health suffered in consequence of the husband's treatment.

In my opinion the wife has established in this case that her health suffered by the conduct of the husband after she condoned his incestuous adultery, and the result of that is that the incestuous adultery has been revived, and therefore the wife is entitled to a decree.

On the wife's petition, I grant a decree *nisi* with the usual order for costs, including all reserved costs, and the husband's petition is dismissed with costs against the respondent and co-respondent. The wife to have custody of the child.

C. E. B.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

GORA MIAN

v.

ABDUL MAJID.*

1911.

Dec. 6.

Magistrate, jurisdiction of—Criminal Procedure Code (Act V of 1898), ss. 100, 552—Jurisdiction of first class Magistrate, upon an application under s. 552 of the Code, to issue a search warrant under s. 100 on a fresh complaint of facts alleging wrongful confinement—Warrant under s. 100 drawn up on a printed form used under s. 98, with the necessary alterations—Presumption that such alterations were made—Destruction of original warrant by the accused—Resistance to execution of such warrant and assault on the police—Penal Code (Act XLV of 1860), ss. 147 and 332.

Where, on an application made under s. 552 of the Criminal Procedure Code, to a Magistrate of the first class, he examined the applicant on oath,

*Criminal Revision, No. 1082 of 1911, against the order of J. A. Dawson, Additional Sessions Judge, Chittagong, dated July 27, 1911.

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recorded a statement of facts alleging wrongful detention of his wife, and directed the issue of a search-warrant under s. 100 :

Held, that he had jurisdiction to do so.

A search warrant under s. 100 of the Code, drawn up, in the absence of a printed form of warrant thereunder, on a printed form used under s. 98, with the necessary alterations, is not illegal.

Bisu Haldar v. *Probhat Chunder Chuckerbutty*(1) distinguished.

Where the original warrant was in such a case not produced at the trial owing to its destruction by the accused at the time of its execution :

Held, that it must be taken that it contained the substance of s. 100, and that the necessary alterations were made.

ON the 10th April 1911, one Abdul Majid filed an application, purporting to be made under s. 552 of the Criminal Procedure Code, before the Joint Magistrate of Chittagong, alleging that his wife, Mamuda Khatun, had been taken away to the house of her uncle, Abdul Ghani, and was detained against her will with the object of getting her married to some one else. The Magistrate, finding that he had no jurisdiction under the section stated, examined Abdul Majid on oath, recorded, on the back of the original petition, a statement of facts under ss. 342 and 498 of the Penal Code, and directed the issue of a search warrant under s. 100 of the Criminal Procedure Code. It appeared that there was no printed form of a warrant under s. 100, and that the clerks who drew up warrants always employed in such cases a printed form in use under s. 98, with the necessary alterations to make it conform to the provisions of the former section. The warrant in the present case was drawn up on a form under s. 98. The complainant went with a head-constable and two constables to the house of the petitioner Abdul Ghani and surrounded it with a view to search the premises. Abdul Ghani came out and the warrant was shown to him. He then raised an outcry, and a number of villagers came up and beat the complainant

(1) (1907) 6 C. L. J. 127.

and the police party, capturing the head-constable. The others escaped and went to the thana and came back with a rescue party. On the arrival of the latter, the persons concerned in the first occurrence were arrested and identified. They were tried by a Deputy Magistrate at Chittagong on charges under ss. 147 and 332 of the Penal Code, and convicted and sentenced thereunder, on the 14th July 1911, to rigorous imprisonment for nine months and a fine of Rs. 30 each. The common object laid in the charge under s. 147 was to resist the police on the execution of a search warrant for the production of Mamuda, and to beat the police. The charge under s. 332 stated that the accused voluntarily caused hurt to the head-constable to deter the police from doing their duty, namely, the execution of the above warrant.

An appeal from the order of conviction was dismissed by the Additional Sessions Judge of Chittagong on the 27th July 1911. The original warrant was not produced at the trial, but the learned Judge found that it was snatched away and destroyed by some of the accused at the time of the occurrence. He also found that, though the heading of the warrant was not corrected, and there was no direct evidence of the unnecessary words in the printed form used under s. 98 having been scored through, the writer of the warrant must have made the necessary alterations in the body of the document. The petitioners then moved the High Court and obtained the present Rule.

Mr. A. Chaudhuri and *Babu Khitish Chandra Sen* for the petitioners.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HOLMWOOD and SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Chittagong to

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shew cause why the conviction and sentence passed on the petitioners should not be set aside on the ground that, on the facts proved, it ought to be held that the alleged search warrant was illegal and without jurisdiction, and resistance, if any, to the execution thereof does not amount to any offence.

We are unable to find on the facts that the alleged search warrant was either illegal or without jurisdiction. The order of the Magistrate passing it was made with jurisdiction, and it was an order for a warrant under section 100 for Mamuda Khatun for immediate appearance. Now that warrant was snatched away and destroyed by the accused persons, and it must, therefore, be presumed that it contained the substance of what is set out in section 100 although admittedly it was drawn up on a form which is printed for use under section 98. Now, under section 100 the only kind of warrant that can be issued is a search warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before the Magistrate. Now, let us see how this warrant under section 100 can be conveyed on a form under section 98. It is perfectly clear that the form under section 98, after scratching out clauses (*c*) and (*d*), would be perfectly sufficient for the execution of a process under section 100. It is in evidence that there is no form printed under section 100, and that the form under section 98 is always used for these warrants under section 100. We must, therefore, take it that the portions which had to be altered were altered. But a warrant under section 98, used for the purpose of section 100, would run perfectly correctly in the words of section 98—to enter, with such assistance as may be required, such place, that is,

the house where the woman was confined, and to search the same in the manner specified in the warrant, and to take into custody and carry before the Magistrate the person named therein. Now, the evidence is that the person named therein is this Mamuda Khatun. We, therefore, find that the alleged search warrant was not illegal nor without jurisdiction, and that any resistance thereto was, therefore, an offence.

Several cases have been cited to us, but there is only one of them which in any way touches this case, and this is the ruling in *Bisu Haldar* v. *Probodh Chandra Chakravarti* (1). There the person applied under section 100 of the Criminal Procedure Code for a search warrant, but the Magistrate issued a warrant under section 96 of the Criminal Procedure Code under which the police supposed themselves to be acting: *held*, that the issue of the warrant under section 96 was illegal and the order was a nullity. Reading this finding and the judgment in the case, it is clear that the error in that case was an error in substance and not in form. The Magistrate himself with his eyes open issued the warrant under section 96. The warrant purported to be for the purpose of section 96, and the police who executed it supposed that they were acting under section 96. The case, therefore, is clearly distinguishable from the present case where the error, if there is any, as to which we know nothing, could have been one merely of form. But having regard to what the learned Judge has said with respect to these cases in the last passage in his judgment, we think that the accused have been too harshly dealt with. The learned Judge says: "This is one of those cases, of not infrequent occurrence, which show how keenly Mahomedans resent the issue of any process against a woman who may be an accused or a

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witness in a 498 Indian Penal Code case, or analogous case; and it is doubtless because of such cases that the Government of this Province has recently issued an order that such complaints should in the first instance be referred to a local Mahomedan Marriage Registrar or other gentleman of position for enquiry and report. Probably if this had been done in the present instance, the present case would not have arisen."

We think that there is a great deal to be said from this point of view, and while we agree with the learned Judge that the police, when they get a warrant from the Magistrate, are bound to execute it and must be fully protected in the execution thereof, we are willing to take a more lenient view of the conduct of the accused in the present case than the lower Courts have found it necessary to do.

We, therefore, in discharging the Rule, direct that the sentence on the petitioners be reduced to one of three months' rigorous imprisonment, and that the fine of 30 rupees each passed upon them do stand with the alternative sentence of imprisonment. The accused will, therefore, surrender to their bail, and serve out the rest of their modified sentence.

E. H. M. *Rule discharged.*