1914.

Present : Lascelles C.J.

AVALIYA *et al. v.* KHAN *et al.*

234-240—P. C. Trincomalee, 7,541.

Conviction for affray—Subsequent charge for causing hurt against some of those who were convicted for affray—Penal Code, s. 314—Criminal Procedure Code, ss. 330 and 180—Interpretation Ordinance, No. 21 of 1901, s. 8.

Ten persons were convicted of committing an affray under section 157 of the Penal Code. Thereafter three of those who were convicted of affray charged the other seven in this case under section 314 of the Penal Code with having caused hurt to them,—

Held, that the conviction in the affray case was not a bar to the conviction in the present case.

TEN persons were charged with having committed an affray under section 157 of the Penal Code and convicted. Thereafter three out of the ten accused charged the other seven with having caused hurt to them on the said occasion. The seven accused

[1] *(1911) 14 N. L. R. 238.*

pleaded the conviction under section 157 of the Penal Code as a bar to the present prosecution. The learned Magistrate over-ruled the objection, and after trial convicted the seven assused. They appealed.

Balasingham, for the appellants.—The accused have already been convicted of having committed an affray. They were charged with having committed an affray, as they had fought in a public road. It is not open to the complainants to charge the others who took part in the affray with having caused hurt to them. It was because the complainants and accused had caused hurt to each other on a public place that they were prosecuted for affray. Section 8 of the Interpretation Ordinance, No. 21 of 1901, provides that where any act or omission constitutes an offence under two or more laws, the offender shall be liable to be prosecuted and punished under either or any of those laws, but shall not be liable to be punished twice for the same offence. The offence of fighting on the road is an offence falling under two sections, viz., section 157 of the Penal Code and section 314 of the Penal Code. Fighting, when it takes place on a public place, is an offence under section 157; but when it takes place elsewhere is an offence under section 314 (hurt) or under section 340 (criminal force). It is repugnant to the provisions of section 8 to prosecute the accused under section 314 after having punished them for substantially the same offence under section 157. See *Modder v. Perera.* [1] To constitute affray both partise should have caused hurt or used criminal force to each other. See *Banda v. Chlliah.* [2]

Arulanandam, for the respondent, not called upon.

March 23, 1914. LASCELLES C.J.—

This is an appeal against the conviction of the seven accused in a charge of hurt, the conviction being on the complaints of three complainants. It appears that all these ten persons had previously been convicted of the offence of causing an affray, and it is now argued on behalf of the appellants that their conviction in the previous case is a bar to the present conviction. The law on the matter is clearly laid down in sub-section (2) of section 330 of the Criminal Procedure Code. The section is as follows:—" A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sub-section (1) of section 180, " which section deals with the joinder of charges. The question then is whether, on the former trial, the accused might have been charged with assaulting the three complainants in addition to the charge of affray. There can be no doubt but that

[1] *(1913) 16 N. L. R. 87.*

[2] *2 Leader 123.*

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LASCELLES C.J.

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this question should be answered in the affirmative. The charges spring out of the same transaction, and they could have been joined in the same charge. So far the matter seems absolutely clear. Then I am referred to section 8 of the Interpretation Ordinance of 1901 and the case of *Modder v. Perera.* [1] Section 8 of the Interpretation Ordinance provides that where any act or omission constitutes an offence under two or more laws, the offender is liable to be prosecuted under either of the laws, but he shall not be punished twice for the same offence. Now, in order to render this section applicable to the present case, one has to assume that the offence of affray is the same or substantially the same as the offence of hurt. This obviously is not the case. The element of hurt is not a necessary ingredient in the offence of affray. You may have an affray without any hurt being caused at all. The essence of an affray is fighting, which is a disturbance of the public peace. It seems to me that these two offences are essentially different, and that the conviction in the former case is not a bar to the conviction in the latter case.

The appeals are dismissed.

Appeals dismissed.

[1] *(1913) 16 N. L. R. 87.*