

Before Mr. Justice Bennet.

EMPEROR *v.* BABU RAM AND ANOTHER.*

Indian Penal Code, section 160—Affray—Whether mutual attack essential—One person attacking and overpowering the other, who merely defends himself—Whether affray.

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In a public place two persons attacked and overpowered another person, who merely defended himself. *Held* that the two persons were rightly convicted of affray under section 160 of the Indian Penal Code, as there was a "fighting" in a public place, notwithstanding the fact that the third person only defended himself in exercise of his right of private defence.

The parties were not represented.

BENNET, J. :—This is a reference by the learned Sessions Judge of Kumaun asking this Court to set aside the convictions of Babu Ram and Bhim Singh under section 160 of the Indian Penal Code and the sentences of fines of Rs. 75 and Rs. 25 respectively. The sole ground for the recommendation is expressed as follows: "But I am doubtful whether on the facts stated the conviction under section 160 of the Indian Penal Code is justified. The offence of 'affray' is committed when two or more persons, by fighting in a public place, disturb the public peace. There must not only be a disturbance of the public peace, there must also be a fight, and the fight must be between two or more persons. By this I understand that there must be at least one person fighting on each side. In the present case Kali Das was acquitted of an offence under section 160 of the Indian Penal Code on the ground that 'he took no part in the affray'. He did no fighting at all. He was merely dragged out of his shop and beaten. If this was the case we are left with Babu Ram and Bhim Singh, both on the same side. In the circumstances can there be said to have been a fight at all? If Kali Das did not fight, it is difficult to see how Babu Ram and Bhim Singh can have done so, for, as I understand the mean-

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ing of the word, there cannot be a fight without at least one combatant on each side.”

There are several fallacies in the reasoning of the Sessions Judge and his recommendation that the fines should be remitted. The accused were prosecuted by the police under section 160 of the Indian Penal Code, and if the reasoning of the Sessions Judge was correct, and no cognizable offence was committed by the beating of Kali Das in Pauri Bazar street, the result would follow that the constable who intervened would have no right to do so under section 149 of the Code of Criminal Procedure but he could only have acted in the right of private defence of the body of Kali Das under section 97 of the Indian Penal Code. The Sessions Judge states that traffic was temporarily suspended. But his view is that a constable would have no power to interfere with persons who were suspending traffic in this manner, as there is in his opinion no cognizable offence. If therefore Kali Das did not make a complaint under section 323 of the Indian Penal Code for the wrong done to him privately, the accused Babu Ram and Bhim Singh could not, in the opinion of the Sessions Judge, be in any way punished. If the Indian Penal Code failed to provide for the punishment of persons who obstructed traffic in a public street in this manner, the Code would surely be defective. But chapter XIV of the Indian Penal Code does provide for offences against the public convenience and section 283 of the Indian Penal Code provides for the punishment of “whoever, by doing any act, causes danger, obstruction or injury to any person in any public way”, by fine which may extend to two hundred rupees. In the present case there is a clear finding that the accused Babu Ram and Bhim Singh caused obstruction to traffic in the public way, and they also caused injury to Kali Das in the public way. They could therefore have been charged under section 283 of the Indian Penal Code, or if not charged under that section they could have been convicted under it in

accordance with the provisions of section 237 of the Code of Criminal Procedure and the conviction under section 160 of the Indian Penal Code could be altered on revision to a conviction under section 283 of the Indian Penal Code. The section 283 of the Indian Penal Code is cognizable and triable summarily. The only difference would be that the sentences of one week's rigorous imprisonment in lieu of payment of fine would be altered to one week's simple imprisonment, as section 67 of the Indian Penal Code provides that where the offence is punishable with fine only the imprisonment in default of payment of fine shall be simple.

The next question is whether on the facts found by the Magistrate the offence of section 160 of the Indian Penal Code was proved against Babu Ram and Bhim Singh. The Sessions Judge has not quoted the findings correctly and he is wrong in stating that the Magistrate found as regards Kali Das that "he did no fighting at all. He was merely dragged out of his shop and beaten." What the Magistrate found was: "Kali Das took no part in the *affray*. He was beaten by the accused, Babu Ram and Bhim Singh. *Whatever he did, he did in his self defence*. It has been proved from the statements of prosecution witnesses that he was overpowered by the accused Babu Ram and Bhim Singh. He is therefore not guilty under section 160 of the Indian Penal Code." This finding shows that Kali Das did defend himself. This was in accordance with the prosecution evidence. Prem Singh constable says as regards the three accused, of whom Kali Das was one: "The accused were quarrelling in the Pauri bazar and beating each other . . . Kali Das was beating one of the accused when I reached the spot. Bhim Singh was beating Kali Das with his hand and so was accused Babu Ram . . . I do not know who was the aggressor." The evidence of the other prosecution witnesses showed that Babu Ram and Bhim Singh were the aggressors and so the Magistrate found

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that Kali Das was acting in his right of self defence. But where one person attacks and the other defends it is legally correct to say that the two persons are fighting and the case comes under the definition of affray in section 159 of the Indian Penal Code. When two or more persons, by fighting in a public place disturb the public peace, they are said to "commit an affray".

Gour's Penal Law of India, 1925 edition, paragraph 1426 quotes 1 Hawk., P. C. C. 63, section 22 as stating that an affray may receive an aggravation from the persons against whom it is committed, as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or by the bare attempt to make such a rescue. The officers of justice would not be guilty of any offence in defending themselves against such an attack, yet the attackers are held to be guilty of committing an affray. "Affrays" says Blackstone "are the fighting of two or more persons in some public place, to the terror of His Majesty's subjects; for, if the fighting be in private, it is no affray, but an assault" (4 Black, 145). The gist of the offence consists in the terror it causes the public. The fact that Babu Ram and Bhim Singh were the aggressors and were able to overpower Kali Das is a fact which would cause the people in the bazar more terror, not less terror. Affray is derived from the French *affraier*, to terrify. I refuse the reference and direct that the record be returned.