Court in the case of *Pollard* v. *Mothial* (1) took another view; but, as pointed out in the case of *Queen Empress* v. *Kattayan* (2), the definition in the Code of Criminal Procedure on which we base our decision is subsequent in date to that authority. As regards Bombay, there is a quite recent authority, following a previous authority, both of which are to be found in the same volume, namely, *Emperor* v. *Dhondu* (3) and *Emperor* v. *Balu Saluji* (4), in which the Bombay High Court, following an English authority which deals with the question of a penalty, has emphatically taken the other view, without, however, noticing the use of the word "punishable" in Act No. XIII of 1859. On the other hand, there is a clear dictum by a Judge of this Court, reported in the case of *Queen-Empress* v. *Indarjit* (5), which has never been questioned and which must be taken to have been for all these years the guiding principle in this province. We have come to the conclusion that we are compelled by the force of language to follow this ruling, and we hold that this offence is triable summarily by a magistrate of the first class. Let the record be returned.

APPELLATE CRIMINAL.

Before Mr. Justice Tudball and Mr. Justice Walsh.

1920. *November*, 3.

EMPEROR v. JANKI PRASAD AND ANOTHER.*

Criminal Court—Duty of a Criminal Court in respect of a case before it distinguished from the duty of a Civil Court trying a civil case—Relevant documents in existence, but on file of a connected case—Refusal of Court to send for record.

Whatever attitude may be taken up by a Civil Court trying a civil suit, where it is the duty of the parties to place their case as they think best before the Court, it is the duty of every Criminal Court to get to the bottom of a case and to bring all relevant evidence upon the record and to see that justice is done.

THE facts of this case are fully stated in the judgment of TUDBALL, J.

* Criminal Appeal No. 707 of 1920 by the Local Government, from an order of Shekhar Nath Banerji, Sessions Judge of Mainpuri, dated the 15th of May, 1920.

(1) (1881) I. L. R., 4 Mad., 234. (3) (1904) I. L. R., 33 Bom., 22.
(2) (1897) I. L. R., 20 Mad., 235 (238). (4) (1908) I. L. R., 33 Bom., 25.
(5) (1889) I. L. R., 11 All., 262.

The Government Advocate (Mr. *W. Wallach*), for the Crown.

Mr. *C. Ross Alston* and Babu *Satya Chandra Mukerji* for the accused.

EMPEROR v. JANKI PRASAD.

TUDBALL, J.:—This is a Government appeal against an order of acquittal passed by the Sessions Judge on appeal from an order of conviction passed by a first class magistrate against the accused persons Janki Prasad and Lachhman, under which these persons were sentenced to three months' rigorous imprisonment and a fine of Rs. 100 each, for offences under section 353/225 of the Indian Penal Code. The case comes from the town of Phaphund. From the record of case No. 17, *King-Emperor* v. *Kedar Nath, Ram Dat and Bhure &c.*, of the court of the magistrate in the year 1920, and from the record of case No. 11 of 1920, *Bachchan Lal* v. *Wali Muhammad*, it appears that on the 10th of December, 1919, a quarrel took place between a Brahman named Bachchan Lal and a constable named Wali Muhammad attached to the outpost of the local police station. It arose over the drinking of water at a well when Wali Muhammad was washing his teeth by the side of the well. Apparently the two men came to blows and Bachchan Lal at once made a complaint in court. On the same date a report was made by Nazir Husain, the head constable at the police station, which charged Kedar Nath, Ram Dat, Bhure and Bachchan Lal and two other persons with having committed the offences of criminal trespass and rioting, in that after the first squabble between Wali Muhammad and Bachchan Lal the latter had collected some friends, had gone to the police outpost, had dragged Wali Muhammad out of it and beaten him. The inquiry in the latter case was taken up by the Sub-Inspector Muhammad Mohsin Jafri, and on the 11th of December, he issued to Nazir Husain, head constable, written orders under section 56 of the Code of Criminal Procedure directing him to arrest Bhure and Ram Dat as well as others for the offences charged against them. The same magistrate tried these two cases and also the present case. The cases were apparently heard together and judgments were delivered on the same date. In the first case the charge against Wali Muhammad of assaulting Bachchan Lal was dismissed, and in the second case the charge against Bhure, Ram Dat, and Bachchan Lal of the offence under

section 147 of the Indian Penal Code was also dismissed. The magistrate was of opinion that even if Bachchan Lal and his friends had gone to the outpost after the first quarrel with Wali Muhammad, they went really to make a complaint, and that the charge against them had been exaggerated. The present case, the third one, arises in this way, out of the first two. The case for the prosecution is that on the 22nd of December last Nazir Husain and Lallu Ram, head constables, found Bhure and Ram Dat sitting at the shop of Janki Prasad and Lachhman, that they arrested them at the shop, showed them the written orders under section 56 of the Code of Criminal Procedure and took them out on to the road, that thereupon Lachhman, Janki Prasad and some of their friends advanced angrily upon them, insisted upon the men being released, finally pushed aside the police with their hands, and the men escaped and ran back to their shop. Nazir Husain sent to the outpost, which was some 50 or 60 paces away for some constables. On their arrival he wrote a report on a piece of paper and sent it on to the police station to the Sub-Inspector. The Sub-Inspector at once proceeded to the spot and made an inquiry. Finally he sent up Janki Prasad and Lachhman and two other persons for trial of the offence of having rescued Ram Dat and Bhure from lawful custody.

The defence case is as follows:—Janki Prasad stated that on the day in question the head constable came to him at his shop telling him that the Sub-Inspector desired his attendance at the police station in order that he might bring his influence to bear upon Bachchan Lal to settle the dispute which had arisen between Bachchan Lal and Wali Muhammad; that he (Janki Prasad) refused to go, declining to interfere in a matter with which he had no concern, that the head constable abused him, that he returned it with compliments and the head constable went away; that very shortly after, the Sub-Inspector arrived upon the scene armed with a gun, that he called for the man who had been impertinent to the police, that he abused Janki Prasad and the latter in return abused him, whereupon the Sub-Inspector deliberately raised his gun and fired point blank at him and that the shot would have taken effect had not the head constable struck up the gun with his hand.

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Tudball, J.

The magistrate took evidence for both sides and finally came to the conclusion that the prosecution story was true, that the story told by Janki Prasad was improbable and unworthy of belief, and he convicted the accused and sentenced them as mentioned above. It will be remembered that he was the same Magistrate who acquitted Ram Dat and Bhure in the charge which had been preferred against them by Wali Muhammad and Nazir Husain. We may note here that two other accused were acquitted because their names were not entered in the first report, i.e., the report which was written by Nazir Husain at the scene of the occurrence and sent to the police station. Janki Prasad and Lachhman appealed to the learned Sessions Judge, who has acquitted them without going into the actual facts of the case at all. His judgment sets out the case for the prosecution and the case for the defence. He then proceeds to say as follows:— "Now in this appeal we have to see whether Nazir Husain had any authority to arrest Bhure and Ram Dat. The record shows that there is no warrant for arrest of Bhure and Ram Dat, nor is there any order of the thanadar to arrest Bhure and Ram Dat. The prosecution failed to prove that there was any such warrant or order. There is no secondary evidence on the record which would satisfactorily prove that there was any warrant for arrest of Bhure and Ram Dat, nor is there any satisfactory evidence to show that Ram Dat and Bhure had been accused of any cognizable offence so that a police officer could arrest them without any warrant." Thereupon the learned Sessions Judge quotes the case reported in I. L. R., 26 Calc., 630, which really does not govern the facts of the present case at all. He then continues to say:—"The deposition of Nazir Husain would show that he arrested Bhure and Ram Dat and then showed them the warrant. In *Satish Chandra Rai* v. *Jodu Nandan Singh* (1) PRINSEP and HILL, JJ., held that an arrest by a police officer without notifying the substance of the warrant to the person against whom the warrant is issued, as required by section 80 of the Code of Criminal Procedure, is not a lawful arrest, and resistance to such arrest is not an offence under section 225 B of the Indian Penal Code. As I have shown above, there is no warrant

(1) (1899) I. L. R., 26 Calc., 748.

on the record in this case nor is there satisfactory evidence of any warrant, and the evidence of Nazir Husain also shows that he did not notify the substance of the warrant before he arrested the persons. So I do not see how the offence under section 353/225 of the Indian Penal Code could have been committed, and how the accused could have been convicted of this. There has not been any application in writing by the prosecution that I should either get the original warrant or get secondary evidence about it or should send the case to the court below to get the warrant in original, or secondary evidence about it, so I do not think I would be justified in doing anything of the kind, for I do not think the Judge's duty to be to procure evidence which was never produced by the prosecution."

It it difficult to understand what conception the learned Sessions Judge has of his duty as a Sessions Judge trying a criminal case. It is the duty of every Criminal Court to get to the bottom of a case and to bring all relevant evidence upon the record and to see that justice is done. The latter portion of the Judge's judgment shows clearly that his conception of his duty as a Judge is utterly incorrect and somewhat puerile. It is the attitude that might possibly be taken up by a Civil Court trying a civil suit where it is the duty of the parties to place their case as they think best before the court. But in a criminal case it is the duty of the court to get to the very bottom of it and to see that every scrap of relevant evidence is brought before it. The learned Sessions Judge has fallen far short of his duty in the present case. As a matter of actual fact the Magistrate who tried the case had the record of the other two cases before him. They were in court and the cases were tried together and the judgments were delivered together. We have seen and we have examined those records. The written orders passed under section 56 of the Code of Criminal Procedure are before the court and are on the record of the very case in which Ram Dat and Bhure were tried and acquitted. To say that there was no evidence before the magistrate of any complaint of a cognizable offence is utterly incorrect. The record of the case was before the court and the court itself was trying that very case. In addition to this there was the first report which was on the record of this case. The

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learned Sessions Judge's judgment has made it necessary for us to go through the evidence in the case and to hear the appeal just as he ought to have done.

[His Lordship then examined the evidence and convicted the accused.]

WALSH, J. :—I agree. In my opinion it was impossible for the Government to permit the judgment of the Sessions Judge to stand. Whatever the merits might have been, a decision that members of the public are entitled to interfere with members of the police force while in the *bonâ fide* execution of their supposed duty, and to rescue their friends, is so entirely without legal foundation and so dangerous in principle that no Government could in the public interest permit it to stand. The learned Judge has muddled himself over cases relating to arrest when the question which he had to decide was one of rescue, an entirely different matter. He has also muddled himself over a question of warrants when the question which he had to decide arose out of an arrest without a warrant under section 56 of the Code. He had the courage to hold that there was no evidence on the record and that the prosecution had failed to prove the order, when a proper order, dated the 11th of December, was on the record before him.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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RAM PRASAD AND ANOTHER (DEFENDANTS) v. ASA RAM AND OTHERS (PLAINTIFFS). *

Civil Procedure Code (1908), order XLVII, rule 1(a)—Appeal and application for review filed by same party—Appeal withdrawn—Jurisdiction of court to entertain application for review not ousted.

An appeal which has been withdrawn must be treated as if it had never been "presented" within the meaning of order XLVII, rule 1, of the Code of Civil Procedure. *Ramappa* v. *Bharma* (1) referred to.

A party to a suit filed an appeal against the decree and thereafter an application for review of judgment. After the review had been filed, the applicant withdrew his appeal. *Held* that the fact of an appeal having been filed and

* Civil Revision No. 162 of 1919.

(1) (1906) I. L. R., 30 Bom., 625.