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BA'I KANKU v. SHIVA TOYA.

The case must be sent back to the District Court for further inquiry and evidence, as it lies on the petitioner to prove the marriage, the residence, and both the adultery and the desertion, and with reference to section 17 to explain the delay in bringing the suit. The result should be certified to the High Court within four months.

Order accordingly.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Telang.

1892. *August* 18.

QUEEN-EMPRESS *v.* BOSTAN VALAD FUTTEKHA'N.*

Indian Penal Code (Act XLV of 1860), Sec. 81—Act likely to cause harm, done without a criminal intent and to prevent other harm.

The accused was a sepoy in a native infantry regiment. On the occasion of a fire in the city of Ahmednagar, he and the rest of his company turned out to assist in extinguishing it. He with other sepoys was stationed by their officer with orders to keep clear a space in front of the burning house, and not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear they were warned off by the sentries. A fracas between the soldiers and the police took place, and the chief constable was kicked by the accused. For this he was charged before the Magistrate, and fined for voluntarily causing hurt under section 323 of the Penal Code. In evidence it appeared that the police attempted to force the military guard, which had been posted as above stated, and it was further proved that the chief constable was not in uniform and that the accused did not know who he was. It was not alleged that the kick was unnecessarily violent.

Held, that the conviction was bad. The Magistrate having found that the chief constable was not in uniform, and that the accused did not know who he was, the kick was justifiable as given in good faith for the purpose of preventing much greater harm under section 81 of the Indian Penal Code, and as a means of acting up to the military order,

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882) by the District Magistrate of Ahmednagar.

The reference was in the following terms :—

"The accused are sepoys of the 8th Regiment Bombay Infantry. On the night of the 1st April, 1892, a fire occurred in the city of Ahmednagar, and a company of the regiment turned out to assist in extinguishing it. The accused with other sepoys were

* Criminal Reference, No. 82 of 1892.

stationed by their officer with orders to keep clear a space in front of the burning house. The orders received by them through the the lance naique were not to allow any one not in uniform to intrude on that space. The police under the city chief constable were also engaged at the fire, and on some of them coming round from the rear to the front of the house they found themselves warned off by the sentries. A fracas between the soldiers and the police seems to have ensued, during which the chief constable is said to have received a kick from the accused Bostan.

"Ráo Bahádur Moro Chintámon Joshi, First Class Magistrate, found the accused guilty of voluntarily causing hurt to the chief constable, and under section 323 of the Indian Penal Code sentenced him to pay a fine of Rs. 5.

"I think that Bostan committed no offence. The Court wrongly came to the conclusion that a sentry placed in the position in which the accused was placed is not justified in kicking any person whatever who attempts to force his guard. I am not prepared to say what a sentry may do under such circumstances; but I imagine that he is justified in using all reasonable force, and that the use of the foot may under certain circumstances not be unreasonable. It is perfectly certain that the police did attempt to force the guard which had been set under the Adjutant's directions. It is further in evidence, and it was so found by the Magistrate, that the chief constable was not in uniform, and the accused had no knowledge as to who he was. It is not alleged that the kick was unnecessarily violent, or that it caused any damage, and it would appear to have amounted to just such a use of the foot as may have been necessary to repel an invader of the space which the sentries were guarding. It appears probable that had the party who met with the sentry's foot been a private individual, a prosecution would not have been instituted, or would have been unsuccessful if instituted. I am of opinion that the sentence should be reversed.'

There was no appearance for the Crown or for the accused.

JARDINE, J.:—There is some discrepancy whether, as one witness says, the order to the soldiers was to prevent any person not in uniform going to the front of the house, or only to prevent any

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person going there until they had ascertained that he was really on duty. We have no doubt that the order required the men of the military guard to give such access to persons of civil authority as the law requires, they being under the same obligation to act in subordination to the civil authorities responsible, in time of peace, for the maintenance of the public order as other well-intentioned citizens who exercise their legal right of protecting the persons and property of other people from illegal violence. The case is not one to which Chapter 9 of the Code of Criminal Procedure (X of 1882) applies for the protection of the soldier, who, in dispersing an unlawful assembly, acts in obedience to an order which under military law he is bound to obey. It is unnecessary to consider the case of a soldier who, acting on such an order, obstructs a civil officer, *whom he knows to be such*, in the execution of his duty in ordinary times of quiet. In the present case there was no criminal intention, the kick was a mild and bloodless means of acting up to the military order, and it is found that the accused did not know who the chief constable was, and it is not found that he ought under all the circumstances to have guessed it. I have no doubt that, if the chief constable had not been an official, the soldier would, under our ordinary law, have committed no offence in obstructing and, if necessary, kicking him if he (the soldier) in good faith thought that the man forcing his way through the guard was, in so doing, removing the protection placed by the presence of the guard on the property. The kick would be justified under section 81 of the Penal Code (XLV of 1860) as given in good faith for the purpose of preventing much greater harm, the looting of the house or the spread of the fire, on the same principle that the man is excused by that section who in a great fire pulls down other people's houses to prevent the conflagration from spreading. As Bostan did not know the official character of the chief constable, and this ignorance was a mistake of fact, not of law, he must be dealt with as if the chief constable were an ordinary citizen; and the District Magistrate of Ahmednagar is right in his view of the law that the conviction and sentence are wrong. We now quash the conviction and sentence.

Conviction quashed.