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me that it was for the accused to prove that he had already been tried and acquitted, and not for the prosecution to prove the negative: suppose an accused person were to allege a previous acquittal without specifying the place and date or producing a copy of the order, is the prosecution to ransack the record of every Court in India until it can satisfy the Court that the alleged defence is a false one"? The High Court having procured the record of the trial of Tika Singh before the Extra Assistant Commissioner of Jalandhar, the reference was laid before Pearson, J., and Oldfield, J., for disposal, by whom the following order was passed:—

PEARSON, J.—Having examined the records of the Court of the Extra Assistant Commissioner of Jalandhar, we come to the conclusion that he discharged Tika Singh under the provisions of s. 215, Act X of 1872. In the case tried by that officer, no charge was drawn up, and Tika was not acquitted, but only released. His discharge does not bar the revival of a prosecution for the same offence, but it can only be revived in the Court in which it could legally be instituted. That offence was committed in Philor and was properly triable by the Jalandhar Court. Tika was not tried in the Court of the Assistant Magistrate of Bijnor for concealing or detaining a woman who had been enticed away with criminal intent under the latter part of s. 498, Indian Penal Code, but for the very same offence of which he had been accused at Jalandhar, *viz*, "that you, on or about the 3rd February, 1880, did entice one Jas Kuar, the wife of Ganga Singh, with criminal intent." It is moreover obvious to remark that he could not be convicted of detaining an enticed woman until the enticing had been proved. The orders passed by the Sessions Court appear to us therefore to be right. With these remarks the record may be returned.

APPELLATE CRIMINAL.

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October 5

Before Mr. Justice Pearson and Mr. Justice Straight.

EMPRESS OF INDIA *v.* ABDUL HAKIM.

Right of Private Defence—Murder.

A head-constable, making an investigation into a case of house-breaking and theft, searched the tents of certain gipsies for the stolen property, but discovered nothing. After he had completed the search, the gipsies gave him a certain sum

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of money, which he accepted, but at the same time, not deeming it sufficient, he demanded a further sum from them. They refused to give anything more on the ground that they were poor and had no more to give. Thereupon he unlawfully ordered one of them to be bound and taken away. On his subordinates proceeding to execute such order all the gipsies in the camp, men, women, and children, turned out, some four or five of the men being armed with sticks and stones, and advanced in a threatening manner towards the place such gipsy was being bound and the head-constable was standing. Before any actual violence was used by the crowd of advancing gipsies the head-constable fired with a gun at such crowd when it was about five paces from him, and killed one of the gipsies, and, having done so, ran away. Any apprehension that death or grievous hurt would be the consequence of the acts of such crowd would have ceased had he released the gipsy he had unlawfully arrested and withdrawn himself and his subordinates, or had he effected his escape. *Held* that such head-constable had not a right of private defence against the acts of such gipsies, as those acts did not reasonably cause the apprehension that death or grievous hurt would be their consequence, and such head-constable was guilty of culpable homicide amounting to murder.

THIS was an appeal by the Local Government from a judgment of acquittal of the Sessions Judge of Meerut, dated the 8th April, 1880. The facts of the case are stated in the judgment of the High Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Local Government.

Mr. *Amir-ud-din*, for the accused person.

The High Court (PEARSON, J., and STRAIGHT, J.,) delivered the following judgment:—

STRAIGHT, J.—This is an appeal on behalf of Government from an order passed by the Sessions Judge of Meerut on the 8th April last acquitting the respondent, Abdul Hakim, of charges preferred against him under ss. 304 and 304A. of the Penal Code. The circumstances of the case, as detailed in the record, appear to be as follows:—On the night of the 28th January, 1880, the house of one Harjas, Thakur of Karoli, was burglariously broken into by some person or persons, and certain property stolen therefrom. Information of the commission of this offence was in due course lodged at the Jewar Thana by a chaukidar of the name of Mangala; and the respondent Abdul Hakim, chief constable of the station, was detailed for the duty of making inquiries into the matter. About midday on the 29th of January, accompanied by Gopal constable, Bura

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and Mangala chaukidars, and Harjas, he left the Jewar Thana, and proceeded to a place called Dianatpur, where there was an encampment of gipsies. Upon his arrival a search was made through the various tents for the stolen property or traces of it, but without success; and nothing was discovered in any way to connect the inhabitants of the camp with the crime of the previous night. It would seem that searches of a similar kind have been frequently made at the same place upon former occasions, and that a most reprehensible practice had sprung up for the police to accept presents in money from the gipsies, the amount of which varied more or less according to the rank of the officer conducting such search. After the respondent and his party had concluded their examination of the tents, a sum of Rs. 2-4-0 was handed by one of the gipsies named Bandhu to the constable Gopal, who in his turn delivered it over to the respondent Abdul Hakim, who put it in his pocket, and then, saying it was not sufficient, demanded Rs. 5. This the gipsies refused to give, pleading poverty and their inability to pay such an amount; and thereupon the respondent ordered the constable Gopal, and the two chaukidars, Bura and Mangala, to bind Hardeva, one of the gipsies and brother of Bandhu, and to take him away in custody. This they were proceeding to do, whereupon all the men, women, and children in the camp turned out, some four or five of the men being armed with sticks, and advanced in a threatening manner towards the spot where Hardeva was being bound, and the respondent was standing. Before any blow, however, had been struck, or any actual violence received by him or his companions, the respondent raised a double-barrelled gun that he was carrying and aimed it at the people, or, as some of the witnesses say, directly at Bandhu, and fired it, the death of Bandhu being the instantaneous result. When he had done this, he immediately turned round and took to flight, but was pursued by some of the gipsies, and a constable who was present of the name of Kan Singh, and was captured by them and brought back to where the body of the deceased man was lying. Meanwhile information was conveyed by Gopal to the sub-inspector at the Thana, named Abdul Kadir, and he ultimately went over to the camp at Dianatpur, and there after a long interval had elapsed, by a bribe of Rs. 125, induced the gipsies to burn the dead body of Bandhu and surrender the gun by which

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his death had been caused. That portion of the case does not appear to have any very material bearing upon the guilt or innocence of the respondent Abdul Hakim. It has been made the subject of a charge against the sub-inspector Abdul Kadir, with this extraordinary result, that, while the Sessions Judge has held that, in point of law, no offence was committed by Abdul Hakim, yet nevertheless that Abdul Kadir, knowing and having reason to believe that an offence had been committed by Abdul Hakim, caused evidence of the commission of that offence to disappear, with the intention of screening him from legal punishment. It is obvious that such a position is wholly untenable, and the Full Bench ruling of this Court has already so decided.

We cannot but express our deep regret at, and disapproval of, the very inadequate and unsatisfactory manner in which the case was disposed of by the Sessions Court. We do not at all agree with the view of the Judge that the Magistrate's record was too voluminous. On the contrary, we think that he might well have imitated the care and diligence with which the inquiry was concluded in the first Court; and it is inexplicable why on the trial before him he omitted to take the evidence of too such important witnesses as Hardeva and Hatti, the two gipsies, called before the Magistrate. The notes recorded of what was said by the persons who were examined in the Sessions Court are sadly curt and incomplete; and the inference is irresistible that the Judge altogether misunderstood the true meaning of the principles of law upon which the right of self-defence is based, and too hastily adopted a conclusion that neither facts nor law, nor both combined, for an instant warranted. He seems entirely to have lost sight of the circumstance that the conduct of the gipsies, which is said to have justified the discharge of the gun, was provoked by the illegal act of the respondent in ordering the arrest of Hardeva for the purpose of getting his extortionate demand of Rs. 5 complied with. He had no right whatever to cause Hardeva to be taken into custody, for no stolen property had been found in the camp, nor was there any reasonable suspicion against him, nor had he obstructed the officers in making the search or in discharging their duty. Himself having

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cedure, the respondent stands in no better and no worse position than any private person, and is not entitled to the superior protection which is thrown around a public servant lawfully acting in the discharge of his duty. It does not, however, appear to us that any question as to the right of self-defence strictly speaking arises, for upon the facts it is clear that any apprehension of death or grievous hurt which the respondent might have had could have at once been determined by the release of Hardeva, the abandonment of his demand for the Rs. 5, and the withdrawal of himself and his companions from the spot. In standing his ground for the moment and firing the gun off, he was in no way acting in the discharge of his duty as a police officer to protect his person or prevent the rescue of a prisoner, and as a private person there was ample opportunity for him to escape, and so remove all grounds of fear for life or limb. But even if we were for a moment to take into consideration the question as to whether he was or was not in apprehension of death or grievous hurt, it does not appear to us that, having regard to the fact that he himself was armed and his companions had batons in their hands, and that no violence had been used by the gipsies, there was reasonable cause for him to entertain any such apprehension. It is not sufficient, as was urged by counsel before us, for the respondent to say he was in fear of death or grievous hurt, which, by the way, he himself never has asserted; it is for the tribunal determining his guilt or innocence to find whether, having reference to all the circumstances in which he was placed, there were adequate grounds to justify him as a reasonable person in having such an apprehension. We entirely fail to follow the reasoning of the Sessions Judge that the not attempting to fire the second barrel is an indication of the absence of malice on the part of the respondent. It is pretty evident that, having seen the fatal consequences of his first shot, his immediate thought was to take to flight and save himself. Looking at all the facts, as disclosed in the records of the Magistrate and Sessions Court, we are of opinion that the acquittal of Abdul Hakim was a grave miscarriage of justice, and that this appeal by Government must prevail. The act of the respondent is entitled to no such justification, excuse, or protection, as can remove it from the category of culpable homicide amounting to murder. To fire a gun at the distance of five paces

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at a number of persons, holding it in such a way that one of them is mortally wounded in the heart, is to do a thing so imminently dangerous that the person doing it must have known that he would probably cause death, or such bodily injury as would be likely to cause death. According to the respondent's statement the shooting of Bandhu was accidental, and he had simply intended to fire off the gun over the heads of the gipsies for the purpose of frightening them, but his hand trembled, and the shots miscarried. This defence, however, is altogether disbelieved by the Sessions Judge, and so far, we may say, we entirely concur with him. In reference to this point, however, it may be observed that the ground upon which the Sessions Judge passed his order of acquittal was never taken by the accused himself, either in the Magistrate's Court or in the Court of Session.

The case is one of very grave public importance, and while we are fully sensible of the necessity for affording the fullest protection to police officers in the discharge of their duty, it is equally incumbent upon us to take care that the public are protected from extortion and violence at their hands. Money presents to the police of the kind mentioned in this case are only made under threats and compulsion and are grossly irregular and improper. Their unavoidable accompaniments are violence and coercion, and their inevitable consequences most injurious to the interests of justice. The conduct of the respondent Abdul Hakim was altogether gross and indefensible. We convict him of murder and direct that he be transported for the term of his natural life.

Appeal allowed.

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October 27.

Before Mr. Justice Pearson.

EMPRESS OF INDIA *v.* JAGAN NATH.

Irregular Commitment—Place of inquiry and trial—Act X of 1872 *(Criminal Procedure Code), ss.* 33, 63.

S. 33 of Act X of 1872 contemplates the contingency of a case which has been inquired into at the proper place, as indicated by s. 63 of that Act, being committed to the proper Court of Session by a particular Magistrate not duly empowered by law to make such commitment; and not of a case which has been inquired into in a district in which it was not committed, being committed to the