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flowers in the course of his business is satisfactorily accounted for. The presumption, therefore, under section 53 cannot be said to arise in this case, and it lies upon the prosecution—no such presumption arising—to make out that the accused had in his possession mowra flowers for the manufacturing of liquor. The prosecution has failed to make it out.

The Magistrate from the evidence of the liquor-contractor's man, that illicit distillation is common in the Bulsár Táluka, presumes that the accused in this case kept the mowra flowers in his possession with the intention of using them for illicit distillation by himself or by other persons purchasing the same from him. We are unable to follow his reasoning. Also it is evident that the accused cannot be held responsible for the use made by purchasers of the materials after they have passed from his control.

The statement of the Magistrate in his judgment, that the mowra flowers are not used in the district as food for men or animals, is contrary to the statement on oath of witness No. 23 (Chotálál Vasandás).

The conviction and sentence are reversed. Fine, if levied, to be repaid.

Conviction and sentence set aside.

REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

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In re THE PETITION OF RAKHMA'JI.*

Penal Code (Act XLV of 1860), Secs. 353 and 352—Rules or executive orders of Government published in Mr. Nairne's Revenue Hand Book—Impressment of carts for the use of Government officers, how far legal.

The rules or executive orders of Government printed at pages 26 and 27 of Mr. Nairne's Revenue Hand Book have not the force of law, and a public servant, acting in obedience thereto, cannot be considered as acting in execution of his duty as a public servant, if his act is otherwise illegal.

Accordingly, where on a complaint by a sepoy in the Revenue Department deputed by a forest settlement officer to impress some carts for the use of the latter,

* Review Petition, No. 51 of 1885.

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that the accused assaulted and prevented him from seizing his cart, a Magistrate of the First Class convicted the accused under section 353 of the Penal Code (Act XLV of 1860) for assaulting and obstructing a public servant in the execution of his duty, and sentenced the accused to undergo twenty-one days' rigorous imprisonment,

Held, that the conviction under section 353 of the Penal Code should be set aside. The only offence of which, upon the evidence, the accused was guilty, was that of simple assault under section 352 of the Penal Code.

THIS was a review petition for setting aside an order of conviction and sentence by E. L. Cappel, a Magistrate of the First Class at Sholápur.

The forest settlement officer of Sholápur had deputed Mohidin, a sepoy in the Revenue Department, to impress fifteen carts for his use. The petitioner owned a cart, and prevented Mohidin from seizing it. On a complaint lodged by Mohidin before a First Class Magistrate at Sholápur the petitioner was charged, under section 353 of the Indian Penal Code, with the offence of assaulting Mohidin with intent to prevent him from executing his duty as a public servant, and was convicted, and sentenced to undergo twenty-one days' rigorous imprisonment.

The petitioner made the present application to the High Court under its revisional criminal jurisdiction, which came on for hearing on the 13th April 1885, when no one appeared for the Crown.

Ghanashám Nilkanth Nádkarni for the petitioner.—The complainant Mohidin could not be considered as performing his duty as a public servant in seizing the petitioner's cart, which he had no right to seize, and, therefore, the conviction under section 353 of the Penal Code is illegal. There was no assault on the part of the petitioner in protecting his property from being seized.

NÁNÁBHÁI HÁRIDÁS, J.—It appears to the Court that the peon in this case was not only not acting in the execution of his duty as a public servant, but apparently in contravention of section 374, Indian Penal Code; and, therefore, the conviction of the accused under section 353, Indian Penal Code, ought to be set aside, unless the rules at pages 26 and 27 of Nairne's Hand Book, (3rd ed.), have the force of law, and the proceedings were taken lawfully under them. Notice to be given to the Govern-

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ment Pleader to enable him to ascertain under what law the above rules were made. Record and proceedings to be shown to him.

That was accordingly done, and the Government Pleader, having received instructions to appear for the Crown, did so on the 6th July 1885.

Hon. *V. N. Mandlik* for the Crown.—The sepoy was not seizing the cart for his use, but under order from the settlement-officer. The rules or executive orders printed at pp. 26 and 27 of Mr. Nairne's Revenue Hand Book justify such seizure of carts, and the sepoy, therefore, was executing his duty as a public servant, and he was assaulted by the petitioner. Should the executive orders be not recognized as law, the conviction for assault ought to be upheld.

NÁNÁBHÁI HÁRIDÁS, J.—After hearing the Government Pleader we are of opinion that the rules or executive orders of Government, printed at pages 26 and 27 of Mr. Nairne's Revenue Hand Book, have not the force of law. The peon, therefore, who, according to his own evidence, was deputed by the forest settlement officer "to impress fifteen carts for his use," was not acting in the execution of his duty as a public servant when he seized the accused's cart, and the conviction under section 353 of the Penal Code must, therefore, be set aside. The only offence of which, upon the evidence, the accused was guilty, is that of simple assault under section 352 of the Penal Code, and we think, under the circumstances, a few rupees' fine would have sufficed. As, however, he has already suffered a week's imprisonment, we remit the unexpired portion of his sentence, he having been released on bail.

We are surprised to find that the First Class Magistrate considered that to be lawful which is expressly prohibited by section 374 of the Penal Code.