1932 *Present:* **Macdonell C.J., Garvin S.P.J., and Dalton J.**

WEERASINGHE *v.* MOHAMADU ISMAIL.

533-563—P. C. Puttalam, 13,442.

Affray—Two opposing factions—Joint trial—Criminal Procedure Code, s. 184, illustration (d).

Members of two opposing factions charged with affray may be tried togeher.

CASE referred by Maartensz A.J. to a Full Bench on the question whether two opposing factions charged with affray may be tried together.

Hayley, K.C. (with him *Nadarajah*), for sixteenth to thirty-first accused, appellants.—The first to fifteenth accused formed members of one party, and the sixteenth to thirty-first accused were members of a rival party. It is submitted that members of opposing factions should not be tried together on a charge of affray (*Velaiden v. Soysa*[1]; *Keegal v. Mohideen*[2]; *Police Officer v. Dineshamy*[3]). In *Abeywardene v. Fernando et al.*[4] Bertram C.J. doubted the correctness of this principle, but held that he was bound by it. The Divisional Bench differentiated the earlier cases, but did not overrule them, in *Hewavitarne v. Appuhamy.*[5]

[1] *14 N. L. R. 140.*
[2] *5 C. W. R. 162.*
[3] *21 N. L. R. 127.*
[4] *27 N. L. R. 97.*
[5] *30 N. L. R. 33.*

The Criminal Procedure Code, section 178, is the governing section with regard to the joinder of accused. Every distinct offence requires a distinct charge and a distinct trial. When a number of persons engage in a fight, there are several distinct offences of affray committed.

[GARVIN S.P.J.—Does not the fact that there is concerted action make a difference ?]

The element of concerted action and common intention has no place in the offence of affray, which connotes a breach of the peace being committed unexpectedly and without any previous intention (Gour's *Penal Code, p. 817, 3rd ed.*). As soon as we have concerted action, the offence committed is that of rioting and not of affray.

The joint trial of members of opposing factions is calculated to embarrass the accused in their defence. The law will not permit accused persons to be tried together in circumstances which indicate that they will thereby be prejudiced. Every accused might have a separate defence to the charge, and the Magistrate will find it difficult to distinguish the case of each accused.

[MACDONELL C.J.—But section 184 of the Criminal Procedure Code is merely discretionary.]

In any event it is submitted that general evidence alone is not sufficient to justify a conviction. Distinct acts of fighting must be held against each individual accused before he can be found guilty of affray (*Russell on Crimes 406; Archbold (26th ed.), p. 1228*).

Ameresekera and *E. F. N. Gratiaen* for first to fifteenth accused, appellants, adopted the above arguments, and further submitted that the accused had been committed for trial; no charge of rioting on the identical facts proved in this case. The offences of rioting and affray are mutually exclusive, and if an offience of rioting was disclosed by the evidence the Magistrate had no jurisdiction to try the accused summarily for affray (Criminal Procedure Code, section 193 (2)). In the alternative, affray constitutes a minor offence and is subsidiary to the major offence of rioting. The Magistrate is not entitled to try the accused on the lesser offence and thereby confer on himself jurisdiction. The accused have now been found guilty of affray. If they are subsequently convicted of rioting, a double sentence would be imposed in respect of the same transaction. The practice of splitting up a serious offence and charging and sentencing accused persons separately in respect of subsidiary offences has been discouraged by this Court (vide *Sub-Inspector of Police v. Evebinu Appu* [1]). Counsel also referred to section 67 of the Penal Code.

[DALTON J.—This is not a question that has been referred to the Divisional Bench.]

But the matter can be dealt with in revision.

J. E. M. Obeyesekere, C.C., for the respondent, not called upon.

[1] *31 N. L. R. 446.*

April 25, 1932. MACDONELL C.J.—

This was a matter referred by Maartensz J. to a Full Bench for decision. We gave a short judgment at the time, but announced that we would give a considered judgment later, which we now do.

The matter referred by Maartensz J. was the question " whether two opposing factions charged with affray can or cannot be tried together ", and he drew the attention of the Court to illustration (*d*) to section 184 of the Criminal Procedure Code. The section and illustration are as follows:—

" 184. When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit; and the provisions contained in the former part of this chapter shall apply to all such charges.

Illustration.

" (*d*) A and B are accused of being members of opposing factions in a riot. They should be indicated and tried separately."

According to the evidence, the facts in the case were that there was a dispute between two factions of the Muslims in Karativu with regard to the affairs of the mosque there. The first to fifteenth accused formed one faction called the " Sinne party ", while the sixteenth to thirty-first accused formed another faction called the " Peria party ". On several occasions the Udayar had had to interpose to prevent a breach of the peace, but on the day in question his efforts were of no effect, there was a fight between the two factions in a public place and for this fight the thirty-one accused were prosecuted under section 157 of the Penal Code as for an affray. It is to be observed, further, that according to the evidence it was one fight and not several—persons, time, and place all seem to have been the same.

The main reason for the present reference is the doubts expressed by Bertram C.J. in *Abeyewardena v. Fernando and others'* commenting on previous decisions. In that case objection had been taken that " where persons before the Court are members of opposite factions involved in a disturbance, they ought not to be tried together but should be tried separately "; and *Velaiden v. Soysa* [2], *Wickremesuriya v. Don Lewis* [3], *Keegal v. Mohideen* [4], and *Police Officer v. Dineshamy* [5] were cited in support of this. Bertram C.J. upheld the objection with some reluctance and in deference to what he considered authority, and he added, *loc. cit.* " It seems to me that in cases of this sort where there is a mutual assault or affray in a public place, or any sort of disturbance between various persons, it would often be most convenient and reasonable to bring them together before the Court, have all the circumstances investigated, and have the several accused dealt with according to their responsibility."

[1] *27 N. L. R. 97.*
[2] *14 N. L. R. 140.*
[3] *1 C. W. R. 192.*
[4] *5 C. W. R. 162.*
[5] *21 N. L. R. 127.*

Affray is defined by section 156 of the Penal Code as follows:—" When two or more persons, by fighting in a public place disturb the public peace, they are said to commit an affray." There must then be more persons concerned than one and the gist of the offence is their joint action of fighting in public to the disturbance of the public peace, and the two or more persons involved commit one and the same offence by reason of such 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 they " may be charged and tried together or separately as the Court thinks fit "; and see *per* FISHER C.J. in *Hewavitarne v. Appuhamy* [1]. But if the offence be a joint one none the less the part taken by each joint offender must be proved against him and this essentially differentiates the offence of affray from that of riot. Once there is sufficient evidence to prove a riot, namely, the number of persons, the common object, and the violence in prosecution of the common object, every member of the assembly guilty of the riot is responsible for the acts of every other member in prosecution of that common object. This rule of law imposing this joint responsibility explains the enactment of illustration (*d*) to section 184 of the Criminal Procedure Code. It would be embarrassing and unfair to a member or members of one faction charged with riot to be tried along with a member or members of the opposing faction charged also with riot, hence the enactment that they should be indicted and tried separately. There would seem to be a logical reason also. One of the ingredients of riot is violence in prosecution of a common object, and where two factions are contending, it is doubtless the common object of faction A to injure faction B, and of faction B to injure faction A, but it might be difficult to show that the two factions were, as an assembly, animated by any one common object. Analysis of their intentions seems to show the existence of two objects, not of one object in common, and, if so, this is a good reason for not allowing the two factions to be tried together for riot. But no such rule applies in cases of affray, even where two factions are involved. Affray is a joint offence in so far that it takes more than a single person to commit it, but it is also an individual offence in that to find anyone guilty of it, it is not sufficient to prove acts of fighting by others in a public place, not even acts of his own faction, it is necessary to prove such acts against him individually. Consequently illustration (*d*) to section 184 does not apply to the case of affray both by its terms, for it speaks of riot only, and in essence, since the two offences, riot and affray, are essentially distinct for the reason just given. I would respectfully concur with Bertram C.J. in *Abeyewardena v. Fernando and others* (*supra*) that it is both convenient and reasonable to try all the participants in an affray in one proceeding. It is certainly the rule under English law, to try jointly all persons accused of affray, and if so, the same rule should apply under our law *a fortiori*, since by English law to prove affray it is not necessary to prove actual violence but only that the acts proved have caused terror to the King's subjects (*Archbold, 27th ed., p. 1232*), while by section 156 of the Penal Code it is necessary

[1] *30 N. L. R. at p. 35.*

to prove actual fighting, so that there is the less risk on a joint prosecution of any person being unjustly convicted, since an act of fighting must be proved against him individually without which he cannot be found guilty.

For these reasons I would answer the question put to us in the affirmative and say that two opposing factions charged with affray can be indicted and tried together, also that illustration (*d*) to section 184 of the Criminal Procedure Code does not apply to a case of affray.

There was a further point raised before us under section 193 (2) of the Criminal Procedure Code, namely, that the Magistrate should have stayed further proceedings because an offence had been disclosed not within his jurisdiction to try. This was not one of the points referred to this Court by Maartensz J. and it does not seem to be a matter which arises definitely from the evidence in this case. It would appear that section 193 (2) requires either that the Magistrate's attention must be drawn to the fact that there is evidence disclosing an offence beyond his jurisdiction, or that this fact must leap to the eye from what has been proved in the case before. In any case, this point was not one that was referred to us in this case.

GARVIN S.P.J.—I agree.

DALTON J.—I agree.