1905.
February 2.

WIJEYSEKERE *v.* SEMERA LEBBE.

P. C., Panadure, 17,762.

Ordinance No. 34 of 1884—Chairman of Village Committee—His summons and ex facie bad warrant—Failure to record reasons for warrant—Arrest under it and custody—Custody unlawful—Escape therefrom not punishable—Penal Code, ss. 219 and 220.

Where a villager, though served with summons, had failed to attend the Village Tribunal to be tried for breaches of rules under Ordinance No. 34 of 1884, and where, in consequence, a warrant *ex facie* bad was issued by the Chairman, who had also failed to record his reasons therefor; and where under such warrant the villager was arrested and placed in custody, but had escaped therefrom:

Held, that such escape was not an escape from lawful custody, and was therefore not punishable under section 219 of the Penal Code, nor his aiders and abettors under section 220 of the Penal Code.

ONE Medi Lebbe Assan Bawa had a complaint lodged against him for failing to perform labour on a certain road or to commute such labour by money payment. At first an ordinary summons was served on him at the instance of the Chairman of the Village Committee to appear and answer the charge of violating one of the rules of the Village Committee for "1904," which, however, was a clerical error for "1903." The accused made no appearance, and thereupon a warrant was issued under rule 9 of the rules to be observed by Village Committees for breaches of rules under Ordinance No. 34 of 1884. Under this warrant he was arrested and placed in custody, but with the help of a few of his friends he managed to escape from it.

Thereupon he was charged before the Police Court under sections 219 and 220 of the Penal Code, and his aiders and abettors under section 219. They were convicted, and four of them, including the principal, appealed against the conviction.

The case came up for argument before Middleton, J., on the 16th November, 1903, but stood over for information from the Police Magistrate as to the authority under which warrant was issued. It came up again for argument on the 26th January, 1905.

Bawa (with him *E. W. Jayawardene*), for appellant.

Ramanathan, S.-G., for respondent.

[The following cases were cited by counsel:—*Daviot v. Rodrigoo*, 5 *S. C. C. 68; Ismail Waipody v. Pannikipody, 5 S. C. C. 152; Alliar Levvai v. Ismail, 3 N. L. R. 224; Abdul Gafur v. Queen Empress, I. L. R. 23, Cal. 896; In re* Insolvency of *Tillekeratna Tambyah, 30; Queen Empress v. Tulsiram, 1. L. R. 13, Bomb. 168; Wijetunge v. Podi Sinno, 3 Br. 57.*]

Cur adv. vult.

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Three of the four appellants were convicted under section 220 of the Ceylon Penal Code of offering resistance or illegal obstruction (*sic*) to the lawful apprehension of one Medi Lebbe Assan Bawa, the fourth appellant, who was also convicted under section 219 of escaping from lawful custody under a warrant issued by the Chairman of the Village Committee of Adikari pattu dated 3rd October, 1904.

This warrant purported on the face of it to issue on the ground that the attendance of the fourth appellant before the Committee could not be secured by means of an ordinary summons to answer a complaint for failing to perform labour on a certain road or to commute such labour by money payment in accordance with the rules of Village Committees for " 1904."

It is admitted by the Solicitor-General that no such rules exist, but he submits that this is a mere clerical error for " 1903," which can be easily cured, and does not invalidate the warrant.

Strictly speaking, the warrant is ill-founded and bad *ex facie*, and my opinion is confirmed by the ruling of Bonser, C.J., and Withers, J., in D. C., Colombo, 1,866, reported in *Tambyah's Reports, p. 30.*

I think also that a warrant under rule 9 of the rules to be observed by Village Committees for the trial of breaches of rules under Ordinance No. 34 of 1884 in the Western Province, published in *Gazette* No. 4,850 of March 23, 1888, would not be a lawful one, unless there was some evidence recorded by the Chairman showing that the defendant contumaciously refused to attend.

The fact that he has been served with a summons and does not attend is not sufficient.

I cannot see any reason why a Chairman of a Village Committee should have greater powers than a Magistrate has under section 62 of the Criminal Procedure Code, who is bound to have reasons for issuing a warrant and to record them in writing.

I think therefore that the 4th appellant was not in lawful custody when he escaped, and he is not responsible under section 219, nor the other appellants under section 220, of the Penal Code, and they must be acquitted on the charges in the conviction.

I have not, however, the slightest sympathy with any of these appellants, and think they should be punished if the law can reach them. It seems to me that the complainant, being a police vidhan, was acting as a public servant in good faith under colour of his office, though his act was not strictly justifiable by law, and the first, second, and third appellants would have no right of private defence against him under section 92 of the Criminal Procedure Code. The evidence is that the police vidhan had the warrant

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with him and explained it, and it must have been well known to the appellants who he was. The evidence also clearly shows that the second accused and appellant held the police vidhan by the neck; that the first accused and appellant pulled the seventh accused and fourth accused out of the custody of the complainant, while the third appellant and accused had a stick with him and was insulting the complainant. And the accused who has been convicted, and wisely not appealed, threw mud over the complainant. Strictly speaking, there was an assault on the complainant by second accused and appellant, and the first and third accused appellants were present aiding and abetting that assault, and would be responsible as principals under sections 33 and 107 of the Penal Code of the offence of assault defined under section 342.

I do not think the Chairman's action in granting the warrant was so entirely *ultra vires* as the Court held the Collector's order to be in the case reported at p. 168 of *I. L. R. 13 Bombay*, and I think these accused have no reason to complain that I treat them as strictly and technically as their counsel desired I should in the matter of the warrant. Acting then within the powers conferred on this Court under section 347 of the Crimnial Procedure Code, I find the first, second, and third accused, appellants, guilty of assault under section 345 of the Criminal Procedure Code, and I maintain the fine of Rs. 20 and imprisonment in default inflicted by the Magistrate upon each of them.

The convictions under sections 219 and 220 will be set aside, and the fourth appellant will be discharged.