REVISIONAL CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1885. *December* 7.

QUEEN-EMPRESS *v.* AMARSANG JETHA', HOSAIN GULÁM AND BHIMRA'O KESHAVRA'O.*

Arrest without warrant—Powers of the police to arrest without a warrant—Criminal Procedure Code (Act X of 1882), Sec. 54—Indian Penal Code (Act XLV of 1860), Secs. 220 and 342.

Section 54 of the Criminal Procedure Code (Act X of 1882) authorizes the arrest by the police, not only of persons against whom a reasonable complaint has been made or a reasonable suspicion exists of their having been concerned in a "cognizable offence," but also of persons against whom "credible information" to that effect has been received.

Semble—Where the arrest is legal there can be no guilty knowledge, such as is added to an illegal act, such as it is necessary to establish against the accused to justify a conviction under section 220 of the Indian Penal Code (Act XLV of 1860).

It is only where there has been an excess, by a police officer, of his legal powers of arrest that it becomes necessary to consider whether he has acted corruptly or maliciously, and with the knowledge that he was acting contrary to law.

On the night of the 28th April, 1885, a Pársi resident of Surat, named Hormasji Dosábhái, aged fifty or fifty-five, in apparently good health, was arrested by the accused in his house and taken to a police station. While in custody there, he died suddenly within an hour of his arrest. The medical evidence showed that there was no external mark of violence on the person of the deceased, and that the cause of death was syncope induced by either mental or physical shock. Thereupon the accused were placed before F. S. Lely, First Class Magistrate of Surat, on charges, first, of causing the death of the said Hormasji Dosábhái; second, of having arrested him without legal justification; third, of having made the arrest without any necessary or reasonable cause; and fourth, of having acted in an illegal and irregular manner in carrying out the arrest.

The First Class Magistrate, Mr. Lely, held that the deceased died in all probability of a nervous shock, but not from any physical violence offered by the accused; that the accused arrested

* Criminal Appeal, No. 263 of 1885.

1885.

QUEEN-EMPRESS v. AMARSANG JETHÁ.

the deceased on receipt of credible information to the effect that certain stolen property was lying concealed in his house; that there was no sufficient evidence to show that the accused, or any of them, corruptly or maliciously committed the deceased to confinement, knowing that in so doing they were acting contrary to law; and that the arrest, though conducted with unnecessary harshness, was perfectly legal. The accused were, therefore, discharged under section 253 of the Criminal Procedure Code (Act X of 1882). As to the legality of the arrest, his judgment was to the following effect:—

"Was the arrest of deceased a legal act? There is some dispute as to whether accused 1 or 2 made the arrest, but I do not think it is of much consequence under the circumstances. Whether it was Amarsing or Bhimráo or both who did the act, I think they were within the technical powers conferred by the law. On the other hand, whether Amarsing was present at deceased's house at the time or not, any moral blame must rest upon him alone as the superior and responsible officer. The law under which the arrest was made is contained in sections 54 and 47 of the Code of Criminal Procedure (X of 1882). The relevant words of section 54 are—'Any police officer may . . . arrest any person . . . against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in any cognizable offence.' The question for decision, therefore, is, whether there were reasonable grounds—not, be it noted, for immediately arresting (that falls under head III.)—but for believing or suspecting the deceased to be guilty of a cognizable offence, *i.e.*, dishonestly] receiving stolen property. Now the arrest was either made by Amarsing as alleged by the family of the deceased, or by Bhimráo by virtue of the order of Amarsing, or by Bhimráo on his own responsibility as a police officer. It could not have been made by Bhimráo by virtue of the order of Amarsing, because (1) such order was superfluous, Bhimráo being himself a police officer, and (2) there was no written order as required by section 56 of the Code of Criminal Procedure (X of 1882). It must, therefore, have been the sole act of Amarsing or of Bhimráo. As the former is a second class head constable and the latter a fourth class head constable in charge of the Kanpith police station, each was a police officer, and, as such, had sufficient authority, provided he had a reasonable suspicion. In the case of Amarsing the alleged ground of action was information supplied by one Parbhu Jamnádás to the effect that certain stolen property was in the deceased's house. In the case of Bhimráo we may fairly add to this the verbal order or advice of his superior officer, which, though perhaps of no effect as a legal act, may yet be taken into account as having operated in the mind of a junior officer when deciding whether or not there were sufficient grounds for proceeding. It is in evidence that Parbhu Jamnádás had given useful information to the police on previous occasions. It may be allowed that the communication alleged to have been made by him to the accused was sufficient to constitute 'credible information', if in

1885.

QUEEN-EMPRESS v. AMARSANG JETHÁ.

fact it was made—that is the question. Parbhu Jamnádás (No. 19) himself on being called denies that he gave the information, or pointed out the deceased's house as alleged. But it would be very unfair to the accused to take this denial as conclusively disposing of the matter. Seeing that an admission by Parbhu would at once expose him to a prosecution for an offence under section 182 of the Indian Penal Code (XLV of 1860) it might have been predicted with some certainty that he would not make it. His own answers make it apparent that he acts, more or less, as a police spy, not a sort of person who would be likely to hesitate a moment in telling a lie to save himself. His denial does not, in my opinion, raise any presumption against the accused, but leaves the case pretty much where it was. Here some evidence for the defence calls for notice, but it does not help us much. According to the accused, the informer mentioned 'a Beluchi' as in league with the deceased, and a respectable old Mahomedan gentleman (No. 23) in charge of the Chandpir Masjid corroborates accused No. 3's statement, that he (accused 3) went there on the night in question to enquire about this Beluchi. He is not, however, very decisive as to the particular day. The other two witnesses to this point (Nos. 24 and 25) are of no account. Witnesses Nos. 27 and 28 are called to speak to having seen the informer Parbhu talking with Amarsing about the time in question; but, at the best, this evidence can have little or no effective weight. A vast number of crimes are detected by means of informers who are not prepared to discover themselves. This is recognized by the Legislature so distinctly that section 125 of the Evidence Act I of 1872 expressly lays down that 'no magistrate or police officer shall be compelled to say whence he got any information as to the commission of an offence.' If the spirit of this provision of law be observed, it would seem to follow by natural sequence that if a police officer on trial for arresting without reasonable cause limit himself to pleading not guilty and refuse to give the name of his informant, he must be acquitted, unless there is some positive evidence against him. It may safely be said that nine-tenths of the secret informers *(bátmidárs)* would deny all part in the matter if taxed with it in open Court in proceedings like the present. It would be disastrous to the public safety if the police were liable to have to produce a positive justification of every arrest. They would be quite paralyzed in their investigation of crimes, as no prudent policeman would venture to act on secret intelligence. Consequently, I think full scope should be given to the maxim, that a man should be presumed innocent until positively proved guilty,—that is to say, the police should be presumed to have acted upon reasonable grounds in this matter until the contrary is proved. To raise the contrary presumption in this case, certain allegations of malice have been made, and must now be considered. So far as those allegations have been given a definite shape, they have been connected with a contest which has been going on in the Criminal Courts for nearly a year between some policemen and a certain club, some members of which were accused by the former of public gaming. In order to get the facts clearly on the record, Mr. Nánábhái, the city police inspector, was recalled by the Magistrate. There is no need to recount here the particulars as stated by him. Suffice it to note, that the deceased was not involved in the proceedings at all either as a party or witness. He was not even a member of the club, nor is there any

proof that he had any connection with it, except that (as we are told by Kharsedji) he did work for it as messenger, &c., and may also have been a personal friend of some of the members. Turning now to the other side, we find that none of the accused were connected with the proceedings. The original prosecutor in the gambling case was Pir Mahomed, a head constable, who is not even suggested in the Court to have had anything to do with the affair now under inquiry. He with Morad Abu and Mahomed Bhikhán were sent up by the Magistrate for trial for perjury, but the solitary link, (if it can be called such), between them and the accused is that Amarsing was summoned, but not called as a witness for Pir Mahomed. In short, a feud between certain Pársis and certain policemen is laid before us, and we are asked to infer the arrest of a certain other Pársi by certain other policeman to have been an outcome of it. I do not by any means say that it is impossible, but I do without hesitation hold that the connection is far too loose and remote to justify the inference by a Court of law. Perozshaw (No. 29), a relative of the deceased, testifies to his wish to get away from Surat, 'because,' said he, the 'police have got ill-will against me, because I refused to give false evidence', &c. Both before Mr. Dárásha and in his examination-in-chief before this Court the witness speaks merely of the 'police,' mentioning no name. Before Mr. Dárásha he even says: 'He (deceased) mentioned some police *jamádár* whose name was not stated.' In cross-examination before this Court he (witness) mentions Amarsing's name in answer to a direct question. The contention for the defence is that if this witness be telling the truth, the deceased was referring to the gambling case with which the accused had nothing to do. If so, the '*jamádár*' would be Pir Mahomed probably. Then, again, the deceased's wife and daughter (Nos. 2 and 3) describe an interview a month or two before the arrest between the deceased and accused, in which the latter wanted him to sign something, and on meeting with a refusal went away using a threat. The widow (No. 3) in narrating this occurrence says that she was in the front room downstairs, and that no one else was there, and that her daughter (No. 2) was upstairs. No. 2 herself says that she overheard what was said as she was coming out of the house to sprinkle water on the *otelá*. It is difficult to explain such a very important difference between the two—No. 3 does not mention the alleged threat. With reference to all these three special witnesses, it must be remembered that they are relatives of the deceased, and, as such, naturally embittered against the police as a body, whom they look upon as the author of their relative's death without perhaps making much distinction between individual members of the force. Such feelings would naturally give a tinge to their memory of past conversations and make them dangerous guides if trusted too implicitly. On the whole, then, I do not consider there is sufficient evidence to prove that the accused or any of them (in the words of section 220, I. P. C.) corruptly or maliciously committed the deceased to confinement, knowing that in so doing they were acting contrary to law."

Subsequently Mirbái, the widow of the deceased Hormasji Dosábhái, applied to the High Court for a revision of the proceedings in this case, and obtained a rule *nisi* from Nánábhái and

1885.

QUEEN-EMPRESS v. AMARSANG JETHÁ.

Wedderburn, JJ., calling upon the accused Amarsang Jetha, Hosain Gulám Mahomed and Bhimráo Keshavráo, to show cause why they should not be committed for trial to the Sessions Court on charges under sections 220 and 342 of the Indian Penal Code (Act XLV of 1860).

The rule came on for hearing before Birdwood and Jardine, JJ., on 7th December, 1885.

Mánekshá Jahángirshá for applicant.

Gokuldás Kahándás Parikh for opponents.

Per Curiam:—In this case, Mirbái, the widow of Hormasji Dosábhái, obtained a rule from Nánábhái and Wedderburn, JJ., requiring the accused Amarsang Jetha, Hosain Gulám Mahomed and Bhimráo Keshavráo, to show cause why they should not be committed for trial on charges under sections 220 and 342 of the Indian Penal Code (Act XLV of 1860). It has been urged before us by Mr. Mánekshá, for Mirbái, that Mr. Lely, the Magistrate who discharged the accused, was wrong in his findings on the issues recorded by him as to the legality of the arrest of Hormasji and the corrupt or malicious *animus* of the accused. We have been asked to infer the existence of this *animus* from the unnecessary harshness with which the arrest was conducted—a subject with which Mr. Lely has dealt in his third finding. On these grounds we are asked to direct the committal of the accused to the Court of Session.

On consideration of the very careful judgment recorded by Mr. Lely and his full discussion of the evidence as to the alleged reasons for the arrest, we do not think that, as a Court of Revision, we should interfere with his decision, either on the ground that there was no reasonable suspicion or complaint to justify the arrest, or on the ground that the accused acted from corrupt or malicious motives.

We have been referred to the opinion expressed by the Calcutta High Court in *Queen* v. *Behary Singh*[1]. In that case, which was decided when the powers of police officers to arrest without a warrant were regulated by section 100 of Act XXV of 1861, Markby, J., observed: "What is a reasonable complaint

(1) 7 Calc. W. R. Cr. Rul., 3.

or suspicion must depend on the circumstances of each particular case; but it must be at least found on some definite fact tending to throw suspicion on the person arrested, and not on mere vague surmise or information." These words are a comment on clause 2 of section 100 of the Code of 1861, which authorized the arrest, without a warrant, of a person against whom a reasonable complaint had been made or a reasonable suspicion existed of his having been concerned in any offence of the class described in the Codes of 1872 and 1882 as "cognizable offences." The law has now been altered by section 54 of the Code of 1882, which authorizes the arrest, not only of persons against whom a reasonable complaint has been made or a reasonable suspicion exists of their having been so concerned, but also of persons against whom "credible information" to that effect has been received. In the present case, the prosecution failed to satisfy the Magistrate that the informer Parbhu Jamnádás had given no information to the accused of the kind contemplated in section 54 of the Code, and we cannot say that the Magistrate's finding on the evidence before him was wrong, or that he failed to notice any evidence bearing on the point.

We must hold, therefore, that the accused acted within their legal powers of arrest, however harshly they may have behaved in the exercise of those powers.

These considerations are really sufficient to enable us to dispose of the application now before us. If the arrest was legal, there could be no guilty knowledge "superadded to an illegal act," such as it would be necessary to establish against the accused to justify a conviction under section 220 of the Indian Penal Code (XLV of 1860): see *Reg.* v. *Nárâyan Bábáji*[1]. It is only when there has been an excess by a police officer of his legal powers of arrest that it becomes necessary to consider whether he has acted corruptly or maliciously and with the knowledge that he was "acting contrary to law." Nevertheless, in the present case, we may say that there is no reason for holding that Mr. Lely has wrongly appreciated so much of the evidence as bears on the motives which actuated the accused in arresting the deceased Hormasji.

(1) 9 Bom. H. C. Rep., 346.

1885.

QUEEN-EMPRESS v. AMARSANG JETHÁ.

The arrest was certainly conducted with unnecessary harshness; but we concur with Mr. Lely in holding that the Legislature has left the protection of individuals from such conduct as the police were guilty of in the present case to the supervision of executive authority; and such supervision is shown to have been exercised as regards the accused.

The arrest of the deceased having been strictly legal, it is obvious that the accused could not be successfully proceeded against on a charge under section 342 of the Indian Penal Code (Act XLV of 1860).

For these reasons we decline to interfere with the Magistrate's order.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *March* 4.

QUEEN-EMPRESS *v.* LAKSHMAN DAGDU.*

Insanity—Plea of insanity in criminal cases—Indian Penal Code (Act XLV of 1860), Sec. 84—Legal test of responsibility in cases of alleged unsoundness of mind.

Section 84 of the Indian Penal Code (Act XLV of 1860) lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined.

The accused killed his two young children with a hatchet. The reason given for the crime was that, while he was laid up with fever, the crying of the children annoyed him. It was alleged that the fever had made him irritable and sensitive to sound, but it did not appear that he was delirious at the time of perpetrating the crime. There was no attempt at concealment; and the accused made a full confession.

Held, that, as the accused was conscious of the nature of his act, he must be presumed to have been conscious of its criminality. He was, therefore, guilty of murder.

THIS was a reference to the High Court under section 374 of the Criminal Procedure Code (Act X of 1882) for confirmation of the sentence of death passed upon the accused by M. B. Barrer, Sessions Judge of Násik.

* Confirmation Case, No. 2 of 1886.