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30 C. 97=6 C. W. N. 342.

the impression. The petitioner went into his house and brought out a *lathi* and said that he would not allow the impression to be taken and that, if any one asked for it, he would break his head. On these facts petitioner has been convicted under section 353 of the Indian Penal Code of assaulting a public servant in the execution of his duty as such public servant and has been sentenced to be rigorously imprisoned for six weeks.

The Sessions Judge upheld the conviction on appeal though he expressed some doubt as to whether the Police were justified in forcing a supposed bad character to give a thumb impression, he held that the act of the petitioner in getting the *lathi* and threatening the Sub-Inspector was not justifiable.

The Government Pleader has appeared in support of the conviction and has referred us to a rule in the Police Code to the effect that when any *surveille* is at home, proof of his presence can be secured by taking a thumb impression on the report. This, we take it, does not impose any obligation upon the *surveille* to give the thumb impression and we do not see how he can be forced to do so, if he objects.

We have further been referred to the first clause of s. 99 of the Indian Penal Code, which provides that "there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law."

The difficulty that we feel as to the application of the section is that we are not satisfied that the act of the petitiner amounted to an assault as that term is defined in section 351 of the Indian [100] Penal Code. It is not said that the petitioner made any gesture or any preparation which would cause the Sub-Inspector to apprehend that the petitioner was about to use criminal force to him then and there. All that could be said is that his preparation taken with his words would cause the Sub-Inspector to apprehend that criminal force would be used to him, if he, the Sub-Inspector, persisted in a particular course of conduct. No doubt if the act done by the petitioner had in itself amounted to an offence, there would have been no question that section 99 would have applied.

In this view of the case we must make the rule absolute, set aside the conviction and sentence, and direct that the petitioner be released from bail.

Rule made absolute.

30 C. 101 (=6 C. W. N. 422).

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ABDUL WAHED *v.* AMIRAN BIBI.* [4th March, 1902].

Order for security for keeping the peace on conviction—Appeal—Appellate Court, power of, to set aside such order—Criminal Procedure Code (Act V of 1898) ss. 106 and 423, cl. (d).

An order in appeal setting aside an order of the first Court made under s. 106 of the Code of Criminal Procedure is an incidental order within the meaning of s 423, cl. (*d*) of the Code and can be made by an appellate Court.

* Criminal Revision No. 1058 of 1901.

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THE petitioners, Abdul Wahed and others, obtained a Rule calling on the District Magistrate to show cause why the order under s. 106 of the Code of Criminal Procedure binding the petitioners down to keep the peace which was part of the case in appeal before the Sessions Judge as a Court of Appeal should not be considered by such Court.

The petitioners were convicted and sentenced on the 18th September 1901 by the Deputy Magistrate of Midnapur under s. 147 of the Penal Code, and were all bound down in the sum of Rs. 100 each, to keep the peace for one year under s. 106 of the Code of Criminal Procedure. On appeal, the Sessions Judge of Midnapur on the 30th September 1901 upheld the conviction and with regard to the order under s. 106 he stated as follows in his judgment :—

"As regards the order to furnish security to keep the peace, I doubt the advisability of it in this case, but this Court cannot interfere with it on appeal. The conviction being upheld, it remains."

Mr. *S. Roy* (*M. Zahidur Rahim Zahid* with him) for the petitioners. Under s. 106, sub-section (3) of the Code of Criminal Procedure, an order binding down persons to keep the peace can be made by an appellate Court. It would be anomalous, if the Sessions Judge, acting as an appellate Court, could make such an order and yet have no power to set it aside when made by a Subordinate Court, while, on the other hand, the District Magistrate on appeal can make a similar order and has power under [102] s. 125 of the Code to cancel the bond, when made by a Subordinate Court.

The defect however, if any, is remedied by clause (*d*) of s. 423 of the Code, which was added by Act V of 1898, which I submit is wide enough in its terms to enable the Judge to deal with questions arising on appeal under s. 106.

STEVENS AND HARINGTON, JJ. The learned Sessions Judge in upholding the conviction under s. 147 of the Indian Penal Code in the case expressed the opinion that the order which had been passed by the first Court requiring security to keep the peace under the provisions of s. 106 of the Code of Criminal Procedure, was one, to use his own expression, of which he doubted the advisability ; but he held that he could not interfere with it on appeal.

This Rule was granted to show cause why the order under s. 106 should not be considered by the Sessions Judge, inasmuch as it was a part of the case in appeal before that officer.

Sub-section 3 of s. 106 provides that an order under the section may be made by an appellate Court, and it would, we think, be very strange if the Legislature empowered an appellate Court to pass such an order for the first time in appeal, and yet did not empower it to set aside an order of the same kind in appeal after it had been passed by the Court of first instance. It seems to us that a case of this kind is within the scope of clause (*d*) of s. 423 of the Code of Criminal Procedure, which provides that an appellate Court may make any amendment, or any consequential or incidental order, that may be just and proper. We think that an order in appeal, setting aside an order of the first Court made under s. 106, is an incidental order within the meaning of s. 423.

We therefore make the rule absolute, and we remit the case to the appellate Court to consider the order under s. 106 of the Code of Criminal Procedure.