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has sent up to this Court along with the reference, and there can be no doubt that annoyance is frequently caused by acts of this kind. We are not satisfied that the act of the women in this case was one which must necessarily have caused annoyance. If the act, of which these women were found guilty, was an act entirely without a remedy, it might be necessary to call attention to the absence of all remedy. All that need be done in the present case is to say that the Sessions Judge is so far right when he says that the act does not fall within section 290 of the Indian Penal Code. The conviction will have to be set aside, and the fines, if paid, be refunded to the person or persons who paid them.

AIKMAN, J.—I am of the same opinion. In my judgment persons who are exercising the right of passing along a public road ought to be protected from being importuned for the purpose of prostitution. Within the limits of Cantonments such protection may be afforded by rules framed under section 26, clause 23, of the Cantonments Act of 1889; similarly within the limits of Municipalities, protection may be afforded by rules framed by Municipal Boards under the provisions of section 55, clause 1, of Act No. XV of 1883. But the sole question we have to deal with now is, whether the conduct of petitioners amounted to a public nuisance as defined in section 268 of the Indian Penal Code. I entirely concur with my learned brother in holding that it did not. The conviction and sentence must therefore be set aside.

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Before Mr. Justice Knox and Mr. Justice Aikman.

QUEEN-EMPRESS v. KHEM.*

Act No. XLV of 1860 (Indian Penal Code) section 193 *Criminal Procedure Code, section* 164*—Statement made in the course of a "Judicial proceeding"—Statement made before a Magistrate under section* 164.

Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under section 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly

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be convicted under the second—if not under the first—paragraph of section 193 of the Indian Penal Code. *Queen-Empress* v. *Bharma* (1) considered and distinguished.

This was an appeal by the Local Government from the acquittal of one Khem by the Sessions Judge of Farrukhabad on a charge under section 193 of the Indian Penal Code. The facts were briefly, that Khem had been put before a Magistrate of the third class as a witness in a case of theft and had made a statement before the Magistrate under section 164 of the Code of Criminal Procedure on solemn affirmation. Subsequently Khem, as a witness before the first class Magistrate who tried the case, made a diametrically opposite statement, also on solemn affirmation. Khem was tried on a charge framed in the alternative in respect of these two statements, and was convicted under section 193 of the Code of Criminal Procedure by a Magistrate of the first class. Khem appealed to the Court of Session, and that Court acquitted him on the ground that the statement made by Khem under section 164 of the Code of Criminal Procedure before the third class Magistrate was not made in the course of a judicial proceeding, and with reference to the case of *Queen-Empress* v. *Bharma* (1). From this acquittal an appeal was preferred by the Local Government.

The Government Advocate (for whom Mr. *W. K. Porter*), for the Crown.

KNOX and AIKMAN, JJ.—In this case, as in the cases which have preceded, the accused had been convicted on an alternative charge of giving false evidence in that he made two contradictory statements. The first statement was made before a Magistrate of the third class while a police investigation in a case of theft was pending. The second was made before a Magistrate of the first class who tried the case. Khem in his defence stated that the statement which he had made in the Court of the Magistrate who tried the theft case was a true statement, and that the statement which he had made to the effect that three other persons had been present at the theft, namely, the statement which he made before the Magistrate of the third class, was made through fear and at the instigation of the police. The learned Sessions

(1) (1886) I. L. R., 11 Bom., 702.

Judge on Khem's appeal considered himself bound to follow the ruling *Queen-Empress* v. *Bharma* (1) and to hold that a statement taken down in the course of a police investigation by a third class Magistrate is not evidence in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. Even if this were a right view of the law, the false statement made under such circumstances would fall within the second paragraph of section 193 of the Indian Penal Code. Moreover, the ruling which the learned Sessions Judge has followed is not one which applies to the present case. The statement with which the Bombay Court was dealing was a statement taken by a third class Magistrate in an investigation into a charge of murder, and it was on the ground that such Magistrate had not authority to carry on the preliminary inquiry in the case that the statement so recorded was held not to be evidence in a stage of judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. If the view of the Bombay Court taken in that case is a correct view, it does not apply to the case before us, in which the Magistrate who recorded the statement under section 164 of the Code of Criminal Procedure had himself authority, inasmuch as the case was one of theft only, to complete the trial. We have examined the statements made by Khem on the 18th and 23rd of January. They are statements so contradictory that we cannot see any way of reconciling them, and one or the other of them must have been false to the knowledge of the accused. We accordingly allow the appeal, and setting aside the appellate judgment of acquittal, restore the conviction of the Magistrate. We think, however, that it will be sufficient to direct that the accused suffer rigorous imprisonment for the space of three months with effect from to-day's date. Any portion of the imprisonment or detention since this appeal was filed that the accused has undergone on this charge will be deemed to be part of the substantive sentence.

[*See* also in this connection *Queen-Empress* v. *Alagu Kone* (2) and *Queen-Empress* v. *Puran* (3)—ED.]

(1) (1886) I. L. R., 11 Bom., 702. (2) (1892) I. L. R., 16 Mad., 421.
(3) Weekly Notes, 1899, p. 39.