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30 C. 93=6 C. W. N. 471.

We think that, inasmuch as the offences of which the petitioners were convicted do not in themselves, and apart from any other incidents, come within the terms of s. 106, it was incumbent upon the Deputy Magistrate to record a clear finding with respect to the facts which in his opinion made the provisions of that section applicable. We are supported in this view by the case of *Jib Lal Gir* v. *Jogmohan Gir.* (1)

We think that on the record, as it stands, the order made under s. 106 is bad. We therefore make the rule absolute, and set that order aside.

Rule made absolute.

30 C. 95 (=6 C. W. N. 511).

[95] CRIMINAL REVISION.

BAISTAB CHARAN SHAHA *v.* EMPEROR.* [27th February, 1902].

Wrongful confinement—Prisoner in Jail—Confinement, illegal in cell—Penal Code (Act XLV of 1869), *ss.* 79, 114 *and* 342.

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.

IN this case a prisoner in the Monghyr Jail was suffering from dysentery. The Civil Surgeon ordered the petitioner Baistab Charan Shaha, the Civil Hospital Assistant, to give him some enemas. The prisoner objected on one occasion and was, under the orders of the petitioner, locked up in a cell. The prisoner while in the cell attempted to commit suicide.

The petitioner was convicted on the 6th June 1901 by the Deputy Magistrate of Monghyr under s. 342 read with s. 114 of the Indian Penal Code, and sentenced to undergo simple imprisonment for seven days and ordered to pay a fine of Rs. 50. The Sessions Judge on appeal affirmed the conviction, but altered the sentence to one of fine of Rs. 120.

Babu *Huri Bhusun Mukerji* for the petitioner.

STEVENS AND HARINGTON, JJ. In this case a Rule was granted calling upon the District Magistrate to show cause why the conviction of and the sentence passed upon the petitioner should not be set aside on the ground that the facts found do not amount to an offence.

The petitioner has been convicted under ss. 342 and 114 of the Indian Penal Code, and has been sentenced by the Magistrate, who tried him, to suffer simple imprisonment for one week and to pay a fine of rupees fifty, or one month's simple imprisonment in default. On appeal the Judge of the lower Appellate Court affirmed the conviction, but altered the sentence to one of fine of 120 rupees.

[96] A perusal of the judgment of the lower Court shows that it was established that a man named Ram Shahay Dhanee was suffering from dysentery in the Jail; that the Civil Surgeon ordered an enema to be given to him; that the accused administered some enemas to

* Criminal Revision No. 1029 of 1901, against the order passed by W. H. Vincent, Esquire, Sessions Judge of Bhagalpore, dated the 5th of July 1901.

(1) (1899) I. L. R. 26 Cal. 576.

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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.