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30 C. 95=6 C. W. N. 341.

him; that on his refusal to submit to having another enema administered to him he was ordered by the accused to be put into a cell; and that in pursuance of that order Ram Sahay Dhanee was put into a cell and locked up. These findings establish that there was a confinement. We do not agree with the argument which has been addressed to us that there cannot be an imprisonment within an imprisonment. It seems to us clear that, if a prisoner is confined in a particular part of a prison without legal authority, that confinement is a wrongful one, notwithstanding that his confinement in the prison at large may be legal. There is nothing in the judgment of the lower Court from which we can infer that there was any legal warrant for the confinement of Ram Sahay Dhanee in the cell in which the accused ordered him to be confined; and the learned vakil who has appeared for the appellant has not been able to draw our attention to any provisions of law under which such confinement can be justified. But he contends that the act of confining Ram Sahay Dhanee in the cell in question was done by a person, who, under a mistake of facts, believed himself justified in so confining him, and therefore under s. 79 the act is not an offence. There is nothing in the facts disclosed in the judgment to warrant us in saying that there was any mistake of fact which led the appellant to suppose himself justified in law in confining this man; and the Magistrate points out that the appellant made certain inconsistent statements as to what had taken place, which, in our opinion, render it impossible to suppose that the appellant in good faith believed himself justified in law in acting as he did.

On these grounds, we think that this conviction must be sustained. The Rule is therefore discharged.

Rule discharged.

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

[97] CRIMINAL REVISION.

BIRBAL KHALIFA *v.* EMPEROR.* [20th February, 1902.]

Assault to deter public servant from discharge of his duty—Right of private defence—Rule in Police Code, effect of—Penal Code (Act XLV of 1860) ss. 99, 351 and 353

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, does not impose any obligation on the *surveille* to give the thumb impression and he cannot be forced to do so.

Before an act can amount to an assault under s. 351 of the Penal Code it is necessary that a gesture or preparation should be made by a person which would cause another to apprehend that the person was about to use criminal force to him then and there. A preparation taken with words which would cause him to apprehend that criminal force would be used to him, if he persisted in a particular course of conduct, does not amount to an assault.

Where a *surveille* on a domiciliary visit being paid to him by a police officer, refused to allow his thumb impression to be taken, and on the officer attempting to take it, produced a *lathi* saying he would not allow the impression to be taken and, if any one asked for it, he would break his head.

Held, that the act of the *surveille* did not amount to an assault and that his conviction under s. 353 of the Penal Code should be set aside.

* Criminal Revision No. 980 of 1901, against the order of W. H. Vincent, Esq., Sessions Judge of Bhagalpur, dated the 29th October 1901.

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Held, further that, if his act had in itself amounted to an offence s. 99 of the Penal Code would apply.

[Fol. 13 I. C. 237.]

THE petitioner Birbal Khalifa was a C class bad character on the Police Register. On the night of the 10th July 1901 the Sub-Inspector of Behipur thana paid a domiciliary visit to the petitioner in order to ascertain if he was at home. He called to the petitioner, who came out, whereupon the Sub-Inspector wished to take an impression of his thumb. The petitioner objected to this, and upon the Sub-Inspector extending his hand to take the impression, the petitioner went into his house and brought out a *lathi*, saying he would not allow the impression to be taken and he would break the head of any one who asked for it.

[98] The petitioner was convicted under s. 353 of the Penal Code of assaulting a public servant in the execution of his duty and sentenced to rigorous imprisonment for six weeks. He appealed and his appeal was dismissed by the Sessions Judge of Bhagalpur on the 29th of October 1901.

Mr. *Swinhoe* (Babu *Dasarathi Sanyal* and Babu *Chunder Dutt* with him) for the petitioner. Upon the facts found by the Sessions Judge the conviction under s. 353 of the Penal Code cannot stand. The action of the accused did not amount to an assault. The Sub-Inspector had no right to attempt to take the thumb impression by force after the accused had refused it ; the latter was also justified in refusing to give it, his threat to assault anyone who would ask for the impression did not amount to an assault, as there was no intention on the part of the accused to use criminal force at the time he spoke, but only in case a further attempt was made to compel him to give it.

Babu *Srish Chunder Chowdhry* for the Crown. The accused has been rightly convicted. The Inspector was acting in accordance with the direction contained in Rule 42 (*h*) of the Police Code which says that when a *surveillé* is at home proof of his presence can be secured by taking a thumb impression on the report. The Inspector was justified in trying to get the impression, and the accused had no right to refuse it. Even if he were not acting quite legally, s. 99 of the Penal Code would apply and the accused would have no right of private defence, as the Inspector was a public servant acting in good faith under colour of his office. The action of the accused in threatening the Inspector with a *lathi* was clearly an assault within s. 351 of the Penal Code.

Mr. *Swinhoe* in reply. There was no threat to commit violence on the spot, but only if the Inspector persisted in doing what he had no right to do. There is nothing to show under what authority the rules in the Police Code were made ; they are apparently for the guidance of the police and are not binding on any one. Under Rule 42 (*h*) the Inspector could no doubt take the impression, provided the accused was willing to give it, but not otherwise. My client is in no way affected by s. 99 ; he has [99] committed no offence, so that the question of the right of private defence does not arise.

STEVENS AND HARINGTON, JJ. The applicant in this case is registered as a bad character in the Police Register.

The case for the prosecution is that the Sub-Inspector paid a domiciliary visit to the petitioner in order to ascertain that he was at home and wished to take an impression of his thumb. The petitioner objected. The Sub-Inspector as he says "extended his hand" to take

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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).

[101] CRIMINAL REVISION.

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.