

THIEDEMAN *v.* FERNANDO *et al.**P. C., Negombo, 20,482.*

1896.

August 17
and 18.

*Arrest of person found drunk and disorderly in a public thoroughfare—
Power of police officer in such case—Criminal Procedure Code,
chapters IV. and V. and s. 34—“The Police Ordinance, 1865,”
s. 51.*

The general provisions of chapters IV. and V. of the Criminal Procedure Code, regarding the powers of arrest by the police and private persons must be regarded as comprising the whole of the present law on the subject. A police officer has, therefore, no power* to arrest and detain a person whom he finds drunk and disorderly in a public thoroughfare, except when he refuses, on the demand of the police officer, to give his name and residence, or gives a name and residence which such officer has reason to believe to be false. In that case he may, under the provisions of section 34 of the Criminal Procedure Code, be arrested by the police officer in order that his name or residence may be ascertained.

THE facts of the case appear in the judgment.

Jayawardena, for accused appellants.

Cur. adv. vult.

18th August, 1896. WITHERS, J.—

One of the appellants, Simeon Fernando, has been convicted of escaping from the custody of the police in which he was found to be lawfully detained. He was arrested and detained for the offence of being drunk and disorderly in a public thoroughfare under section 219 of the Penal Code. The other appellant, Mano Sinno or Manuel Fernando, has been convicted of two offences: one is the offence of intentionally offering illegal obstruction to the lawful apprehension of one Juan for the offence of being drunk and disorderly in a public thoroughfare, under section 220 of the Penal Code; the other offence is that of voluntarily causing hurt to the person of Constable Wirakoon, under section 314 of the Penal Code.

These are the facts as described by the Police Constable Wirakoon. As he was on duty one evening in Main street, Negombo, he heard the sound of a disturbance near a cigar boutique. He went up and found Juan and Simeon before spoken of, on the street holding each other by the waist cloth and pulling each other. They were quarrelling; Juan was asking Simeon to buy him a pint of arrack. Juan was drunk, and the other smelt of arrack.

The witness called in aid a constable, Ossensa, who was passing by, and the constable arrested Juan and Simeon in order to take them to the station. On their way a crowd hooted the constables and encouraged the men to break away from their captors. Simeon, the appellant, succeeded in getting away.

* See footnote in next page—Ed.

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According to this witness he and his brother constables were somewhat roughly used by the people in the crowd, and 'amongst others Mano Sinno, the appellant, struck him on the nose with a small axe. After Simeon had escaped this witness went to the help of the other constable, and the two took Juan with them as far as the office of the Registrar of Lands. Thereabout Juan, with the aid of people in the crowd, including Mano Sinno, the appellant, got away from the custody of the witness. Wirakoon's testimony was confirmed in a general way by that of his brother officer Ossensa. The chief point made in appeal was that the police constables had not the power to arrest either Juan or Simeon, whether they were engaged in committing an offence or whether they were drunk and disorderly in a public thoroughfare.

I was at the time somewhat surprised by the argument, for I had in my mind, what I could not precisely recall at the time, the judgment of Mr. Justice Clarence, which I have since found reported in *Wendt's Reports*, page 283.

The case is *Keith v. Fernando*, and these are the words used by the learned Justice :—

“ Now, it is proved that the man Juse was brawling in a public street, and refused to desist when required to do so by the constable.” [Wirakoon, the constable, says he told Juan and Simeon to report and go away. It does not appear whether he gave these men an opportunity to comply with his request.] “ And in my opinion a constable under these circumstances, irrespective of a special statutory permission, has a right to arrest a party so disturbing the public peace.”

Mr. Clarence's judgment was pronounced in June, 1883, and the Criminal Procedure Code No. 3 of 1883 came into operation the following October.

It seems to me that the general provisions of chapter IV. and chapter V. of this Code, regarding the powers of arrest by the police and private persons, must be regarded as comprising the whole of the present law on the subject. Mr. Solicitor-General, as *amicus curiæ*, called my attention* to the 51st section of the Police Ordinance of 1865, which enacts, *inter alia*, that every police officer shall apprehend disorderly and suspicious characters.

* This was in regard to a particular argument urged by the counsel for the appellant. See, however, section 23 of the Licensing Ordinance, enacted eight years after the Code, viz., No. 12 of 1891, which runs as follows :—“ Every person found drunk and incapable of taking care of himself in any thoroughfare or public place,

whether a building or not, or on any licensed premises or tavern, and any person who shall be guilty of violent, quarrelsome, noisy, disorderly, or riotous conduct in or about such premises or tavern, shall be liable to a fine not exceeding Rs. 5, and on second conviction within a period of twelve

According to section 2 of the Vagrant Ordinance, No. 4 of 1841, every person behaving in a disorderly manner in a public street is liable to a fine not exceeding ten shillings ; and by section 488 of the Penal Code, whoever in a state of intoxication appears in any public place and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to one month. The Police Ordinance notwithstanding, my present inclination is to hold that the provisions of the Criminal Procedure Code contain the whole law as to arrest. The offences of affray and the other offences above referred to are non-cognizable offences, and do not come within the scope of section 33 of the Criminal Procedure Code, which indicates in what cases a police officer may, without an order from the Magistrate, and without a warrant, arrest a person. Section 34 enacts in what circumstances a police officer may arrest a person committing a non-cognizable offence in his presence. When such person refuses on the demand of a police officer to give his name and residence, or give the name or residence which such officer has reason to believe to be false, he may be arrested by a police officer who sees him commit a non-cognizable offence, or receives an accusation of such an offence having been committed by a particular person, in order that his name or residence may be ascertained. Only for this purpose may he be arrested in such circumstances. No doubt it is the duty of a police officer to use all reasonable endeavours to suppress an affray, and this would justify his laying hands on a person engaged in an affray in order to stop it, but to take a man into custody is a different matter.

My opinion is fortified by my brother Lawrie's judgment in the case of *Jayan v. Allesinno* (2 S. C. R. 78).

I therefore feel bound to set aside the conviction of Simeon for escaping from the constable's custody and of Mano Sinno for aiding the man Juan to escape from the other constable's custody.

The sentence of fine imposed on Mano Sinno for voluntarily causing hurt to Wirakoon will stand.

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months shall be liable to a fine not exceeding Rs. 10, and on a third or subsequent conviction within such period of twelve months be liable to a fine not exceeding Rs. 20. Every person who in any thoroughfare or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge, on any

thoroughfare or other public place, of any carriage, horse, or cattle, or who is drunk when in possession of any loaded firearms, may be apprehended without a warrant, and kept in custody until he gets sober, and shall be liable in addition, to a fine not exceeding Rs. 20, or to simple or rigorous imprisonment for any term not exceeding one month."—ED.