was naturally indignant at being asked about his bundle, but he should have remembered who his questioner was. The general security of the public is to be considered of more importance than the occasional detention of a person like the complainant, who, if as in this [399] case unjustly arrested, can very speedily clear himself. In suspecting the complainant, and in proceeding to examine the cloth more closely, I am clearly of opinion that the accused is shown to have been acting in good faith in the execution of his duty. Against his acts, even if not strictly justifiable by law, there would be no right of private defence of property at all, and none of person, unless the acts were such as to cause the apprehension of death or of grievous hurt. The acts of the accused in this case, even if directed against the person of the complainant, were not such. The complainant was, therefore, not justified in refusing to

allow the accused to inspect the cloth, in snatching it from him, and in scuffling with him, and he must be considered in so doing to have obstructed a police officer whilst in the execution of his duty. It would be a perilous thing to hold that any person, however well dressed, could refuse to allow a bundle which he was carrying to be inspected by a police officer, who entertained a reasonable suspicion of its contents and could support that refusal by force. For the obstruction caused to him while in execution of his duty the accused could under s. 54 (5) of the Criminal Procedure Code arrest the complainant. Whether, therefore, the arrest be considered as the result of the complainant being reasonably suspected of having stolen property in his possession as the Magistrate appears to consider, or as an arrest in consequence of the accused having been obstructed in the execution of his duty as the accused says it was, and as there is ample evidence on the record to show that it was, in either case my opinion is that the conviction of the accused for an offence under s. 342 is not sustainable in law. It is, therefore, unnecessary for me to consider the point as to whether the arrest was or was not made in consequence of a distinct assault committed by the complainant. I concur in reversing the conviction and sentence and in ordering the accused to be acquitted and discharged.

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Conviction and sentence reversed.

Note.—See the case of *Lawrence v. Hedger* (1), where the plaintiff passing through the streets of the city of London with a bundle in his hand about 10 o'clock P.M., was stopped by a watchman, who took him to the defendant, a [400] beadle, who asked him what he had in his bundle and who gave the bundle to him. The plaintiff replied that he did not know, and that he was carrying the bundle to his sister in *St. George's Fields*; and referred him to a house there. The defendant did not inquire there but sent the plaintiff to the *Poultry Compter*, charging the gaoler there with the prisoner in the name of Stevens the constable, for the night. The next morning the sitting alderman discharged the plaintiff. It was contended for the plaintiff that the power of detention and imprisonment being given to the constable of the night only, the beadle had no authority to detain and imprison him. It was held by Heath, J., that it would be extremely mischievous if the defendant could not be considered sufficiently a constable for the performance of the duty; that any watchman might have detained the plaintiff, and that it was the constable's duty to secure him when so apprehended. "At every *Old Bailey Sessions*," he said, "numbers of persons are convicted in consequence of their being stopped by watchmen while they are carrying bundles in this way." Lawrence, J., said: "A woman walking up and down the streets to pick up men, a night-walker, may be apprehended; yet her's is a much less offence than is here suspected." Chambre, J., said: "In the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise."