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second charge of the second trial by reason of the fact that proceeding illegally with that charge would not necessarily have vitiated the trial by virtue of section 537 (*b*) of the Criminal Procedure Code. Such proceeding would, in my opinion, nevertheless, have been illegal, even though the illegality might have been subsequently condoned under certain circumstances under section 537 (*b*) by a superior Court.

I also concur on the question of fact, viz., accused's guilty knowledge, and in the propriety of the sentence.

Conviction and sentence confirmed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

EMPEROR *v.* BECHUR ANOP.[a]

Indian Penal Code (Act XLV of 1860), sections 100, 325—Grievous hurt—Private defence—Plea cannot be set up in cases of deliberate fight.

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The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them.

APPEAL from convictions and sentences passed by P. J. Taleyarkhan, Sessions Judge of Broach.

The deceased Jiji took away a log of wood belonging to accused No. 2 and threw it into the Holi bon-fire. The accused No. 2 was anxious to reclaim the wood from the fire, but was prevented from doing so by the deceased. A quarrel took place between them; but they were separated and sent away to their houses. The wood though charred was reclaimed from fire and taken to the house of accused No. 2.

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A party consisting of Jiji and four others then went to the house of accused No. 2 to take back the piece of wood ; but they were resisted by the three accused.

A street fight ensued between them, in which persons on both sides were hurt. The injuries received by Jiji were so serious that he died in a short time.

The accused were thereupon tried by the Sessions Judge of Broach for an offence punishable under section 325 of the Indian Penal Code (Act XLV of 1860), in that they caused voluntary grievous hurt to Jiji without any grave and sudden provocation. The accused raised a plea of self-defence ; but the plea was disallowed, on the following grounds :—

"It was faintly suggested by the pleader for accused Nos. 1 and 2 that they were acting in self-defence. The accused themselves however have not put forward any such plea though accused No. 1, no doubt, says that Jiji and his companions came over to where the charred piece of wood was lying and thereupon there was a fight, while accused No. 2 states that Jiji commenced the fight by striking his father. It however appears from the evidence of prosecution witnesses as well as from that of the defence witnesses that the fight was preceded by a verbal altercation carried on for some length of time ; and as the fight took place in the street and as the combatants on both sides were armed with sticks, it is clear that men on both sides must have gone into the street to fight. Under the circumstances the plea of self-defence cannot avail the accused."

The accused were all convicted. The accused Nos. 1 and 2 were sentenced to suffer rigorous imprisonment for five years; and accused No. 3 to rigorous imprisonment for one year.

The accused appealed to the High Court.

G. N. Thakore, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

BATCHELOR, J. :—This is an appeal from a judgment of the learned Sessions Judge of Broach who convicted

the three appellants of voluntarily causing grievous hurt otherwise than on grave and sudden provocation, and under section 325 of the Indian Penal Code sentenced accused Nos. 1 and 2 to five years' rigorous imprisonment and accused No. 3 to one year's rigorous imprisonment.

The only contention advanced by the learned pleader on behalf of the appellants was that the learned Judge below should have acquitted the appellants on the ground that they were entitled by their right of private defence to use the violence which in fact they did use. The evidence, however, satisfies us that the fight which resulted in the death of one man and in injuries to one or two others, took place in the public street between the accused's party and the deceased's party, and that both sides voluntarily engaged in it. There is every reason to believe that both sides were more or less drunk on the occasion in question, the quarrel having arisen about a log of wood which was thrown into the Holi fire, and the parties belonging to a caste in which it is usual to make the festival of Holi a pretext for intoxication and quarrelling. Now where both sides voluntarily and deliberately engage in fighting as in the circumstances now before us, it is not, I think, open to a member of either party to claim the right of private defence. In Russell upon Crimes (7th Edition, Vol. I, p. 810 Book IX, Chapter I), the law is stated in the following words:—"The law is that if the blow, from the effect of which the deceased died, was given purely in self-defence, as distinguished from a desire to fight, it is excusable, and it is a question for the Jury whether the prisoner struck the blow in self-defence, or whether he really desired to fight": see *Reg.* v. *Knock*[1]. And in India we have a similar decision by the

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Calcutta High Court in *Kabiruddin* v. *Emperor*, [1] where Mr. Justice Rampini says :—

"I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case, when both parties armed themselves for a fight, to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle, killing one man and wounding others....In the present case the appellants, if they had any right of private defence, which in the circumstances in my opinion they had not, did not act within the legal limits of such right. They did not restrict themselves merely to the use of such force as was necessary to resist trespass. On the contrary, they far exceeded their right, if they had any, for they killed a man and inflicted serious injuries on others."

So here, even if it could be shown by the appellants, on whom the onus lies, that they were entitled to the right of private defence—and in my opinion it cannot be so shown—yet it is manifest that they exceeded that right by causing the death of the deceased man on whom no less than eleven injuries were found. But, as I have said, in my judgment this appeal fails, because the right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them.

The convictions, must, therefore, be confirmed. But in view of all the circumstances disclosed on the record, I think that the sentences passed upon accused Nos. 1 and 2 may safely be reduced to sentences of two years' rigorous imprisonment in the case of each.

HAYWARD, J. :—I concur.

Convictions confirmed but sentences reduced.

R. R.

[1] (1908) 35 Cal. 368 at p. 376.