Present : Fisher C.J., Drieberg J., and Jayewardene A.J. 1928.

HEWAVITARNE *v.* APPUHAMY.

229—P. C. Badulla, 1,367.

Affray—Persons charged together—Legality—Criminal Procedure Code.

Two persons who are charged with committing an affray may be tried together in the same proceedings.

CASE referred by Jayewardene A.J. to a Bench of three Judges on the question whether two persons who are charged with committing an affray may be tried together.

Garvin, for appellant.—Two opposing factions cannot be charged together in the same proceedings. Illustration (*d*) of section 184 of the Criminal Procedure Code supports this view.

It has been held in numerous decisions of the Supreme Court that it is a fatal irregularity to charge members of opposing factions in the same proceedings. The reason being that a conflict of defences may result if such procedure is adopted. Opposing factions have conflicting interests. (*Velaiden v. Zoysa*[1] ; *Keegal v. Mohideen.*[2])

An affray is only created by two factions, and it requires two or more persons to create a faction. (*Police Officer v. Dineshamy.*[3])

Counsel contended that the principle of these decisions were applicable to the present case in that the illustration (*d*) of section 184 of the Criminal Procedure Code had been held to be applicable to case of affray.

Basnayake (*Acting C. C.*), for respondent.—The offence of affray must have the following ingredients :—

(1) That two or more persons were fighting.
(2) That the fighting was in a public place.
(3) That the fight disturbed the public peace.

See *Gour, vol. I., p. 885, ed. 1928.*

The essence of the offence is " A breach of the King's peace." In a charge for the offence of affray the extent of the injuries, the person who initiated the affray by striking the first blow does not matter. The moment the King's peace is disturbed by two or more persons fighting in a public place the offence is committed.

Two persons jointly commit one offence. In the case of a riot two opposing factions do not always exist. A riot can be committed by one party who have made up their minds to commit the offence.

[1] *(1910) 14 N. L. R. 140.* [2] *5 C. W. R. 162.*
[3] *21 N. L R. 127.*

1928.

Hewavitarne v. Appuhamy

Premeditation is not needed to constitute the offence of affray. Whether a person acted in self-defence or not, when attacked suddenly in a public place, does not enter into the decision of the question as to whether an affray was committed.

There is no direct authority to the effect that persons committing an affray cannot be charged together under section 156.

English practice is to charge persons committing an affray in the same indictment. See *Russell on Crimes and Misdemeanour.*

July 30, 1928. FISHER C.J.—

In this case the appellant and another man were convicted of committing an affray under section 157 of the Ceylon Penal Code They were tried together, and it is contended on their bebalf that the conviction is bad on that ground. The appeal originally came before Jayewardene A.J., who in view of the case of *Abeyewardene v. Fernando et al.*[1] reserved the question for the decision of three judges.

The facts in the present case seem to be very similar to those in the case referred to in which two rival boutique-keepers were bound over to keep the peace under section 81 of the Criminal Procedure Code. The point was taken that they must be treated as members of opposing factions, and therefore not triable together, and Sir Anton Bertram C.J. feeling himself bound by the decisions in *Velaiden v. Zoysa,*[2] *Wickremesuriya v. Don Lewis,*[3] *Keegal v. Mohideen and others,*[4] and *Police Officer v. Dineshamy et al.*[5] reluctantly upheld that view and allowed the appeal.

By section 156 of the Penal Code an affray is committed " when two or more persons, by fighting in a public place disturb the public peace ". The contention for the appellant is founded on illustration (*d*) to section 184 of the Criminal Procedure Code which reads as follows :—

> " A and B are accused of being members of opposing factions in a riot. They should be indicted and tried separately. "

All the four cases by which Sir Anton Bertram felt himself bound are distinguishable from the present case and from *Abeyewardene v. Fernando et al.* (*supra*) in that there were several accused in each of those cases. In the case of *Wickremesuriya v. Don Lewis* (*supra*) ten persons were summoned, and Shaw J. in his judgment says that " the evidence showed that the accused belonged to two rival factions." In *Keegal v. Mohideen and others* (*supra*) thirteen persons were charged with affray and the disturbance was between two rival parties. In *Velaiden v. Zoysa* (*supra*) Middleton J. states in his judgment that the accused-appellant relied upon the fact " that he was charged together with persons of an opposing

[1] (*1924*) *27 N. L. R. 97.*
[2] (*1910*) *14 N. L. R. 140.*
[3] (*1915*) *1 C. W. R. 192.*
[4] (*1918*) *5 C. W. R. 162.*
[5] (*1919*) *21 N. L. R. 127.*

party, with whom he was at enmity, in one proceeding." In *Police Officer v. Dineshamy et al.* (*supra*) there were six accused. In the case of *Abeyewardene v. Fernando et al.* (*supra*) and the present case, two persons were alleged to be fighting each other and there is no suggestion that there were other persons involved or that the two persons present were concerned with any interests other than their own.

Section 156 of the Penal Code lays down that an affray is committed "when two or more persons, by fighting in a public place disturb the public peace." It is therefore an offence which one person cannot commit alone. Intention to commit the offence is not a necessary element, and the gist of the offence is not the assault but the effect produced by the joint action of the combatants, namely, the disturbing of the public peace, the interference with the tranquillity of the public. The two or more persons involved therefore commit one and the same offence by reason of the effect of their joint action. They are therefore persons who, in the words of section 184 of the Criminal Procedure Code, "are accused of jointly committing the same offence," and under that section "may be charged and tried together or separately as the Court thinks fit."

In my opinion the words in illustration (*d*) in section 184 of the Criminal Procedure Code preclude the application of the illustration to a case such as the present. They refer to a more serious type of offence than that with which we are concerned, namely, to an indictable offence which is not triable by a Magisterial Court, and I can see no anology in the case we are considering which is a mere personal quarrel to the class of case contemplated by the illustration.

In my opinion therefore the two persons were properly tried together and the appeal must be dismissed.

DRIEBERG J.—

I agree with the judgments of my Lord the Chief Justice and my brother Jayewardene.

JAYEWARDENE A.J.—

I agree with my Lord the Chief Justice. When the case was first argued before me, Counsel for the appellant pressed me to consider the question of the sentence, and I was inclined to think the part of the sentence which ordered the accused to enter into a bond to keep the peace for three months was too severe.

I find that the accused has entered into a bond on March 5, and the period has expired. In the circumstances I would dismiss the appeal.

Appeal dismissed.