CRIMINAL REVISION.

Before Suhrawardy and Jack JJ.

K. T. HING

v.

I. N. SILAS.*

1929

July 10, 25, 31.

Public nuisance—Annoyance to a few, if a public nuisance—Indian Penal Code (Act XLV of 1860), s. 290.

The annoyance of a few residents of a single house is not sufficient to constitute a public nuisance as contemplated by section 290 of the Indian Penal Code. It is not sufficient proof under that section to say that the complainant and a few of his tenants represent the people in general who occupy property in the vicinity, there being no other people dwelling within unpleasant range.

RULE obtained by accused K. T. Hing, a partner of Messrs. K. T. Hing and brothers, the proprietors of the Chinese Theatre, against a conviction under section 290 of the Indian Penal Code.

The firm of the accused obtained a lease of a plot of land from the Improvement Trust of Calcutta for a period of 25 years for the purpose of building a two storied structure for a theatre. In the beginning of 1929, they built the present theatre on a plan approved by the Improvement Trust and sanctioned by the Calcutta Corporation. A license under section 391 of the Calcutta Municipal Act was also obtained from the Corporation for running the Chinese Theatre, and a Chinese theatrical party from Singapore came and began their performances there. The complainant was the joint owner of a building, known as Silas building, situated to the west of the theatre, next to the stage end. On the 24th April, 1929, the complainant lodged a complaint before the Chief Presidency Magistrate, Calcutta, against the

*Criminal Revision, No. 857 of 1929, against the order of T. Roxburgh, Chief Presidency Magistrate, Calcutta, dated June 13 and 19, 1929.

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petitioner, K. T. Hing, for having committed a public nuisance. *During the trial,* the prosecution examined five tenants of the Silas Mansions and some Mahomedans residing in Guriama's Lane, about 40 yards from the theatre. The learned Magistrate found that the grievance of the Mahomedans was not genuine, they being less susceptible to noise. He was further of opinion that if that place were surrounded by Chinese dwelling, no objection could be made. But he held that the complainant and his tenants represented substantially the public in general who dwelt and occupied property in the vicinity, the complainant's building being at present the only substantial inhabited property in the neighbourhood. He, thereupon, convicted the petitioner under section 290 of the Indian Penal Code, who obtained this present Rule.

Mr. S. N. Banerji (with him *Mr. S. K. Sen* and *Mr. Satindranath Mukherji*). The findings of the Magistrate do not bring the case within section 290 of the Indian Penal Code. "Public" is defined in section 12 and "Public nuisance" in section 268 of the Code. The mere fact that only 3 or 4 persons living in that portion of Silas building abutting the stage end of the theatre have complained of the noise of the Chinese music cannot render such music a public nuisance, within the meaning of the Act. The learned Magistrate has found that the grievance of the Mahomedans is not genuine. There are admittedly other tenants in the Silas building who have not been called. The theatre is situated in a locality which is at present vacant and there can be no question of causing any annoyance to the public in general. Moreover, in that locality circuses, cinemas and other public amusements are held in certain seasons of the year. The learned Magistrate is wrong in supposing that the few tenants of a portion of the Silas building can substantially represent the public in general. There is no public nuisance and the conviction is, therefore, bad.

Mr. B. C. Chatterji (with him *Mr. Manindranath Mukherji*), for the opposite party. The nature of the terrible and deafening noise of drums, cymbals, crackers and a number of flutes and the times at which these are played clearly show that the so called music is a nuisance of a serious character detrimental to public peace and health. The opposite party has examined a large number of witnesses who have come forward to depose about the annoyance caused by this music. It is contended that the nuisance, if any, is really private and not public. But, in view of the fact that the surrounding land is mostly open space and that the witnesses called are the major portion of the dwellors in the vicinity, the learned Magistrate is right in holding that they represent substantially the public in general. Moreover, what constitutes a public nuisance is a question of fact and, after the clear finding of the learned Magistrate, the conviction should not be interfered with.

Cur. adv. vult.

JACK J. The petitioner is one of the proprietors of the Chinese Theatre Studio on Chittaranjan Avenue. He has been convicted under section 290 of the Indian Penal Code of committing a public nuisance by the annoyance caused by the sounds made by his theatre band, in connection with performances at the theatre from 12 noon to 4 p.m. and 8 p.m. to midnight every day.

The only ground for revision seriously urged is that the prosecution has failed to prove the existence of a public nuisance inasmuch as it has not been shown that annoyance has been caused to the public or to the people in general who dwell or occupy property in the vicinity in accordance with the terms of section 268 of the Indian Penal Code defining public nuisance. On this point, the finding of the learned Chief Presidency Magistrate is as follows: "It is suggested that this is not a public but a private "nuisance. Some Mahomedans have been called by

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"the complainant to help him over the difficulty, I "doubt if their grievance is very genuine. I imagine "they are less susceptible to noise. But, in the "peculiar circumstances of this case, as shown by the "plans, the complainant and his tenants, represent "substantially the public in general who dwell and "occupy property in the vicinity. The complainant's "house is at present the only substantial inhabited "property in the neighbourhood. The rest is mostly "open space, or covered by small huts. If these were "occupied by buildings inhabited by people who "would say they did not mind the noise (*e.g.*, Chinese) "the matter might be different. But the accused has "not called a single person living in the vicinity to "contradict the evidence given by the prosecution." The learned Magistrate finds that "partly owing to "the proximity of the theatre to the complainant's "building and partly owing to the unusual nature of "the sounds which constitute Chinese music, the "complainant and his tenants have a genuine "grievance."

On the findings, it appears that the only persons affected are those occupying the end of the complainant's building next the theatre. Not more than 7 or 8 persons in all occupy these rooms. Of these four, including the complainant, have been examined and say that they are annoyed by the noise from the theatre, especially at night. The question then is whether the annoyance of these few residents of a single house is sufficient to show that the noise made by the theatre band constitutes a public nuisance, *i.e.*, whether it can be said to cause annoyance to the people in general who dwell or occupy property in the vicinity. There are practically no other people occupying property in the vicinity except the occupants of some huts, the nearest of which is 30 or 40 yards from the front of the theatre. That the other people are affected, I do not believe on the evidence or findings of the magistrate. Taking it for granted that, at the time complained

of, the noise was sufficiently loud to seriously annoy the residents of the end rooms of the Silas building, which is built almost right against the stage end of the theatre, it does not follow that it would necessarily cause annoyance to the residents of other buildings in the vicinity, except those very close to the stage end of the theatre. But there are in fact no other people dwelling in the vicinity within unpleasant range of the noise or music of the band. In these circumstances, the noise can hardly be called a public nuisance.

In the case of *Soltau* v. *de Held* (1), the Vice-Chancellor held that a peal of bells which caused a nuisance to the residents of the adjoining house could not be called a public nuisance. "If," he says, "the thing complained of is such that it is a great "nuisance to those who are more immediately within "the sphere of its operation but no nuisance or "inconvenience whatever, or is but advantageous or "pleasurable to those who are more removed from it, "it does not, I conceive, come within the meaning of "the term public nuisance."

In the case of *Allen* v. *Lloyd* (2), it was held that the noise made by a tinman which was a nuisance to the occupants of three sets of chambers of Clifford's Inn close by, did not constitute a public nuisance, not being sufficiently general in extent to support an indictment. This decision is authority for the contention that where only a very limited number are affected the nuisance does not amount to a public nuisance.

The learned advocate for the prosecution has referred to the case of *Lallu Ram* v. *Emperor* (3). This was a case apparently under a municipal Act affecting people passing along a public thoroughfare and has no application to the facts of the present case. It is not, in my opinion, sufficient to say that the

(1) (1851) 2 Sim. (N.S.) 133, 143. (2) (1802) 4 Esp. 200; 170 E. R. 691.
(3) (1923) 21 All. L. J. 772.

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complainant and 3 or 4 of his tenants represent the people in general who occupy property in the vicinity. The annoyance must actually be caused to people in general occupying property in the vicinity. Because the residents of a single house are annoyed by the noise of a theatre, the householder is not entitled to prosecute, unless he can show that the noise annoys other people living in the vicinity. There is not sufficient proof of this in the present case. I, therefore, think that the conviction and sentence should be set aside, the accused acquitted and the fine if paid refunded.

SUHRAWARDY J. I agree with my learned brother, though not without some hesitation. It may be argued that the evidence falls short of establishing an indictable nuisance.

Rule made absolute, conviction set aside.

A. C. R. C.