

APPELLATE CRIMINAL.

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February 18.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Burkitt.

QUEEN-EMPRESS v DALIP AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), sections 99, 147, 332, 323—Criminal Procedure Code, sections 55, 56, 114—Public servant in the execution of his duty as such—Arrest without sufficient authority, but in good faith—Assault on police making arrest—Right of private defence.

A warrant was issued by a Magistrate for the arrest of one Dalip under section 114 of the Code of Criminal Procedure. The warrant was sent to a certain thána to be executed. It was there, after being copied into a book kept for that purpose at the thána, made over to a particular constable for execution. When the constable to whom the warrant had been made over had left the thána, it was discovered that Dalip was in a village other than that in which he had been supposed to be. Thereupon the officer temporarily in charge of the thána made a copy from the book at the thána, endorsed on the back the names of one Nazir Husain and some other constables, and, having signed the endorsement, sent Nazir Husain and the others out with this paper to arrest Dalip. Nazir Husain and his companions arrested Dalip; but, as they were returning with him in custody, some of Dalip's friends, aided by Dalip himself, attacked them, rescued Dalip and caused hurt to the Police.

Held that the Police officers concerned in arresting Dalip under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of section 332 of the Indian Penal Code, so as to render the accused liable to conviction under that section; but, inasmuch as they were acting in good faith under the colour of their office, section 99 of the Indian Penal Code applied, and Dalip and his associates might be properly convicted under sections 147 and 323 of the Code.

The words "in the discharge of his duty as such public servant" in the earlier portion of section 332 of the Indian Penal Code mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. *The Queen v. Roaburgh* (1) referred to

THE facts of this case are fully stated in the judgment of the Court.

Mr. D. N. Banerji and Babu Badri Das for the respondents.

The Public Prosecutor (Mr. E. Chamier) for the Crown.

EDGE, C. J., and BURKITT, J.—This is an appeal by the Government from an acquittal on appeal of certain accused persons

* Criminal Appeal No. 1162 of 1895, from an order of A. M. Markham, Esq., Sessions Judge of Meerut, dated the 13th of July 1895.

(1) 12 Cox. Cr. Ca., 8.

who had been convicted by a Magistrate of the offences punishable under sections 147, 332 and 225B of the Indian Penal Code. A Magistrate had issued his warrant under section 114 of the Code of Criminal Procedure for the arrest of one Dalip in respect of the matters specified in the first paragraph of section 110 of the Code of Criminal Procedure. That warrant had been addressed to and sent to the officer who was in charge of a particular thána for execution. The warrant was copied at the thána. The original warrant was handed to a particular constable to be executed. After the constable who had the warrant in his possession had left the thána to execute it, it was ascertained that Dalip was in a different village. Thereupon the officer who was temporarily in charge of the thána wrote on the back of a copy of the warrant the names of Nazir Husain and some other constables, whom he orally ordered to proceed to the village where Dalip was and to arrest him. The officer temporarily in charge signed his name to the endorsement on the copy of the warrant and handed the copy to Nazir Husain. Nazir Husain proceeded to the village where Dalip was, arrested Dalip, and was proceeding with Dalip in custody to the thána, when the other accused persons assembled, attacked the constables and rescued Dalip. In that attack two of the constables received hurts from the rescuing party and also from Dalip.

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The Sessions Judge in appeal was of opinion that no offence had been committed. He held that, as Nazir Husain and his companions had not got the original warrant in their possession at the time of the arrest of Dalip and his rescue, they had no legal authority to arrest him, and that the assault committed upon them in the rescue was not within the purview of section 332 of the Indian Penal Code, the officers not being at the time in the discharge of their duty. He also held that the officer in charge of the thána could not legally issue an order in writing for the arrest of Dalip, as the Magistrate by issuing his warrant had assumed jurisdiction in the case. There appears to have been some confusion in thought or argument in the Court below, as section 99

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of the Indian Penal Code was considered in reference to section 332. The Sessions Judge found that Nazir Husain had not been acting in the matter in good faith.

It is quite clear what the law in England would be in a case of this kind. In England a Police officer cannot arrest an accused person for an offence in respect of which a warrant is required, unless he has the warrant actually in his possession at the time of the arrest. We are not referring, of course, to cases in which in England a Police officer is entitled to arrest for an offence committed in his presence, and such like cases. We are referring to cases in which a warrant is required as a justification for the arrest, and in those cases the Police officer must have in his possession his authority, namely, the warrant. It is a reasonable view of the law to take, at least in England, where a subject who has committed no offence at all and is not ostensibly preparing to commit an offence is justified in demanding from the Police officer that officer's authority for arresting him.

In the present case Nazir Husain and his companions had no authority for making the arrest or detaining Dalip in custody except such authority, if any, as the endorsed copy of the warrant afforded. We have no doubt in this case that it was perfectly competent to the officer in charge of the thána, if he had felt so disposed, to have issued to Nazir Husain an order in writing under section 56 of the Code of Criminal Procedure for the arrest of Dalip. The Magistrate, having issued his warrant for the arrest of Dalip, did not exclude the jurisdiction of the officer in charge of the thána and prevent him issuing his written order under section 56. It might be different if the Magistrate had decided that no warrant should issue against Dalip and that a summons only should issue; but that was not the case here. In order to clear the ground, we may say that in our opinion the writing of the names of Nazir Husain and his fellow constables on the back of the copy of the warrant and the signing of that endorsement by the officer in charge of the thána did not constitute the copy of the warrant an order in writing within the meaning of section 56 of the Code.

of Criminal Procedure. If the officer in charge of the thána had written on the copy of the warrant words to the following effect:—
 “Arrest Dalip, the person within naméd, for the offence within named,” and had put the names of the constables on the copy of the warrant and had signed such endorsement, he would have made an order in writing within the meaning of section 56. It is obvious from the endorsement itself in the present case and from the evidence of the officer in charge of the thána that he did not conceive that he was making an order under section 56 when he endorsed the copy of the warrant. If he had made such an order as we suggested, these accused persons would certainly have been liable to punishment under section 332 of the Indian Penal Code in respect of the hurt inflicted by them jointly on these Police officers. As the Police officers were not acting under an order in writing made under section 56 of the Code of Criminal Procedure, we must consider whether in arresting Dalip and in detaining him in custody under the copy of the warrant they were acting in the discharge of their duty within the meaning of section 332 of the Indian Penal Code.

An officer in our opinion cannot be said to be acting in the discharge of his duty if it is not his duty as a Police officer to do the particular act. In the case of the *The Queen v. Roxburgh* (1) a Police officer whilst assisting a householder to eject a person from his house was assaulted. It was there held by Cockburn, C. J., that the person who assaulted the Police officer was not liable to be convicted, under section 38 of 24 and 25 Vict. Cap. 100, of an assault on an officer in the due execution of his duty, that learned Chief Justice holding that the Police officer was not acting, strictly speaking, in the execution of his duty as a Police officer, since he was not actually obliged to assist in ejecting the accused person from the house; but the Chief Justice further held that, although the person who assaulted the Police officer was not liable to be convicted of the graver offence of assaulting an officer in the execution of his duty, he was liable to be convicted of a

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common assault, as the Police officer in rendering assistance to the householder was acting lawfully.

It was pressed upon us in argument that the earlier portions of section 332 of the Indian Penal Code should be read, not as if the words were—"in the lawful discharge of his duty," but as if the words were—"in the lawful or unlawful discharge of his duty," and for that contention reliance was placed upon the introduction into the latter portion of section 332 of the word "lawful" before the words "discharge of his duty." Reliance was also placed on the decision of this Court in *Queen-Empress v. Nand Kishore* (1).

In our opinion the words "in discharge of his duty" can have only one meaning, and that is that the officer has a duty to discharge and is discharging it at the particular time. They cannot mean that the officer is acting under colour of his office. He must be acting at the time as a Police officer and in the particular matter discharging a duty incumbent upon him as a Police officer. A Police officer may of course occasionally exceed what his duty requires of him when in the discharge of his duty, or may in the course of the discharge of his duty be guilty of an act unlawful in itself and not required to be done by the Police officer for the purpose of performing the duty which he is then engaged upon. It is to cover acts which the Police officer may have to do when in the discharge of his duty that in our opinion the words "lawful discharge" are introduced in the concluding portion of section 332. We can best explain our meaning by an illustration. A warrant is handed to a Police officer for the arrest of a particular person. That warrant on the face of it does not direct him to break open premises, for instance, in order to effect the arrest, and yet it may be necessary for the officer in discharge of his duty in arresting the accused under the warrant to break into the accused's house, or to do some other act without the doing of which the warrant could not be executed. Such acts would be properly described as done or attempted to be

(1) Weekly Notes 1892, p. 1.

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done by the Police officer in the lawful discharge of his duty. If it was unnecessary to do such an act and yet it was done, the act would not be done by the Police officer in the lawful discharge of his duty, and therefore would not be covered by the concluding portion of section 332. The Legislature has provided the procedure to be followed in making the arrest of a person to whom section 110 of the Code of Criminal Procedure applies. The Legislature does not contemplate that a warrant should be issued for the arrest unless the circumstances bring the case within the proviso to section 114 of the Code of Criminal Procedure. The procedure intended to be followed in such cases is that of summons. In our opinion, as the warrant in this case for the arrest of Dalip was not endorsed to Nazir Husain or his companions, and was not in the possession of any of them, and was in fact in the possession of a constable who had been directed to execute it and who was not with Nazir Husain, Nazir Husain and his companions were not in the discharge of their duty at the time when they arrested Dalip and detained him in custody. There is very good reason why the officer executing a warrant issued by a Magistrate or an order in writing under section 56 of the Code of Criminal Procedure should have in his possession at the time of the arrest the warrant or order in writing. If he has a warrant or order in writing in his possession, no doubt a Court would take a very serious view of an assault on the officer or of a rescue or attempt to rescue. In this case neither Nazir Husain nor his fellow constables had in their possession any warrant or order in writing under which it was their duty to arrest Dalip. We consequently hold that the constables were not in the discharge of their duty at the time when the rescuers of Dalip assaulted them, and that the case does not come within section 332 of the Indian Penal Code.

Dalip and his companions are, however, liable, in our opinion, to be convicted under section 323 of the Indian Penal Code. That they inflicted hurt on the two constables in pursuance of a common object, namely, that of using violence if necessary in effecting the

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rescue of Dalip, there cannot be a doubt, and section 99 of the Indian Penal Code applies in this case. That is a section which, if the arguments for the prosecution in this case were correct, would be entirely superfluous in the Code, that is, if a case came within section 332 of the Indian Penal Code, when hurt was inflicted on a Police officer, whether he was lawfully or unlawfully in discharge of his duty, there would have been no necessity for the enacting of section 99. The first clause of section 99 was enacted to meet cases which would not fall within section 332 by reason of the public servant in section 332 not being at the time when the assault was committed on him in discharge of a duty imposed on him by law. The first clause of section 99 applies to those cases in which the public servant is acting in good faith under colour of his office, though the particular act being done by him may not be justifiable by law. In this case we entirely disagree with the Sessions Judge in his finding that Nazir Husain acted otherwise than in good faith. The officer in charge of the thána was carrying out the intention of the Magistrate, who had no feeling in the matter, in causing the arrest of Dalip. Nazir Husain and his fellow constables were carrying out the informal orders of the officer in charge of the thána, and although under the circumstances of the case their arrest and detention of Dalip were not strictly justifiable by law, Nazir Husain and his fellow constables were, in making the arrest and in removing Dalip in custody, acting in good faith under colour of their office. We have no doubt that they believed that they were justified by law in making the arrest and in removing Dalip in custody. They may well have believed that section 25 of Act No. V of 1861, applied to the verbal order, it was not an order in writing, which they had received from the officer in charge of the thána. There was no case here under section 225B of the Indian Penal Code. We do not interfere with the order of the Sessions Judge in setting aside the convictions under that section. Dalip and his companions, when they assaulted the Police officers, were undoubtedly members of an unlawful assembly within the meaning of section 141 of the Indian Penal

Code. Their common object at that time was to commit an offence, namely, the offence of using criminal violence to the constables in order to effect the rescue of Dalip. Dalip joined with the rescuers in carrying out their common object, and he himself used violence. In our opinion all the accused were rightly convicted of the offence punishable under section 147 of the Indian Penal Code, and of that offence we convict them. We set aside so much of the order of the Sessions Judge as quashed the convictions under section 147. Dalip and his companions also committed the offence punishable under section 323 of the Indian Penal Code and of that offence we convict them. The acquittal by the Sessions Judge of the offence charged under section 332 of the Indian Penal Code was right, and we do not interfere with his order in that respect. For the offence under section 323 we sentence the respondents to this appeal severally to twelve months' rigorous imprisonment. For the offence punishable under section 147 of the Indian Penal Code we sentence the respondents severally to one day's rigorous imprisonment. Warrants will issue for the arrest of the respondents. The sentences will be concurrent.

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 APPELLATE CIVIL.

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Before Mr. Justice Banerji and Mr. Justice Aikman.

BALWANT SINGH (DEFENDANT) v. ROSHAN SINGH (PLAINTIFF).

Hindu Law—Joint Hindu family—Rights of illegitimate member of the family—Mortgage—Redemption—Suit by legitimate son of illegitimate member of family to redeem a mortgage made by previous legitimate owner.

The right of an illegitimate son in a Hindu family to receive maintenance from the family property is a purely personal right and does not descend to his son.

Held that the legitimate son of an illegitimate member of a Hindu family, who, as such illegitimate son, might have had a right to maintenance from the property of his father, had no such interest in the estate belonging to the family as would entitle him to redeem a mortgage made by a previous rightful and legitimate owner of the estate.

THE facts of this case sufficiently appear from the judgment of the Court.

First Appeal No. 113 of 1894, from a decree of Babu Ganga Saran, B.A., Subordinate Judge of Aligarh, dated the 31st March 1894.