1954 *Present :* **Gratiaen J. and Fernando A.J.**

D. H. R. A. COREA *et al.*, Appellants, *and* THE QUEEN, Respondent

S. C. 33–35—D. C. (Criminal) Nuwara Eliya, 279

Arrest without warrant—Cognizable offence—Duty to inform suspect of the charge against him—Criminal Procedure Code, ss. 23 (1), 32 (1) (b), 35, 53—Penal Code, ss. 69, 333, 348.

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere 'unexpressed suspicion' that a particular cognizable offence has been committed—unless 'the circumstances are such that the man must know the general nature of the offence for which he is detained' or unless the man 'himself produces the situation which makes it practically impossible to inform him'. In such a case the police officer is liable to be convicted under the Penal Code for assault and wrongful confinement.

Held further, that a police constable who *bona fide* arrests a person on an order wrongly given by his senior officer is in certain circumstances entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code.

APPEAL from a judgment of the District Court, Nuwara Eliya.

The 1st appellant, an Inspector of Police, and the 2nd and 3rd appellants, who were police constables, were convicted of using criminal force on, and attempting wrongfully to confine, one M. The evidence showed that the appellants went to the house of M. in order to inquire into a complaint of a cognizable offence. Originally M. was "asked" or "invited" by the 1st appellant to accompany the police party to the police station and M. agreed to do so. Later, however, M. changed his mind and refused to go with the police officers, whereupon the 1st appellant, in the trial Judge's opinion, "took exception to the manner in which M. spoke or behaved" and ordered M 's arrest in order to "teach him a lesson". The subsequent attempts to remove M. forcibly were made without any further intimation to him of the reasons for his proposed compulsory detention or arrest.

G. E. Chitty, with *O. M. de Alwis*, for the 1st accused appellant.

G. E. Chitty, with *A. S. Vanigasooriar*, for the 2nd and 3rd accused appellants.

A. E. Keuneman, Crown Counsel, for the Crown.

Cur. adv. vult.

2——J. N. B 36679–1,592 (7/54)

May 28, 1954. GRATIAEN J.—

The 1st appellant was at the relevant time an Inspector of Police in charge of the Nuwara Eliya Police Station, while the 2nd and 3rd appellants were police constables attached to the same station. They were jointly indicted in the District Court of Nuwara Eliya for the following offences :

(1) committing house-trespass by entering the residence of F. D. Munaweera on 30th August 1949 with intent (*a*) to use criminal force on him, (*b*) wrongfully to confine him and (*c*) to annoy him ;

(2) using criminal force on him in attempting wrongfully to confine him ;

(3) attempting wrongfully to confine him.

The 1st appellant was in addition charged in the 4th count of the indictment with having caused grievous hurt to Munaweera in the course of the same transaction by shooting him. They were all convicted on the 2nd and 3rd counts, but orders of acquittal were entered in respect of counts 1 and 4.

A particularly unsatisfactory feature of this case was that, although such serious offences were alleged to have been committed in August 1949, and Munaweera's complaint was brought to the immediate notice of an Assistant Superintendent of Police, non-summary proceedings against the appellants were not commenced until 1st June 1951, and that too at the instance of Munaweera in the exercise of his rights as a private citizen ; the indictment was presented on 10th September 1952 ; the trial was concluded on 25th March 1953 ; and the present appeal listed for hearing only on 19th May 1954. These delays speak for themselves.

In *Muttusamy v. Kannangara* [1] I pointed out that " the actions of police officers who seek to search private houses or to arrest private citizens without a warrant should be jealously scrutinised by their senior officers " and that, in cases of this nature, " it seems preferable that the facts should in the first instance be reported to the Law Officers of the Crown so that, after an impartial examination of all the available material, the real transgressors, whoever they might be, could be brought to justice ". I reemphasise these observations in connection with the present case. Learned Crown Counsel who appeared before us in support of the convictions under appeal stated that the earliest communication received by his Department with regard to this case was dated 15th February 1952, *i.e. 2-and-a-half years after the incident took place.* And even that communication was a request by the 1st appellant's lawyers for an interview with a view to having the Magistrate's order of committal quashed by the Attorney General.

The learned District Judge gave the 1st appellant the benefit of the doubt on the charge of grievous hurt, although he was perfectly satisfied that the 1st appellant did (as Munaweera alleged) take a double-barrelled

[1] *(1951) 52 N. L. R. 324.*

gun into his hands when Munaweera was resisting an illegal attempt to remove him forcibly from his house to the police station. The learned judge was not convinced, however, that the 1st appellant knew that the gun was loaded, and, though confidently rejecting the defence version of this part of the incident, he did not rule out the possibility that the grievous gunshot injuries sustained by Munaweera in the course of his illegal arrest had been accidentally inflicted by the 1st appellant.

The basis of the convictions on the 2nd and 3rd counts—namely, the charges of using criminal force on Munaweera (section 348 of the Penal Code) and attempting unlawfully to confine him (section 333 read with section 490)—was that the 2nd and 3rd appellants, acting on the orders of the 1st appellant, had attempted to arrest Munaweera and to remove him forcibly to the police station in circumstances which made it illegal to arrest a private citizen without the authority of a warrant.

As to the validity of these convictions, I accept as correct the findings of fact recorded by the learned judge who had the advantage (which we lack) of assessing the oral testimony of the witnesses in the light of certain documents almost contemporaneously recording their respective versions of what took place on the night of 30th August 1949. The appellants are without doubt entitled to the benefit of every finding in their favour which formed the basis of the orders acquitting them on the 1st and 4th counts (against which the Crown has not appealed). At the same time, after an independent examination of the evidence on record, I agree with learned Crown Counsel that there is no valid ground for rejecting the findings of fact which were unfavourable to them on the other counts. In the result, the question for our decision resolves itself into a question of law—whether, on the facts as found by the learned judge, the arrest (or attempted arrest) of Munaweera at the instance of the 1st appellant on the night in question was illegal.

On the afternoon of 30th August 1949, a Sanitary Assistant named Viswalingam arrived at the Nuwara Eliya police station and made an oral complaint to the 1st appellant who directed the reserve-sergeant to reduce it to writing. The gist of the complaint (D2) was that, after Viswalingam and Dr. Mendis (the Medical Officer of Health) had completed an official inspection of the premises of F. D. Munaweera's brother in connection with a pending case, Munaweera and his brother "obstructed their passage and threatened bodily harm to them". Viswalingam "felt greatly humiliated and disgraced". (Dr. Mendis, according to his evidence at the trial, did not take the incident so seriously as Viswalingam had done.)

The 1st appellant was satisfied that this complaint called for police investigation. His purpose in visiting Munaweera's house at about 7.30 p.m. is best explained in his own written statement D9 recorded at 8.40 p.m. on the same night:—

> "On a complaint made by Mr. Viswalingam the Sanitary Assistant and supported by Mr. Bowen Sanitary Inspector that they had been *intimidated and obstructed* when on duty at Mahagastota by Munaweera and his brother Thomas, *I went for inquiry* with Police Constables 29 and 418 (the 2nd and 3rd appellants)."

Munaweera was at home, wearing a sarong and " pyjama coat ", when the appellants arrived. The precise nature of the discussions which took place is in dispute, but admittedly some reference was made to the earlier incident in which Dr. Mendis and Viswalingam had been involved. It is also common ground that at a certain stage Munaweera was " asked " or " invited " by the 1st appellant to accompany the police party to the police station, and that originally he agreed to do so. Later, however, he expressed a wish (which was granted) to change into more suitable clothes before leaving his house. The 1st appellant then left the scene for a short while, one of the constables remaining behind with Munaweera. Munaweera also considered it prudent, before leaving for the police station, to write two letters asking a friend and a lawyer to protect his interests in the situation which had arisen. One of these letters (P3b) was addressed to a personal friend in the following terms :

" Dear Aiyah,

I am being called by the Inspector of Police to the police station. I do not know why. They say that there was a complaint made by this M. O. H. *I am going to the station at his (i.e. the 1st appellant's) request.* Please look after my interests. "

The subsequent events prevented this letter from being sent to Munaweera's friend. When the 1st appellant returned to the scene, Munaweera had commenced to write another letter (P3c) to a senior Proctor who was also an Unofficial Magistrate. It reads as follows :

" Dear Mr. Modder,

Over the instance I told you today about the M. O. H., *I am now being called by the Inspector of Police to the police station. I am proceeding with him.* Please see about this matter and kindly—"

It will be observed that the last sentence of P3c is incomplete.

The explanation is that Munaweera was not permitted to conclude his letter to Mr. Modder, nor was he allowed an opportunity to send it to Mr. Modder even in its incomplete form. His evidence at the trial was to the following effect :

" The Inspector said, ' Come, let us go '. I said, ' I am just writing these letters ; I will get down somebody to look after my interests and then come '. *Even at this stage I did not refuse to go.* The Inspector said, ' You must come immediately ; otherwise I am going to drag you out '. *Then I refused* . . . . "

This version is substantially supported by his dying deposition which was recorded on the same night (after the shooting incident) by the Magistrate of Nuwara Eliya.

The 1st appellant's written statement D9 (previously referred to) is to the effect that, when Munaweera ultimately refused to go to the police station, " I told him he would have to come . . . *and to do so without a fuss and he said that he would not. I told him that he must and told P. C. 418 to bring him out* ".

I shall now quote a passage from the 1st appellant's oral evidence as to the events immediately preceding Munaweera's refusal to accompany him to the police station :

> " He wanted time to complete the letters. I said he could complete them. He continued to write. I asked him not to waste time and to come because he was delaying. As he kept on delaying *I said I would give him two minutes more and if he did not come we would have to take him* . I told the two constables to give him two minutes more and if he did not come, to bring him. "

The 1st appellant falsely claimed that he had left the room before the 2nd and 3rd appellants carried out his orders to remove Munaweera from the room, and, when they proceeded to " drag " him away by force on his refusal to accompany them " without a fuss ".

I accept the learned judge's findings as to the circumstances in which Munaweera was (perhaps accidentally) shot during the scuffle which ensued. Nor do I see the slightest reason for rejecting the conclusion that *Munaweera was not informed " on what charge or suspicion of what crime he was seized* ". Indeed even if the 1st appellant's intention at that stage had been only to have Munaweera removed by force to the police station in order to have his statement recorded under section 122 of the Criminal Procedure Code, such action would have been equally illegal.

It is not, perhaps, completely impossible to construe Viswalingam's complaint as having alleged facts constituting an offence punishable under section 344 of the Penal Code and for which a police officer, reasonably suspecting the truth of that complaint, may arrest the alleged offender without a warrant under section 32 (1) (*b*) of the Criminal Procedure Code. At the same time, the 1st appellant 's written statement D9 strongly supports the learned judge 's conclusion that " *when he went to inquire into this complaint, he did not suspect anything more than a case of intimidation or obstruction* " (both non-cognizable offences). The learned judge's impression was that, when Munaweera ultimately changed his mind and refused to accompany the police officers to the police station, the 1st appellant " took exception to the manner in which Munaweera spoke or behaved " and accordingly ordered Munaweera's arrest in order to " teach him a lesson ".

Chapter 12 of the Criminal Procedure Code affords many safeguards to a private citizen against whom an allegation of having committed a cognizable offence is made to the officer-in-charge of a police station. For instance, before the officer proceeds to investigate the facts and, if necessary, to arrest the suspect, he must " forthwith " send a report

to his own immediate superior—section 121 (2). This was not done. In one sense, the omission is favourable to the 1st appellant, because it exonerates him of an intention to act illegally from the very outset. But in another sense, it supports the view that at a later stage he acted from improper motives.

Even on the view which is more favourable to the 1st appellant (namely, that he believed that he was entitled to have Munaweera arrested without a warrant on a reasonable suspicion that an offence under section 344 of the Code had been committed) the arrest or attempted arrest of Munaweera in the particular circumstances of this case was illegal. The charges of criminal force and attempted wrongful confinement were therefore equally established against the 1st appellant on either hypothesis. Let me explain why.

The Crown strongly relied in both Courts on *Muttusamy v. Kannangara* (*supra*). I there held, following the decision of the House of Lords in *Christie v. Leachinsky*[1], that a police officer who would otherwise be justified in arresting a man without a warrant under section 32 (1) nevertheless acts illegally if (subject to certain exceptions which do not here apply) he does so *without informing the suspect of the nature of the charge upon which he is arrested.*

Mr. Chitty has invited us to reconsider this ruling. He argued that, whereas section 53 of the Criminal Procedure Code in terms requires a police officer arresting a man on the authority of a warrant "to notify the substance of the warrant to the person arrested" no such duty is expressly imposed on a police officer who acts without a warrant under section 32. The submission is that in Ceylon the powers of police officers are regulated by statute, and cannot further be circumscribed by any general principles of the English law (on which the greater part of our Code is substantially based).

I have given most anxious consideration to Mr. Chitty's argument, and am very glad to re-affirm my conviction that in this country (as in England) a police officer who arrests private citizens *with or without the authority of a warrant* is equally obliged to notify the arrested person of the reason for interfering with his personal freedom. A recognition of this fundamental rule (which owes its origin to the English common law) is demonstrably implicit in the scheme of our Code.

It is sufficient to refer only to section 23 (1). "In making an arrest the person making the same shall actually touch or confine the body of a person to be arrested *unless there be a submission to the custody by word or action*". The law does not require a man to consent or "submit" to his detention or arrest unless he knows "the reason why". As Lord Simon observed in *Christie's case* (*supra*), "the matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and *is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed*". It follows as a necessary corollary

[1] (*1947*) *A. C. 573.*

that "in normal circumstances an arrest without warrant by a policeman or by a private citizen can only be justified if it is an arrest on *a charge made known to the person arrested* ".

How else can he arrive at a decision whether to "submit" or not? How else can he satisfy himself that his proposed detention is authorised by law?

The judgment of Lord Simonds in *Christie's case* (*supra*) is equally instructive. Having observed that "every citizen is entitled to resist arrest unless that arrest is lawful", he asks, " *How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested?* ". Similarly, Lord du Parcq points out that " *the right to arrest and the duty to submit are correlative.* A man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, the person *must, as a general rule, tell him what the reason is, for unless he is told, he cannot be expected to submit to arrest, or blamed for resisting* ".

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere "unexpressed suspicion" that a particular cognizable offence has been committed—unless, of course, "the circumstances are such that the man must know the general nature of the offence for which he is detained" or unless the man "himself produces the situation which makes it practically impossible to inform him". I refuse to believe that the legislature intended police officers or private individuals making arrests in this country on their own initiative to enjoy the right to greater reticence than persons who execute warrants issued by a Magistrate after a judicial decision that the evidence before him justified interference with the liberty of the subject *before trial.* Mr. Chitty's argument, if sound, would equally apply to any private citizen purporting to make an arrest under section 35. That cannot be the law of any civilized country.

In *Christie's case* (*supra*) the House of Lords unanimously approved the following propositions laid down by Scott L.J. in the Court of Appeal in (*1946*) *1 K.B. 124:*

" (1) Arrest on a criminal charge always was and still is a mere step on the procedural road to committal, trial, verdict, judgment, punishment or acquittal.

(2) The power of arrest conferred by the law is limited to the purpose of the particular proceeding, namely *the specific charge formulated.*

(3) The arrest must be made *on that charge only, and the person arrested must be told by the constable, at the time of the arrest, what the charge is.* "

These rules are equally applicable in Ceylon. " The law does not allow an arrest *in vacuo*, or without reason assigned, and the reason assigned must be that the arrest is *for the purpose of a prosecution on the self-same charge as is the justification for the arrest* ".

Police officers must also realise that before they arrest without a warrant, " *they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence "—*per* Lord Porter in *John Lewis & Co. Ltd. v. Tims* [1]. In the present case, the 1st appellant asserted (and the learned judge believed) that he had not finally decided to arrest Munaweera at the time that he first entered Munaweera's house.

Munaweera had agreed in the first instance to accompany the police officers for a reason which was not made clear to him (P3b), but he was perfectly justified before leaving his house, in deciding to notify a lawyer of his own selection of what was taking place. The exercise of that elementary right was denied him, and he accordingly refused the " polite invitation " to go to the police station. The subsequent attempts to remove him forcibly *without any further intimation of the reasons for his proposed compulsory detention or arrest* were quite illegal. For these reasons, I would affirm the conviction of the 1st appellant on the 2nd and 3rd counts in the indictment. He was the senior officer present, and he was responsible for the actions of the 2nd and 3rd appellants who were admittedly acting on his orders. The sentences passed on the 1st appellant must also be affirmed. In my opinion, they err on the side of leniency.

As to the convictions of the 2nd and 3rd appellants, however, I take the view, and learned Crown Counsel very fairly conceded, that their acquittal on the 1st count (involving as it did a rejection of the suggested inference that they had entered Munaweera's house in pursuance of a prior conspiracy to commit the offences alleged in the other counts) should as a necessary corollary have led to their acquittal on the chargee of criminal force and wrongful confinement as well. It is not improbable that, when the senior police officer present eventually ordered Munaweera's arrest at a later stage, they reasonably and in good faith entertained the belief that the order was one which they ought to obey. In these circumstances, they were entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code. Their case can be differentiated from one where obedience of an order known to be illegal is relevant only to the question of punishment, but not to the issue of guilt. See *Chaman Lal's case* [2]. I would therefore allow the appeals of the 2nd and 3rd appellants and make order acquitting them. Their applications in revision should for the same reason be granted.

FERNANDO A.J.—I agree.

Appeal of 1st appellant dismissed.

Appeals of 2nd and 3rd appellants allowed.

[1] *(1952) A. C. 676 at 691.*

[2] *A. I. R. (1940) Lah. 210 at 216.*