

1931

Present: Macdonell C.J.

BADOORDEEN v. DINGIRI BANDA

690—P. C. Gampola, 24,502.

Civil warrant—Issued under section 219 of Civil Procedure Code—Execution—Process-server's mistaken belief of rights—Penal Code, ss. 71 and 72.

A warrant of arrest under section 219 of the Civil Procedure Code is a process issued in civil proceedings and may be executed between the hours of sunrise and sunset only. A process-server who executes such a warrant in good faith after sunset is not protected in law.

A PPEAL from a conviction by the Police Magistrate of Gampola.

The accused was charged with wrongfully confining the complainant under section 333 of the Penal Code, and sentenced to pay a fine of Rs. 10. It would appear that the accused, who was a process-server, arrested the complainant at 8 p.m. on an attachment issued under section 219 of the Civil Procedure Code.

Rajapakse, for accused, appellant.—Under section 219 warrant of arrest may be issued even *ex mero motu*, section 219 (2). The assumption is the commission of a contempt of Court. The words of the warrant are "to arrest . . . that he may undergo the penalties . . . for such contempt"; similar to words in Form 39 under section 137. See also sections 717 and 718.

Civil Courts have special criminal jurisdiction to punish for contempt. Section 59 of Courts Ordinance. Even otherwise, non-obedience of Court's order renders debtor liable under section 172 of Penal Code. The mistake is as much one of fact as of law, and is no offence under section 72 of Penal Code.

In any case the offence is technical and accused may be discharged under section 325 of Criminal Procedure Code.

H. V. Perera, for complainant, respondent.—The question whether the penalties attached show whether the contempt is *quasi-criminal* or civil does not arise here. This is a process issued in a civil case, and section 365 specifically says that such processes shall not be executed between sunset and sunrise. The mistake is one of law and is not excusable.

October 28, 1931. MACDONELL C.J.—

In this case the accused was a process-server and in a certain civil case he had to execute a warrant issued under section 219. The ultimate penalty for disobedience to the warrant on the part of the person named therein would have been to be "arrested". During argument I am

afraid I rather wasted time in considering what must be regarded as a side issue, namely, whether the contempt itself is or is not a criminal matter. I have looked up the English authorities on the question and the effect of them is that, at any rate as regards English law, contempt is not criminal unless the act punished *per se* constitutes a crime. We seem to have very little authority on that point, and, of course, anything I say in the view I take of it is *obiter*, but probably that is not a bad rule for distinguishing between the different kinds of contempt; if that for which you are punished as for a contempt constitutes on other grounds a crime, then the contempt is criminal, but not otherwise. But the real point before me was this. Had this process been issued in a civil proceeding? I am perfectly clear that it had. The mere fact that the ultimate sanction of this process was imprisonment—or even that failure to obey this process entailed the committing of an offence called contempt, see section 137—does not alter the nature of the process which was a process in a civil case. The process was merely an incident in a particular civil case and must, I think, remain stamped with that character, because without that civil case, the process could never have been issued at all. If it was so, then this unfortunate man was wrong and broke the law by arresting the person under the process entrusted to him at a time in the day after sunset. If that is so, then it seems to me that the conviction was justified. But it has been argued that, if the accused in good faith was mistaken as to what he could do, he would be protected and no prosecution could properly be brought against him for having arrested the person named in the process after sunset. I do not think that is the law. Sections 71 and 72 of the Penal Code define clearly and sufficiently the protection thrown around the person who exercises the process of law. If a man receives process from a Court of law, which he honestly believes that that Court of law has power to issue, and executes the same, then he is protected in what he does in good faith under that process, even though the Court had not jurisdiction to issue that process. But he must not be mistaken in what the law allows him to do, and if, as in this case, the particular process had by law attached to it the condition that the arrest could only lawfully be effected during daylight hours, then the act of the appellant in this case in arresting after daylight hours was a mistake in law for which no section in the Penal Code protects him. If that is so this appeal must be dismissed and the conviction upheld, but I do agree with what the learned Magistrate says, that it is hard luck on the unfortunate man and that he has apparently been rather maliciously harried by the prosecutor who has attributed to him a number of acts in the execution of the warrant which the Magistrate finds he never committed, and that being so the Magistrate imposed a nominal sentence of a fine of Rs. 10, or in default one week's imprisonment. I have been asked to deal with the appellant under section 325, but I cannot do that since he has been convicted, and in my opinion quite rightly. I will, however, extend further sympathy to the appellant in the matter of sentence and accordingly order him to pay a fine of Re. 1, or in default one week's simple imprisonment.

Sentence Varied.