Present: De Sampayo J.

1916.

RAHIM *v.* NONAHAMY *et al.*

747 and 748—P. C. Kalutara 40,366.

Conviction under s. 287 of the Penal Code—Obscene words—Order under s. 80 (1) of the Criminal Procedure Code to enter into bond to be of good behaviour.

The conviction of a person under section 287 of the Penal Code for having used obscene words on the public road to the annoyance of the public does not justify an order under section 80 (1) of the Criminal Procedure Code to enter into a bond to be of good behaviour.

THE facts are set out in the judgment.

De Jong, for accused, appellant.

A. St. V. Jayewardene, for complainant, respondent.

Cur. adv. vult.

August 28, 1916. DE SAMPAYO J.—

The accused, Nonohamy and Jane Nona, have been charged under section 287 of the Penal Code with having used obscene words on the public road to the annoyance of the public. It appears that the accused live in the neighbourhood of the house of Mr. Edirisinghe, Proctor, of Kalutara, and a dog belonging to Mr. Edirisinghe having bitten a child of one of the accused, these women made remarks aimed at Mr. Edirisinghe while he was inside his house. Some of the words used were offensive and filthy, and this prosecution has been instituted by the Police at the instance of Mr. Edirisinghe.

The first point taken on this appeal is that there is no evidence whatever against the 1st accused. I think that this ground of appeal is entitled to succeed. Mr. Edirisinghe speaks generally of the abusive language used by the women, but admits that he is not certain which accused it was that abused. The Police Sergeant, who came to the place at the time, says that the 2nd accused used abusive words towards Mr. Edirisinghe, but that the 1st said nothing in his hearing. There are no other witnesses for the prosecution, while the 1st accused who gave evidence on her own behalf denies that she abused Mr. Edirisinghe or any one else. In these circumstances, it is impossible to sustain the conviction of the 1st accused.

1916.

DE SAMPAYO J.

Rahim v. Nonahamy

An objection is also taken to the legality of the sentence. The Magistrate, in addition to a fine, ordered the accused to enter into a bond to be of good behaviour for three months. This order must be presumed to have been made under section 80 (1) of the Criminal Procedure Code, which provides for the making of such an order " whenever any person is convicted of any offence which involves a breach of the peace, or committing criminal intimidation by threatening injury to person or property, or being a member of an unlawful assembly ". The present order can only be justified on the footing that the offence of which the accused have been convicted " involves a breach of the peace ". In my opinion the nature of the offence itself should involve a breach of the peace. An offence under section 287 of the Penal Code is not an offence involving a breach of the peace within the contemplation of section 80 (1) of the Criminal Procedure Code. This was also the view taken by Wendt J. in 385 P. C. Hatton, 6,384,[1] which has been cited by Mr. de Jong for the accused. I may also refer to *Graham v. Alagie*,[2] in which Wood Renton J. observed that section 80 (1) of the Criminal Procedure Code was applicable only to cases in which the offence involved, as one of its ingredients, a breach of the peace. Counsel for the complainant, to the contrary, cited *Silva v. James*[3] and *Alwis v. Kumarasinghe*.[4] But these are cases of mischief and criminal trespass, and may well come under the other classes of offences specified in section 80 (1) of the Criminal Procedure Code. Moreover, it appears that in those cases the circumstances were such as to indicate an intention to commit a breach of the peace. On the other hand, in *Fernando v. Mathes Pulle*,[5] which was a case of mischief, Wendt J. set aside the order for security as being without jurisdiction. I may add that in this case the facts do not at all disclose an intention on the part of the accused to commit a breach of the peace, nor is that the case of the prosecution either. For these reasons, I think the order of the Magistrate as to security is unauthorized and irregular.

Before parting with this record I should like to refer to a point in the proceedings. At the bottom of the report of the complaint to Court by the Police Sergeant there appear these words: " Accused absent, move for warrant." The absence of the accused is presumably the ground for the application for the warrant. But since the accused had not been previously arrested, and this report was the initiation of the prosecution, the accused must necessarily have been absent, and I cannot understand how their absence could be considered any reason for the application. The Magistrate allowed the warrant, without any material before him, and merely stating, evidently as his reason, that the Police moved for it. The

[1] *S. C. Min., July 22, 1908.*
[2] *(1908) 1 S. C. D. 86.*
[3] *(1910) 3 S. C. C. 80.*
[4] *(1912) 16 N. L. R. 45.*
[5] *(1909) 12 N. L. R. 159.*

Police Sergeant was not examined, not even for the purpose of formally verifying the complaint, and there was nothing before the Court to show that an ordinary summons would not have been sufficient to bring the accused before the Court. Sections 149, 150, and 151 of the Criminal Procedure Code require such examination before the issue even of a summons, and the form of warrant itself shows that the matter of the complaint should be substantiated by oath. In this case a warrant was not only issued on July 28 without any foundation being laid for it, but the accused were arrested and kept in custody at the Police Station until the next day, when they were brought before the Court. It seems to me that the issue of the warrant was not justified, and amounted to a misuse of the process of Court.

The conviction of the 1st accused is set aside. The conviction of the 2nd accused, as well as the sentence of fine, is affirmed, but the order requiring her to enter into a security bond is set aside.

Varied.