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TAMBYAH'S REPORTS:

BEING REPORTS

of

CASES DECIDED BY

THE SUPREME COURT OF THE ISLAND OF CEYLON IN APPEAL

Edited by

Isaac Tambyah, Advocate

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61 P. C. Matale 899

Narayanen v; *Katibu Musapen*

Clarence, J., 25 March, 1886.

Penal Code § 180—False information—Charge of desertion against the complainant's concubine—Falsity—Annoyance to complainant—Accused's knowledge and motive—Warrant without sworn proof—False evidence to give annoyance.

Where the accused falsely charged the complainant's concubine with desertion under Ord. No. 11 1865, but there was no proof that the accused knew of the relations between the complainant and the woman, *Held*—that the accused did not give false information with intent to annoy the complainant.

Judgment.

Clarence, J.,—Appellant appeals against a conviction on a charge laid under section 180 of the Penal Code, which is substantially a charge of giving false evidence in order to cause annoyance to one Narayanen the complainant, the false information being embodied in a charge charging a woman named Kadirai under the Labour Ordinance, with deserting from accused's employ. It would appear that the woman Kadirai, a prostitute, had gone to live with the present complainant as his concubine, one Karpen having purported to sell her to him for a sum of Rs. 30, and there is evidence that while she was living with complainant she was arrested on a warrant issued under accused's charge of desertion. The magistrate finds, and probably with truth, that accused's charge of desertion was false. There is, however, no evidence that could have been left to a jury, to prove that accused's motive in making this false charge was to annoy complainant or that he had any knowledge that the action of the magistrate on the false

charge would be likely to cause annoyance to complainant. There is no evidence whatever to show that accused had any knowledge whatever of the connection which had arisen between complainant and the woman Kadirai. The conviction must, therefore, be set aside and appellant acquitted.

It is to be regretted that the magistrate should in the original matter have allowed a warrant to issue against the woman Kadirai without any evidence whatever. The warrant appears to have been issued without any sworn information and without any evidence whatever.

451 P. C. NeweraEliya 7960.

R. v. *James et al.*

Lawrie, J. Nov. 14, 1893.

Penal Code, § 156—Fighting in a public place—Effect of Penal Code on § 2 of Ord. No. 4 of 1841—Implied repeal—Public peace.

Where two or more persons are guilty of disorderly conduct by fighting in a public place and so disturbing the public peace, the offence falls under § 156 of the Penal Code and not under the "antiquated" Ord. No. 4 of 1841.

The facts appear in the judgment.

Bawa for accused-appellants.

Judgment

Lawrie, J.,—The first accused has been convicted under § 2 of Ordinance 4 of 1841. The police magistrate has overlooked the proviso that the offence is punishable with no more than 10 shillings fine, whereas he has imposed a fine of Rs. 10.

The fine is reduced to Rs. 5. and if it has been paid Rs. 5. must be returned to the accused. The second section of Ordinance 4 of 1841 has not been expressly repealed, but where the disorderly conduct consists in two or more persons fighting in a public place and thereby disturbing the public peace, the offence is committing an affray, punishable under § 156 of the Penal Code, and under that section and not under the antiquated 4 of 1841, ought the 1st accused to have been charged and punished.

Again the 2nd accused has been convicted under § 219 of the Penal Code, but that section is inappli-

cable. The magistrate ought to have charged and convicted under § 220 or (as I think) more correctly, under § 149. However, the second accused has not been prejudiced by these errors. They did not cause a failure of justice in comformity with § 494 [§425 of 15 of 1898], so I shall not interfere further than to reduce the punishment of the second accused to six weeks' rigorous imprisonment. I think the punishment imposed excessive.

P. C. Matara 17786.

Sanders v. *Tillekeratne*

Withers, J., March, 29 1893

Penal Code, § 183—In the exercise of office—Request to accused to desist from what was apparently a nuisance—Magistrate as private individual—Common assault.

Where the complainant, police magistrate of Matara, went to a neighbour's house one night and asked him to desist from what his household regarded as a nuisance, and was then assaulted by the accused, *Held*—that the complainant was not in the exercise of his office as magistrate.

A great deal of noise proceeded one night from the house of the accused. It was due to beating tom-toms. Mr. W. R. B. Sanders, police magistrate, residing in the neighbourhood thought that the noise was a nuisance and went up to the accused's house and asked him to stop the noise. The accused and others treated him as a trespasser and treated him with much indignity. The principal accused (Tillekeratne) was sentenced to undergo imprisonment. He appealed.

Dornhorst for appellant.

Ramanathan S. G. for respondent.

Judgment.

Withers, J. If Mr. Sanders had been assaulted in the exercise of his office as magistrate, I should have emphatically affirmed the sentence of the magistrate.

As it is, I can only regard Mr. Sanders as a private individual who went to a neighbour's house one night and asked him to desist from what his household no doubt regarded as a great nuisance.

Consideriug his position in the station it was rather a delicate undertaking on his part, and while the indignity he suffered is to be regretted, I do not think that fact can be considered in passing sentence on those who assaulted him.

At the same time a man in the position of the 1st accused must not be too lightly treated when he commits an assault of this kind.

I set aside the sentence of imprisonment passed on the 1st accused and in lieu thereof sentence him to pay a fine of Rs. 50.

I reduce the fine imposed on the 3rd accused from Rs. 100. to Rs. 25.

P. C. Kalutara 14611

Silva v. *Silva*

Lawrie, J., May 5, 1893.

Mens rea—Statutory statement as to criminal responsibility—Penal Code ch. iv.

The fourth chapter of the Penal Code contains the law as to criminal responsibility and obviates reference to earlier case-law on *mens rea*.

Dornhorst for accused-appellant.

W. Pereira for respondent.

Lawrie J., This conviction and sentence are affirmed. My first impression was, that, in the circumstances, the accused was in the lawful possession of the arrack, but, careful consideration of the 32nd section of the Ordinance 10 of 1844 shewed me that the provisions of that section are clear and imperative, and that it is impossible to bring the accused under any of the exceptions.

The cases to which the counsel for the accused referred me on the question of the absence of *mens rea*, are not, I think, now of much authority, for I conceive that our law of criminal responsibility is to be found in the Penal Code especially in chapter iv.

The exception in that chapter which comes nearest to this case is section 73, but even that

does not apply, and I must affirm the conviction, which is founded on the unambiguous words of the ordinance.

P. C. Chilaw 3349.

Amarasekera v. *Baiya et al*

Withers, J., Feb. 16, 1893.

Penal Code § 183—Obstruction—Surveyor authorised by Surveyor-General—Public functions—Survey of alleged Crown land.

1. To sustain a conviction under § 183 of the Penal Code, for obstructing a surveyor authorised by the Surveyor-General under Ord. No. 4 of 1866 it must be proved thated there was a necessity for the survey.

2. The fact that a land had been surveyed once under Ord. No. 4 of 1866 rebuts the proof of further necessity for a survey.

The facts appear in the judgment.

F. M. De Saram for complainant-appellant.

Seneviratne for accused-respondent.

Judgment

Withers J., This case was sent back last August for the purpose of ascertaining whether the officer alleged to have been obstructed in the discharge of his public functions was an assistant to the Surveyor-General, or, if not, if he had been authorised on that behalf in writing by the Surveyor-General, and whether this particular parcel of land was the subject of pending litigation between the Government and private parties, and I quashed the conviction for that purpose because if both the two first questions had been negatived and the third had been answered in the affirmative the accused in my opinion could not properly be convicted.

It is sufficiently proved that Mr. Speldeiwindé is an assistant to the Surveyor-General so that I need do no more than point out that what is put in as a written authority on that behalf to him is not in my opinion insufficient in law for the purpose.

At the same time I think the acquittal must be affirmed on the ground that the necessity for making this particular survey, (an element without

which the officer could not be said to be in the discharge of his public functions, and which is a condition required by clause 3 of Ordinance 4 of 1886) has not been sufficiently established.

Amerakoon Mudliyar, the complainant, deposes to this effect:

"I am of opinion that the land in question is Crown land; the land or lot has been surveyed before and numbered by the Surveyor-General and the boundaries clearly defined; this was in 1886 or 1887." After so recent an inspection and survey of this land it becomes incumbent on the prosecution to satisfy the conscience of the Court that is was necessary to inspect and survey the land a second time.

At the first inquiry Mr. Speldeiwinde said that he was aware that the lot had been surveyed before, but that he knew nothing of the purpose of the first survey.

At the second inquiry he says the survey was for the purpose of instituting an action.

But the Court has to be satisfied that this second survey was necessary to ascertain whether the land belonged to Her Majesty or was the private property of the person claiming it.

What more was wanted for this purpose than the survey of 1886-7. No satisfactory explanation has been offered.

P. C. Kegalle 10964

Jansz v. *Appuhamy*

Withers J., March 2, 1893.

Right of private defence—Thief at night—Coming down cocoanut tree with nuts—Inhabited neighbourhood—Defence of person—Defence of property—Justification—No danger of using knife—Firing without warning.

1. The right of private defence of the person does not arise where a man armed with a gun sees at night, upon property he is set to watch, a thief armed with a knife when the thief shews no intention of using it for purposes of resistance or attack.

2. Where a thief is seen coming down a tree with nuts, the watcher, having no time to have recourse to the public authorities, is justified in firing at the thief so as to prevent the thief's escape with the stolen property.

The facts appear in the judgment.

Baca for accused-appellant.

Judgment

Withers. J.—The accused one night went armed with a single-barrelled gun loaded with small shot to watch his father's garden which had been subject to frequent depredations by thieves. While on his rounds his attention was attracted to a noise on a tree a short distance from him and he saw a man whom he recognised as a convicted thief coming down a cocoanut tree in the garden with three cocoanuts and a knife in his hand. The accused was alone and without a word of warning aimed at the man's legs, fired and hit him in the left leg. The man was treated for his wounds and cured. There were houses in the neighbourhood and people living there within a call from the place where the complainant was shot. On these facts the magistrate convicted the accused of voluntarily causing hurt to the complainant and sentenced him to pay a fine of Rs. 100. The magistrate was not satisfied that the complainant had a knife in his hand. I confess I should have thought it more likely than not, but as the man shewed no intention of using it for the purposes of resistance or attack its presence or absence is not material as regards the right of defence of the person alternatively pleaded. For I hold with the magistrate that nothing occurred to justify the accused in shooting the complainant in defence of his own person. But the question remains, was he justified in shooting the man as he did in defence of his father's property? The man was coming down the tree with stolen cocoanuts in his hand so that at the time the accused fired at him there was reasonable apprehension of danger to his father's property. Indeed there was not a moment of time to lose if the protection of his father's property was to be secured. There was clearly no time to have recourse to the public authorities. If he had shouted for help from people in the houses said to be some fifty fathoms off the thief might well have escaped with the stolen nuts. If the offence to property be theft, the right of private defence by our code extends subject to restrictions in section 92 to voluntarily causing to the wrongdoer any harm other than death. I have touched on one of those restrictions which apply to this case.

The other is that the right of private defence of property shall in no case extend to the inflicting of more harm than is necessary to inflict for the purpose of defence. Was more harm inflicted here than was necessary? I really think not. In my opinion the act of the accused was not an offence under our law and his conviction must be set aside and he himself acquitted.

417 P. C. Panadure 9792

Karunaratne v. *Ismail Lebbe Marikar*

Lawrie J., Oct. 31. 1893.

Penal Code § 181—Immovable property—Writ of possession resisted—"Taking"—Fiscal's officer—Public servant—Civil Procedure Code § 325.

1. Penal Code § 181 applies to movables, property capable of being "taken," and not to lands.

2. Resistance to a writ of possession is covered by §§ 325, 326 of the Civil Procedure Code.

3. A fiscal's officer executing judicial process is a public servant.

The necessary facts may be gathered from the judgment.

Wendt for accused-appellant.

Judgment

Lawrie. J.—A fiscal's officer entrusted to execute judicial process is a public servant and resistance to him, if it fulfills the requirements of section 181, is an offence.

Here, a fiscal's officer was entrusted with a writ to put a man "in possession of half of the soil and trees of Delgahawatta together with the tiled house standing thereon, and, if need be, to remove any person, bound by the decree, who may refuse to vacate the same." Two of those bound by the decree refused to leave the house, and the fiscal's peon pushed the 1st accused out of the house into the compound but he rushed back into the house. Then the fiscal's peon pushed the 2nd accused out, but he too rushed back.

These facts having been proved, the police magistrate framed a charge under § 181 of the Penal

Code, and found the accused guilty of the offence of resisting the taking of the land Delgahawatta and the house standing thereon by the lawful authority of the fiscal's officer.

The punishment imposed was one month's rigorous imprisonment against which no appeal lay except on a matter of law, because the magistrate has not given leave to appeal.

I need not decide whether the writ of possession gave to the fiscal's officer authority to use force to eject the defendants from the house, and whether, as the purchaser had acquired only half of the soil and trees, he had right to the whole house.

Section 181 of the Penal Code provides that "whoever offers resistance to the taking of any property by the lawful authority of any public servant shall be punished with imprisonment. . . or with fine . . . or with both."

I am of opinion that the property there referred to is movable property which can be taken away by the officer, and that the section is not applicable to resistance to a writ of possession of land. In such cases though the land is property, it is not property which can be taken away by a public servant. Resistance to execution of proprietary decrees is dealt with in § 325 and subsequent sections of the Civil Procedure Code. Under these resistance is punishable by commitment to jail for one month, which, I take it, is simple imprisonment. The accused are acquitted.

P. C. Hatton 12800

Pieris v. *Baba Appu Mudalali*

Withers J., June 1, 1893.

Penal Code § 185—Disobedience to lawful orders—Inspector of Police—Power to issue orders—Ord. No. 16 of 1865 § 69—Buddhist procession—Worship in a mosque—Oral order to abstain from a certain act—Apprehension of disturbance—Evidence of such apprehension.

1. The offence under § 185 of the Penal Code is distinct from that under § 69 of Ord. No. 16 of 1865.

2. A police inspector is a person lawfully competent to issue an order contemplated by § 180 of the Penal Code.

3. An oral direction by an inspector of police to a Buddhist procession not to beat tom-toms at a distance of fifty yards on either side of a Mahommedan mosque is an order "lawfully promulgated."

4. That a noisy Buddhist procession passing in front of a mosque is likely to cause annoyance to the worshippers in the mosque or to cause a rupture between the processionists and the Mahommedans in the mosque, may be sufficiently proved by the evidence of the police without the worshippers in the mosque being witnesses.

The facts appear in the judgment.

Dornhorst for appellant.

W. Drieberg and *J. Grenier* for respondent.

Judgment

Withers, J., The accused in this case was allowed by the Police Magistrate to conduct a pinkama procession from Hatton to Dikoya and back again, on the 1st May last with beat of tom-toms during the procession.

The prosecutor, the inspector of police at Hatton, by word of mouth directed the appellant to abstain from beating the tom-toms at a distance of 50 yards on either side of a Moorish mosque which this procession would pass and repass on its way.

The accused clearly understood the directions and promised that tom-toms should not be beaten within that distance of the mosque during the procession.

It is proved that both in going and returning by the mosque the accused incited the men with tom-toms to beat them loudly, within the distance prescribed by the order.

The mosque is one used by Mahommedans for public worship, and at the time the procession passed by, it was occupied by Mahommedans and lawfully employed for religious and other purposes.

It is idle to suppose that a Buddhist procession with its noisy accompaniment of tom-toms was not calculated to annoy the Mahommedans there present or was not calculated to cause an affray between the Mahommedans and the processionists.

It was pressed upon me that no Mahommedan witness was called to prove that the tom tom-beat-

ing, as the procession passed by, caused annoyance to the Moors in the mosque or was likely to cause a conflict between the Moors and the processionists.

The evidence of the inspector discloses reasonable ground for apprehension of disturbance.

The prosecutor is a public servant of a grade competent to issue the orders which he did issue to the appellants. See Ord. 16 of 1865 § 69.

The explanation and illustration of § 185 of the Code under which the accused has been convicted clearly indicate that the present case belongs to a class of cases contemplated by § 185.

Again this offence is not identical with the offence contemplated by § 69 of Ord. 16 of 1885.

The offence under the code must cause or tend to cause certain obnoxious effects.

As to the matter of the affidavits submitted by appellant's counsel, I cannot see that the accused was substantially prejudiced. Even assuming, as I only do for argument's sake, that the magistrate has made a mistake in what occured about the proposed cross-examination of the prosecutor for the defence, there is no reason that I can see why he was not cross-examined in the ordinary course of things after his examination-in-chief for the prosecution.

Conviction and sentence affirmed.

P. C. Kandy 16460

(*In Revision*)

Abdul v. *Abdul Rahiman et al*

Browne, J., Nov. 10, 1893.

Penal Code § 183—Fiscal's peon—Person under lawful orders—Writ against person—Good on the face of it—Irregularly issued—Execution regular—No request to surrender property —No deposit of subsistence money—Obstruction.

1. Where a writ against a person is good and regular on the face of it, and is regularly sought to be executed, obstruction is not justified by reason of irregularities in issuing the writ.

2. A fiscal's officer is a person acting under lawful orders of a public servant.

Van Langenberg for accused.

Judgment

Browne, J., In the cases P. C. Colombo 841 (Supreme Court Minutes 13th May 1885) and P. C. Jaffna 8529 1 C. L. R. 90, convictions were sustained when made under section 183 Ceylon Penal Code, for resistance of a fiscal's officer. The charges may have been there framed as here for voluntarily obstructing a public servant in the discharge of his public functions, but to me it appears especially with regard to the holding in P. C. Galle 8610, 2 C. L. R. 149, that in relation to such an officer it should have been rather for obstruction of a person acting under the lawful order of a public servant, viz, of the fiscal who gave the complainant the authority This would however at best have necessitated only an amendment of the charge.

The other ground upon which revision of the finding and sentences were prayed concerned the validity of the writ placed in the hands of the complainant for execution. It was submitted that the District Court should never have issued the writ of arrest of person since there had not been a due return to the writ against property in that there was no return that the defendant had been requested to surrender property and had refused to do so, and there was proof that the District Court had not required the lodgment of any subistence money ere it had issued.

Neither has the writ against the property nor any return thereto nor the writ against the person been filed for evidence. It has not been suggested that there was any defect in form in the writ against person or that the complainant proceeded irregularly in its execution. The fiscal and his officers being merely ministerial officers were not bound to examine into the legality of any writ issued to them to execute, and complainant was only acting in the due execution of a process issued by a Court having jurisdiction. It may be that that process was for want of due material or certain preliminaries erroneously issued. It was nevertheless complainant's duty to execute it. If he did so irregularly petitioners could not be con-

victed of obstruction of him (P. C. Pt. Pedro 7071 1 B. and V. 67) but so long as he did so in a regular manner he was acting under the lawful orders of the fiscal in the discharge of his public functions, and obstruction thereof is a breach of section 183 and the petitioners were rightly convicted.

There is less occasion to review this conviction and sentence in that the grounds urged for the Court so doing were not connected in any way with the conduct of the petitioners in resisting the execution (3 S. C. C. 71). I therefore decline to interfere with the conviction and sentence.

268 P. C. Anuradhapura 14793

Bawa, P. V. v. *Perera et al*

Withers J., Aug. 3, 1893.

Penal Code §§ 220, 183—Arrest by division officer—Ord. No. 31 of 1884, §§ 15, 16—Public functions—Warrant defective—Simple hurt.

1. It is not part of a division officer's public functions to arrest a person offending against §§ 15,16 of Ord. No. 31 of 1884.

2. A division officer executing a proper warrant issued by the chairman of a Road Committee is a person acting under the lawful orders of a public servant.

3. A warrant of arrest defective on the face of it is not a lawful order.

The facts appear in the judgment.
Dornhorst for accused-appellant.

Judgment.

Withers, J., The facts disclose an offence against § 220 rather than against § 183 of the Ceylon Penal Code.

The arrest by a division officer of a person offending against §§ 15 and 16 of Ordinance 31 of 1884 is not part of his public functions. He may be required to execute a warrant of arrest issued in accordance with the provisions of that ordinance by the chairman of the Road Committee of the district. The obstruction to him in the execution of such a

warrant can only be an offence under § 183 of the Penal Code, if the warrant is the lawful order of a public servant in the discharge of his public functions.

Here, however, the warrant of arrest is so defective on the face of it, that it cannot be said to be a lawful order. See 8 S. C. C. page 58. The accused have been properly convicted on the second count of voluntarily causing hurt, but as the magistrate at the first trial considered a fine of Rs. 20 each with one month's rigorous imprisonment in default of payment thereof, a sufficiently severe sentence on the accused, I think it only fair to adopt his sentence.

The assault was quite unjustifiable, for the act which prompted the assault was done by the direction of a public servant acting in good faith under colour of his office, and there is no question of the *bona fides* on the part of the division officer.

49 D. C. Kegalle 790.

R. v. *Guneratne Unnanse*

Withers, J., Aug. 25, 1893

Private defence—Assailant armed with a knife—Accused armed with a loaded pistol—Commencement of robbery—Duty to warn assailant—Defence of person and property—Commencement of right of private defence.

1. A man armed with a loaded gun, on being deprived by force of his money by a man armed with a knife, is not justified in firing upon the other unless that other attempts to use the knife or refuses to restore the money.

2. Even if there is an apprehension of assault or robbery the accused is bound to warn before firing.

The facts appear in the judgment.

Bawa for accused-appellant

W. Drieberg C. C. for respondent.

Judgment

Withers, J.,—It would have been of great assistance to this Court if the learned judge had stated what

he believed to be the circumstance under which the accused fired at the prosecutor and wounded him, instead of merely expressing disbelief generally in the prosecutor's story and a qualified belief in the defence.

The justification of the accused depends entirely on the exact state of facts. Had there been an actual robbery or an actual assault on the part of the prosecutor the accused would have been, in my opinion, justified in shooting the man, and so far I am with his counsel.

The learned judge is in error when he says that, as regards the defence of property, the right was gone when the notes were snatched away by the prosecutor. That was not so, for the robbery, if there was robbery, commenced when the prosecutor, in carrying away the notes, voluntarily caused fear of instant hurt by the use of his knife, and the law sanctions harm being done to a robber if there is no time to have recourse to the public authorities, and if no more harm than is necessary in the circumstance is inflicted.

Taking however the accused's statement as a fair version of what occurred and having regard to what happened after, as well as before the shooting, I cannot help thinking that there was no such clear intention on the part of the prosecutor to rob or assault the accused as to excite him to take such measure as he did in defence of person and property. Armed as he was with a loaded pistol, not a very priestly weapon, he should at best have warned the prosecutor of his intention to use the pistol if the other attempted to use his knife or did not restore him his notes.

In my view of the case, even if the accused really thought he was going to be robbed or assaulted, he was so well on his guard and so well able to protect himself and his property that he was bound to warn the prosecutor before he fired upon him.

For these reasons I affirm the judgment.

172 P. C. Avisawella 20390

Jacolyn v. *Perera.*

Lawrie, J., June. 12, 1896.

Penal Code, § 180 — False information —To Police Magistrate —Telegram—Magistrate not giving evidence —Impression of information on receiver's mind—Lawful power—Judicial cognisance.

Where a police magistrate received a telegram of information against the complainant, it was held he was a material witness as to the receipt of the telegram, as to the the meaning which he attached to it and as to what lawful powers he had to injure and annoy complainant.

The facts appear in the judgment.

Dornhorst for accused-appellant

Weinman for respondent

Judgment.

Lawrie, J.,—I quash these proceedings. The sanction necessary under section 149 (a) was not obtained.

The magistrate directed the complainant to bring this prosecution. He could not try it. It was to the magistrate that the telegram was sent. He was a necessary witness in the case, both as to the receipt of the telegram and as to the meaning which he attached to it, and as to what lawful powers he had to injure and annoy the complainant.

Instead of subjecting himself to cross-examination, he took what he called judicial cognizance of having received the telegram, and stated in his judgment what impression the telegram made on him, and said he could have caused the dismissal of the complainant.

It is right that these proceedings should be set aside.

The complainant, if so advised, may present a fresh complaint to the present magistrate.

P. C. Haldumulla 4640.

Perera v. *Rupesinghe*

Dias, J., Dec. 17, 1891.

Penal Code, § 171—Preventing service of summons—Person summoned not sufficiently named—No initials—Summons not accepted.

Where a summons addressed to a person named him "Rupesinghe" without giving any initials, and was served on the accused, the accused was held justified in refusing to accept the summons.

Sampayo for accused appellant.

Judgment.

Dias, J., In this case the defendant Rupesinghe, contractor, was charged under section 171 of the Penal Code with preventing the service of a summons on himself issued by the police magistrate of Haldumulla, having authority to issue such summons. The summons is to be found in case 4590 Police Court Haldummula. It appears to be a summons addressed to Rupesinghe without any initial letters or any other mark by which Rupesinghe might have been identified. According to the written statement put in by the defendant his true name is D. W. Rupesinghe. When the summons was presented to the defendant he refused to accept it. The word Rupesinghe as used in the summons is too vague as there may be more Rupesinghes than one in the district, and I do not think the defendant was bound to accept such a vague document. The conviction is set aside, and the defendant acquitted

P. C. Pusselawa 13194.

Rasool P. C. v. *Samuel Appu.*

Burnside C. J., Dec. 20, 1892.

Penal Code § 183—Obstruction—Warrant to search—Warrant to be in evidence—Warrant not naming accused correctly.

Where the accused's house was searched under a warrant which did not give his name, Samuel, that by which he was named in the case, resistance to the warrant was held lawful.

Judgment.

Burnside, C. J., As this case originally came in appeal before me I could find no legal evidence that the complainant, when the alleged obstruction took place, was acting in the discharge of a lawful duty. He asserted that he had a warrant to search the 1st accused's house. There was no evidence of the contents of the warrant itself nor any certified copy appeared in the proceedings. I, therefore, sent the case back in order that the learned police magistrate might take evidence identifying the warrant and its contents. He has done so, and the case has been returned with the warrant itself, and I cannot find that it authorized the search of the 1st accused's house. The 1st accused is charged by the name of Samuel and the warrant nowhere refers to such a person. If Samuel is an *alias* for any other name, then there should have been some indication or proof of it.

The conviction must be set aside, and the appellant acquitted.

100 P. C. Colombo 13083

Fernando v. *Moor, Mendis, and another*

Dias J., June 1, 1887.

Penal Code § 180 –False information—Pointing out wrong man for arrest—Penal Code, § 333—Detention by the police.

It is an offence under § 180 of the Penal Code for a person to point out to the police for arrest a person other than the one wanted by the police

The facts appear in the judgment.

R. H. Morgan for accused appellant

Dornhorst for respondent

Judgment

Dias, J.,—On the facts I think the magistrate has arrived at a right conclusion but I shall only

notice some of the points raised by appellant's counsel. The accused was tried and convicted on three separate charges. The first charged him with causing the complainant to be wrongly arrested and confined by a constable, he the accused having pointed him out as the person the constable was in search of.

This charge as well as the second charge is laid under section 333 of the Penal Code. The second charge is that the accused wrongfully confined the complainant, and the third charges the accused with giving false information to a constable and getting him to arrest and detain the complainant. The last charge is laid under section 180 of the Penal Code. The 1st accused (police inspector) and the 3rd accused (police constable) were acquitted and were subsequently examined as witnesses. The 2nd accused Ameris Mendis was convicted apparently on all the three charges. Two of the charges, as I have already noticed, are founded on section 333, but the evidence does not seem to me to sustain either charge. The offence created by that section is the wrongful confinement of a party. In point of fact the complainant was arrested and detained by the police, who were misled by the 2nd accused's false information. The part which the 2nd accused took in the matter, if anything, amounts to an abetment, which is a different offence, and which required a different charge. See Chapter V. section 100 of the Penal Code. The conviction under section 180 is sustained by the evidence. I will set aside the conviction under section 333, and affirm the conviction under section 180.

350 P. C. Badulla 15182

Packeer v. *Shick Ali et al*

Bonser, C. J., Sept. 18, 1895

Penal Code § 157 —Queen's peace—Public peace—"Disturbing"—Proof of Disturbing—Fighting—English Law —Affray—Policeman's beat—Public peace.

1. In a prosecution for affray it is enough to prove that there was a fighting, and no evidence need be led of "disturbing the public peace."

2. The "Queen's peace" is the public peace.

The judgment gives the necessary facts.

Dornhorst for accused appellants.

Judgment

Bonser, C. J.—In this case the appellants were convicted, under § 157 of the Penal Code, of an affray, by fighting with each other, at a place called South lane, in Badulla, and so disturbing the public peace, and were sentenced to one month's rigorous imprisonment. They have appealed on several grounds, the first ground being that there is no evidence that South lane is a public place. The evidence is not very precise on that point, but I think it can be inferred from the evidence of Kalu Banda, police constable, that South lane is a public place, for he speaks of it as being on his "beat". The further objection was taken that there is no evidence that the appellant, disturbed the public peace, but, in my opinion, it is not necessary to prove that. If two persons fight in a public place, it necessarily follows that they disturb the public peace. The form of indictment for affray in England states that two persons "being unlawfully assembled together and arrayed in warlike manner in a certain public street and highway .... unlawfully, and to the great terror and disturbance of divers liege subjects of our said Lady the Queen then and there being present, did make an affray in contempt of our said Lady the Queen and her laws to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity." Now, according to Hawkins the only thing necessary to be proved on such an indictment is that the defendants fought in a public street or highway, and if you prove that, it carries with it the disturbance of the Queen's peace, which I understand to be the same as the public peace. Therefore, I consider that ground of objection fails. A further objection was raised, viz. that the evidence was unreliable, but the magistrate has expressly believed the evidence, and I see no reason to disbelieve it. But the magistrate has sentenced these accused to the maximum term of imprisonment—one month's rigorous imprisonment provided for the offence. That seems an excessive punishment. I think that is would be sufficient to fine them Rs. 10 each, and

to bind them over, with one surety in the sum of Rs. 100 to keep the peace for 3 months.

408 P. C. Panadure 9760

Ratnabharty v. *Gunewarasurighe*

Withers, J., Oct. 24, 1893.

Penal Code, § 88—Slight harm—Trespasser ejected—Damage to measuring tape.

When the complainant entered the accused's land without his permission, to measure it, and the accused ejected the complainant and damaged the measuring tape while so doing, *Held*—that the accused was justified in ejecting the complainant trespasser and that, though the complainant was justified in trying to retain hold of his tape, yet the damage caused to it fell under § 88 of the Penal Code.

The facts may be gathered from the judgment.

VanLangenberg for accused appellant.

Judgment.

Withers, J., The appeal in my opinion is entitled to succeed. The complainant was in his way as much to blame as the accused. He had no right to enter upon the accused's land without his permission. Accused had a right to eject the complainant from the land but not to seize his measuring tape.

The injury to the tape was caused by the struggle of the two to retain the tape, and while it may be said that the accused knew that he was likely to damage the tape if he persisted in keeping hold of it while the owner —as he was quite justified in doing—attempted to take it from him, I think the harm caused was so slight that no person of ordinary sense and temper should complain of such harm specially as the person injured by the harm done was, as I before observed, a trespasser on the accused's land. Thus the 88th section of the Code comes in to protect the appellant.

P. C. Kalutara 11069

Goonewardene v. *Ranesinghe.*

Dias, J., March 19, 1891

Penal Code, § 185—Order— Ord. No. 6 of 1847, § 10—[Ord No. 2 of 1895, § 50]—Refusal to hand over office books to successor—Successor not duly appointed—Accused not duly dismissed.

A registrar of marriages, suspended but not duly dismissed, refusing to give up all official papers and books to his successor, not duly appointed, was held to have offended against § 185 of the Penal Code.

The facts appear in the judgment.

J. Pieris for accused appellant.

Judgment

Dias, J., In this case the accused was a district registrar of marriages. He was suspended by his superior officer who recommended another to succeed the accused; but that other was not duly appointed, nor was the accused duly dismissed. The accused refused to give up all the official papers and books in his possession to his successor so named as aforesaid. Accordingly, a plaint was filed against the accused under section 10 of Ordinance 6 of 1847, but the police magistrate having some doubt about the applicability of that section to the facts proved before him, charged the accused under section 185 of the Penal Code and convicted him. Against this conviction the accused appeals. In my opinion the facts as disclosed are quite sufficient to warrant a charge under section 10 of the Ordinance of 1847, and as the magistrate did not proceed upon it, it is unnecessary to say anything further. I see no objection to the charge as laid under the Code, and I affirm the verdict.

427 P. C. Gampola 9559.

Heyt v. Northway.

Clarence, J., Dec. 19, 1890.

Mens rea—Servant's offence—Master's liability—Master's instruction broken English law Railway Ord. No. 26 of 1885 § 20.

1. Where the master had given directions that a quantity of dynamite was to be despatched by road and not by rail but the servant tendered it at the Gampola railway station without taking the statutory precautions, the master was held not responsible criminally.

2. To render a master criminally responsible for his servant's acts, *mens rea* must be proved unless the statute expressly dispenses with proof of *mens rea*.

The judgment sets out the necessary facts.

Dumbleton C. C. for compainant appellant.

Browne for accused respondent.

Judgment

Clarence, J.,—This is a prosecution under the 20th section of the Ceylon Railways Ordinance 1885, which prohibits the sending by railway of any dangerous article unless the package containing the same be distinctly marked as required by the section and the required notice given to the railway officials. Defendant was prosecuted for sending dynamite by railway without the statutory precautions. It would be difficult to conceive of any statutory prohibition more deserving, in the interests of the public, to be strictly enforced.

The charge as framed by the magistrate does not follow the precise words of the ordinance, but I need no dwell upon this. The substance of the accusation against defendant is that he by the hand of his servant delivered to the railway officials at Gampola station two packages containing 12 lbs. of dynamite, without observing the statutory precautions. The facts are not in dispute. Defendant had this dynamite and also a quantity of glass-ware and other goods of a non-dangerous character, which he wished to send away. This property was stored in Messrs Walker's store. Defendant left his residence,

after giving his servant instructions for the forwarding of the property; and he especially ordered the servant to send the dynmite by road. The servant in consequence (according to his own account) of an insufficiency of coolies, departed from defendant's instructions and sent the dynamite to the railway.

In my opinion, the magistrate has taken a correct view of the law and the appeal against his decision must be dismissed. There is no doubt as to the general rule. A man may be civilly responsible for a misfeasance of his servant done in the course of his employment, but to render the master criminally responsible you must show the *mens rea* on his part, unless the Legislature has thought proper to enact that the master shall be criminally responsible even without the *mens rea*, and as the judges point out in *Chrisholm* v. *Doulton*, 22 Q. B. D. 736, it lies on those who assert that the Legislature has enacted such a departure from the general principle, to make that out convincingly by the language employed. As Baron Pollock tersely put the matter in *Roberts* v *Woodward*, 25 Q. B. D. 412, we "know of no instance in which a master is criminally responsible for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master." In the present case neither of these exceptional conditions is fulfilled. Appeal dismissed.

349 P. C. Negombo 10875.

Mellowney v. *Kaluappu*

Clarence, J., Oct. 30, 1890.

Attempt—"Attempted to stab"—Conclusion of law—Proof.

1. It is not every act, indicative of a desire to commit an offence, which is an attempt to commit the offence.

2. That one "attempted" to commit an offence is a statement of a conclusion of law, and not evidence, in the absence of proof of the acts or act amounting to an attempt.

R. H. Morgan for accused appellant

Judgment

Clarence, J.,— I must set aside this conviction, and send the case back to the police court for evidence as to what was the act, if any, done by the defendant, amounting to an attempt to stab. It is not every act indicative of a desire to commit an offence, which is an attempt to commit the offence within the purview of the law. Several witnesses say very baldly, that defendant "attempted to stab." That, however, is not evidence but the mere statement of a conclusion of law.

P. C. Panadure 4256.

Catherine Jayatilleke v. *Fernando et al.*

Dias, J., May, 1, 1891.

Penal Code § 291—Religious ceremonies—Procession—Music—Wesleyan chapel not in use—Monday.

1. Drumming and singing in a Salvation Army street procession is being engaged in religious ceremonies within the meaning of Penal Code § 291

2. On a day when a Wesleyan chapel was not being used, it being Monday, and no service going on in the chapel, it was held lawful for a Salvation Army procession to pass the chapel with music.

The facts appear in the judgment.

Dornhorst for accused-appellants.

Judgment

Dias, J.—In my opinion all the accused were properly convicted and deservedly punished. The Salvationists have as much right as other religious bodies to conduct their religious ceremonies according to their own fashion, as long as they do not interfere with the general public. The 23rd of February was a Monday, and all that the Salvationists did was to carry on a religious procession on the road passing a Wesleyan Chapel. It does not appear that at the time there was any service going on in the chapel, and the day being a Monday I

presume the chapel was shut up when the Salvationists passed. The usual drumming and singing accompanied the Salvationist procession, and the accused probably took offence at the Salvationists daring to pass their chapel making a noise, and they made a most cowardly attack on the Salvationists, assaulting the complainant, who appears to be a Sinhalese lady. The 1st count under section 291 of the Code is fully sustained by the evidence, as at the time of the disturbance the Salvationists were engaged in some religious ceremonies within the meaning of the section. The charge of assault has been very clearly proved and I will not interfere with the verdict or the sentence.

P. C. Kandy 9665

Seneviratne v. *Arumothan et al*

Burnside C. J., May 23, 1890

Penal Code, §§ 183, 484,—Peace officer inquiring why accused had abused another—Trespasser—Words of menace—Breach of the peace—Joint trial—Mother and sons—Prejudice—Trivial matter.

1. A peace officer entering a woman's house to inquire why she had abused another woman, was held a trespasser and rightly sent out of the house.

2. The words, "If you come out, we will break your head for having entered our house" spoken by the accused to the peace officer carried no intent to cause the peace officer to break the peace, but stated that the speaker would break the peace.

3. Where a mother and sons committing distinct offences were tried together it was held that the sons were prejudiced in that they were not able to call their mother as a witness.

Judgment

Burnside, C. J.,—No appeal lay in this case except by permission of the magistrate and he has permitted it, from which I conclude that he himself desired that his conviction should be revised. The offence alleged in the first instance in the complaint was one under the 183rd section of the code for obs-

tructing a public servant in the discharge of his public functions. The magistrate has properly disregarded the complaint which is not in any way supported by evidence, and he has charged and convicted the appellants with int ntional insult with intent to provoke a breach of the peace under section 484 of the code and the defendants have appealed. The conviction is bad for several reasons, The 1st accused is the mother of the 2nd, 3rd and 4th. It appears that the complainant is a peace officer and, without any authority, he entered upon the 1st accused's house as he says, to enquire of her why she had beaten another woman. Now it is clear that he was a trespasser and the accused committed no offence in sending him off and saying she should strike him if he spoke much. The complainant says she used other filthy words. I find no filthy words recorded. The complainant went away at 9.30: that night 2nd, 3rd and 4th accused were in front of complainant's house. They said "If you came out we will break your head for having entered our house and spoken in an inpertinent way." Now it is clear that the 1st defendant being no party to this, she has been improperly convicted, and with regard to the 2nd, 3rd and 4th accused I cannot find any insult with such an intent as the law requires i. e. to cause the insulted man to break the peace. Their intent, if any, was to break the peace themselves, if the complainant had inprudently gone out, in return for his trespass on their mother. They may have been liable under section 483 for criminal intimidation. Then again the 1st accused, apart from the merits, to which I have referred, ought not to have been tried with her sons, her offence, if she had committed one, was entirely apart and distinct from the others—and the 2nd, 3rd and 4th defendants were evidently prejudiced by not being able to call their mother as a witness of what had previously occurred, and upon the case it seems to me that the complainant had been the aggressor and the case was too trivial to have merited the sentence imposed.

I set aside the conviction and acquit the accused.

107 P. C. Hatton 7210.

Rahim Police Sergeant v. *Salgado*

Burnside C. J., May 25, 1890.

Penal Code §§ 183, 289—Public functions - Lawful authority—Delegation—Ord. No. 8 of 1860, § 5—Obstruction—Mere words—Neglect.

1. A subordinate not statutorily authorised to do what the law requires to be done in particular cases by his superior may not be delegated a general authority to do that act.

2. Where the affixing of small-pox placards was to be done by a superintendent of police or a police magistrate, but was sought to be done by a sergeant, he was held not in the lawful discharge of any public function.

3. The accused merely telling the sergeant that he would not allow a small-pox placard to be affixed to his house did not constitute obstruction.

The facts appear in the judgment.

Dornhorst and Sampayo for accused-appellant.

Judgment

Burnside. C. J.,—I cannot find that the appellant in this case committed any offence. He certainly did not violate the provisions of the 5th section of the ordinance 8 of 1860 because the sergeant of police had no authority whatever under the section to affix the small-pox placard to his, the appellant's house. The superintendent of police or police magistrate were the only authorities to do so, and neither of them could delegate to an agent a general authority to do that which the law requires should only be done in particular cases, if occasion requires. The officers themselves must decide as to the necessity in each case.

Nor did he offend against the 289th section of the ordinance. He did not wilfully neglect or omit to perform any duty imposed on him, nor did he wilfully disobey or infringe the provision of any ordinance. He disobeyed nobody.

So with regard to the second charge, I cannot find that he in any way obstructed the officer. Telling the officer that he could not let him put up the placard was not obstruction, and even if it were, the

sergeant, as I have shewn, had not sufficient authority at the time from the superintendent of police or police magistrate and he was not therefore a public servant acting in discharge of his known functions nor a person acting under the lawful orders of a public servant.

The conviction on that charge also cannot be supported.

It is satisfactory to find that as soon as sufficient authority appeared for the order the accused acquiesced at once.

25 D. C. Cr. Colombo 464.

R. v. *Mye Appu et al*

Burnside, C. J., June 3, 1890.

Deadly weapon — What gives character to a weapon — Stone — Club — Purpose.

1. The character of a weapon is given to it by the manner in, and intent with which, it is used.

2. A stone or a club is a deadly weapon because it could be used with a deadly purpose.

Dornhorst and W. Pereira for accused-appellant.

Fisher C. C. for the respondent.

Judgment

Burnside, C. J.—This conviction is right. The indictment sufficiently stated the offence and the evidence supports it, in that it is proved that each of the parties was armed with a deadly weapon. Whether a club or a stone the character of a weapon is given to it by the manner in and intent with which it is used and in this case it is proved that stones were hurled at persons and other persons were struck over the head with clubs whilst some of the assembly were armed with loaded guns which were discharged at other persons. Under these facts I do not hesitate to hold that a stone or a club comes within the category of a deadly weapon because it could and would be used with a deadly purpose. I find also that the object of the as-

semblv was sufficiently proved to be, to commit criminal trespass. Conviction affirmed.

52 P. C. Puttalam 412, 15561

Rajab P. C. v. *Sobar.*

Dias, J., April 1, 1890

Penal Code § 183—Obstruction—Public functions—Police constable—Stopping noise in house near road.—

A police constable hearing a great noise of tom-tomming in a house close to a public street is in the lawful exercise of a public duty in going to the house and asking the occupant to stop the noise.

Sampayo for accused-appellant

Judgment

Dias, J.—The evidence proved beyond doubt that the complainant, who was a police constable, was obstructed and assaulted when engaged in the lawful exercise of a public duty. It appears that some people close to the road were making a great noise in a house, by beating tom-toms and drums. The complainant interfered and very politely asked the parties to desist, when the 1st defendant came up, pushed the constable aside and encouraged the offenders to go on. The defendants were found guilty of a very lawless proceeding and I will not interfere either with the verdict or sentence.

123 P. C. Kalutara 6463

Perera v. *Fernando*

Burnside C. J., June 12, 1889.

Penal Code § 181—Civil process—Taking money out of debtor's pockets—Trespass—Resistance—Public policy—Breach of the peace.

It is a trespass to seize a man for the purpose of taking money out of his pockets, though such taking be under an execution, and resistance to such taking is justified.

Browne for accused-appellant

Judgment

Burnside C. J.—The question to be determined in this case, is, whether the fiscal can seize money on the person of an execution-debtor under a writ against property. There is no special law giving that power, and I can find no direct authority on the point. It is said in the old authorities that "the axe in a man's hand, the horse on which he is riding" are not subject to distress for rent, on the ground of public policy to avoid a possible breach of the peace, and on the same grounds it would appear that they would not be liable in execution. I think it would be a trespass to seize a man for the purpose of taking money out of his pocket, which would not be answered by a plea that the taking was under an execution.

The magistrate says the resistance was against the money being taken from the peon. I think the resistance was justifiable and the accused must be acquitted.

198 P. C. Negombo 8630

Toussaint v. *Silva*

Clarence, J., Aug. 29, 1889.

Affray—Public place—Court verandah—One-sided assault—"Fighting"

1. A court verandah is a public place under § 156 of the Penal Code.

2. Where there is a simple one-sided assault and no fight there is no affray.

Judgment

Clarence, J., Had I affirmed this conviction I would not have affirmed the sentence imposing on each defendant a fine of Rs. 50 a most severe sentence to impose on an average Sinhalese countryman, and one which may lead to his land being sold.

I cannot, however, support the conviction on this charge in the absence of a finding of facts which would constitute the offence charged. Defendants are charged with being concerned in an "affray" by

"fighting" in what is certainly a public place, viz, the court house verandah. The evidence for the prosecution, however, describes no fighting but a simple one-sided assault. A witness called for the defence does seem to speak of a fight. What the magistrate considered the truth to be I do not know. The assault may quite conceivably be worse than the "affray," but I cannot uphold the conviction on the charge as framed, if there was an assault and no fight. I quash the charge and conviction and send the case back for further proceedings as the police magistrate may deem it proper to take.

P. C. Colombo 19216.

Gunasekera v. *Manuel*

Withers, J., Aug. 11, 1892.

Penal Code § 183—Obstruction—Lawful discharge of public functions—Ord. No. 7 of 1887, 209—"Alter"—Substitution.

Where a municipal overseer entered the accused's premises to "alter" a privy under Ord. No. 7 of 1887, § 209 but proceeded to substitute another privy, it was held he was not in the lawful discharge of his public functions, and that he was lawfully resisted.

The complainant, a municipal overseer, purporting to act under § 209 of Ord. No. 7 of 1887 proceeded to clean out the accused's cesspit privy and substitute a dry earth closet. He was obstructed and the magistrate acquitted. The Attorney-General appealed.

Dornhorst for complainant-appellant.

Wendt and Sampayo for accused-respondent.

Judgment

Withers, J.,—In this case the Attorney-General appeals from an acquittal and Mr. Dornhorst argued the case for the appellant.

The accused was prosecuted for an offence punishable under § 183 of the Ceylon Penal Code before the police court of Colombo of voluntarily obstructing a public servant in the discharge of his public functions.

The chief point, as Mr. Dornhorst admitted, is what is the meaning of the word "alter" in § 209 of the Municipal Ordinance 7 of 1887, and as I cannot agree with Mr. Dornhorst's contention as to the meaning of the word. I shall not address myself to the other grounds urged by Mr. Wendt in support of the order appealed from. Assuming the requirments of that ordinance to have been fulfilled, I am to decide whether it was an offence to prevent a public servant from entering the accused's premises for the purpose of cleaning out, and I suppose stopping up, the cesspit of a privy and providing another necessary in the shape of dry-earth closet.

I do not think it was, because the act interfered with would be not to alter a cesspit-privy but to substitute a different kind of privy altogether. Now surely to alter a thing is to vary it without an entire change, but the intended act of the person employed by the chairman was to effect an entire change. Consequently the police magistrate's order acquitting and discharging the accused must be affirmed.

283 P. C. Hatton 3722.

Nikulashami v. *James.*

Dias, J., Oct. 27, 1887.

Penal Code § 183 — Obstruction by deception — Helping escape from custody—Civil prisoner.

Passing off a deception on a policeman in charge of a civil prisoner and so putting him on the wrong scent, so that the prisoner escaped, was held to be obstruction.

Dornhorst and Wendt for accused-appellant.

Judgment.

Dias. J., The accused was properly convicted under section 183 of the Penal Code. The policeman on whom the accused passed off a deception by which he succeeded in putting the constable on the wrong scent, was acting under the order of the complainant who was a fiscal's officer and was acting as such when the civil prisoner escaped from his custody. I affirm the verdict.

264 P. C. Negombo A

Fernando v. *Fernando*

Clarence, J., Sept. 29, 1887

Penal Code § 88—No marks, no process order Plaint partly entertained.

The fact that there are no marks on the complainant complaining of hurt is no ground for declining to issue process.

The facts appear in the judgment.
Cooke for complainant-appellant.

Judgment

Clarence J.—This appeal lies, inasmuch as the police magistrate has to some extent entertained the complaint. I cannot agree with the police magistrate that the mere circumstance of the women not being able to show on their persons any marks resulting from the alleged assault, necessarily brings the case within the purview of section 88 of the Penal code, as a case of harm so slight that no person of ordinary sense or temper would complain of it. I can express no opinion whether a more patient examination of the complainant's case may or may not show the case to be one in which process ought not to issued. The magistrate's refusal to issue summons as at present recorded by him proceeds on a ground which is not sustainable. The matter of the complaint must therefore be remitted to the magistrate to be further investigated.

379 P. C. Ratnapura 4348

Welenis Appuhamy v. *Salena et al.*

Clarence, J., Nov. 30, 1888.

Penal Code § 183—Local Board Constable—Cruelty to animals—Cattle worked contrary to Ord. No. 7 of 1862—Public Servant—Penal Code § 19—Public function.

A Local Board officer charged with the duty of bringing to justice the offence of working cattle contrary to Ord. No. 7 of 1862 is a public servant under § 19 of the Penal Code, and resistance to his seizing cattle so worked is an offence under §183 of the Penal Code.

The facts may be gathered from the judgment.

C. A. T. La Brooy for accused-appellants.

Judgment

Clarence J.—Defendants have been convicted of obstructing a public servant, to wit, a constable of the Ratnapura Local Board, when seizing in order to their production before the police court certain cattle which were being worked contrary to the provisions of Ordinance 7 of 1862. The point of law argued in appeal is, whether the officer in question is a public servant within the meaning of section 19 of the Penal Code and it was also contended that there was no evidence that the officer when resisted was acting in the discharge of any public function.

The case might certainly have been made clearer. The officer in question is described simply as a "constable of the Local Board". What functions or duties he was appointed to discharge, no witness states. Still, having regard to the Local Board Ordinance, and the ordinary meaning of the word constable, I think there is *prima facie* evidence that he was empowered to represent the Local Board in the matter of bringing to justice the offence of working cattle contrary to the provisions of the ordinance against cruelty to animals, and inasmuch as a municipal inspector is expressly stated in the Penal Code to be a public servant, it seems to be impossible to resist the conclusion that a Local Board officer charged with such functions as those indicated, is a public servant within the meaning of the code. And there is evidence that this officer was obstructed by defendants when in the exercise of his public functions.

139 P. C. Colombo 841

Don Juanis v. Perera.

Dias J, May 13, 1885

Penal code §183—Seizure of property not the debtor's—Penal code § 92—Good faith—Act under color of office—Policy of the law as to acts of public servant.

1. The policy of the law is to prevent third parties taki n

the law into their own hands and determining for themselves whether or not the acts of a public officer are lawful.

2. Where a table was seized as the debtor's and his daughter claimed it as hers before the seizing officer, the magistrate was doubtful as to ownership, it was held that resistance was bad as the officer was acting in good faith under color of his office.

The judgment contains the necessary facts.

Wendt for accused-appellant.

Judgment

Dias, J., — This is a charge under section 183 of the Penal Code. The complainant who is a fiscal's officer seized a table, which is said to be the property of the execution-debtors the 1st and 2nd defendants, when the 3rd defendant who is a daughter of the 2nd, claimed the table as her property, and all the defendants seem to have resisted the complainant in seizing and removing the table. The police magistrate entertained some doubt as to the ownership of the table, but he convicted the accused, holding that, under section 92 of the Penal Code, the resistance was unlawful, as the complainant was acting as a public servant, and in good faith, under colour of his office. This holding seems to me to be right. The policy of the law is to prevent third parties taking the law into their own hands, and determining for themselves whether or not the acts of a public officer are lawful. Mr. Mayne in his commentary on the Indian Penal Code, which is the same as the 183 rd section of our Code, seems to be of that opinion (See p. 154.) The matter of the resistance is very much exaggerated; and as the third accused seems to have acted in the *bona fide* belief of her right, the fine imposed by the police magistrate appears to me excessive.

168 P. C. Trincomalee 4154.

Cookson v. Tampaiya et al.

Lawrie., J., June 12, 1894

Penal Code § 185—Order not to fish in a certain place for three months—Riot apprehended—Factions of fishers —Criminal Procedure Code of 1883, §§ 115, 129—[Crim

Proc. Code of 1898, § 114]—Order ultra vires—Nuisance —Urgent cases.

A Police Magistrate has no power to order fishermen not committing a nuisance not to fish in a certain place for a period time, and, such order being *ultra vires*, disobedience thereto is not an offence.

The facts are sufficiently set out in the judgment.

Dornhorst and Senathi Rajah for accused-appellants.

Judgment.

Lawrie, J.—As the powers given to a police magistrate by the 129th section of the Criminal Procedure Code may be used only in urgent cases of nuisance, and that the order made by Mr. Cookson on the 21st April 1894 was *ultra vires*, disobedience to it cannot be punished under section 185 of the Penal Code.

The facts are these. The police magistrate of Trincomalie had eight complaints made to him resulting from a disturbance among the fisher people on the night of the 19th April. The magistrate seeing that both parties were to blame and apprehensive that if the disputes were renewed the peace of the town would be seriously disturbed, sent for all the fishermen whom he had reason to believe had been engaged in the disturbance of the 19th. In Court on the 21st April he made this order:

"I absolutely forbid all those present to fish on the padu in question for a period of one month from this date."

Notwithstanding this order, three of those then present in Court to whom the order had been addressed went out to fish on the 27th April.

Mr. Cookson himself became the complainant and filed an information before Mr. Burrows, the Asst. Agent and additional police magistrate.

I cannot approve of the police magistrate being himself the complainant of a beach of his own order.

Mr. Burrows found the men guilty and sentenced them to imprisonment under section 185 of the Penal Code. I am of opinion that the accused are entitled to an acquittal first, because it is not proved that they disobeyed Mr. Cookson's order. The local

limits within which they were prohibited from fishing are obscurely described in the order. Those possessed of local knowledge probably know whether Usandapadu, where the accused are said to have fished on the 27th, is or is not within the limits from Back Bay Customs to the Sally Port, but it is not even proved that the accused fished in Usandapadu. The proof of disobedience is defective.

But secondly I hold that the 129th section of the Criminal Procedure Code did not give to the police magistrate power to make the order. I give him full credit for a desire to prevent crime and to do justice.

The authority given to a magistrate under section 129 is supplemental to the power given in section 115. In ordinary cases of public nuisance, the magistrate may make a conditional order for the removal of the nuisance and may order the offender to appear before him to have the order set aside or modified, but there are some cases of nuisance of urgent necessity and for these the 129th section provides the procedure and remedy.

The fishing of these fishermen at Trincomalie was not a public nuisance. It was not a trade or occupation which was injurious to the health or physical comfort of the community. The magistrate had no power to say to any fisherman not committing a public nuisance, you shall not fish there for one month. He might as well have said to a couple of villagers who had disputes about a field, you shall not sow it, or to two people who dispute about a house, neither of you shall live in it or to others none of you shall pluck nuts or draw toddy from the trees in dispute.

By this order as the magistrate interfered with the occupation and means of subsistence of 20 families, he reduced the food supply of I know not how many more. I respect his intentions but the order was impassable. I acquit.

328 P. C. Galle 1910

Gurusinghe v. *Samararatne*

Dias, J,. Jun. 14, 1886

Penal Code § 183—Resistance by stranger to civil decree—Writ against wife's property—Dispossession of husband—Wife sued without husband—Writ of possession.

The wife having been sued without the husband being joined, and writ of possession issued to give creditor possession of wife's property, resistance by the husband to his being dispossessed was held justified.

The judgment gives the necessary facts.

D. F. Browne for accused-appellant.

Seneviratne for respondent.

Judgment

Dias J.—A writ of possession was issued by the District Court of Galle in a case to which this appellant was no party, and in the execution of this writ, the fiscal's officer attempted to dispossess the appellant by turning him out of the house in which he then lived; as regards the appellant this was an unlawful trespass on the part of the fiscal's officer and the appellant had a perfect right to resist as he did.

The case in which the writ was issued was one against the appellant's wife. He was no party to that suit, and was not therefore bound by any proceeding had therein. The party in whose favor the writ was issued seems to have been a purchaser in execution under a writ of execution issued in that case, and the police magistrate says that the writ of execution was binding on appellant as it was issued to recover a debt due by the wife. The answer to this is that a debt due from the wife cannot be recovered by a suit against her. It can only be done by a suit against the husband. The alleged debt of the wife for which the writ of execution was issued was a debt incurred by her before the Ordinance of 1876 came into operation, and whether the wife's liability accrued before or after that ordinance, the husband was a necessary party to the suit. The verdict and sentence are set aside and the appellant is acquitted.

315 P. C. Ratnapura 9993

Banda v. *Mohotty Hamy*

Withers, J.. Sept. 11, 1894.

Penal Code § 180—Public servant—Lawful power—No direct power—Inquirer into deaths—Duty to pass on the information.

The public servant to whom information is given must be empowered by virtue of his office to do something to the direct and immediate injury of the person informed against, and a person whose duty it may be to pass on the information to others is not a public servant so empowered.

The facts appear in the judgment.

Sampayo for accused-appellant.

Judgment

Withers, J. The accused has been sentenced to undergo 6 months' rigorous imprisonment for an offence under the provisions of § 180 of the Penal Code.

This sentence, in my opinion, cannot be supported. First of all there is no proper judgment on which it is based. The words "I convict accused of the charge laid" do not constitute a judgment in accordance with the provisions of the 372 section of the Criminal Procedure Code. [1883] Then the evidence does not support the charge. According to the charge, the information given by the accused to a public servant which he knew or believed to be false was that one Simanhamy committed theft from his (accused's) house of a gun and other property. The complaint to the public officer concerned is that two people named Siyanhamy and Kiri Etana did on the 29th May forcibly enter his house and remove therefrom a brass basin, a gun, two mammoties and two katties and committed mischief by pelting stones on complainant's roof and voluntarily caused hurt to the accused.

There is nothing there about the commission of theft. The public servant himself deposes that the information given to him by the two was that one Gira and one Siyanhamy entered the accused's house, broke the tiles and took away certain things. There is nothing there said about the commission of

theft. This witness speaks of the removal and alleged theft but that may be his view regarding it. It is not the language of the accused whose brother is the said Siyanhamy. But the main reason for setting aside the conviction is that the information was not given to a public servant capable of using his *lawful* power to the injury or annoyance of any person. For I take the words of this section to mean that the particular public servant to whom false information is given must be empowered by virtue of his office to do something to the direct and immediate injury of the person informed against. The public servant in this case is an enquirer into deaths. His duty is to enquire into deaths, and his powers are commensurate with, and limited to, those duties. He could procure the attendance, or even the arrest, of a person suspected of being concerned in a death and the exercise of his powers against the person whom he had summoned or arrested on false information of suspicious circumstances relating to a sudden or violent death would be to the direct injury or annoyance of the person so summoned or arrested. He had no lawful power to exercise against Siyanhamy or Kira on account of the offences laid before him to their charge by the accused. He could not lawfully have them summoned before him or arrested—it might be his duty to pass on that information to others who could lawfully procure their attendance by a summons or warrant, but that might be the duty of a private as well as of a public person.

299 P. C. Hatton 13402.

Pieris v. *Muttuswamy.*

Browne, J., Aug. 15, 1893.

Penal Code § 180—Inspector of police—Lawful power—Information of non-cognizable offences—Annoyance—Mere inquiry—Intent.

1. Mere inquiry into the truth or otherwise of information is not injury or annoyance under Penal Code § 180.

2. Where information is given of a non-cognizable offence to an inspector of police, he not being empowered to arrest

without a warrant in respect of such an offence, has no lawful power to use to the injury or annoyance of the person informed against.

The facts appear in the judgment.

Dornhorst for accused-appellant.

Wendt for complainant-respondent.

Judgment

Browne, J.—Granted that the information which accused gave to inspector Pieris was to his knowledge or belief false, complainant has to establish that appellant intended thereby to cause, or knew it likely that he would thereby cause, the inspector to use his lawful power to the injury or annoyance of some one. I have looked in vain through the complaint, charge, evidence and finding, to discover any particularization of what was the lawful power which the inspector did use or could have used to such injury and annoyance. The offences of forgery and abetment thereof not being cognizable, no arrest therefor could be made without warrant, and I hardly consider that the mere enquiry whether an assertion is true or not would be a cause of such injury or annoyance to innocent persons as the section contemplates. But there is no direct evidence whatever of any such intent, no request that the inspector would do or not do anything—go to the estate, arrest, or institute a criminal proceedings. The intent I believe to have been that stated by accused himself to lay the foundation for a future repudiation of the transaction, and not that any action should be taken by the inspector or police thereon.

146 P. C. Hambantotta 536.

Pullenayagam v *Wootler.*

Clarence, J., July 3, 1889.

Penal Code § *180—Public servant—Who may complain —Inferior.*

The expression "public servant" in § 180 of the Penal Code refers to the public servant to whom false information is given, or to his superior.

The facts appear in the judgment.

James Pieris for accused-appellant.

Judgment

Clarence, J., I am obliged to quash the conviction, because having regard to section 149 of the Procedure Code, the magistrate had no power to take cognizance of the alleged offence. He could not take cognizance except with the sanction of the Attorney-General, which has not been obtained, or on the complaint of the public servant concerned or some public servant to whom he is subordinate. Now here the words "public servant" clearly refer to the public servant to whom the alleged false information was given or to the superior of such servant. The information in this case is said to have been given to the Director of Public Works and the complaint is not made by the Director of Public works, but by a subordinate of his. Consequently this conviction cannot stand. I quash the conviction.

389 P. C. Point Pedro 9266

Chupper P. V. v. *Chandrasegara et al.*

Withers, J., Oct. 17, 1893.

Penal Code § 180—Lawful power—Mere duty to communicate information to another—Sudden death—Power of headman in cases of—Power lawful in certain cases—Intent.

1. The public servant in Penal Code § 180 must be one capable of directly acting in the subject matter of the false information.

2. Mere communication as in duty bound to another of information [of a sudden death] is not an exercise of power, it being putting in motion another who has power.

3. Taking measures, in the case of a sudden death, for keeping the body in *statu quo* pending inquiry is not always direct exercise of lawful power.

4. When the informant intended a public servant to use a power lawful in certain cases he is guilty under § 180 P. C.

The judgment sets out the facts.

Dornhorst and W. N. S. Ascrappa for accused-appellant.

Wendt and Sampayo for respondent.

Judgment

Withers, J.—The magistrate has found in effect that the accused gave to the prosecutor, a police headman, information false in itself and false to his knowledge intending to cause the headman to use his lawful power to the annoyance of the members of the family of deceased.

The appellant's counsel contended that a public servant in § 180 of the Code must be one capable of acting directly in the subject matter of the false information, and that is, no doubt, a right contention.

The duty specially imposed on the police officer by the Code is forthwith to communicate with the nearest police magistrate any information which he may have respecting the occurrence of sudden death. This in itself is not an exercise of power. It is rather putting in motion a public servant who has power to exercise in dealing with cases of sudden death. The magistrate, however, holds that a police headman has the lawful power in all cases of sudden deaths to take measures for keeping the body in *statu quo* pending reference to the enquirer into deaths. To take such measures would be a direct act in the exercise of lawful power.

As at present advised, I am not prepared to support so broad a proposition. In cases of death from violence or under circumstances reasonably exciting a suspicion of foul play or indicating non-natural causes, I have no doubt he would have that power, perhaps in other cases.

Now the question comes to this: Did the informant intend to cause the prosecutor in this case to use a power, lawful in certain cases at all events, to the injury or annoyance of some persons. If he did then it appears to me he is guilty of the offence charged. The magistrate's opinion on this point is so clear and strong that the judgment must be affirmed.

75 P. C. Urugalla 20.

Appuhamy P. Sergeant v. *Keerale.*

Lawrie, J., March 18, 1885.

Penal Code, § 180—Charging aratchie with receiving a bribe—Information to police constable—Lawful power—Pass on information—Direct power—Penal Code, § 158—Village gossip.

Information though false to a police constable of an offence in respect of which he has no lawful power to act directly but only a duty to pass on the information to another is not under Penal Code § 180.

The facts appear in the judgment.

Van Langenberg for accused-appellant.

Judgment

Lawrie, J., The statement which Bohari P. C. says the accused made to him was "I have something private to tell. At Kandy a man has been killed and the aratchie had taken Rs. 7 and a gun from a man and let him go. . . . ." He (the accused) said he did not know the name of the man who had beaten the other, the only name he mentioned was that of the aratchie who he said had taken a bribe.

The police magistrate records his belief that the charge against the aratchie was false and that the accused when he made it knew it was false.

It seems to me that the evidence is insufficient and with the verdict on both these points I am not disposed to agree. Further I much doubt whether it is proved the accused gave this information to the police constable intending to cause or knowing it to be likely that he would thereby cause the police constable to use the lawful power of such police constable to the injury or annoyance of the aratchie.

The offence which the accused stated or suggested that he heard the aratchie had committed was accepting a bribe. That offence fell under the 185th section of the Penal Code and a police constable has no lawful power to arrest an accused under that clause without a warrant. For such a matter the police

constable had no power except to do his duty under section 24 of the Criminal Procedure Code, to report to the police magistrate.[§ 22 of Code 1898]

Repeating this village gossip to the police constable who though a public servant had no lawful powers to act directly in this matter seems to me to have been an act which does not fall under section 180 of the Penal Code.

I am of opinion that the accused has not been proved to be guilty under that section and the conviction and sentence should be set aside and the accused acquitted.

212 P. C. Matara 5224.

Eaton v. *Norris Appu*

Clarence, J., July 17, 1888.

Penal Code sec. 180—Knowledge of falsity—Proof bona fidei —More than malice.

1. The essence of the offence under Penal Code, § 180 is knowledge of falsity of information.

2. In a prosecution under Penal Code § 180 it must be proved that the accused did more than act maliciously, that he knew the information to be false.

The facts appear in the judgment.

James Pieris for accused-appellant.

Judgment

Clarence, J., I cannot sustain the conviction on any findings recorded by the magistrate, and as it is inexpedient to prolong the charge any further after a second successful appeal of defendant, I set aside the conviction and acquit the appellants. The essence of the offence with which the defendants are charged is knowledge that the information given to a public servant touching the assault was false. If it be the fact (and the magistrate has not found upon the evidence for the defence that it is not the fact) that salt was taken from the salt store improperly, defendants might *bona fide* believe the storekeeper to be in complicity. Had this been a civil

action instead of a criminal prosecution the occasion would have been a privileged one, and the plaintiff in order to succeed would have had to show malice. In a criminal prosecution the complainant has to go further and show that defendants knew the information to be false.

375 P. C. Kegalle 4271.

Ranghamy v. *Rajepakse Mudalihamy*

Clarence, J., Nov. 23, 1888.

Penal Code § 180 — Abetment — Proof of falsity.

The falsity of the information must be proved by the prosecution in the first instance.

Judgment

Clarence, J., Appellants have been charged under section 180 of the Penal Code with aiding and abetting a third person in committing the offence described in that section. The charge on which they have been convicted is defective inasmuch as it does not state what was the false information which the principal offender gave. This is all the more important, inasmuch as the defence seems to be that the information was true. I quash the charge and send the case back for proceedings *de novo*. The charge must set out the particular allegations charged as having been made falsely. It is of course for the prosecution to show the untruth of those allegations in the first instance.

213 P. C. Colombo 2653.

Rodrigo v. *Webster P. C.*

Fleming, C. J., Aug. 19, 1885.

Police Constable—Acting in good faith—Use of necessary force—Proof of contrary—Ejecting trespassers from a tavern—Hurt—Burden of proof

A constable acting in good faith in the discharge of his

duty may use force, even cause hurt or injury, necessary for his purpose.

The facts appear in the judgment.
Dornhorst for accused-appellant.

Judgment

Fleming, A. C. J.,—This is an appeal from the decision of the police magistrate, Colombo, who acquitted the accused on a charge of having voluntarily caused hurt.

The appeal was not entered at the instance of the Attorney-General, but Mr. Dornhorst who appeared for the appellant, mentioned such was unnecessary as the appeal is on a pure question of law.

It is not necessary for me to say whether or not I concur with Mr. Dornhorst's contention on this point; if it were I should be prepared to express my opinion upon it. I am satisfied the police magistrate arrived at a correct conclusion. This appeal is closely connected with a case that came before me not long since. (Police Court Colombo 2650.) The respondent in this case, who is a police constable, was called upon by a tavern keeper to expel a person from the tavern on the ground that such person had misbehaved himself and had refused to leave.

The constable in doing what he did, apparently acted in good faith, and unless he used more force than necessary while endeavouring to do what under section 27 of Ordinance No. 7 of 1873 he has been called upon to do, he would not be liable even if he did cause hurt or injury.

Whether a police officer does or does not, on any particular occasion, make use of more violence than is necessary is often a most difficult question to determine, but when it *prima facie* appears that he was acting in good faith and in the execution of his duty there should be satisfactory evidence to show that he really made use of greater force than was justifiable.

In this particular case I see no reason for concluding that the constable was wrong and I am of opinion that the judgment of the police magistrate acquitting the respondent should be affirmed and this appeal dismissed.

125 P. C. Kurunegalle 7388.

Van Houten v. *Letchimanan Chetty.*

Dias, J., June 4, 1891

Penal Code § 2—"And not otherwise"—Offence under Code and Law earlier than the Code—Ord. No. 8 of 1866

When an offence punishable under the Penal Code falls also under an earlier unrepealed penal statute it is punishable under the Code "and not otherwise"

The facts appear in the judgment.

Senathi Rajah for accused-appellant.

Grenier for respondent.

Judgment

Dias J.—The two accused were charged under section 183 of the Penal Code with obstructing two public officers in the discharge of their public functions. viz. in causing two small-pox patients to be removed to a public hospital. It appears that under section 10 of Ordinance 8 of 1866 certain regulations were made by the Governor with regard to persons suffering from small-pox, and acting under these regulations the authorities at Kurunegala attempted to remove two patients from a house in the Kurunegala bazaar to hospital, and the two accused successfully opposed such removal. The investigation of the case occupied more than one day and the magistrate framed a charge under section 183 of the Penal Code. The principal question which I have to decide is whether the magistrate was right in proceeding under the Code, there being a special provision in Ordinance No. 8 of 1866 applicable to the facts of the case. This objection was taken in the court below, but the magistrate passed it over, being of opinion, that he could proceed under the Code, if the facts disclosed at the trial warranted such a course. The Ordinance of 1866 was passed before the Code Came into operation, but the 2nd section of the Code provides "that every person shall be liable to punishment under this code, and not otherwise, for every act or omission contrary to the provisions thereof of which he shall be guilty within this colony on or after the day on which this

code comes into operation." When the offence for which the accused were charged and convicted was committed, the Code was in operation and under section 183, the act of obstructing a public servant in the discharge of his public functions is made punishable with fine or imprisonment or with both, and in my opinion the act proved against the accused is contrary to the provisions of the Code and can only be dealt with under the Code, and not otherwise. The verdict is right but the punishment imposed by the police magistrate, as regards the 1st accused, is excessive under the circumstances. The two accused are chetty traders, a class of men who do not often come before the courts charged with acts of violence, and in this particular case they seem to have allowed their feelings to get the better of their judgment, and a heavy fine I think will meet the ends of justice. The sentence, as regards the 1st accused, is set aside, and he is sentenced to pay a fine of Rs. 100. In all other respects the verdict and sentence are affirmed.

D. C. Cr. Kegalle 795.

R. v. *Unga*

Withers, J., Aug. 30, 1892.

Deadly weapon—Club—Grievous hurt—In the course of a faction fight — Extenuating character— Analogy of Penal Code § 294 Exception 4 — Penal Code §§ 316, 317.

1. A club is not a deadly weapon.

2. When grievous hurt is caused in the course of a faction fight it is, by analogy of Penal Code § 291 Exc. 4, extenuated in the sense of being reduced in character by reason of the occasion.

The facts appear in the judgment.

Dornhorst for accused—appellant.

Drieberg C. C., for respondent.

Judgment

Withers J., If the accused had assaulted the complainant in the circumstances described by the complainant he would have richly deserved the sentence

passed upon him by the learned District Judge

The learned District Judge has found, however, that the assault was committed on the complainant by the accused in the course of a faction fight, and this circumstance, in my opinion, materially alters the character of the offence.

It will be remembered that culpable homicide is not murder, if it is committed without premeditation in a sudden fight, in the heat of passion, upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

By a sort of analogy, I think the offence of voluntarily causing grievous hurt to an adversary in the course of a free fight may be said to be extenuated in the sense of being reduced in character by reason of the occasion on which the offence is committed.

I am moreover of opinion that a club is not an instrument which used as a weapon of offence is likely to cause death.

Grievous hurt was no doubt voluntarily caused by the accused to the complainant. For these reasons I quash the conviction and sentence and in lieu thereof I convict the accused Morage Unga of voluntarily causing grievous hurt to one Kottepolle Unga at Kottepolle on or about the 1st day of February, 1892, contrary to the 316th section of the Penal Code on that behalf made and provided, and sentence him to a term of three months' rigorous imprisonment.

P. C. Tangalle 6781

Samoradira v. *Netorissa*

Burnside, C. J., Aug. 19, 1892

Penal Code § 183—No physical act—Mere warning—Process server—Public servant—No warrant in evidence—Search for a bull in a dwelling house.

1. Simply to warn not to search house, without offering physical obstruction, does not fall under Penal Code § 183

2. A process-server is not a public servant.

3. In prosecutions under Penal Code § 183, the warrant obstructed in execution must be produced.

The judgment gives necessary facts.

Judgment

Burnside, C. J., I cannot affirm this conviction for many reasons. In the first place there is no warrant in evidence from which I can judge how far it protected anyone. Then the clause of the Code refers to obstructing "public servants". Something is said in the evidence about "process servers." I have carefully examined all authorities at my disposal to discriminate to what class of public servants these gentlemen belong, but I have failed to find out anything—they certainly are not included in any of the definitions of the Code, by that name, and if they do come within any of the definitions it should appear in evidence. Then it appears the object of this search was a bull or animal of some kind, and in the absence of the warrant itself I cannot conclude that it would have been issued to search a dwelling house for an animal of that kind, and if it did not especially authorise a search of the house the parties executing it had no right to attempt to search the house and were properly obstructed, if indeed they were obstructed. For it does not appear that any physical obstruction was offered them, they were simply warned not to search the house, and immediately with that prudence which is characteristic they walked away. But above all the prosecution is a stale vindictive prosecution, against a man who has just served a term of rigorous imprisonment and who, under the sentence of another six months' rigorous imprisonment has for want of bail, already undergone three weeks' imprisonment -all the punishment which in my opinion he deserved if the offence had been proved against him.

117 P. C. Colombo 6859

Pullenayagam v. *Tamby Marikar*

Dias, J., June 9, 1886.

Wilful disobedience—Order of municipal chairman—Shutting the door—Ord. No.8 of 1886—Smallpox patient.

Shutting the door of a house to prevent small-pox patient's removal to hospital is wilful disobedience of a lawful order under Ord. No. 8 of 1886.

Judgment

Dias, J.,— The accused was charged with wilfully disobeying an order issued by the chairman of the municipal council for the removal of a small-pox patient to the smallpox hospital. The order is dated 22nd February 1886. It is very clumsily drawn but it gives sufficient notice to the accused that the sanitary officer of the municipal council will attend between 7 and 12 a. m. of the 23rd of February for the removal of the patient. The order is given by the then chairman of the municipal council. According to the evidence there can be no doubt that when the officer went to the house at 7 a. m, the accused was in the house but the doors were shut. From what had taken place the accused seemed to have been determined to prevent the removal, for on the previous day, the 22nd February, when the notice was served on him he told the server that he would not allow the removal. There can be no doubt that it was the accused who shut the doors for the purpose of preventing the removal of the patient and that being so he has committed an offence under section 11 of Ord. No. 8 of 1866.

228 P. C. Kegalle 4008.

Vigors v. *Cornelius.*

Dias J., Aug. 14, 1888.

Penal Code, § 172—Witness—Cited for a date—Case postponed—Noticed to attend—Notice equal to a subpoena.

Where a case is adjourned and a witness cited for the first date is noticed to appear on a subsequent date, such notice is equal to a subpoena, and disobedience thereto is punishable.

The facts appear in the judgment.

The notice was probably in writing.

Judgment

Dias J.—When a witness is in court on a subpoena requiring him to attend and give evidence in any

case, and that case is adjourned to another day, and the witness is noticed to attend on that day, he is legally bound to obey that order which is equal to a subpoena, and is liable to be punished for disobedience of that order. The accused was rightly convicted and I affirm the verdict.

7 P. C. Ratnapura 3265.

Silva v. *Cooray*

Dias J., Feb. 9, 1888

Quashed—Previous evidence — Fresh examination of witnesses.

Where proceedings are quashed by the Supreme Court all previous evidence is taken out of the case, and in subsequent proceedings the witnesses have to be examined afresh.

The facts appear in the judgment.

Morgan for accused-appellant.

Judgment

Dias, J.—This conviction is not founded on any evidence. By the last order of the Supreme Court all the proceedings after the charge were quashed. So all the evidence previously taken is out of the case; but the police magistrate under a misapprehension that the evidence previously taken was still available, decided on the same evidence and convicted the accused. He should have re-examined the witnesses in open court. I set aside the verdict and send the case back for further investigation.

D. C. Cr. Jaffna 1349.

R. v. *Tinagary et al*

Withers, J. Aug. 18, 1892

Penal Code, s. 145—Deadly weapon—Thick stick

A thick stick is not a deadly weapon

The facts appear in the judgment

Ramanathan and Dornhorst for accused-appellant.

Drieberg C. C. for respondent.

Judgment

Withers, J.—Everything was said that could be said by appellant's counsel to persuade me that the District Judge's verdict was against the weight of evidence, and complaint was made, as not unfrequently with justice it may be made, that the District Judge gave no distinct reasons for preferring to believe the evidence led for the prosecution.

I must say that, after reading the evidence, on both sides, I think he has very good grounds for doing so.

It cannot be denied that there was a disturbance, and a serious assault at the Pillayar Temple in Alvai North.

The defence of the accused is, in short, an *alibi* at Pulikandi Temple on the night of the alleged disturbance at the other temple, and that it was some one else altogether who assaulted the complainant's party, and interfered with the dancing in his temple. To say nothing of the fact that the accused quite failed to prove that they could not have been at the Pillayar temple on the evening when the disturbance took place there, this Court is asked to believe, without any suggestion of a motive for it that the complainant and his associates have deliberately charged innocent people with a serious offence. I decline to believe they have done so.

There is, however, a fatal defect in the conviction on the 1st count of the indictment.

That count is for the offence of rioting, being armed with something which, used as a weapon of offence, is likely to cause death, though the section under which it is laid is erroneously numbered 144 in the indictment.

This offence the District Court had no jurisdiction to try. See schedule 11, entitled Tabular Statements of Offences, to Criminal Procedure Code, 1883.

The conviction on that count must be quashed and the accused found guilty of it discharged.

Then the conviction on the 2nd count under § 317 of the Penal Code of causing grievous hurt by means of an instrument which used as a weapon of

offence is likely to cause death, is wrong, because, in my opinion, a thick stick cannot reasonably be considered an instrument which used as a weapon of offence is likely to cause death.

That conviction must be set aside and the accused found guilty of that offence must be and are acquitted.

There is, however, ample evidence that the 1st accused Kanthar Karthikesar, 2nd accused Karthikeser Tinakary and 3rd accused Karthikeser Sidamparapulle voluntarily caused grievous hurt to one Valli Vyravan.

Accordingly, in lieu of the judgment of the District Judge, it is adjudged that the three accused, to wit, Kanthar Karhtikeser, Karthikeser Tinakari and Karthikeser Sidamparapulle are each guilty of the offence of voluntarily causing grievous hurt to one Valli Vyravan on or about the 4th of March 1892 contrary to the 316th section of the Penal Code, in that behalf made and provided, and each is sentenced to undergo a term of 9 months' rigorous imprisonment.

D. C. Galle 11964.

Amaris v. *Muttucumaru*

Withers, J., Oct. 21, 1892

Private defence—More harm than necessary—Trespasser—Knuckle-duster—Rib broken.

While it is lawful forcibly to eject a trespasser from one's property, the use of a knuckle-duster to the injury of one of the trespasser's ribs is in excess of the right of self-defence.

The facts appear in the judgment.

Dornhorst for accused-appellant.

De Vos. C. C., for respondent.

Judgment

Withers, J.—The learned Judge has found. that the appellant fractured the prosecutor's rib by a blow with a knuckle-duster, and voluntarily caused him grievous hurt.

I am not prepared to disturb that finding though I do not very heartily concur in it.

For this the accused has been sentenced to 12 months' rigorous imprisonment.

On the other hand, I am so far impressed with the evidence for the defence that I believe that, at the time of the alleged assault, the prosecutor was a criminal trespasser on the property of the 1st accused, under circumstances that warranted the 4th accused in assisting the 1st accused to defend his property and in using vigorous measures to expel the prosecutor from the premises.

The use of a knuckle-duster was, however, an excessive exercise of the right of defence but I think one month's rigorous imprisonment quite sufficient a punishment for the particular offence. Sentence reduced to one month's rigorous imprisonment.

238 P. C. Chavagacheri, 7162

Velupillai Odear v. *Velupillai*

Dias J., July 30, 1891.

Penal Code, § 183—Resistance—Civil writ—No endorsement—Civil Procedure Code § 360.

Where a writ bore no endorsement in terms of Civil Procedure Code § 360 the officer seeking to execute it has no authority to execute it, and resistance is justified.

The judgment gives necessary facts.

Wendt for accused-appellant.

Judgment

Dias, J., The writ in this case was directed to the fiscal of the Northern Province, and an odear who called himself a fiscal's officer attempted to execute it. There is no endorsement on the writ by the fiscal authorising the odear to carry out the writ, as required by section 360 of the Civil Procedure Code, and the odear had no authority to execute the writ. The resistance was therefore lawful and the verdict is set aside and the defendants are acquitted.

P. C. Haldumulla 4586

Cureem P. C. v. *Fernando et al.*

Clarence and Dias, J. J., Dec. 15, 1891.

Penal Code §§ 283, 284 — Public nuisance — Penal Code § 185—Criminal Procedure Code of 1883 § 129 —[Cr. Procedure Code of 1898, § 115]— Religious procession—Cholera stricken locality — General order— Public health.

When a religious procession passed though a cholera-striken locality, contrary to a magistrate's orders, the conviction was deemed more appropriate under Penal Code § 185 than under §§ 283, 284.

The facts appear in the judgment.

Dornhorst for accused-appellant.

Attorney-General for respondent,

Judgment

Clarence J. Appellants appeal against a conviction on two charges. The first charge is laid under section 283 of the Penal Code and is a charge of committing a public nuisance by marching in procession with a crowd of people through, Haldumulla while cholera was prevalent at Wellawaya, to the danger of the public health. The second charge is laid under section 284 and charges that defendants continued the nuisance aforesaid having been enjoined by the Haldumulla police magistrate, in an order issued by him under section 129 of the Procedure Code, not to continue such nuisance. On these charges defendants have been fined Rs. 50 each.

It appears from the evidence that cholera was prevalent at a certain place between which and Haldumulla there is much traffic; prevalent to such an extent that it was found necessary to establish a cholera hospital there. Under these circumstances the magistrate considered it right, for the protection of the public health, to issue an order prohibiting certain Buddhist processions then contemplated in Haldumulla. The 129th section of the Procedure Code warranted the magistrate in issuing the order in question if in his opinion it was advisable in the interest of the public health. We need not dwell on

the need of supporting public officers in measures directed to preventing the spread of a disease such as cholera. We are at the same time concerned to see that all that is done is done according to law.

It is proved by uncontradicted evidence that, when other persons concerned in a certain projected procession were willing to forego the procession in deference to the magistrate's order, appellants defiantly and deliberately determined on having the procession and did take part in the procession. It was indeed contended in appeal, and the same point seems to have been raised in the police court by one of the appellants, that the magistrate had no right to try the charge, for that he had himself directed the prosecution. But I do not find that the magistrate did direct the prosecution. It appears that all that the magistrate did, was to instruct the police generally to take the names of any persons who might disobey the order, and prosecute them before the police court. There was no direction to prosecute these defendants, indeed at the time when he gave his instructions to the police, the procession had not yet taken place. The case is therefore quite different from that reported in 9 S. C. C. 126. It is clear that appellants deliberately disobeyed the magistrate's order, and the only question remaining is—whether on these facts defendants are rightly convicted on the charges as laid. It may often be difficult for a magistrate, when called upon to act in an emergency for the protection of the public, to frame a charge in the most appropriate manner, and we ought not to allow the ends of justice to be defeated in such a matter.

I think that there is some difficulty in supporting the convictions upon the charges as laid, and indeed the Attorney-General did not attempt to support the convictions upon the charges as laid. It is clear, however, that the appellants have offended against section 185, in that they disobeyed the magistrate's lawfully promulgated order, it being proved by uncontradicted evidence, that their disobedience tended to cause danger to human health. Therefore, without going the length of saying that charges under § § 283, 284. may not hold water under similar circumstances, I think it will be well to add a count under section 185 and uphold the conviction and sentences on that count. There is no hardship whatever to the appellants in this course.

Dias J., The defendants were charged under two counts (1st) under section 283 of the code with committing a public nuisance in marching in procession over the town with a large crowd when cholera was prevailing in the neighborhood and (2nd)under section 284 for continuing the said nuisance in wilful disobedience of an order issued by the police magistrate. Section 261 of the code defines a nuisance to be an act which may cause any common injury, danger or annoyance to the public. The danger to the public in this case is very plain and the defendants knew it, but nevertheless acted in a reckless manner in utter disregard of the consequences and I am of opinion that the conviction on the first count is sustained by the evidence.

The conviction on the second count is more doubtful. The order of the police magistrate contemplated by section 129 of the Procedure Code is an order on any person or persons to abstain from doing any particular act or acts. The order here is a general order and not one directed to the defendants or any other person in particular, so as to make disobedience an offence under section 284. As my brother Clarence has some doubt as to the applicability of sections 283 and 284 to the circumstance of the case, I have no objection to uphold the conviction on a count under section 185.

269 P. C. Galle 1317

Silva v. *Pedris Hamy*

Lawrie, J., Oct. 14, 1885.

Penal Code, § 183—Arrest—Warrant ex facie illegal —Lawful order.

When objections to the legality of a warrant are obvious, the executing officer cannot be said to be acting under lawful orders.

The facts may be gathered from the judgment.

Seneviratne for accused-appellant.

Judgment

Lawrie, J., The conviction and sentence under the 183rd section of the Penal Code are set aside and the accused are acquitted of that charge.

The conviction and sentence of Rs. 25 under the 343rd section of the Penal Code are affirmed.

The sentence in default of paying the fine is reduced to six weeks' rigorous imprisonment.

The objections to the legality of the warrant are so obvious that in my opinion the complainant cannot be said to have been acting under lawful orders when he attempted to arrest the accused.

10 P. C. Galle 4984

Deen Assen v. *Silva*

Clarence, J., Feb. 3, 1887.

Penal Code, § 183—Criminal Procedure Code 1883, § 33— [Cr. Proc. Code of 1898, § 32] — No warrant— No proof of circumstances justifying arrest without warrant – "Concerned in" – "Reasonable complaint" – "Credible information"—Cattle-stealing.

Where there was no warrant, and the arrest purported to be under Criminal Procedure Code of 1883, § 33 [Crim. Pro. Code of 1898 §32] but there was no proof of circumstances and conditions justifying such arrest, the case was sent back for the legality of the arrest to be proved.

The facts may be gathered from the judgment.

Dornhorst for the accused-appellant.

Judgment

Clarence, J. Defendant is charged with obstructing two policemen in discharge of their public functions, by preventing them from arresting a certain person "charged with cattle stealing in P. C. case No. 4844" The prosecution have to show that the policemen had authority to make this arrest. The sergeant says he had a warrant for the arrest of the party. The warrant is not produced. Cattle-stealing, however, is an offence for which a police officer may arrest without a warrant, by virtue of section 33 of the Criminal Procedure Code under the circumstances described in subsection 1 of that section. But the prosecution have not proved that any of those circumstances exist. There is no proof that the person in

question "has been concerned in" cattle stealing, or that "a reasonable complaint has been made on credible information received" either in the P C. case No. 4844 or in any other manner, of his having been so concerned. Consequently there is no evidence which could have been left to a jury in support of the charge on which the magistrate has convicted the defendant.

I have therefore no alternative but to set aside the conviction, but inasmuch as the defence before the magistrate and the appeal petition appear to have been directed solely to the question whether defendant did or did not obstruct the policemen in their attempt to make the arrest, which fact is clearly proved, I think it proper to send the case back for further proceedings, to enable the prosecution to prove, if it can be proved, the legality of the attempt to arrest.

194 P. C. Kandy 659

Perera v. *Rutiyah Kangany.*

Lawrie, J., June 19, 1896.

Penal Code §§ 183, 220 —Defective war rant—Description insufficient —General warrant.

1. A Court has no right to issue a general warrant

2. It is settled law that a warrant of arrest must describe the person to be arrested with such minuteness as to leave no doubt as to the person intended, and such description must be as to name and address.

3. A warrant for the arrest of "Carupaiy now in the Kandy district" was held general and materially defective.

The judgment sets out necessary facts.

Wendt for accused-appellant.

Cooke for respondent.

Judgment

Lawrie, J., The two accused rescued Carpaye when she was in the custody of W. H. Perera. I shall assume that the license he held as a fiscal's officer was then in force. It is not necessary to decide that point, but it is abundantly clear that the warrant he held was illegal and did not justify the arrest and confinement of this woman.

The warrant was to the fiscal of Kandy to arrest "Carpaie now in the Kandy district."

It is settled law that a warrant of arrest must describe the person who is to be arrested with such minuteness as to leave no doubt as to the person intended. The description must both be as to the name and the address. "Carpaie" is a name common to many Tamil women, and in the Kandy District there are probably more than a hundred on the estates, possibly many more, two or three on every estate.

The warrant does not describe which Carpaie is meant. She is not described as the wife or daughter of any one—nor in such a gang under a named cangany, nor does the warrant give her address as on such an estate.

There are many decisions which settle that a warrant in these general terms is illegal (*Hood's Case* 1 Moody's Cr. Cases p. 281. *Hasting's Case* 9 Born H. C. L. p. 154). But authority is hardly needed, no Court has a right to issue a general warrant of arrest.

In the present case the warrant stated that Carpaie had been charged with quitting the service of Mr. M. W. Smith. In the proof there is no suggestion that the woman who was arrested on the warrant had ever served under Mr. Smith. The search seems to have been made for the wife of Saibu. This Carpaie Gallantena did not wish to go to or to return to Saibo. She was rescued from an illegal arrest and those who assisted her in her distress are not liable to punishment.

124 P. C. Galle 20038

Kitchel v. *Perera et al.*

Bonser, C. J., May, 13, 1896.

Penal Code, § 183—Act likely injuriously to affect accused's land—Remonstrance - Interfering with work—Civil remedy—Strangers in interest joining—Sentence.

1. Where a person has the possibility of a civil remedy against a public servant's act done in the lawful discharge of his public functions, such act may not be interfered with.

2. Where the owner of a land by the side of a bridge, fearing that certain excavations carried on near the bridge by a district engineer were likely to affect his land

injuriously, obstructed the engineer, and others not interested in the land, joined in the obstruction, such others were punished more severely than the owner of the land.

The facts appear in the judgment.

Dornhorst and *Bauca* for accused-appellant.

Cooke, C. C. for respondent.

Judgment

Bonser, C. J., In this case Mr. Carte, the District Engineer of Galle, in the course of his duty was superintending the removal of earth by the side of a bridge on the Galle-Matara road. The 1st appellant, who was owner of the adjoining land, seems to have been of opinion that this operation would prejudicially affect his land by letting in the flood water in the rainy season, and also to have thought that the district engineer was going to interfere with his land which adjoined the bridge. He thereupon remonstrated with him, and becoming very excited tried to stop him from proceeding with the work. The district engineer seems to have lost his temper, and a scuffle between the two men ensued in which the appellant got the worst of it. Thereupon a number of people came up and assaulted the district engineer with their fists, and stones. It does not appear that they had the excuse which the appellent had, of believing that their property was going to be injured, by the work in progress. The district engineer would have shown more discretion if he had made some attempt to remove the objections, raised by the appellants. Still the appellant had his remedy in a civil court, and he ought to have been satisfied with that instead of trying forcibly to prevent the district engineer from carrying out his work. The magistrate has found that the appellant did obstruct the district engineer, in the discharge of his public functions, and taking into account the fact that he met with punishment at the hands of the district engineer, he inflicted the light sentence of Rs. 50 fine. I do not feel disposed to interfere with that sentence. The other men, who had not the same excuse for assaulting him, were found guilty of using criminal force and were each sentenced to one month's rigorous imprisonment. Their defence was that they took no part in the assault, but they were clearly identified by the complainant. No appeal lies from their sentence, and I see no reason for going out on my way to interfere with it. I do not consider that any injustice has been done them.

444 P. C. Jaffna 15514.

Kanagaratnam v *Tiruchchittambalam et al.*

Browne J., Nov. 25, 1895.

Penal Code § 138 (3)—Show of criminal force—Criminal remedy for civil matters—Accused's land—Mortgage decree—Sale—Accused in possession—No writ of possession—Accused regarded as having some interest in land—Reaping of crops—Abuse of Penal Code, Ch. viii.

1. Where accused's parents had mortgaged a land of theirs and died, and the accused was sued, and suffered judgment, and there was a sale at which the complainant bought the land, but there was no writ of possession, and the accused remained in possession of the land, and the complainant asked the accused for a deed and was refused, it was held that the act of the accused and his 17 coolies in reaping the paddy crops on the land was not criminal.

2. Show of criminal force is not to be inferred from the mere number of people assembled.

The facts appear in the judgment.

Sampayo for accused-appellants.

Dornhorst for respondent.

Judgment

Browne, J., The chief issue in this prosecution is whether the 1st accused as the ringleader of the other 17 accuseds of whom, save 2nd and 3rd accuseds his relatives, all are mere coolies in his employment did assemble with the rest and with the common object of enforcing a right to a certain land by show of criminal force.

The magistrate has denounced this "high-handed way of marching an army of cultivators armed with knives no doubt to cut olas and perhaps any one who interferes." It is true the plaint made mention of knives, but this altogether is entirely unsupported by any evidence. Two witnesses, the cultivators, deposed that 1st accused was armed with a cudgel and one of them also said "They reaped the crop by show of force." There is no evidence

therefore to sustain the extravagant language of the judgment, and, "show of force" is dependent for proof solely on the number of the men. This appellant excuses by the fact that what was reaped and removed was not 3 bushels of paddy as the magistrate has recited but 50 or 60 bushels.

It is difficult to arrive at the exact facts eliminating even only the evidence which possibly self-interest may have affected. This much is clear from the evidence for the prosecution, that 1st defendant's father and mother having mortgaged this land before her death, the mortgagee's widow and administrator entered action against the surviving mortgagor, the 1st defendant (then a minor by his father as guardian ad litem) and another, and recovered judgment, and in execution sale in 1886 the land was bought by Sapapathy Kandyah who dowried it to his daughter, complainant's wife, but her title thereto was not perfected by obtaining the fiscal's transfer till 1894.

The debtor after confessing judgment went with his children to India and he died there. 1st defendant returned to Ceylon only in 1895 but may possibly have visited Jaffna occasionally in the interim. There is no evidence that writ of possession to the purchasers ever issued and complainant says: "In 1894 after obtaining transfer of my wife I asked the defendants" (he does not say which of them) "to complete the sale. They refused to do so instigated by others as they had lived on the land for 10 years." Now while 1st defendant's father was yet owner, he had made a planting agreement with Kasinader Elliappa who planted the land but the trees were not in bearing at the time of the sale and Elliappa says he made a subsequent agreement with complainant and remained in possession of the cocoanut trees. All parties agree that subsequently Kaderavelu was cultivator and each claim him to have been his tenant. On his return, 1st accused demanded rent from Kadiravelu who answered at first that some settlement between the parties must be come to or he would not pay any one, and afterwards that he had paid half the rent to the man who gave him the lease which he says was about May last.

Now without entering into discussion of the cre-

dibility of the evidence given by the Udayar and another supplementary thereto that Kadiravelu actually ceded permission to 1st accused to reap the crop, there is enough in all this to show that the complainant regarded 1st accused as possibly still having the right in the land and the evidence further indicates that during his absence 1st defendant had always had agents in Jaffna to watch her interests in the matter while the sale never affected the original plantation or residential rights of any one. In the admission of demand of rent from the cultivator and that he guardedly paid only a moiety of the rent due by him, and in the absence of all evidence of any violence, I cannot hold it proved that there has been any criminal offence committed by accuseds. The only witnesses who profess to depose to the acts of the accuseds on the land are the two cultivators, and when there had been the previous demanding of rent from Kaderavelu, I question entirely the accuracy of their description at pp. 13 and 14.

I think it is matter for regret that the power of the civil court to restrain the dispossession of land by injunction is not sought in Jaffna more frequently instead of prosecutions under Ch. VIII of the Ceylon Penal Code being instituted. The evidence recorded in the prosecution would almost suffice to have determined the rights of the parties to this land for ever. Out of some 36 pages of evidence, that relating to the actual offence of show of criminal force and contained on pages 13, 15 and 18 and 20 and 34-35 occupies about the space of one or two pages only.

6 P. C. Chilaw 9490.

Fernando v. *Manual appu*

Lawrie, J. Feb. 6, 1896.

Penal Code §183—Familiar talk—Laughing—No obstruction.

Accused, under the influence of liquor, spoke familiarly to, and laughed at, a constable aratchie's peon, *Held*, it was not obstruction, and no offence.

The judgment sets out necessary facts.

Dornhorst for accused-appellant.

Judgment

Lawrie, J., The offence charged is obstructing a peon of a constable aratchy in the discharge of his duty. The evidence shews that there was no obstruction.

The duty which the peon was at the moment performing is perhaps the lowest which a human being can be called on to perform, but in the conduct of that duty the peon was in no way obstructed. The accused perhaps was drunk and ventured to speak somewhat familiarly and to have laughed at the peon who was full of his own importance.

So far from agreeing with the police magistrate that this was a very serious offence, I am of the opinion that it was not an offence at all.

245 P. C. Colombo, 3152.

Pietersz v. *Packeer Tamby Hadjie*

Lawrie, J., Oct 16, 1885.

Penal Code §§ 183, 344—Conviction under both sections—Violation of cemetry laws— Obstruction

The offence under § 183 of the Penal Code includes the offence under § 344, and a judge having convicted under § 344 had no power on the same facts to punish him under the other charge.

The facts appear in the judgment.

VanLangenberg and *Browne* for accused-appellant.

Sampayo for respondent.

Judgment

Lawrie, J., It is proved that the Mahomedan cemetry in New Moor Street has been closed by the orders of Government; that on the 18th of July the police received notice that the members of a family living in Old Moor Street intended to bury a dead body, notwithstanding the Government

prohibition, and Mr. Inspector Pietersz sent two sergeants and two constables to prevent the burial.

This small force proved quite insufficient to turn back the very considerable number of people who assembled at the burial ground before the bier arrived and the large number who accompanied the funeral procession. Among the many who were there Packeer Tamby Hadjie took a prominent part. It has not been proved that he had anything to do with the selection of this cemetry as the place of burial or had any other reason for attending than that he belonged to the same race and creed as the deceased.

So far as the evidence shews the accused is not responsible for the burial in this cemetry.

When the procession arrived at the gate of the burial ground the sergeant stood forward. He says he did not resist as he found he would be injured, he merely stood in the way and said that burials were not permitted.

Then the accused Packeer Tamby Hadjie who was close to the bier put his hand on the sergeant's chest and pushed him aside calling him a pariah, the bier was carried in by the bearers, one witness says, without even an interruption in the chanting of the funeral song.

For the part he took Packeer Tamby Hadjie has been charged under two sections of the Penal Code and has been sentenced to six months' rigorous imprisonment.

The police magistrate characterizes the offence as a most serious one. It is (he says) a deliberate organized attempt and a successful attempt to violate a well-known law and to have recourse to violence in carrying out this attempt.

The offence of burying in a cemetry which Government has declared closed is by the Ordinance punishable by a fine of Rs. 200 and if the conduct of present accused was such as to render him liable to that penalty he doubtless either has been or will be prosecuted and punished.

For the violation of a well-known law closing cemetries the accused was not tried in this case.

The issue is whether the accused committed one or both of the offences of which he is charged.

The first is a breach of the 344th section of the Code: "Whoever assaults or uses criminal force to any person being a public servant with intent to prevent or deter that person from discharging his duty as such public servant shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both."

The police magistrate found the accused guilty and sentenced him to three months' imprisonment.

Though I was of opinion that a fine would have been the appropriate punishment, I was not at first disposed to disturb the sentence of imprisonment, but on consultation with my brother Dias and in deference to his opinion which he has arrived at after deliberate consideration of the whole case, while I affirm the conviction under the 344th section, I set aside the sentence of imprisonment and in lieu thereof I sentence the accused to pay a fine of Rs. 100 and in default of payment he shall suffer rigorous imprisonment for the period of six weeks.

The accused was further charged on a second count under the 183rd section of the Penal Code:

"Whoever voluntarily obstructs any public servant or any person acting under the lawful orders of such public servant in the discharge of his public functions shall be punished with imprisonment of either description for a term which may extend to three months or with fine which may extend to Rs. 100 or with both."

I share the opinion of the Chief Justice * indicated in the last sentence of his judgment on the judgment of the police magistrate pronounced in this case.

The offence under section 344 includes the offence under section 183.

There was here but one act. It cannot be made two offences.

Having convicted the accused under section 344 the Police Magistrate had no power on the same facts to convict him on the other charge and to give him further imprisonment.

The justice of this is to my mind obvious.

* There are not two judgments in this case in appeal. It is difficult to say whether Dias, J., delivered a judgment and whether the reference in this line is to Mr. Justice Lawrie, if he was acting C. J. [Editor]

Suppose the accused had been tried in the District Court and on conviction received the full punishment under the 344th section, 2 years' rigorous imprisonment and Rs. 1000 fine, it is to me clear that it would not have been just nor according to law to have convicted him on the lesser charge under section 183 which is included in the former, and to have added to the full punishment already inflicted an additional three months' imprisonment and an additional fine of Rs. 100.

P. C. Kalutara 1802.

Broadhurst v. *Daniel et al.*

Lawrie, J., March. 16, 1897.

Penal Code § 183—Obstruction—Writ against movables—Civil Procedure Code, § 227—Standing crops—Accused no parties to decree—Seizure—Claim by accused disallowed—No sale—Legal technicalities.

1. The officer executing a writ against movables has no authority under § 227 of the Civil Procedure Code to enter on a field of growing paddy, and to reap it and thresh it, nor to take possession of, and remove and stack, reaped paddy, and such acts may be resisted.

2. Where the accused were in possession of paddy fields and the crops they had raised, and the fields were siezed under a decree to which the accused were not parties, and their claim being disallowed, there was no sale, *Held*—that the attempt to seize stack of crops already reaped and to reap what remained unreaped was unlawful.

The facts appear in the judgment.

Dornhorst for accused-appellant.

Dias C. C. for the respondent.

Judgment

Lawrie, J., I set aside the convictions and sentences. The learned police magistrate after showing that the order of the District Court was illegal, stated that the prosecution perceiving the flaws in respect of the charge "shifted ground," and then asked the court under section 210 of the Criminal Procedure code to charge the accused under section 210 for obstructing the fiscal in the discharge of his public functions, in

the ordinary exercise of his discretion in executing a writ against movable property under section [Civil Procedure Code] 227 and so committed an offience punishable under section 183 of the Penal Code. But section 227 does not give authority to the fiscal to enter on a field of growing paddy and to reap it and thresh it nor to take possession of and remove and stack reaped paddy.

The learned police magistrate says that the defiance of authority cannot be tolerated and mere technicalities should not be allowed to stand in the way of its punishment.

The legal exercise of authority rests on the observance of law which some may call technicality. The non-observance of what the law requires makes the exercise of authority illegal and if illegal permits it to be resisted.

These accused were in possession of fields which they had sown and were about to reap, and under writs issued in a case to which they were no parties, the fields were seized. It is said that the accused claimed to have the seizure released but that the claim was disallowed. If the lands had been put up for sale they would have had the opportunity of protecting their interests by purchasing it. Instead of proceeding to sell it there was an attempt to seize stacks of crops already reaped and an attempt to reap what still remained and the accused resisted the unlawful acts. They did not use unnecessary force.

D. C. Jaffna, 958

Veluppillai v. *Beebe*

Chantamal Devaditta, witness-appellant.

Lawrie, J., Feb. 2, 1897.

Contempt—Witness—Cited for one day and absent on another—No batta deposited — Note in summons as to batta.

Where a witness cited for one day and not for the day to which the case had been adjourned was absent from court, and the "Note" in the summons that attendance is not obligatory for want of deposit of batta was allowed to stand, *Held*, that the witness was not bound to attend and was not guilty of contempt.

The facts appear in the judgment.

Jayawardene for witness-appellant.

Judgment

Lawrie, J., The district judge imposed a small fine upon the appellant because he committed contempt of court in that he absented himself, without sufficient excuse, from the district court of Jaffna on the 21st December 1896 although he was summoned to appear and give evidence and not to depart hence until he had been examined or the court had risen or unless he had obtained the leave of the court.

The only summons to this witness (filed in the record on p. 58) is a summons to appear in court on the 24th November 1896. I find no summons to attend court on 21st December. In his petition of appeal the appellant says that he received none.

Then on the summons filed: it is stated: "If you are detained beyond the day within named a sum of Rs. (blank) will be tendered to you for each day's attendance beyond the day specified." There is no suggestion that this was done. The summons to the witness also bears, "Note (3): No money having been paid into court to cover the cost of your attendance and no security having been given for payment thereof your attendance on the summons is not obligatory'."

By our code this note should be made only on the summons to witnesses living beyond 4 miles from the court and it ought to be deleted in a summons to a witness living near the court. In the present case it was not deleted. In these circumstances it cannot be said that the departure of the witness from the court on the 21st of December was a contempt of court. He was not summoned to attend on that day and the court had informed him in the summons that his attendance was not obligatory even on the 24th November the day he was obliged and cited to attend.

The witness is entitled to leave. The order is set aside.

P. C. Anuradhapura, 18235

Carbery v. *Perera.*

Lawrie, J., Feb. 2, 1897.

Penal Code, § 180—False information—Second part of the section—Omit to do—Proctor applying for postponement upon false information.

1. The second part of § 180 of the Penal Code refers to a case where no intention to injury or annoy exists.

2. Where the proctor of complainant in a case applied for postponement of it on the ground of complainant's illness, upon a certificate signed by the vidhan aratchy and the vidhan aratchy, present in court at the time of the application, said that complainant was ill as certified whereas in fact he was not ill, *held* that the vidhan aratchie had given false information within the meaning of the second part of § 180.

The facts appear in the judgment.

Dornhorst (with him *Seneviratne*) for appellant.

Dias C. C. for the respondent.

Judgment

Lawrie, J., I am of the opinion that the information given by the accused to the magistrate was false, but there is no evidence that it was given with the intention to cause, or knowing it to be likely that it would cause, the magistrate to use his lawful power to the injury or annoyance of any person. But the 180th section goes on to enact that it is an offence to give false information to a public servant with the intention of causing him to do or omit anything which he would not do or omit if the true state of facts respecting such information were known by him. This, I think, refers to a case where no intention to injure or annoy exists, where the intention may, on the contrary, be to assist a man by getting an order which would not be made were the true facts known. Here the proctor for Sinnatamby moved for a postponement of the criminal case in which he was complainant on the ground of his necessary absence and in support of the motion he produced a report written by the vidhan aratchy of Tripona, in which it was stated that Sinnatamby was suffering from injuries sustained and from fever. The magistrate hearing that the vidhan aratchy was in court ques-

tioned him, and he said he had seen Sinnatamby that morning and that he was ill. That was false, because Sinnatamby was on a journey as a carter. I affirm the conviction of the aratchy. The sentence of a month's rigorous imprisonment is sufficient punishment: I remit the fine.

P. C. Negombo 14985

Silva v. *Silva*

Withers J., March 2, 1893

Grievous hurt—Drunken brawl—Analogy of killing in a sudden fight—Countercases in evidence.

On the analogy of killing not being murder if it is in a sudden fight, cutting with a knife one of the parties to a drunken brawl, there being no unusual cruelty in the act, was reduced to using criminal force.

Judgment

Withers, J.—The magistrate has adopted the very inconvenient and embarrassing course of trying the present charge brought by Sadris Silva against the appellant for assaulting him with a club simultaneously with a counter charge by the appellant against the prosecutor and three others for hurting him and wounding him with a knife and in the judgment herein appealed from, there is reference made to the so called counter case and the evidence called in the two cases is pronounced very irreconcileable. The appellant was the first to lodge a complaint against his prosecutor and others for stabbing and hurt. This was followed the next day by the information herein. On the 25th of January the two complaints were enquired into and so interwoven that at first I was puzzled as to the order of their going. At the close of the prosecution in the counter case 14982 are recorded these words:

"For the defence it is asked that the counter charge 14985 be heard. The other case having been heard I proceed to decide this."

Agreeable to that request which should never have been assented to, the present complaint was enquired into and at the close of the prosecution the appellant

was informed of his right to make a statement with regard to the charge of voluntarily causing the complainant hurt. He naturally, "said I have nothing to add to what I stated in the counter charge." Then judgments were pronounced in the two cases commencing each with a reference to the evidence in the counter case.

Appellant's counsel very properly pointed out to the Court though he did not want to press a point which was rather disadvantageous than not to his client, that this court has constantly set its face against the trial of one case by reference to another—declaring that every case should be tried and determined independently on its own particular merits.

There can of course be no doubt about it, and in dealing with this appeal I feel as if I was lending my support to the procedure which has been adopted and that I ought to send the case back for the accused to be called on for his defence in the usual way by statement and evidence as advised.

But in view of the special circumstances of the case I doubt if the administration of justice would really be promoted by my doing so.

The appellant naturally appealed to his evidence in the former case, and I shall take it as his statement and without reference to any other part of the case and if it leads me to a different conclusion from that of the magistrate, and it may be an erroneous one, I am sorry for it, but such is the position in which I am placed. Comparing his evidence there with the evidence against him here I come to the conclusion that there was drunken brawl in which this accused returned blows that were given to him in a sudden quarrel of which the origin is obscure. And just as it would not have been murder had he killed the complainant because he did not act in a cruel or unusual manner, so I think his offence in the circumstances is reduced to the lesser one of the use of criminal force.

Conviction and sentence are set aside and the accused is convicted of using criminal force to Manikerge Sadeis Silva at Maduwa on or about the 25th day of October 1892, contrary to the 341st section of the Penal Code in that behalf made and provided and he is sentenced to pay a fine of Rs. 5.

P. C. Balapitiya 12215.

Silva v. *Aya*

Lawrie, J., March, 13, 1894.

Warrant in order—Arrest of road tax defaulter – Duration of warrant—Penal Code § § 186, 220.

1. Warrant not returnable at a particular time remains in force till executed.

2. Threat of injury to a public servant executing a warrant not returnable at a particular time is an offence under Penal Code § 186.

Judgment

Lawrie, J., The warrant of arrest is in proper form. It is dated 14th May 1891. The warrant was not returnable at a particular time and hence it remained in force until it was executed (Paley *Summary Convictions* p. 339-5th Edition), and Criminal Procedure Code section 51 "Every warrant shall remain in force until it is cancelled by the court which issued it or until it is executed."

The offence for which the warrant was issued (viz. not performing labour under the Thoroughfare Ordinance) is not cognizable by a police court and hence resistance or obstruction to his apprehension under the warrant could not be tried by the police magistrate under section 219.

I am obliged to set aside the conviction of the 1st accused following the recent judgment of this Court in Revision (3 Supreme Court Reports p. 33).

The means taken by the 2nd, 3rd, and 4th accused to rescue the 5th accused were slight. Very little violence was used.

The fine of Rs. 50. on each with the alternative of two months' rigorous imprisonment seems to be excessive.

The magistrate has not obeyed the 372 section of the Code, the provisions of which we intend strictly to enforce. . . . In all cases in which an offence is punishable by fine only (and offences under sections 186 and 220 may be punished by fine without imprisonment) the 63rd section of the Penal Code provides that the imprisonment shall be simple.

I quash the conviction of the 5th accused under section 219, the police magistrate having no jurisdiction to try that offence.

P. C. Hambantota 1557.

Muriwera v. *Danta et al*

Withers, J. Dec. 11, 1895.

Penal Code §§ 138, 140—Common object—Assault by more than five persons—Personal violence sole object—Riot.

If mere personal violence is the sole object of five or more persons combinedly assaulting a man, they do not thereby become an unlawful assembly.

Judgment

Withers, J., So far as the conviction of any of the accused of unlawful assembly is concerned, I am unable to sustain the conviction. It is not found that the persons adjudged to be guilty of forming an unlawful assembly, had in view any of the common objects particularised in section 138 Penal Code. It may be that each of the men who assaulted the complainant did so because he had taken water from the pansala well, though told not to do so.

If two people combine to commit an assault it seems to me that that is an assault and no more.

If five or more people so happen to combine, I do not think that under the 8th chapter of the Code, they thereby became an unlawful assembly if personal violence is their sole object. Anyhow in such a case they should not be punished for more than the assault itself. If more than five people combine to assault anyone with the intention of effecting any of the common objects mentioned in chapter 8 of the Ceylon Penal Code, that becomes riot.

If more than five people combine to murder a man it is not usual to indict them for an unlawful assembly. They are indicted for homicide.

Then as to the convictions of violuntarily causing hurt and using criminal force, I am not prepared

to disturb the finding, but the sentences imposed deserve consideration. The magistrate having expressed his opinion that the 8th accused the police vidan came to the scene when the assault was over virtually cuts out of the case the evidence of the complainant's two witnesses, Mathes Hamy and Diyonis who say that they went up with the police vidhane, and who testify not only to the assault by all convicted people but to the fact that the headman aided and abetted the offence, which the magistrate does not believe.

Then there is no medical testimony as to the injuries which the complainant received, and the impression left on my mind, after hearing the case fully gone into, is that the story of the complainant is marked by exaggeration.

There being no previous convictions against any of these people, I think except in the case of the accused who is found to have used a knife,—a fine will meet the justice of the case.

I accordingly sentence the 1st accused to pay a fine of Rs. 50. or in default to rigorous imprisonment for one month, the 2nd accused to one month's rigorous imprisonment in lieu of the sentence of 8 months passed on him; the 3rd accused to pay a fine of Rs. 25. or in default a fortnight's rigorous imprisonment; the 6th and 7th to pay fine each of Rs. 10. or in default one week's rigorous imprisonment each.

483 P. C. Colombo, Plaint C.

Idroos v. *Latiff.*

Withers, J., Nov. 28, 1895.

Penal Code, § 88—Blow with a sandal—Summons refused—No marks—No proof of harm intended.

When complainant was hit in public with a sandal, by the accused, and his examination did not disclose any harm was intended to be done, the case was held covered by Penal Code, § 88.

The facts may be gathered from the judgment.

Walter Pereira, for complainant-appellant.

Judgment

Withers, J. Complaint was made to the magistrate that the complainant had been hit with a sandal with intent to dishonour him. After a short examination of the complainant, the magistrate declined to issue summons, pronouncing the complaint to be frivolous.

The complainant appeals from the order refusing to issue summons.

After hearing Mr. Pereira in support of the appeal, I am not minded to interfere with the order. It was very truly urged by Mr. Pereira that a blow with a sandal in public, even though it does not cause bodily pain, may in certain circumstances constitute an offence which the magistrate would be in duty bound to try. But the examination in this case does not disclose that any harm was intended to be done, and it is apparently of so slight a character, that no person of ordinary sense and temper would complain of it.

I dare say the magistrate had the 88th section of the Penal Code in his mind when he made the order complained of.

I see no adequate reason for directing the trial to be proceeded with, and I therefore, dismiss the appeal.

D. C. Cr. Kalutara 251.

R. v *Swamajoti Unnanse et al.*

Burnside. C. J., Nov. 6, 1888.

Riot – Forcible dispossession—Menace to public peace – Right to property.

Forcible taking of possession of property, though under a right, is not commendable.

The facts may be gathered from the judgment.

Muttiah for accused-appellant.

Dumbleton C. C. for the respondent.

Judgment

Burnside, C. J. I see no reason to interfere with the judgment in this case. Even assuming that the defendant or one of them had a right to the property, the attempt to obtain possession of it by a number of people with show of force amounted to a riot which disturbed the peace, and might have led to more serious consequences.

D. C. Cr. Galle, 11400

R. v. *Hinni Appu et al.*

Lawrie, J., July, 16, 1885.

Penal Code § 145—*Fight—Thief caught—Assault by neighbours—No riot.*

When a thief was caught by the estate watcher, and the neighbours resorted to the spot on the thief's cries, and in the course of the fight which ensued, the watcher's leg was broken, *Held*, that the facts did not disclose a riot.

The facts appear in the judgment.

Dharmaratne for accused-appellant.

Sampayo for respondent.

Judgment

Lawrie, J. It is hereby held and adjudged that the judgment of the District Court of Galle dated the 9th day of June, 1885 be and the same is hereby varied, and, as varied be as follows, that is to say —the conviction of the accused on the charge of rioting, as laid under section 144 of the Penal Code is set aside and the accused acquitted on that count; the conviction of the 1st accused on the charge of voluntarily causing grievous hurt under section 316 of the Penal Code is sustained, and the said accused is sentenced to one year's rigorous imprisonment, in lieu of the punishment awarded by the district judge, and the conviction of the 2nd, 3rd, 4th, and 5th accused on the charge of assault, under the 343rd section of the Penal Code, is

sustained, and, in lieu of the sentence imposed by the district judge, the said accused are severally sentenced to three months' rigorous imprisonment, the longest term permitted by that section.

It seems that one of the accused was seen by an estate watcher plucking nuts from a cocoanut tree; he was seized. On his crying out, the other accused (some of whom seen to be relations, and all of whom lived near the spot) came to his assistance, and there was a fight in which the complainant was struck and his leg was broken. I am of opinion that the facts proved do not bring the case up to one of riot.

D. C. Cr. Colombo 1025

R. v. *Abdul et al.*

Lawrie, J., Jan. 29, 1895.

Native medical practitioner—Arabic system of medicine—Treatment of a lunatic woman—Consent—Good faith—Reason to believe—Burning as part of treatment—Books of medicine not in evidence—Liability—Grievous hurt—Penal Code, §§ 24, 51, 315.—Abetment.

1. When two men purported to treat a woman for insanity, by burning her in various parts of the body, according (as they said) to the Arabic system of medicine, *held*, they ought to have proved their statement that burning was a cure for insanity, by production of Arabic medical works or by expert evidence.

2. In the absence of such evidence, as the burns were severe and irritating, and there were other injuries due to the same treatment, the accused were held not to have acted in good faith.

The facts appear in the judgment.

Templer S. G. (with him *Dias C. C.*) for the Crown-appellant.

Dornhorst (with him *Weinman*) for accused-respondents.

Judgment

Lawrie, J. The judicial medical officer of Colombo, was requested by the police magistrate to visit and report on the condition of a woman residing in New Moor Street. He stated in his evidence in the

case now before me that he found the woman crouching in the passage to the house. She was unable to speak coherently. She appeared to be insane.

He examined her and he found injuries all over her body: an open sore with jagged edges on the top of the head one inch in diameter; another sore on the right side of the chest, the skin and the flesh had been eaten away almost to the bone; a third was also an open sore on the right loin, 3 inches long by 2 inches broad; the fourth was also an open sore 4¼ inches by 2¼ inches.

These injuries were caused by burns. There was a fifth sore at the joint of the right hip.

The burns were symmetrical.

There were large patches of dead skin on both buttocks caused by beating with a cane and also on the outer aspect of both thighs. I do not reckon several smaller and slighter injuries described by Dr. Carbery He added that she looked as if she had been starved. She is still insane. It appeared to the doctor that her life was in danger.

In cross-examination Dr. Carbery said that the burns must have taken place about 2 weeks before, and in answer to the Court he said that the burns were not superficial. They were severe burns. It looked (he said) as if the woman did not allow the burns to heal but kept irritating them as a lunatic would probably do. The woman would probably have died of exhaustion and shock if she had not been then attended to.

Two men were tried for causing these injuries which in the indictment were alleged to be grievous hurts. One of the accused is the husband of the woman.

He stated in the course of his voluntary statement that he lives in Moor Street, and I take it as admitted that at the time of Dr. Carbery's visit the woman was in her husband's, the first accuseds' house and under his care.

The woman is insane; she could not be examined as a witness. The first accused explained how his wife received the injuries, "I was present when the 2nd

accused fired my wife." He said to the magistrate, "I did not burn Jan Bee. The marks were caused by the chain by which she was tied by me because she was violent. She is mad. The chains have been on her about a month ago and were kept on continuously ever since as she used to beat people."

I take this was an admission that he saw the burns inflicted, and did not interfere. The second accused, said before the magistrate "I burned the woman on the head only."

Carim Kahn a neighbour of the first accused said he saw the second accused coming with the first accused one evening about 6 o'clock to the house in which the insane woman was living, that the second accused had two canes with black burnt marks on them; that about 11 or 12 o'clock at night there was a great outcry; he heard somebody calling out in pain, "Don't beat me, dont't beat me, don't burn me, release me." He heard these cries till two in the morning; and next morning he saw the lunatic; she had some injuries on her body, and the owner of the house asked the first accused to take the woman away which he did.

The owner of the house corroborates this evidence. He says that it took place a little less than three months before the day he gave evidence, that would be about the middle of September, the doctor says the burns were about two weeks old on 13th September. There is no doubt that some of the injuries were inflicted on the night spoken to by these two witnesses.

My verdict on the evidence is that it is proved that the injuries were caused by both the accused. If the burning was done by the hand of the second (and he admits the burn on the head to be his handiwork) the 1st accused stood by at the "firing" as he calls it and as an abettor present when the act abetted was done is punishable as a principal.

I do not understand that the learned district judge has any doubt that these accused caused the injuries. He held that the treatment adopted by the accused had no stain of criminality in it (I quote his own words) what they are proved to have done they did on good faith honestly believing that it would result in the cure of the patient. The learned judge acquitted the accused. Hence this appeal by the Attorney-General. Both of the accused are said to prac-

tise medicine. The first accused said of himself "I am also a doctor" but I find no corroboration of that, except in the statement of the 2nd accused before the magistrate, when he said "I burned the woman on the head only according to the instructions of the 1st accused as he is a doctor." The second accused is said by one of the witnesses for the prosecution to be a mowlana "a sacred man among us, he practices medicine and is of a higher order than a priest."

Of himself the 2nd accused said:

"I am a man of the White Mountain near Mecca. I am a mowlana and practise medicine and surgery according to the Arabic system and studied the Arabic system for 4 or 5 years. I have cured many people. I treated the 1st accused's wife. She was suffering from insanity. I treated her to the best of my ability, according to the method prescribed by our medical books. The treatment that I adopted in this case has been successful in previous cases, ... If the police had not taken the woman away I would have been able to cure her."

It thus appears that although the accused now say they acted in good faith, it is plain that that was not the first defence. The accused at present denies that there had been any burning, the second accused said he had acted.....
.....
..... in good faith believing that the great pain and hurt would be only temporary and that these would cause the recovery of the woman's mental health. Our law says that nothing is done or believed in good faith which is done or believed without due care or attention, and again that a person has reason to believe a thing if he has sufficient cause to believe that thing but not otherwise. *Prima facie* the accused are guilty.....
.....
..... *that they had any reason to believe that the pain and hurt they caused would do this woman good. If there be such teaching in the Arabic books referred to by the 2nd accused, nothing would have been easier than to have produced the books, or to have called some practitioner to have proved that burning at any time or in any part of the world was ever recommended as a cure for insanity.

The bare statements of the accused that they acted in accordance with Arabic practice and teaching is

* Portions of the judgment undecipherable. *Editor*

most insufficient as a defence for hurting a lunatic who could neither consent nor intelligibly protest and complain. These two men are proved to have caused these painful and exhausting burns. The life of the woman was in danger. I set aside the acquittal and in lieu I find the accused both guility on the first count of the indictment of causing hurt to Jamal by means of fire and thereby committing an offence punishable under section 315 of the Penal Code, and I sentence each to undergo rigorous imprisonment for one year.

P. C. Matara, 28343

Cornelis v. *Dines Hamy et al.*

Lawrie, J. March, 4, 1898.

Resistance—Public servant—Vel vidhan delegated by Aratchie—Seizure of unlicensed gun.

A vel vidhan, not being a public officer, may not have delegated to him the powers of a police officer, and a seizure of unlicensed guns by such vel vidhan, without warrant being unlawful was properly resisted.

The facts appear in the judgment.

Bawa for accused-appellants.

Judgment

Lawrie, J. The accused are entitled to an acquittal on a matter of law, viz, that it was not proved that Hattotunsegamage Cornelis vel vidhan of Akuressa was a public servant acting at the time in the execution of his duty. Cornelis says of himself that he is not a police officer, that he is a vel vedhan, but that the vidhan aratchi and police officer have instructed him to act for them in cases where they are not present. He said he had no warrant to seize the gun.

The vidhan aratchi and the police officer have no power to devolve their duties or authority on another, and I fully appreciate the difficulty felt and experienced by the magistrate, whether the ordinance empowers the seizure of unlicensed guns

I cannot say that I think the accused were beyond their rights in trying to regain possession of a gun taken from them without authority.

D. C. Cr. Badulla, 4254

R. v. *Lassama.*

Lawrie, J., Sept. 16, 1896

Deadly weapon—Club—No evidence of character of club —Stick three fingers thick with knots.

The character of a weapon must be found, and upon the evidence in the case.

Necessary facts appear in the judgment.

No appearance for appellant.

Ramanathan, S. G. for respondent.

Judgment

Lawrie, J., Of the three accused who were convicted of the offence under § 315, only the 1st accused Lassama has appealed. The sentence passed on him was a fine of Rs. 20 or in default a month's imprisonment. Against this sentence no appeal lay except on a matter of law. The matter of law suggested in the petition of appeal is that it had not been proved that the club used by him was an instrument which used as a weapon of offence was likely to cause death. The learned district judge did not expressly find that the stick was likely to cause death. The evidence is that the stick was about three fingers thick and that there were knots on it.

I think it better to vary the conviction by finding the 1st accused guilty of having voluntarily caused hurt, an offence punishable under § 314. I do not vary the sentence which was deserved.

P. C. Puttalam, 4146

Naragattegama Udaiyar v. *Madar et al.*

Lawrie, J., Dec. 7, 1896.

Penal Code. § 183—Obstruction—Complainant merely questioned—Proof of being public servant—Public function—Detaining buffalo for inquiry—Person acting under lawful orders.

1. Where the complainant sought to detain a buffalo for inquiry, and the accused asked him, "What are you going to do with the buffalo?" *held*, there was no obstruction.

2. Where the complainant, udaiyar of a place, sought to detain a buffalo as the subject of an inquiry into its theft, *held*, that the prosecution was bound to prove that the udayar was a public servant, and that detention of the animal was part of his public function.

3. A person said to be acting under lawful orders must be proved to be so.

The facts appear in the judgment.

Dornhorst for accused-appellants.

Felix Dias, C. C. for respondent.

Judgment

Lawrie, J. The 1st accused has been convicted of voluntarily obstructing a public servant in the discharge of his public functions as udaiyar in detaining for inquiry a buffalo he had reason to believe to be stolen property.

I venture to hold that not one of the necessary facts to support the conviction has been proved. I find no proof of obstruction, all that the 1st accused did to the udaiyar was to come up very close to him and to call out loud, "What are you going to do with the buffalo?" Then the udaiyar thinking he was going to oppose the detention of the buffalo ran towards the police station 30 or 40 fathoms off and brought 2 or 3 constables. This was not an obstruction of the udaiyar.

Then was the udaiyar a public servant? He may be so, but no evidence of this was led. I do not know what office an udaiyar holds in Puttalam. He is not a superintendent. Thirdly, it was not proved that it was part of the public function of the udaiyar

to detain buffaloes for inquiry. And lastly there was no reason to believe that the buffalo was stolen. In fact the carter had a permit for it. The conviction of the 1st accused seems to be unwarranted.

The conviction of the 2nd accused rests on even still less evidence. He is said to have obstructed Isak Fernando, a person acting under the orders of B. P. Nawagattegame, a public servant, in the discharge of his public functions in detaining for inquiry a buffalo he had reason to believe to be stolen property. But the first sentence of Isak Fernando's evidence is "I am not employed under complainant" and so far as appears Isak was accidentally present and had no public functions to discharge. The conviction and sentence are set aside and the accused are acquitted.

P. C. Gampola 21002

Beddawala v. *Sitambaram Chetty*

Bonser, C. J., Dec. 7 1896.

Penal Code, § 183—Obstruction—Fiscal's officer in charge of sold estate—Accused taking produce—Title.

1. Taking some of the produce of a land sold in execution and in charge of the fiscal is not obstruction.

2. Such taking by a person without title is theft.

3. On a charge of obstruction the question of title is immaterial.

The judgment gives necessary facts.

Wendt for accused-appellants.

Bawa for respondent.

Judgment

Bonser C. J. I think the conviction in this case must be quashed.

It appears that a fiscal's officer was in possession of an estate which had been sold in execution. It is alleged that the defendant went and took some of the produce of that estate. The magistrate finds

this to amount to "an obstruction to the authority of the fiscal" whatever that may mean. I do not know of any such offence in the Penal Code. What the magistrate apparently meant was that it was obstruction of the fiscal's servant in the discharge of his public functions. I do not think it was an obstruction. If the defendant took the produce without any title to it, then he stole it and would be guilty of theft. I cannot on the evidence convict the appellant of theft, for he was not charged with it. It may be that he will be able to shew that he had some title to the land or its produce. On a charge of obstruction, the question of title would be immaterial. Therefore I quash the conviction; but if the complainant thinks that he can bring another charge against the accused he is at liberty to do so. All I decide is that the facts do not prove an offence, under section 183 of the Penal Code.

D. C. Crim. Galle 12295

R. v. *Kaiya et al*

Lawrie, J., Dec. 7, 1896.

Right of private defence—Possession—Reaping crops—Civil wrong—Injuries by attacking party—Crown witness not called—District Court evidence.

1. An attacking party has no right of private defence against the defending party.

2. The right of private defence of property invaded arises only when the invasion of property amounts to an offence, not to a civil wrong.

3. When the prosecution does not call at the trial a witness examined at the inquiry, the accused might apply to have him examined or call him himself.

4. The Appeal Court looks only at the evidence had at the trial and not at the inquiry.

The judgment gives necessary facts.

Rudra for accused-appellants.

Felix Dias, C. C. (with *Dornhorst*) for respondent.

Judgment

Lawrie J. The accused did not inflict these injuries in the exercise of the right of private defence.

In the first place, they were the attacking party, not the defending. In the next place the acts of the complainants did not amount to, nor involve, a crime or offence on their part. It is possible that in reaping the crop the complainants were doing a civil wrong for which they were liable in damages, but so far as the evidence shews they were not committing or attempting to commit an offence, and it is only when the invasion of property amounts to an offence that the possessor is justified in defending it to the hurt of the invaders.

The learned counsel for the accused desired me to read the deposition of a witness examined at the preliminary enquiry who had neither been called as a witness in the district court nor whose deposition had been read there.

This I could not do. As a Court of Appeal I can take into consideration only the evidence which was before the district judge, whose conviction and sentence are under appeal.

If there was any irregularity in the conduct of the case in the district court, if evidence which should have been brought before the district judge was not adduced, the accused might at the trial have moved that it be adduced by the prosecution; he might have called the witness whom the Crown did not choose to call. An irregularity in the conduct of the trial in the district court would have been a good reason for quashing the proceedings and for ordering a new trial. That was not asked for. I was asked in appeal to acquit the accused on evidence which had not been laid before the district court and that I refuse to do.

P. C. Kegalle 16899

Menikrala v. *KiriBanda.*

Withers, J.. Aug. 11, 1897.

Penal Code § 183—Obstruction of gan aratchie—Search warrant — Warrant in Sinhalese — Warrant ex facie defective—Forms viii, ix of Cr. Pro. Code of 1883—[No. corresponding forms in code of 1898]—Cr.

Proc. Code of 1883, §§ 71, 73 [Code of 1898, §§ 68, 70]—Want of proper recitals in warrant—1 N. L. R. 248, 4 S. C. C. 118.

1. Objection to the form of a warrant is not a mere technicality.

2. When a warrant is *ex facie* defective the public servant executing it cannot be said to be in the discharge of a public function.

3. Reasonable force may be used to resist execution of a warrant *ex facie* defective.

The facts appear in the judgment.

De Vos for accused-appellants.

Judgment

Withers J. In this case four people have been convicted of an offence under § 183 of the Penal Code in that on the 5th May 1897 at Tallawalla they voluntarily obstructed Menikrala gan aratchie of Makura, a public servant in the discharge of a public function, namely the execution of a warrant signed by the police magistrate of Kegalle to search the house and premises of Punchi Hamy, one of the four appellants, for a buffalo bearing certain brand marks. The accused have been sentenced to pay a fine of 25 rupees each.

Unless there is some clear point of law, no appeal lies from this conviction and sentence.

Mr. De Vos on behalf of the appellants has submitted two points of law. One is that the warrant committed to the gan aratchi for execution is in the Sinhalese language and therefore of no validity.

In the case of *Cornelis* vs. *Ubuwitike* reported in 1 N. L.R. p. 248, the Chief Justice noticed in the paper book before him in appeal, a document purporting to be a warrant of arrest and apparently expressed in the Sinhalese language. On that discovery he made the following observation:-

"I do not understand under what authority process is issued in a foreign language, and the Solicitor-General who was in court at the argument professed himself unable to explain how this process came to be issued. The language of our courts is the English language, and it appears to me that serious doubts might arise as to the legality of an arrest upon a warrant in such form."

I do not propose to adjudicate on this point as Mr. De Vos's other objection seems to be fatal

I am content to say that I venture to agree with what fell from the Chief Justice.

The other point of law is that the warrant of search is on the face of it so defective that a public officer intending to execute it could not be said to be discharging a public function. This document appears to be drafted from form viii in the schedule to the Criminal Procedure Code. Form viii is described as a "warrant to search after information of a particular offence," and refers to § 71 of the same Code.

I fail to see how this section applies to the circumstances of the present case.

The real object of this warrant was to authorise the search and production of a stolen buffalo supposed to be concealed in the premises of the accused Punchi Hamy. A warrant of that kind is provided for by § 73 of the Criminal Procedure Code. Form ix in the schedule is the form appropriate to that section. The authority to search in that form is preceded by a recital to the effect that some information of the offence has been laid before the magistrate and that on enquiry he is led to believe that the subject-matter of that offence, be it a live or dead thing, is concealed somewhere, and ought, if possible, to be produced.

Now, the search warrant before me contains no such recital. This is the language of this warrant as translated:

"Whereas complaint has been made before me that so and so committed the offence of keeping in his premises a buffalo, bearing brand marks, belonging to so and so and whereas the production of the said buffalo is essential to the enquiry *about to be made* into the said complaint, this is to authorize and require you to make search for the said buffalo, bearning brand marks—, in the house of the first mentioned person."

What is described as an offence in this warrant is no offence at all, and it would appear on the face of the warrant as if it was issued *before* instead of *after* due enquiry. An analogous case was decided in this court by Cayley C. J., and Dias J., in *Manuel Fernando and another* vs. *John William Perera and others*, reported in 4 S. C. C. 118.

There it was held that a similarly defective search warrant was not sufficient to authorise a peace officer to enter the house and search under it, and

it was further held that reasonable force to prevent the entering of such officer was justifiable. The magistrate does touch this point at the close of his judgment, but he considered the objection a purely technical one and I cannot agree with him.

As the magistrate did not charge the accused or any of them with assaulting, I cannot convict them of the assault though the magistrate finds as a fact that after the aratchi had retired from the house he was followed and assaulted by one or more of the accused.

If that actually occurred, it was an offence and his assailants were liable to be punished for it, but as to the offence under § 183 I feel bound by the authority in the S. C. C. of Chief Justice Cayley's judgment with whom I need hardly say I agree. I therefore set aside the conviction and acquit the accused.

D. C. Cr. Colombo 1267

R. v. *Newman*

Lawrie, J., July 30, 1896.

Penal Code, § § 22,23—*Wrongful gain—Wrongful loss—Dishonestly—Fraudulently — Forgery — "Dishonestly using a forged letter"—Lie to get what is due—Moral offence.*

1. The definition of "dishonestly" in § 22 of the Penal Code is a definition of fraud.

2. An act which is not fraudulent is not dishonest.

3. Fraud is of the very essence of forgery.

4. The using of a forged letter by accused to obtain what was due to him, or shortly would be due to him, if not fraudulently done, is not an offence, though morally reprehensible,

The judgment sets out necessary facts.

Bawa for accused-appellant.

Templer S. G. for respondent.

Judgment

Lawrie, J. The indictment charges the accused first with having forged a letter, and secondly with having

dishonestly and fraudulently used as genuine the letter knowing the same to be a forged document.

The learned district judge acquitted the accused of the offence first charged.

Further the district judge found that the accused did not use the letter fraudulently.

Against these findings in favour of the accused the Attorney-General has not appealed.

The district judge has, however, found the accused guilty of dishonestly using the forged letter.

I am against the district judge both on the law and on the facts.

First on the law—if the act was not fraudulent it was not dishonest.

"Dishonestly" means with the intention of causing wrongful gain to one person or wrongful loss to another person. The definition of "dishonestly" in § 22 is a definition of fraud. There is to my mind no difference between the two.

If the district judge held that there was no intention to defraud, he could not on the same evidence hold that there was an intent to cause wrongful loss to another person.

In my opinion fraud is of the very essence of forgery and of using a forged document.

If fraud be negatived, the crime has not been committed. Further I am against the district judge on the facts. The accused asked only for an advance of what either was then due to him or what would in the course of the next fortnight be due to him.

Wrongful gain is to gain by unlawful means property to which the person gaining is not legally entitled.

Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.

There is here no proof of loss. The advance was in April. The Company could have repaid itself the advance by deduction of salary for April and May.

Then as to wrongful gain, Mr. Booth says there was Rs. 25 due to the accused at the date when the advance was made, that Rs. 25 was over and above money due to accused for overtime. I am of the opinion that the use of the forged letter was neither fraudulent nor

dishonest in the sense of the Penal Code and that the accused ought not to have been prosecuted and is entitled to an acquittal.

The accused undoubtedly committed a grave moral offence. He told an unnecessary lie and deceived his employer. For lying and deception he has been I think sufficiently punished by the disgrace of these proceedings.

He has been for 10 years in the service of the Wharf and Wharehouse Co., at one time he was with Messrs Bois Brothers on a considerable salary and Mr. Booth says he has a very good character for honesty. He was acquitted by the district court of the charge of having forged and of having used a forged letter fraudulently.

He is acquitted by this Court of the charge of having used the forged letter dishonestly i. e. for his own wrongful gain or for the Company's wrongful loss.

P. C. Colombo 42852.

Usoof v. *Bharat Singh.*

Lawrie, J., Aug. 14, 1896.

Penal Code, § § 143, 92—Private defence—Soldiers rescuing a comrade—Marching out of barracks without orders to do so—Order of discharge—Revision—Power of Attorney-General.

1. When two soldiers had got into some scrape in the bazaar, their comrades had no right to march to their rescue without superior orders, and acts done by them are not acts of private defence.

2. Though the Supreme Court can exercise revisional powers over an order of discharge, yet it will not interfere as the Attorney-General can direct fresh proceedings.

The facts may be gathered from the judgment.

Dias, C. C. for Attorney-General-appellant.

Dornhorst for accused-respondents.

Judgment

Lawrie, J. The police magistrate had before him a complaint accusing 15 Sikh gunners of rioting and of causing hurt.

After a lengthened investigation the magistrate discharged all the accused of the charge of rioting.

Against that order of discharge there is no appeal. The discharge is not equivalent to an acquittal, it is open to the Attorney-General to order the men to be committed for trial for rioting.

When the magistrate discharged the men, he did not give his reasons. These are embodied in the judgment now before me in appeal and I have read them with disapproval.

The magistrate says that there is no doubt that the gunners in number of five and more came forth from their barracks with a common object and that common object was an attack on the bazaar people to rescue their comrades. In accomplishing that object, violence was used and three Malays were injured.

The magistrate holds that the assembly of the gunners was not unlawful but was a lawful exercise of the right of private defence of two men of the same regiment who were quarrelling with Malays in the neighbourhood of the Sikh Barracks. Now though it is proved that two gunners were injured, it is plain that they were in no real danger, but whatever scrape the two men had got into, their comrades were not justified in marching out of barracks, without orders from their officers, to use force, for any purpose whatever. The plea that these private soldiers had a right to do this, is so dangerous and so wrong that it is necessary for the Supreme Court emphatically to condemn it.

After discharging the accused for riot, the magistrate framed charges against 6 of the gunners for causing grievous and ordinary hurt and they consented to be tried summarily. After that they were acquitted. The Attorney-General appealed. I understood from Crown Counsel that the object of this appeal was not to have the 6 accused convicted of having caused grievous and ordinary hurt, but to have the acquittal cleared out of the way so that the original charge of riot with force or violence could be tried as a whole. I am of the opinion that there was sufficient evidence to warrant a committal for trial on the combined charge, and it may be that in revision I could set aside the order of discharge and

in appeal the acquittal, and so leave the Attorney-General unfettered. This court has frequently refused to interfere with orders of discharge, on the plain ground that the Code vests control over these in the Attorney-General. I am bound by previous decisions which have excellent reasons to support them. Therefore I cannot do more than deal with the appeal from the acquittal of 6 of these soldiers from the charges of having caused grievous hurt to Ossen and ordinary hurt to Carim and to Owan.

As might be expected the evidence of what any individual did in the middle of a large and excited crowd is very complicated.

The witnesses on both sides speak with bias and to say the least with inaccuracy; indeed they cannot be believed. On such evidence the magistrate did right to acquit. That Carim and Owan were injured, that Ossen was badly hurt, (his arm and leg were broken) is well proved: that these hurts were caused by blows and cuts given by the Sikh soldiers is also well proved, but whether the 6 men who were tried for hurt, were the men who dealt these blows, is not well proved, and they are entitled to the acquittal which I am now considering. The appeal is dismissed.

P. C. Colombo, 41418

Silva v. *Ibrahim Lebbe.*

Lawrie, J. July 10, 1896.

Penal Code § 92—Private defence – Plea not set up at first—Person under lawful orders—Superior present—Offence—Municipal demolition of a house—Good faith.

Where a subordinate municipal officer was present supervising the demolition of a house under orders of his superiors, there and then present, and the owner of the house stabbed the subordinate officer, *Held*, that the officers had acted in good faith and were protected by § 92 (2) of the Penal Code.

The facts may be gathered from the judgment.

Dornhorst with *Van Longenberg* for Attorney-General-appellant.

Judgment

Lawrie, J., The accused is proved to have stabbed Silva on the head with a knife, dividing the outer ear. The wound penetrated into the hollow between the

temporal bone and the angle of the lower jaw close to the carotid artery and the jugular vein, a wound which narrowly missed being fatal.

The police magistrate in an elaborate judgment, in which he has discussed and disapproved of the conduct of several persons, who were not on their trial, has found that this serious attack and injury were made and given in the exercise of the accused's right of private defence.

The accused himself, in his statement at the trial, does not say anything of this right of private defence. It is a plea invented by his counsel and sustained by the court.

In my opinion the plea of justification has not been supported by the facts and that the acquittal (against which an appeal has been presented by the Attorney-General) must be set aside and accused convicted and punished. I hold first that even if the circumstances gave rise to the exercise of private defence, the accused inflicted more harm than it was necessary to inflict for the purpose of defence. The act of the accused, in using a knife, went far beyond what was necessary or excusable. *Secondly*, the man whom the accused stabbed was a subordinate officer who neither gave the orders, nor took an active part in carrying out the acts of demolition of which the accused complained.

Thirdly, the act of which the accused complained for which Silva may be held responsible, though in a subordinate position, was not a criminal offence. In my opinion these municipal officers were not guilty either of mischief or of using criminal force. The act comes under the second explanation of the 92nd section of the Penal Code:

"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 direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law."

The public servant who gave the direction to demolish this building was either Mr. Labrooy or Mr. Casie Chetty; both were present and it was under their orders that Silva and the others went to the place and that the coolies went on the roof to take off the tiles.

I hold that these public officers acted in good faith, under direction given to them by their superiors.

The conclusion to which I came after repeated consideration is that the acquittal must be set aside. The question of the amount of punishment is difficult.

I cannot deal with the accused as a first offender. He admits he has been at least twice in jail. But there was undoubtedly reason for the accused being indignant and excited. He is poor and of weak sight. I must deal gently with him.

I set aside the acquittal and find the accused guilty of the offence of having on the 7th of March 1896 at Avondale Road, Colombo, voluntarily caused hurt to Davit Silva by means of an instrument for cutting, to wit, a knife, which used as a weapon of offence is likely to cause death under section 315 of the Ceylon Penal Code.

I sentence him to one month's simple imprisonment.

P. C. Ratnapura 13012.

Van Haught v. *Seraphim et al*

Lawrie, A. C. J., July 14, 1897.

Public servant—Obstruction—Penal Code § 323—Local Board Constable—Penal Code § 19 (9)—Ord. No. 27 of 1890—Ord. No. 7 of 1886, § 80.

A Local Board constable is a public servant within the meaning of Penal Code § 19, (9).

The facts appear in the judgment.

Bawa for 4th accused-appellant.

Judgment

Lawrie, A. C. J., Only the 4th accused appeals. He was convicted of voluntarily causing hurt to deter a public servant from his discharging his duty under § 323 and was sentenced to one month's rigorous imprisonment.

There is no appeal except on a point of law.

One point argued was that local board constables are not public servants who could arrest without a warrant.

By the Ordinance No. 27 of 1890 power is given to local boards to apply funds for the cost of watchmen employed by the board in such town in lieu of the police.

The 80th section of the Ordinance 7 of 1876 provided for the punishment of those who obstructed any person in the performance of any duty or the exercise of any authority vested in him by the Local Board ordinance. That 80th section was repealed by 3 of 1883, the Criminal Procedure Code. I gather the Legislature considered that the Penal and Criminal Procedure Codes sufficiently covered the the case of those who obstructed local board officers and the 9th sub-section of section 19 of the Penal Code defining public servants (in my opinion) includes constables appointed by a local board in lieu of the police to keep order within the town. Part of their duty must be to arrest offenders and to take them to the police station.

Then it was argued that there was no evidence against the 4th accused, that he was an innocent onlooker.

Pawlis Perera one of the local board constables describing how he held the first accused when attempts were made to rescue him said, "Balahami 4th accused then seized my hand saying let go the man. I gave him a kick. He went aside."

The other constable said he was struck by Balahami 4th accused and that the 1st accused escaped.

This evidence is certainly not strong but there is not such a total want of evidence as makes this an illegal conviction. The appeal fails on the points of law and it is dismissed.

P. C. Rakwana 12169

Packeer Ally v. *Annamalai et al.*

Lawrie, J., Aug. 17, 1896.

Private defence—Expulsion of kangany by force.—Police assisting superintendent of estate—Coolies protesting—No force, no harm—Justification.

Where an estate superintendent, assisted by an armed police officer and a neighbour, sought to expel by force a kangany from the estate. and the coolies shouted, abused, and waved sticks but attacked no one, *Held*—that the coolies were on the defensive and had acted with moderation.

The facts appear in the judgment.

Dornhorst for accused-appellants.

Seneviratne for respondent.

Judgment

Lawrie, J., I understand the facts to be that the superintendent of an estate desired to remove a kangany by force from the lines and to expel him from the estate. For that purpose he got the assistance of a sergeant of police from Rakwana and of a neighbour, an Englishman. The complainant himself carried a pistol in his hand. They went to the lines to remove the kangany. As was anticipated this removal of a kangany by force excited great feeling in the coolies, expecially in those of his own gang. There was loud shouting and talking and using bad words. Some coolies had sticks which were waved and shaken, I find no other evidence of improper conduct on the part of any of the accused. They did not use the sticks, they did not attack any one. They were on the defensive, they did no harm. It was a protest against the removal of the kangany who was handcuffed and taken away by the police.

The two superintendents apprehended danger. They expected it, that it is why they took a pistol and called in the police but they courted the danger. The dangerous coolies did not go to them, they went to meet the coolies.

In my opinion the coolies acted with moderation under trying circumstances and I set aside the conviction and acquit.

P. C. Kalutara, 408,

Asst. Govt. Agent, Kalutara v. *Lebbe Marikar.*

Lawrie J., July 10, 1896.

Penal Code §§ 175, 180—False information—Legally bound—Village statistics for Blue Book—Intention—Police Vidhan.

1. Where the Police Vidhan of a village is not proved legally bound to furnish village statistics for use in a Blue Book, his furnishing of false statistics is not an offence under Penal Code § 175.

2. Though the statistics may be false in fact, their furnishing not being with intent to use a public servant's lawful power against any one, there is no offence under Penal Code § 180.

The facts appear in the judgment

Bawa for accused-appellant

Judgment

Lawrie, J.,—This is an appeal against a conviction under section 157 of the Penal Code and a sentence of Rs. 20.

Leave to appeal was given. The Asst. Govt. Agent is the complainant.

On the evidence before me, I hold that it has not been proved that the accused who is the police vidane of Kariyawork was legally bound to furnish information to the vidhane aratchy of Alutgama, regarding the number of inhabitants of Sinhalese, Tamil, and Moormen and of the number who were cultivators, carpenters &c. and as to the number of cattle, goats &c in Kariyawaka in the year 1895. The magistrate has not recorded evidence as to the duties of a police vidane but enough has been elicited to show that the accused was not competent, and could not reasonably be expected, to give the information which was required, it is said, for annual statistics to be printed in a Blue Book.

The accused gave information which he knew to be false when he wrote none opposite each query. He gave false information because he knew that there were Moormen in the village, he himself was one, and that there were no cattle in the village for he himself had some, but as the information was not given with intention to cause a public servant to use his lawful power to the injury of another person it is not punishable under § 180. The police magistrate characterised the accused's act as impertinent and he has been punished by dismissal from office. I acquit him of an offence punishable under § 175.

P. C. Tangalle 10857

Punchiappu v. *Mohideen et al*

Withers. J., July 7, 1897

Penal Code, § 90—Private defence—Criminal trespass—Courting attack—Land in possession of complainant—Accused trespassing—Right against what is not an offence.

1. The right of private defence is exerciseable only against what is itself an offence.

2. Where the accused with armed men entered on land in complainant's possession and prepared to do complainant bodily injury and were severely beaten back, and one of them then used a knife against the party in possession, *Held*—that the accused were trespassers and had no right of private defence against their lawful ejectment by the party in possession.

The facts may be gathered from the judgment.

Felix Dias, C. C. for Attorney-General-appellant.

Judgment

Withers, J.,—This is an appeal by the Attorney-General from an order of acquittal. The accused was charged with cutting and wounding the prosecutor and his mother and so committing an offence under § 315 of the Code. Evidence was called for the prosecution to the effect that the accused came on the prosecutor's people armed with weapons of violence and prepared to do them bodily injury. This conduct on the part of the accused was, it seems, owing to fault being found with Moorish boys for picking nuts from the garden which prosecutor claims to be in charge of.

The magistrate finds that the 2nd and 3rd accused did go into the prosecutor's garden and did wound the prosecutor and his mother but that they met with more than they bargained for, and received from the occupants of the garden more severe injuries than were inflicted on the prosecutor's party. The magistrate is of opinion that what the accused did was justifiable on the principle of self-defence and he relies on the 90th section of the Code which enacts thus:

"Every person has a right, subject to the restrictions contained in section 92 to defend his own body, and the body of any other person against any offence affecting the human body."

It is only when an act against which one defends himself amounts to an offence that an assault on the offender's person can be justified, but, according to the prosecution, the prosecutor's party were committing no offence at all in attacking the accused. The accused came on the land in the prosecutor's occupation with a show of force and thereby committed criminal trespass, their object being to intimidate or to injure the complainants. Now the complainants had a perfect right to drive these people out of the land and defend themselves from the personal injuries they were threatened with. I cannot provoke a person to assault me and then knock him down and say "I did it in self-defence."

This is really what happened here if the case for the prosecution is true.

I must set aside the order of acquittal and direct the magistrate to call upon the accused to answer to the charge of cutting and wounding the prosecutor and his mother under § 315 of the Penal Code.

P. C. Chilaw 12307

Romel v. *Segadu and wife.*

Lawrie, A. C. J. 4th October 1897.

Wife acting under coercion—Penal Code § 183.

A wife acting in the presence of her husband and on his instigation is not as a general rule liable to punishment.

Chitty for accused-appellants.

VanLangenberg for respondent.

Judgment

Lawrie, A. C. J. As a general rule it is inexpedient to punish a woman for acts committed by her in presence of and on the instigation of her husband. It is the husband who deserves punishment, not the wife who only obeys his orders. I think it right to set aside the conviction of the 2nd accused under section 183. The obstruction complained of was by the husband.

With regard to the charge of causing hurt to Romel with mamotty, under the circumstances I think that lashes should not be imposed.

I set aside that part of the sentence.

The other conviction and sentence are affirmed.

P. C. Kandy 8657

Justina Hamy v. *Bastian et al.*

Browne J. June 13th, 1898.

Penal Code §§ 3, 87—Wife acting under compulsion—English Law—Description of woman in indictment—Breach of trust—Evidence of fraudulent intent.

1. The Penal Code does not recognise a wife's plea of coercion by her husband.

2. The English practice of describing in the indictment

a woman as spinster or married is not applicable to Ceylon.

Wendt for accused-appellants.

Judgment

Browne, J. I agree with the magistrate that the defence that the appellant's house never had been broken into and the property entrusted to them stolen, deserves to be discredited, when apparently the alleged loss of property was of the curtains in question and species of clothing etc. and there was so much of the property in the house as was produced upon the search warrant issued herein and when there were reasons to believe from the way in which the breach of the wall had been made that it had been caused as well from inside as from outside the house, these indicate to me the fraudulent intent which is necessary to constitute the offence (4904) P. C. Colombo S. C. Min. 8 Sept. 1897). Complainant swears she delivered the curtains and I hold both to be liable. If after repeal of all the previous criminal law by section 3 of the Penal Code a married woman can be held excused from liability for having acted under the coercion of her husband—for that code does not by chapter iv expressly allow that her act under compulsion is not an offence—I consider the burden of proof of such excuse rests on the defence, and that the evidence for the defence which is contradictory as to whether or not she was at home all that night has not discharged the onus. I have a note that the present Chief Justice at criminal sessions in July 1896 indicated that the indictment of a woman should state whether she is a spinster or married. But Mayne (Cr. Law Ed. 1896 §§ 120 and 495-497) asserts as regards the corresponding provisions of the Indian Penal Code that it does not recognise the principle of the English law which excuses a wife on the assumption that she has acted under her husband's coercion.

P. C. Avissawella 629.

Sumarakoddy vs. *Don James.*

Withers, J. September 13th. 1897.

Penal Code § 177—Legally bound to speak the truth —Omission to give information of a murder—Penal Code § 199. [Cr. Proc. Code of 1883, §§ 24, 445]

1. The offence under Penal Code § 177 contemplates a judicial proceeding and a refusal to answer questions in such proceeding.

2. Refusal to answer questions by a person not legally bound to speak the truth is not an offence under Penal Code § 177.

Jayawardene for accused-appellant.

Judgment

Withers, J. This conviction is wrong and must be set aside. The offence contemplated by section 177 of the Penal Code is an offence committed during judicial proceedings, and refers to the case of a person who, having been sworn to speak the truth, in the course of that proceeding, refuses to answer any question touching the subject on which he is sworn to speak the truth, put by a public servant who is holding the enquiry or trial. The accused not having been legally bound to state the truth to the mohandiram or mudaliyar, his refusal is not an offence under this section.

Chief Justice Burnside in the case of *Gabriel Allis Palle* vs. *Arnolis Goonesekara et al* reported in 7 S. C. C. 206 points out that the proper course where an offence against the 176 and 177th sections of the Penal Code is disclosed, is to follow the procedure prescribed by the 445th and 446th sections of the Criminal Procedure Code.

The accused may have committed an offence in not informing the proper authorities of the commission of the murder which he pretends to know all about, an offence such as the 199th section of the Penal Code and section 23 of the Criminal Procedure Code contemplate.

But that is not the charge which has been inquired into, and I do not see how I could convict him

of an offence under § 199 of the Penal Code on the evidence recorded in this case. I set aside the conviction and acquit the accused.

D. C. Galle 12563.

K. v. *Amaris et al.*

Browne J. May 25th 1898.

Penal Code § 32, 33, 144—Common object—Individual liability—Change of purpose—English law—Difference between § 32, and § 33.

The existence of a common intention may help to constitute the offence of rioting; or it may create a liability for a criminal act which was not originally intended.

The facts appear in the judgment.

Rudra for accused-appellants.

Judgment

Browne J.—After a perusal of the evidence in this case I desired to see the report D which had been read in evidence at the trial and I did not receive this till yesterday. Delivering of my judgment has been delayed thereby.

As regards the objection taken that the indictment was defective by reason that the common purpose which the learned district judge found was held by the appellants, should have resulted in either an indictment under section 144 or in one under section 315 and section 32, it does not appear to me to be sustainable. Possibly the appellants might have been indicted under section 144. but that they were is no reason why each should not be separately charged for hurt or an aggravated form thereof. The existence of a common intention may have a double effect. It may, when its purpose is one or other of the six classes, specified in § 138, constitute five or more persons holding it into an unlawful assembly and so help to constitute the offence of rioting. But it may sometimes be doubtful at what moment any such purpose became common to all the five or more persons especially when the gathering may not clearly appear to have been so unlawful at its very incep-

tion or almost immediately thereafter, but may possibly have changed in its purpose and acts from what was not, into what was so unlawful. The other effect of it may be to create a liability for a criminal act which was not that originally purposed. I regard the difference between sections 32 and 33 to be well illustrated respectively by sections 382 and section 144, and that "common intention" in section 32 must be read as if the words "lawful or unlawful" when added thereto as Roscoe has written and illustrated in his remarks on the subject (II ed 169). In the case therefore of the prosecutor being in doubt whether the accuseds had a common unlawful purpose especially at the commencement of the "action" of all and so not charging them for an offence founded on its existence, it is open to the court to hold the accuseds liable for that which is of a lesser degree as the learned district judge has here done.

It was also urged that the evidence against some of the appellants was so scant, if indeed there was aught given, that they too, as well as the 9th and 10th accuseds, should have been acquitted. I have been unable to find there is any such paucity of proof given against any of the appellants, assuming the evidence for the prosecution was credible.

As to this last subject for consideration the case stands thus. The cattle-seizer and those who were in his company were severely beaten on the night in question. It rests with their alleged assailants to prove either that they have been falsely or mistakenly charged, or else that the misconduct of the seizer and his men excused in some degree if not absolutely the attack made upon them. The scene of the row was on the high road either 200 yards south or at one or other of two places both under 300 yards north of the house of the Gintota peace officer, and in the latter instance only one or two hundred yards from the house of Takenis Perera, peace officer, and it was to be expected that these officers would be so quickly on the scene that the truth of one of the two connected charges must absolutely appear in these reports written immediately thereafter and their subsequent evidence. It is in issue chiefly whether the men were beaten at the southern point and dragged nearly 500 yards past the Gintota peace officer's house to a garden or whether they were caught close to the garden if not in it when untying and removing i. e. stealing animals

to falsely seize them for trespass on the roads. That officer within an hour or so wrote two reports to the court which are but a cursory view of the accusation made by each party to whom the reports were severally given and are absolutely indecisive but, in the instance noted by the district judge one of them contradicts the other by stating that the appellants accusation was that a head of cattle was "unlawfully seized as trespassing *on the road*" whereas the other states the accusation was that the seizers did "steal and remove *two* head of cattle tied *in the garden* and caught in the garden while the cattle were being removed." I have noted Andrew charges that he saw the Gintota peace officer at his house as he was being brought near it and desired to complain to him but latter went into his house to avoid him. The officer does not deny this expressly but only impliedly by saying that 7th accused called him. Seventh accused however states he did not even hear of the row as he was ½ a mile away.

I see no reason to conclude that the decision of the judge who had all the witnesses before him was wrong. The more I have studied the case the more reason I see to believe that the obnoxious seizers were waylaid as they have deposed and that all in the village have made common cause to screen the offenders from punishment.

I affirm the conviction and sentence.

P. C. Ratnapura 851

Ekneligoda v. *Kiri Banda*

Withers J., February 10th, 1898.

Penal Code § 180—Lawful power.

The Supreme Court remitted the case to ascertain the lawful powers of the public servant to whom information had been given.

Judgment

Withers, J. This case came up originally in appeal before the Chief Justice. When the record was remit-

ted to the police magistrate for the reasons why he convicted the accused of the charge made against him under section 180 of the Penal Code, it was expected that the magistrate would find whether Mr. Moysey, to whom the false information was made by the accused, was a public servant, who could use the lawful powers of his office, to the injury or annoyance of the Ratemahatmaya, of whom the accused had complained. This is an important point, because if Mr. Moysey cannot use his lawful power as a public servant to the injury or annoyance of the Ratemahatmaya, an offence is not made out, however false the information may be and whether or not, the informant knew or believed it to be false.

Before the magistrate can come to any finding on this point, it would be necessary for him, I take it, to recall Mr. Moysey, and to enquire into the nature of his lawful powers with regard to Ratemahatmayas in his province.

P. C. Badulla, 18377.

Silva v. *Jayasekere et al.*

Lawrie A. C. J., December 2, 1897.

Penal Code § 138 – Gambling by five or more persons – Excessive sentence—Individual liability.

1. It is doubtful if an assembly of five or more persons with the common object of gambling, is an unlawful assembly.

2. To sustain a conviction for gambling, an unlawful act by each individual must be proved.

3. Severe sentences must not be imposed in gaming cases except on those who keep gaming houses.

Dornhorst for accused-appellants.

Judgment

Lawrie, A. C. J. I set aside the conviction of the 1, 2, 3 and 5th accused. The magistrate has not recorded any evidence that they took part in this game. It is not enough that there was a game of "Babe kapanawa" played by candle light on the

night of the pinkama opposite, or near, the 1st accused's booth and that these accuseds were standing near and were looking on. To justify a conviction for unlawful gaming there must (in my opinion) be evidence against each of those convicted that they played a game or betted for a stake. It is not enough that witnesses should say "they all gambled." An unlawful act by each individual must be proved and in the present case there is no evidence that four out of six did any unlawful act.

I will not say that on-lookers at unlawful gaming may not be punished as members of an unlawful assembly. I do not know whether the question has ever been raised. It may be that an assembly in a public place of five or more the common object of which is betting or of playing a game for a stake is an unlawful assembly. If so most of us have hitherto escaped due punishment when we went into the enclosure at a race meeting. But as the accused whom I have acquitted have not been charged under section 138 of the Penal Code I will not decide now whether they are guilty under that section or not.

With regard to the 4th accused he pleaded guilty and the learned magistrate sentenced him to pay a fine of Rs. 100 and to undergo 3 months' rigorous imprisonment. This seems to me a most excessive punishment but, as he pleaded guilty, and there is no appeal before me, I cannot now interfere.

With regard to the 6th accused there is evidence that he played the game, he had the pack of cards and dealt them to another: who that other was is not said. The offence he committed is amply punished by a fine of Rs. 10 which is substituted for the larger fine and for the sentence of imprisonment imposed by the magistrate.

Let me refer the magistrate to the opinion of Bonser C. J. in P. C. Hatton 20051 (17 June 1896.): "It appears to me that one month's rigorous imprisonment for gaming is an excessive punishment. Persons whom the law should deal with severely are persons who keep gaming houses and encourage gaming. People who game are for the most part the victims of gaming house keepers. In my opinion Rs. 5 fine is quite a sufficient punishment."

P. C. Newara Eliya 12263.

Abram v. *Singho Appu.*

Lawrie, C.J., May 20,1898.

Penal Code §§ 68, 157—Previous conviction.

Penal Code § 68 does not apply to an offence under § 157 nor does Ordinance No. 17 of 1894.

Wendt for accused-appellants.

Judgment

Lawrie, J., The second accused Singho Appu was convicted under section 157 of committing an affray and was sentenced to three months' rigorous imprisonment.

It did not occur to the magistrate to read the 157th section of the Penal Code or he would have found that the maximum term of imprisonment is one month.

The 68th section of the Penal Code with regard to previous convictions applies only to convictions for crimes punishable with three years' imprisonment under chapters 16 and 17. Affray is under chapter 8 and is punishable with only one month. The ordinance 17 of 1894 does not apply.

The sentence is commuted to a fine of Rs. 2, the same amount as was imposed on the other accused.

D. C. Chilaw 2527.

R. v. *Peiris.*

Lawrie, C. J., May 11, 1898.

Observations on the hardship of fines.

Judgment

Lawrie, J., The District Judge has tried this case carefully and has given a very good judgment with which I agree.

I set aside the fines of Rs. 100. each. The sentence of imprisonment seems to me enough and the result of imposing heavy fines on ordinary Sinhalese villagers is that when the man is in jail his property is attached and sold under a warrant and he and his family are ruined.

A fine punishes others than the wrong-doer and imprisonment and even whipping (much as I dislike it) seem to me better punishments than fines.

D. C. Chilaw 2452.

R. v. *Moraes.*

Lawrie, A. C. J., October 11, 1894.

Observations on fines.

Judgment

Lawrie, A. C. J. I agree with the learned judge for the reasons which he has given that it is well proved that the appellants caused the grievous hurt, for causing which they were tried.

I affirm the conviction. I do not interfere with the sentence of fines of Rs. 200 each, although I am of opinion that the punishment of fine for causing serious bodily injury is an irrational survival from the time when most punishments took the form of compensation to the injured.

However, our law permits a grievous hurt to be punished by fine, only payable not to the injured but to the revenue, and in this case the learned judge may possibly have been right to impose that kind of a punishment.

P. C. Tangalle 11678.

Jansz v. *Simon et al.*

Lawrie, C. J., May 10, 1898.

Penal Code § 183—Obstruction—No physical force—

Ord. No. 4 of 1866—Repeal — Surveyor authorised by Surveyor-General—Public servant.

1. A surveyor licensed to make Crown surveys is a servant under Penal Code § 19 (10).

2. Ordinance No. 4 of 1866 § 4 has given place to Penal Code § 183.

3. To constitute obstruction it is not necessary that force or hurt should be caused, but it is obstruction if there is not a mere protest but an opposition to be overcome only by force.

Aserappa for accused-appellants.

Judgment

Lawrie, C. J. As the sentences are fines of Rs. 10, and in default of payment, two weeks' imprisonment, no appeal lies except on a matter of law.

It must be taken as proved in fact that the accused did prevent the complainant from making the survey which (but for that obstruction) he would have made.

It is not necessary to constitute obstruction that force be used, still less that hurt be caused. It is sufficient if the persons distinctly refuse to allow the work or duty to be done and intimate that it is not a mere protest but that opposition can be overcome only by force.

That narrows this question to the right of the complainant to make the survey. If he had no authority to make it, the accused were within their rights to refuse to allow him. Who then is the complainant? He holds a special license from the Surveyor-General to make surveys on behalf of the Crown during 1898.

He was a public servant under the 10th sub-section of the 19th section of the Penal Code, being an officer *whose duty* it was "to make a survey on behalf of Government."

The 3rd section of ordinance 4 of 1866 gives power to the Surveyor-General or any person authorized on that behalf in writing by the Surveyor-General, after reasonable notice given to the occupiers, to enter upon any land which it may be necessary for him to inspect and survey.

The 4th section of the ordinance which imposes a penalty for obstructing the Surveyor-General or those authorized by him was repealed by the Criminal Procedure Code, thus bringing the offence under the Penal Code section 183. In this case notice was given. Villagers are not left unprotected, for a severe penalty is imposed by section 5 of ordinance 4 of 1866 on an abuse of power, or use of unnecessary violence or wanton injury or uncalled for or vexatious annoyance by authorized surveyors. I hold that the appeal on the matter of law fails. The conviction and sentence are affirmed.

D. C. Kegalle 836.

R. v. *Daniel*

Lawrie, A. C. J., March 12, 1885.

Revision—After appeal.

Where a matter has been heard and disposed of in appeal it cannot be dealt with in revision.

Kanagaratne for accused-appellant.

Judgment

Lawrie, A. C. J. On the application of Mr. Advocate Kanagaratne I sent for the record in this case for the purpose of satisfying myself as to the legality or propriety of the sentence and as to the regularity of the proceedings.

I find that the conviction and sentence were brought before this court in due course in appeal by the Attorney-General and that the appeal was rejected for reasons given. No more can be done in revision than can be done in appeal.

This court has already given its judgment in appeal. That the appeal was heard and rejected is sufficient to satisfy this court of the legality and propriety of the sentence and the regularity of the proceedings.

The complainant has his remedy in a civil action for damages.

D. C. Cr. Batticaloa 2149

Kandappa v. *Konamalai et al.*

Withers, J., Aug. 26, 1898.

Penal Code § § 156, 157—Affray—Public Place—Open square near Hindu Temple—Public meeting.

For the purposes of Penal Code § § 156, 157, an open space about a Hindu temple is a public place, if the public have free access to it for lawful purposes, e. g., to hold a public meeting.

Wendt for accused-appellants.

VanLangenberg for respondent.

Judgment

Withers, J. In this case six persons have been convicted of and punished for the offence of affray which is committed when two or more persons fight in a public place to the disturbance of the public peace. Of these persons the 1st accused Kandappa Konamalai has been further convicted of the offence of voluntarily causing grievous hurt to one Kandappa by means of a cutting instrument under § 317 of the Penal Code. The circumstances under which the alleged fray took place are briefly these. In a place called Arapathy in the district of Batticaloa is a temple with an open space around it of some extent. The chief headman of that part of the district had convened a public meeting at this spot of all the villagers of Arapathy to ascertain whether the majority were in favour of a rural constable being appointed. According to some of the witnesses for the prosecution, including the headman referred to, all the villagers of the district have free access to the open space about the temple. No one said for what purposes the villagers of the district have access to this compound, so I presume it must be for any lawful purpose. [The bulk of the judgment comments on the facts *re* grievous hurt.]

The sentence of one months' rigorous imprisonment on this and the other accused for affray cannot be disturbed. In fact it is not an appealable sentence. It was urged, however, that the space round the temple was not a public place, but the evidence

clearly shows it is a public place. The villagers of the district have free access to it and on the day in question a public meeting of the villagers was convened on that spot.

The fight greatly disturbed the public peace. Nor can it be said there is no evidence to support the judge's finding that every one of the accused actually took a part in the affray.

D. C. Mullaitivu 13.

District Mudaliar v. *Kulas et al.*

Lawrie, C. J., Sept. 19, 1898.

Penal Code § 144—Riot—Unlawful assembly and hurt —Separate sentences—Force or violence—1 N.L.R. 317.

1. It is doubtful if separate sentences may be given for riot and hurt, or if hurt is necessary to constitute riot.

2. Force and violence may be used to animate as well as inanimate objects.

E. W. Jayawardana for accused-appellant.

Judgment

Lawrie, C. J., The two appellants are the 11th & 19th accused.

They have been convicted, first, of rioting under section 144 and have each been sentenced to three months' rigorous imprisonment and to execute a bond to keep the peace for the next six months, and secondly, for causing hurt under sec. 314, and sentenced to six months' rigorous imprisonment.

My brother Withers said, in D. C. Kandy 823 reported in 1 N. L. R. p. 317, that riot was made up of the offences of unlawful assembly and of voluntarily causing hurt and that it was not legal to punish for hurt in addition to riot.

I am not sure that I agree. The offence of riot is committed when members of an unlawful assembly use force and violence, but mere force and violence is different from, and less than, causing hurt.

Force and violence may be used to inanimate things, as trees may be uprooted, crops damaged, houses broken; or even animate things, cattle, &c., are injured, but it seems to me that the causing of hurt, that is, causing pain, disease or infirmity to human beings, is not a necessary part of riot and that it can be charged and punished separately. I admit that the question is doubtful, because I find that it has been decided in India that cumulative sentences cannot be given for culpable homicide and for being a member of an unlawful assembly by which homicide was committed (Mayne 37), but on the other hand it has been decided that the offence of rioting, armed with deadly weapons, is different from that of stabbing a person on whose premises the riot takes place.

As there is some doubt as to the law and in deference to my brother Withers' opinion, I affirm the conviction and sentence for rioting and I set aside the conviction and sentence for causing hurt.

P. C. Hatton 26696

Nikulashomy v. *Punchiappu et al.*

Lawrie, C. J., Dec. 15, 1898.

Penal Code 183—Obstruction — Writ of possession—Tenant refusing to be ejected—No party to decree.

A person claiming to be the tenant or owner of a house does not act illegally in refusing to be ejected under a writ of possession in a case to which he was no party.

Dornhorst and Pieris for accused-appellants.

Wendt for respondent.

Judgment

Lawrie, C. J., The accused have been convicted of obstructing a public officer in the discharge of his public functions in executing a writ of possession. The defence is that the obstruction was lawful, that the judgment and the writ following on it pronounced and issued in an action to which the first accused was no party and that he was not bound by it.

He produced a pass book in which his name is entered as tenant from March to August, 1898, both

inclusive, but Mr. Evans says that the accused was his tenant only for two months, that the temporary tenancy came to an end some months ago, and that at the date of the judgment and of the obstruction, Appu Singho, the defendant in the action, was tenant.

In the petition of appeal it is said that the import of the magistrate's judgment is that the judgment and writ were against the house. It is said there is a question of law raised. I fail to see what it is. The question to my mind is a question of fact, who was the tenant? If Appu Singho was tenant the accused's obstruction was unlawful. But if Mr. Bowle Evans accepted the first accused Punchi Appu as his tenant and if the accused as such was in occupation with his goods &c., it is impossible to convict him of unlawful obstruction, because he had a right to remain until his tenancy terminated by due notice to quit.

The interference of the second accused was inexcusable. The first accused was quite able to take care of himself. I am embarrassed by the want of the writ. Possibly the magistrate had it before him at the trial but it was not put in evidence.

The parties, however, seem to be agreed that it directed the removal of S. K. Appu Singho from the boutique and that the accused Punchi Appu was not named.

I am unable to concur with the magistrate that the accused acted illegally in refusing to quit and in obstructing the fiscal's officer in his attempt to eject the first accused and to take the goods out of the boutique.

I set aside and acquit.

P. C. Colombo (Itin.) 6124.

Modder v. *Loos.*

Withers, J., Dec. 23, 1897.

Penal Code, § 174—Not giving information—Cr. Pro. Code of 1883, § 23, [Code of 1898, §21)—Attempt to commit suicide—Information reaching from other sources.

1. A person is not bound by law to give information of an *attempt* to commit suicide, and to him § 174 Penal Code is inapplicable.

2. To convict a person under Penal Code § 174 with not giving information under the Cr. Procedure Code of a death by violence, there must be proof of (a) the fact of death, (b) the existence of a police station near, (c) intentional omission.

3. A person is not bound to give information if it has already been given by others.

The facts appear in the judgment.

De Vos for accused-appellant.

Judgment

Withers, J. This judgment cannot in my opinion be supported and it must be set aside. The appellant was charged before the magistrate with an offence under § 175 of the Penal Code.

The complaint was not artistically framed. It is alleged that the accused having been aware of the death by violence of one De Silva failed to give notice to the nearest Police Court of the said death as required by § 23 of the Criminal Procedure Code [of 1883.]

It should have alleged that the accused intentionally (§ 174 of the Penal Code) and without reasonable excuse omitted forthwith to give notice of the death not only to the nearest Police Court but to the headmen of the nearest village or to a police officer or to the officer in charge of the nearest police station of such violent death (§ 23 as above). No evidence was led for the prosecution. When the particulars were stated to him the accused said, "I am guilty," and then proceded to explain why he had not forthwith given information to any of the authorities. He was then sworn and proceeded to give an account of what happened and how, under the influence of fright, as soon as his companion had shot himself, he walked straight into Colombo and then was arrested on some charge in connection with the death of his companion De Silva.

Now, in the whole of his statement there was really nothing to convict him of the offence charged. He did not admit and it was not proved that De Silva was dead when the appu left the rest-

house. So it cannot be said that he was then aware of the fact of the young man's death. De Silva was struggling after the shot and an exclamation of "Oh! my God," when the accused started for Colombo. The magistrate, feeling this difficulty, I imagine, found the accused guilty of intentionally omitting to inform the proper authority of the offence of suicide.

What is the offence of suicide? The abetment is punishable with death (see § 299 of the P. C.) The attempt to commit suicide is an offence under § 302 of the Code. But the offence of attempting to commit suicide is not one of the offences a person is bound to give information of, if he is aware of it, under § 23 of the Cr. Pro. Code. What is the nearest police station to the Veyangoda resthouse? No proof was adduced on this point, *non constat* that the accused who was arrested immediately on his arrival at Colombo would not have given information of what had occurred to the Colombo police court if that is the nearest one.

Again, I am not satisfied, and I can only go upon what the accused said, for there is no other evidence, that he intentionally omitted to give information to the police stations which he passed on the way. He was in a state of great agitation and anxious to get to his house in Colombo as soon as possible.

Besides, if any one else was aware of the death of De Silva by violence and gave information to the proper authority, the accused was not bound to give information as well. (See the decisions of the Calcutta High Court on this point). The object (that Court has observed) of a similar section in the Indian Code is to secure the ends of justice, not to compel a race of a number of people to give information to the police officer.

From the fact of the arrest of the appellant as soon as he reached Colombo it is inferred that the proper authorities had been duly apprised of the death by violence of De Silva. All these grounds were urged by Mr. De Vos for the appellant and they must prevail.

The accused is consequently acquitted and discharged.

D. C. Chilaw 2541

R. v. *Juan Appu.*

Withers, J., Aug. 8, 1898.

Penal Code, § 183—Forcible repelling of aggression —Possession of land—Hut—Police headman—Factions—Reasonable apprehension.

1. When the accused, believing in good faith he had a right to possess a land, was, with others, erecting a hut on it, as an act of possession and enjoyment, resisted a headman and others who were seeking to dispossess the accused, *Held*, the accused was not guilty of an offence under § 183.

2. A headman, siding with a party seeking to dispossess another from a land, and there being no probability of a breach of the peace, is not in the execution of any public function.

The facts appear in the judgment.

Wendt for accused-appellant.

Chietty for respondent.

Judgment

Withers, J. The appeal from the conviction of the first charge under sec. 183 is in my opinion entitled to succeed. There is really no evidence that the complainant was in the execution of any duty imposed on him as a headman when he received the injury to his hand.

The complainant appears to have had some interest in the garden on which there was a dispute at the time when he and other headmen arrived on the scene. There was no breach of the peace being committed on the spot, nor was there any imminent probability of a breach of the peace between what I may call his party and the appellant's

party. The accused's party was at that time in possession of the garden and were in the course of putting up a hut, and there can be little doubt that others besides the appellant had knives on their persons, convenient for use in the garden. The evidence points to the fact that the appellant's party had reason to apprehend that they would be dislodged by force from the land which they honestly believed they had [a right to occupy and enjoy in the manner they were doing. Under this impulse they resisted and drove off the complainant and some of his companions.

While reversing the conviction on the 1st count, I see no reason to disturb the conviction for the offence of wounding the complainant with a knife.

The complainant swears it was the appellant who inflicted the wound, though the appellant contradicts him on the point. I am prepared to support the finding of the district judge. At the same time the wound inflicted was a trifling one and I think the assault was committed under extenuating circumstances, such as the forcible compulsion of a person to surrender his rights to property.

I think a fine will meet the justice of the case, and for the sentence of imprisonment I impose a fine of fifty rupees, in default, one month's rigorous imprisonment. It must not be supposed that I look with any indulgence on the use of the knife, indeed, I heartily sympathise with the efforts of Government to put this form of violence down.

P. C. Anuradhapura 19571

Hurulle v. *Appuwa.*

Withers, J., Jan. 12, 1899.

Penal Code, §§ 175, 180, 190—Duty of service of summons—"False information"—Untrue return to summons.

When the accused, entrusted with the service of summons on certain persons, reported falsely that summons had been served, the attendance of such persons was

secured by warrants, *Held*, that the accused had given false information within the meaning of § 190. P. C.

Judgment

Withers, J. Judgments like this which violate the provisions of sec. 372 of the Criminal Procedure Code are very unfair to persons convicted by the judgment. This judgment contains no points, no reasons and does not specify the offence. The accused has simply been found guilty of a breach of sec. 190 of the Penal Code. Now this section contains two distinct offences, intentionally giving false evidence in any stage of judicial proceedings, fabricating false evidence to be used in any stage of judicial proceedings. No facts are found in support of the magistrate's conviction and I can find nothing in the evidence to support it.

The original complaint to the magistrate was that the accused had made a document containing a false statement with the intention indicated in sec. 189 of the Penal Code. What is proved against the accused is this. The accused is a headman holding the office of Velpediya which is not explained. On 8th March last a certain Aratchy instituted a case before a village tribunal in the Anuradhapura district against five Moormen for some offence or matter which the President was competent to try or inquire into. The President issued summons to compel the appearance of the Moormen. The summons was entrusted to the accused for execution. The date fixed in the summons was the 21st March.

By sec. 44 of the Village Communities Ordinance of 1889 "any summons issued by any President under the provisions of chapter 5 of the ordinance may be directed for service to any person or persons named therein and such person or persons or any police officer may execute the same." Now I take it that the accused who accepted this process for execution was bound truly to state how he had executed it. He informed the village tribunal in writing that he had served the summons so entrusted to him on the accused on the 11th March. This was confessedly not a true statement. An explanation which he gave before the present trial was that he had entrusted the summons to Peyna Marikar, vidahne of the village of Kumbatchi

Kulama, where the five Moormen lived, that he had made the return of service of his own accord for which he said he was guilty. Peyna Markar was called for the prosecution and he deposed that the accused brought this summons and left it with him for service. The witness took the summons and retained it, although, he says, he told this accused that the Moormen summoned were not at that time in the village. In consequence of the accused's report the President of the village tribunal issued a warrant against the Moormen. When the Korala came to execute the warrant, the witness Peyna Marikar took the summons left with him by the accused. His explanation on the present complaint being read to him in this case was this:

I handed over the summons to the V. E. V. of Kumbatchi Kulama as I did not know the men. He told me that he would serve the summons on these men and requested me to make return of service to the Ganasabhawa. I did so and handed him the summons two days previous to the day of trial in the Ganasabhawa of the accused and served it on the Moormen.

Now the facts proved bring this case under § 176 or § 189 of the Penal Code. Section 175 enacts as follows:

Whosoever, being legally bound to furnish any information on any subject to any public servant as such, furnishes as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to Rs. 100 or with both.

The rest of the section is hardly material to this case.

Section 180 enacts as follows:

Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause or knowing it to be likely that he will thereby cause such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which such public servant ought not to do or omit, if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description which may extend to six months or with fine which may extend to Rs. 100 or with both.

The first explanation given by the accused was made on affirmation. He did not call himself as a witness at the present trial. His defence is not that he honestly believed that the vidahn with whom he had left the summons would serve it and that in his report of service he anticipated service. This of course would have been very improper conduct, but it might not have brought him within the Penal Code. Now a man in the accused's position must have known that the President, on finding his summons disobeyed, would be likely to issue a warrant, as happened in this case.

In my opinion the accused has offended against the 180th section of the Penal Code. The judgment must be altered accordingly. The fine imposed, which seems to me rather heavy, I shall not touch, but the sentence of imprisonment in default of payment of the fine must be altered from three months to half that period.

I note that the President of the village tribunal omitted to administer an oath or affirmation to the accused, as to the correctness of his report of service. This I think he should have done before issuing warrants against the accused.

End of Vol. vi.