Present : Shaw A.C.J. and De Sampayo J.

1916.

WICKRAMASINGHE *v.* COORE.

175—D. C. Kandy, 24,211.

Ceylon Indemnity Order in Council, 1915—Martial law—Street blocking drill practised by police on orders of the military—Trespass on private grounds—Obstruction to police—Arrest—Action against Police Inspector for wrongful imprisonment and malicious prosecution—Criminal Procedure Code, s. 32.

During the period of martial law instructions were given by the Officer Commanding the Troops to the Superintendent of Police, Central Province, to practise his men in the drill prescribed for street blocking. The appellant, an Inspector in charge of about fifty constables, was engaged in carrying out the prescribed drill at a spot where it was anticipated that trouble might occur, and for the purpose of the manœuvre two wing men of the company crossed the drain on to the respondent's compound.

The respondent ordered them off, but they refused to go. A struggle ensued. The respondent was taken to the police station, and subsequently charged with obstructing the police in the execution of their duty, but was acquitted. He thereupon brought the present action for damages for false imprisonment and malicious prosecution.

Held, that the police were justified in entering on the respondent's compound by the direction of the military authorities, and were not trespassers, and the respondent had no right to eject them, and that the act of obstruction of the police in the exercise of their duty justified immediate arrest without warrant, and entitled the appellant to prosecute respondent before the Magistrate.

De Sampayo J.—Article 2 of the Order in Council of August 12, 1915, would exonerate the defendant as well as the constables from liability to plaintiff for such entry even if the entry was not lawful. But the protection cannot be carried further.

The arrest and detention referred to in Article 5 must, I think, be taken to contemplate persons who took part in the riots, or were charged with offences connected with their repression. The arrest of the plaintiff in this instance was not for such an offence, but for obstructing Constable Mudiyanse in the performance of the drill on this particular occasion, and was therefore outside the scope of the protection afforded by Article 5.

THE facts are set out in the judgment.

Garvin, S.-G. (with him *V. M. Fernando*), for appellant.

Bawa, K. C. (with him *Bartholomeusz*), for respondent.

Cur. adv. vult.

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Wickramasinghe v. Coore.

July 3, 1916. SHAW A.C.J.—

The plaintiff, respondent to this appeal, has been awarded Rs. 1,000 damages against the appellant, an Inspector of Police stationed at Kandy, for false imprisonment and malicious prosecution under the following circumstances.

On August 5, 1914, this Island, together with the rest of the Empire, being in an actual state of war with another country. His Excellency the Governor issued a Proclamation bringing into operation an Imperial Order in Council of Act 24 of 1896, whereby all persons in the Colony became subject to military law, as if they were actually accompanying His Majesty's Forces.

On June 3, 1915, serious disturbances having broken out in the Island, His Excellency by another Proclamation declared certain Provinces of the Island subject to martial law, and committed to the Officer Commanding the Troops the maintenance of order and defence of life and property, and authorized him to take all steps of whatever nature he might deem necessary for those purposes.

Upon the proclamation of martial law instructions were given that the Police Force was to be placed at the disposal of the Officer Commanding the Troops, and was to take its orders from him, and that the Force was to be considered as a military unit while martial law existed.

On July 28 a departmental order was issued in the *Police Gazette* giving instructions to the police as to their duties in actual and anticipated disturbances. Paragraph 9 of this order prescribed the drill to be practised for the purpose, *inter alia*, of effectually blocking a road where rioting was anticipated. Sub-paragraph (*c*) directed that the company should "extend from one side of the road to the other, and completely block the road from wall to wall, or door to door, so that no person can get past."

The Kandy perahera was to commence on August 16, and it was anticipated that there might be a recurrence of rioting at Kandy on the occasion, an anticipation that was fortunately not realized.

In consequence of this anticipation, the Superintendent of Police of the Central Province was given instructions by the Officer Commanding the Troops to practise his men in the drill prescribed for street blocking. It does not appear from the evidence whether the departmental order dealing with the matter was issued by the military authorities, but it is clear from the evidence of the Superintendent of Police that he was given instructions by the Officer Commanding to carry out drills in the manner directed in the order.

On August 13 the appellant, in charge of about fifty constables, was, in accordance with the instructions, engaged in carrying out the prescribed drill in the Peradeniya road, Kandy, a road along which the perahera would pass, and where it was anticipated that trouble might occur.

The appellant gave orders to his men to block the road at a spot opposite to which the respondent happened to reside. His house

is separated from the road by the public drain, about 3 feet wide, and a compound of about 5 feet, in which were some flower beds, there being no wall between the compound and the road.

For the purpose of carrying out the drill in accordance with the instructions, the two wing men of the company crossed the drain on to the respondent's compound, the end man, Mudiyanse, being close against the verandah of the respondent's house, which was screened from the compound by bamboo tats. The respondent ordered them off, but they refused to go, thereupon he either kicked or pushed the tat against Police Constable Mudiyanse, with the result that the bottom of the tat struck Mudiyanse's hand, cutting his finger. The appellant then came up and held the respondent, and a struggle ensued, in the course of which the sleeve of the respondent's banian came off. The appellant then went back into the road and sent two constables to arrest the respondent, which they did, and he was taken to the police station and was subsequently taken before the Police Magistrate and charged, on the information of the appellant, authorized so to do by the Superintendent of Police, with obstructing the police in the execution of their duty. The Magistrate upon an adjourned hearing dismissed the charge against him.

The District Judge has come to the conclusion that the police were trespassers upon the respondent's compound, and that he was entitled to eject them, and that his arrest was therefore illegal and his prosecution unfounded, and he thinks that the respondent was subjected to unduly humiliating treatment by the appellant, because the latter was angry at his dignity as a police officer being offended, and that the proceedings against the respondent were not *bona fide*, but actuated by malicious motives.

I find myself entirely unable to agree with the learned Judge. At the time of the incident the police were acting directly under the instructions of the Officer Commanding the Troops, to whom His Excellency had by the Proclamation of June 3 entrusted the maintenance of order and the defence of life and property in the Central Province in a time of serious local disturbances. For these purposes instructions had been given by him to the police to carry out a certain drill for the purpose of preparing for anticipated disturbances, which instructions necessitated to some extent a trespass on private property.

It is contended that neither the Proclamation nor the actual state of war existing in the Island at the time would justify acts in excess of what the necessity of the situation required, and that the directions to drill in a manner involving the necessity of trespass on private property, and in particular the actual drill undertaken by the appellant and his men, involving as it did an entry on the respondent's compound, were unnecessary and in excess of the needs of the occasion.

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So far as the first part of this proposition is concerned it is perfectly correct, and an excessive and unnecessary interference with the persons or property of individuals would be illegal and justiciable by the tribunals of the country after martial law had been removed, unless the acts came within the protection of the Proclamation or Act of Indemnity then issued or passed. I am quite unable, however, to accept the contention that the orders of the Officer Commanding as to the drills to be undertaken, or the conduct of the police in carrying them out as they did in this particular instance, were unnecessary or in excess of the requirements of the circumstances.

The directions were thought to be necessary by the officer to whom had been entrusted the safety of the Province, and it would certainly appear to me to be a most reasonable and proper precaution to prepare the Police Force to cope with the anticipated disturbances before it actually occurred, even if doing so involved a slight trespass on private property. The place where the drill was carried out by the appellant and his company also appear to me to have been a most proper one, it being at a spot where the anticipated disturbance was likely to occur.

The police were therefore, in my opinion, justified in entering on the respondent's compound by the direction of the military authorities, and were therefore not trespassers, and the respondent had no right to eject them, and the act which he himself admits he committed in pushing the tat against the Constable Mudiyanse was both a breach of the peace and an act of obstruction of the police in the exercise of their duty, which justified his immediate arrest without warrant under section 32 (1) of the Criminal Procedure Code, and entitled the appellant to prosecute him before the Magistrate.

This disposes of the whole of the respondent's cause of action, for if the appellant was legally entitled to arrest him, and if he had committed an offence for which he could be legally brought before the Magistrate, it matters not what the appellant's motive may have been. If the respondent had been unnecessarily roughly treated, he could, of course, have made a claim against, or prosecuted the appellant for assault, but no such allegation was made by the plaint in this case, and no such cause of action was before the Court.

In justification, however, of the conduct of appellant, I must say that I think the learned Judge has taken a somewhat prejudiced view against him that is hardly justified by the evidence, and it seems to me that the respondent has mainly himself to thank for any humiliation to which he has been put.

Acting under annoyance at the invasion of his property, he made an ill-advised, and it now turns out unjustified, assault on the police, and the struggle that took place on the verandah when the appellant came up and seized his hand was, according to his own evidence, the result of his trying to push the appellant out of the verandah.

The fact that he was not allowed to change from his cloth and banian into the European clothes, in which he usually appeared in the streets, when he was taken to the police station, is no doubt truthfully explained by the police sergeant who arrested him, and who says that the reason the respondent was not permitted to stop and change his clothes was that he was behaving in a very violent manner at the time. It is obvious from the respondent's own evidence that he was very excited, and had violently resisted the appellant himself when he had attempted to effect the arrest.

The Judge draws a somewhat graphic picture of the appellant breaking off the drill, only a few minutes after he and his men had started out, for the purpose of marching back in triumph with his captive, from which he draws an inference that the appellant was in a temper and wished to humiliate the respondent. I think the Judge has misapprehended the evidence on the point. There is no evidence whatever that the appellant and his company had only started out a few minutes before the incident; on the contary, the evidence shows that they had been out since 6 A.M., and the entry made in the Station Information Book shows that the respondent was brought considerably after 7. It seems probable that the police were just returning to the station at the time of the incident, for the order for the drill prescribes that it shall take place from 6 to 7 A.M. It is also apparent that the appellant did not march back in triumph with his captive, for the entry in the Information Book, made by the sergeant at the time the respondent was brought in, shows that the appellant had not arrived at the station, and even the statement of the respondent that the appellant and his men arrived one minute after him does not justify the allegation, for even that time would at ordinary walking pace allow a space of about hundred yards between the respondent and the appellant with his company of police.

With regard to the other complaint that the respondent was taken handcuffed to the Police Court, it appears, rightly or wrongly, to have been a precaution commonly taken during the time of martial law, and I do not see why the blame of it, if blame there is, should be attributed to the appellant personally, as it appears that the Superintendent of Police was himself at the station when the respondent was taken to the Court.

Apart from the absolute defence that I think the appellant has, I think there can be no doubt that he *bona fide* believed that the police were entitled to enter on the strip of land between the respondent's house and the road, and that the conduct of the respondent in opposing them rendered him liable to arrest and prosecution.

The judgment of the District Court should, in my opinion, be set aside, and judgment entered for the appellant, with costs here and below.

DE SAMPAYO J.—

I am of the same opinion. I wish, however, to add a few words on one of the arguments of the Solicitor-General on behalf of the defendant. It was contended that His Majesty's Order in Council of August 12, 1915, entitled the Ceylon Indemnity Order in Council, 1915, protected the defendant from liability on the causes of action upon which the plaintiff sued the defendant for damages. By that Order in Council, which was to take effect on August 30, 1915, when martial law itself was by Proclamation terminated, it was enacted that—

1. No action, prosecution, or legal proceeding whatever shall be brought, instituted, or maintained against the Governor of Ceylon, or the person for the time being or at any time commanding the troops in the Colony, or against any person or persons acting under them or any of them respectively in any command or capacity, civil or military, or in pursuance of any orders, general or special, given by them or any of them in that behalf for or on account of or in respect of any acts, matters, or things whatsoever in good faith advised, commanded, ordered, directed, or done for the maintenance of good order and government or for the public safety of the Colony between the date of the commencement of martial law and the date of the taking effect of this Order.

2. Every such person aforesaid by whom any such acts, matters, or things shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid shall be freed, acquitted, discharged, released, or indemnified against all and every person and persons whomsoever in respect thereof.

3. Every such act, matter, or thing referred to in the preceding articles shall be presumed to have been advised, commanded, ordered, directed, or done, as the case may be, in good faith, until the contrary shall have been proved by the party complaining.

4. * * * * * *

5. All persons who have been in good faith under proper military or police authority arrested or detained during the existence of martial law shall be deemed to have been lawfully arrested or detained.

Not only must it be presumed, in the absence of anything to the contrary in this case, but it is obvious, that the military authorities in good faith ordered the instructions as to practise drill to be carried out for the purpose of securing good order and government and the public safety in view of the forthcoming concourse of people at Kandy for the perahera, and that the defendant likewise acted in good faith in carrying out those instructions and getting his men to execute the particular manœuvre, though it necessitated two of them entering the plaintiff's front compound. That being so, even if the entry was not lawful, Article 2 of the above Order in Council would exonerate the defendant as well as the constables from liability to plaintiff for such entry. But I do not think that the protection can be carried further. The arrest and detention referred to in Article 5 must, I think, be taken to contemplate persons who took part

in the riots or were charged with offences connected with their repression. The arrest of the plaintiff in this instance was not for such an offence, but for obstructing Constable Mudiyanse in the performance of the drill on this particular occasion, and was therefore outside the scope of the protection afforded by Article 5. The plaintiff's second cause of action has reference to his subsequent prosecution in the Police Court, and the defendant is equally unprotected by the Order in Council in that respect.

The defence to the plaintiff's action must, therefore, be based on grounds ordinarily available to persons who are sued for illegal arrest and malicious prosecution. As the entry of the police upon the plaintiff's compound was, in my opinion, lawful, it follows that plaintiff's act in thrusting out Constable Mudiyanse and injuring him was an offence for which he was liable to be arrested and prosecuted. The plaintiff's case fails on this ground, quite apart from any question of intention on the part of the defendant. Further, what are in the English law called trespass to person and malicious prosecution come under the generic term *injuria* of the Roman-Dutch law, and in an action for injury the burden is upon the plaintiff of proving that the act complained of was done *animo injuriandi*, that is to say, with actual intention to injure or with such consciousness of wrong as amounts in law to that state of mind. The circumstances of this case have been fully examined and commented on by my lord the Acting Chief Justice, and I need only say that they negative the existence of *animus injuriandi*. The view of the District Judge is that the defendant lost his temper and felt his dignity hurt by what happened between plaintiff and Constable Mudiyanse, and that he arrested and humiliated the plaintiff for that reason only. But this is in the teeth of the plaintiff's own evidence, for he says, " I admit that the police were drilling that day and seemed to be on duty. I do not suggest that the Inspector lost his temper when he behaved in the way he did. " The parties were entire strangers, and did not know each other even by sight. It may, perhaps, be said that the incident which led to the plaintiff's arrest and prosecution was trivial, and might well have been left unnoticed, but I think it is impossible to hold that the defendant acted as he did otherwise than in pursuance of what he conceived to be his duty.

I agree that this appeal should be allowed, with costs.

Set aside.