1896.
June 3.

MACLEAN *v.* APPAN KANGANY.

P. C., Nuwara Eliya, 9,960.

Master and servant.—Insolence -Servant in custody of the law—Wilful disobedience of orders—Charges in Police Court cases—Postponements—Release of accused pending trial—Ordinance No. 11 of 1865, s. 11.

When a servant is in the custody of the law his service is suspended and he cannot be said to be then in the service of his employer. That being so, he cannot be found guilty of insolence under section 11 of Ordinance No. 11 1865, for the use by him, when in such custody, of abusive language towards his master.

A tea estate kangany who refuses to obey an order to perform manual labour in the reasonable belief, founded on the previous course of business on the estate, that it is no part of his duty to perform such labour, is not guilty of wilful disobedience under section 11.

Observationsby BONSER, C.J., on the necessity of charges in Police Court cases being free from looseness and vagueness, and on the impropriety of long postponements in such cases, and of keeping the accused in custody pending trial when he might reasonably be discharged on his own recognizance.

THE facts of the case sufficiently appear in the judgment.

Van Langenberg, for appellant.

3rd June, 1896. BONSER, C.J.—

This is an appeal from a conviction by Mr. Lushington, Acting Police Magistrate of Nuwara Eliya. Much difficulty has been occasioned by the way in which the Acting Police Magistrate has treated the case. It is to be regretted that so much of the time of this Court should be taken up by pointing out and correcting the errors of gentlemen who are either unable or unwilling to make themselves acquainted with the law which they have to administer. The appellant is a man with whom one cannot have much sympathy. He is a man who

uses coarse, abusive, and offensive language, but at the same time he is as much entitled to justice as the most estimable citizen in this community. He was the sub-kangany on the Kabaragalla estate, of which Mr. Maclean is the superintendent. The whole story is very clearly set out by Mr. Maclean in his evidence, and Mr. Maclean has, in my opinion, told the story, from beginning to end, in the fairest manner, without exaggerating in any way the conduct of the appellant, or without seeking to minimize any points which would tell in his favour; and I must say, in addition, that Mr. Maclean, under all the circumstances, behaved with very creditable self-control. I believe every word of what Mr. Maclean said, and I see no ground whatever for the discredit which the Acting Police Magistrate has thrown upon his testimony. Now, the story is this. On the 7th April Mr. Maclean sent for a police officer and directed him to bring the accused to his bungalow. The police officer went and brought the accused, whereupon Mr. Maclean charged him with absenting himself from his work, and ordered him to be taken to the Nuwara Eliya Police Court, a distance, it is proved, of nearly twenty miles from the estate. On this the appellant broke out into a storm of abuse, and applied indecent terms, not only to the superintendent, but even to the estate. He was thereupon marched off by the police officer to the Nuwara Eliya Police Court, where he was charged by the police officer and released on bail. He returned to the estate on the 9th. This abusive language is one of the offences of which the appellant has been convicted. The appellant denied that he had used any abusive or indecent language, but I do not believe him. I give full credit to what Mr. Maclean said. Therefore, the only question is, Was the use of this abusive language at this time and place, and under the circumstances of the case, an offence punishable under section 11 of Ordinance No. 11 of 1865? One of the circumstances of this case is that at the time the abusive language was used the appellant was in the custody of the police officer, and that that custody was illegal. The offence for which he had been arrested by the police officer was the offence of absenting himself from work on a previous day, and there is no pretence for saying that that is an offence for which a police officer can arrest without a warrant. Now, in saying that this man was under arrest, I am differing from the finding of the Acting Police Magistrate. The Acting Police Magistrate says on that point: "The "complainant sent for the village headman, and by the headman sent "for the accused," the village headman being a police officer. I may here make the remark that it seems to me an unusual method for a

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superintendent to adopt of communicating with his own servants by sending a police officer for them. However, the Acting Police Magistrate appears to think that to be the ordinary course of proceeding between master and servant. He goes on to say: "I examined the headman very closely as to his action on that "occasion. Anything approaching an arrest could have been "illegal, and if there had been an arrest it is possible that the "subsequent misconduct of the accused might have been justi- "fiable. But there was nothing of the kind. The headman called "the accused, and he followed him to the bungalow. The accused, "still free from arrest, accompanied the headman to Court." It is to me incredible how any man reading the evidence could have come to such an extraordinary conclusion. What Mr. Maclean says is this: "When the accused was brought to my bungalow he "was brought under arrest by the árachchi," and as to his going willingly to Court—a walk of nearly twenty miles—here is what one of the witnesses called for the prosecution says: "My master "ordered the árachchi to remove the accused. Accused asked if he "was to be taken away without any fault,"—a very natural question. "I told him he had better go quietly;" and then it was that the appellant lost his temper and used filthy and abusive language towards the estate and its superintendent. The account given by the árachchi is "that the superintendent sent for him and "made a complaint; that in consequence of that complaint he went "to fetch the accused; that he used no force or compulsion; that he "merely called the accused, and he came of his own free will; that "he did not arrest him or even touch him—he merely called him, "and he accompanied him to the bungalow." From this I gather that this police officer is of opinion that arresting a man means tying up his hands behind his back, or something of that kind; for he says "I did not arrest him or even touch him." and I can only account for the Police Magistrate having come to the conclusion that there was no arrest of the appellant on the ground that he has taken his law from the árachchi. To touch the body of a person is not necessary to constitute an arrest, if the person arrested submits to being taken into custody. That is clear from section 25 of the Criminal Procedure Code. The árachchi in cross-examination admitted that it was "after the complainant "had asked him to bring the accused in custody to Nuwara "Eliya" that the filthy language was used. It being established that the appellant was in custody, the question arises whether the use of this improper language was an offence under the Ordinance. Now, to constitute the offence it is essential that

it should be committed in the service of the employer. I am of opinion that when a man is in the custody of the law his service is suspended: he cannot during that time be said to be in the service of his employer. Rightly or wrongly—in this case wrongly—the man was in the custody of the law; and one might illustrate it by the case of a servant, while in a court of justice being tried for an offence, pouring forth a volume of abuse against his master. That would be an undoubted contempt of Court, but no one would imagine that it was an offence committed in the master's service, even although he and all the coolies of the estate were in Court; and therefore I hold that the charge of insolence on the 7th of April cannot be sustained.

Then the next charge appears to be—I say appears, because it is almost impossible to disentangle from the confused language of the so-called charge what the offences are of which the appellant has been found guilty—that the appellant on his return to the estate, on the 9th, disobeyed an order of the superintendent. Now, it was proved that there had been some quarrelling between two factions of coolies on this estate, to one of which factions the appellant belonged. The superintendent, in the interests of good order, thought fit to direct the appellant to vacate the quarters which he had previously occupied, and to remove himself to other lines at some little distance in the same estate. It was pressed upon me by Mr. Van Langenberg that it was not proved that this was an order which the appellant was bound to obey, for that it was not proved that he was bound to reside on the estate at all, and to a certain extent I agree with him. If the order had been that the appellant was to take up his quarters in particular lines, I do not think that that would have been an order which the appellant was bound to obey, but the order was to vacate certain lines, and that is an order which, I think, the appellant was bound to obey. He could not reasonably believe that he was entitled to insist upon occupying any particular rooms which he fancied, and therefore I think he was guilty of wilful disobedience of that order.

The third offence of which he was convicted was apparently that of refusing to weed. The Acting Magistrate himself appears to have had some misgivings as to the reasonableness of this order, for he says "that it was perhaps not so reasonable." Mr. Maclean says: "I told the accused that he was not to go to the plucking on "the following day (10th of April), but to take a cooty sack and to "weed a certain contract." He goes on to say: "I took this step "because the accused had disobeyed every order I had given him, "and was defying me, so I had to assert my authority." Now, it is

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clear from this testimony that the order in question was not one given in the ordinary course of estate management, but was an exceptional order given to assert the authority of the superintendent. The explanation of the accused, which was given on oath, as to this was : " I was ordered to weed ; I refused to do so. I was " a kangany supervising work, and I refused to do manual work. " The head kangany also had asked me to superintend the work of " his coolies, and I did so for the last three months. I also had " charge of the tool room." Now, that defence amounts to this : the appellant says that to do manual work was not what he understood to be any part of his duty ; that he was a sub-kangany with coolies under him ; that in addition he was acting for the head kangany ; and that he had other duties which required his personal attendance. This statement was not contradicted. Indeed, Mr. Smethurst, the assistant superintendent, stated " that as long as he had been on the estate the accused " never did any manual labour." Now, I do not wish to say anything which would encourage agricultural labourers to disobey the orders of their superintendents ; but, at the same time, when a man is prosecuted for a criminal offence, it must be shown that he had a criminal intent—in this case that the disobedience was wilful, and was not due to an erroneous idea of his rights and duties. I cannot help thinking that the appellant was justified in believing from the previous course of business on this estate, that it was no part of his duty to perform manual labour. It is not clearly proved that it was his duty, but even assuming that it was his duty, I am of opinion that he might reasonably have thought otherwise ; and when that is coupled with the statement of the superintendent, that the order was given to assert his authority, I think that the appellant might not unreasonably have thought that he was not bound to obey. The conviction will therefore be amended, and the appellant found guilty of the one offence only, of wilful disobedience of orders, in that he disobeyed an order of his employer to remove from the lines which he had been occupying on the estate.

With regard to the punishment, he was sentenced to three months' rigorous imprisonment. He has been in prison since the 18th of April, a period of upwards of six weeks. Under these circumstances it seems to me that he has been sufficiently punished for the offence which has been proved against him, and he will therefore be discharged.

With respect to the charge, I hope I shall never see another like it. The appellant was charged with " wilful disobedience of " orders, of insolence, and general misconduct (constituting one

"continuous series of offences)." The Acting Police Magistrate seems to have forgotten when he framed this document that from the 7th to the 9th of April was spent by the appellant away from the estate, going to and returning from the Nuwara Eliya Court. That I should have thought to be a substantial breach of continuity. There are no provisions of the Code which ought to be more carefully observed than those requiring definiteness in the statement of the offence charged, for looseness in the charge is almost invariably accompanied by looseness and vagueness in the proof of the offence and in the general conduct of the case.

Again, I have to observe that a remand from the 18th April to the 4th May, during which time the appellant was locked up in prison, was wholly unjustifiable. There was no reason for this long postponement. It is no light punishment for a man, who is presumed by the law to be innocent, to be locked up in a dark cell for sixteen days. I trust I shall not have occasion again to call attention to such a case as this. Why, if it was found necessary to postpone the trial, the man should not have been let out on his own recognizance, I cannot conceive. He had shown no symptom of wishing to desert the estate; on the contrary, after he had been dragged away by the police officer to the Nuwara Eliya Police Court on the 7th April, he returned voluntarily to work on the 9th, and he stated that he had advances due to him from the coolies under him. There was no reason to suppose that, had he been released on his personal recognizance, he would not have appeared to stand his trial. These proceedings bear the appearance of oppression: I do not say wilful or intentional oppression, but the appellant might well be excused for thinking that he had been harshly treated.