CRIMINAL REVISION.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Russell.

1905.
December 5.

EMPEROR *v.* HUSSEIN NOOR MAHOMED AND OTHERS.*

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), section 12(1) —Gambling in a railway carriage—Through special train—Public place—Railway track—Public having no right of access except passengers.

The accused were convicted under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) as persons found playing for money in a railway carriage forming part of a through special train running between Poona and Bombay, while the train stopped for engine purposes only at the Reversing Station (on the Bore Ghauts between Karjat and Khandála Stations) of the Great Indian Peninsula Railway.

Held, reversing the conviction, that a railway carriage forming part of a through special train is not a public place under section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887).

Per JENKINS, *C. J.*:—The word "*place*" [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] is, I think, qualified by the word "public" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare*..... I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

---

* Criminal application for revision No. 217 of 1905.

(1) Section 12 of the Bombay Prevention of Gambling Act (IV of 1887).

12. A Police officer may apprehend without warrant—

(*a*) any person found playing for money or other valuable thing with cards, dice, counters or other instruments of gaming used in playing any game, not being a game of mere skill, in any public street, place or thoroughfare;

(*b*) any person setting any birds or animals to fight in any public street, place or thoroughfare;

(*c*) any person there present aiding and abetting such public fighting of birds and animals.

Any such person shall, on conviction, be punished with fine which may extend to fifty rupees, or with imprisonment which may extend to one month.

And such Police officer may seize all birds and animals and instruments of gaming found in such public street, place or thoroughfare or on the person of those whom he shall so arrest, and the Magistrate may, on conviction of the offender, order such instruments to be forthwith destroyed, and such birds and animals to be sold and the proceeds forfeited.

1905.

EMPEROR v. HUSSEIN.

* *Per* RUSSELL, *J.*—The adjective "public" [in section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887)] applies to all the three nouns—street, place or thoroughfare, and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares".

CRIMINAL application for revision of convictions and sentences recorded by K. V. Joshi, First Class Magistrate of Mával at Vadgaon in the Poona District, in case No. 221 of 1905.

On the 2nd September 1905 the accused were travelling in a Second Class Railway carriage of a through special train running from Poona to Bombay. The train ran direct to Bombay and took no passengers at any intermediate stations between Poona and Bombay. During the season of the races at Poona, the Great Indian Peninsula Railway Company started such trains from Bombay to Poona if a sufficient number of passengers offered beforehand to travel by them. The train in which the accused were travelling stopped for the purposes of the engine only at the Reversing Station in the Bore Ghauts between Karjat and Khandála Stations, and while this train was standing the Police raided the carriage in which the accused were travelling and found them sitting round a piece of cloth bearing various devices thereon as heart, anchor, crown, &c., and engaged in what is known as the heart, anchor and crown game with dice and money. It was a game of chance and not a game of skill. The accused were thereupon arrested and tried by the First Class Magistrate of Mával in the Poona District. The Magistrate found that the place where the accused were playing was a "public place" within the meaning of section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) and on the 5th October 1905 convicted and sentenced accused No. 8 to rigorous imprisonment for one month, because he was considered to be the ring-leader and accused Nos. 1—6 to pay a fine of Rs. 40 each. Accused No. 7 was acquitted. The following are the reasons given by the Magistrate for holding that the carriage in which the accused were travelling was a "public place":—

The accused are said to have been found gambling in a railway carriage of the race special second class which ran * * from Poona to Bombay. The question for determination is therefore whether such a carriage comes within

1905.

EMPEROR v. HUSSEIN.

the meaning of the words "public street, place or thoroughfare." There are no definitions given in the Act of these expressions; nor are there Indian rulings to guide this Court in determining the above question. Certainly a railway carriage will not be a public street or thoroughfare. But it is to be seen whether it can be a public place or not. The English case, *Langrish* v. *Archer* (10 Q. B. D. 44) is I think on all fours with this case though the latter has some special circumstances attending on it. In that case it was held that a railway carriage while travelling on its journey is within the definition of "an open and public place to which the public have or are permitted to have access" in the section (3 of the Vagrant Act Amendment Act, 1873—36 and 37 Vic. c. 38). Though we have not got the same words in our section 12 of the Gambling Act, the expression "public street, place or thoroughfare" carries, I think, the same meaning. It is contended on behalf of the defence that the conviction in that case was secured because there were in that case the additional words "any open place to which the public have or are permitted to have access." But from the opinions given by some of the Judges in that case about the case of *Ex parte Freestone*, which was decided before the additional words were inserted, I think that this contention does not hold good. Lord Coleridge, C. J., hadsaid "in *Ex parte Freestone* where it was held that a conviction upon 5 Geo. IV, c. 83, s. 4, for playing cards in a railway carriage must be set aside because it was not shown affirmatively that the carriage was being used for the conveyance of passengers, there is a strong intimation of opinion that if this evidence had been forthcoming the conviction would have been sustained." Another Judge, Stephen J., gives his opinion in the following words: "I am of the same opinion. Although it was not actually decided in *Ex parte Freestone* that a railway carriage while in the act of conveying passengers was an open and public place within 5 Geo. IV, c. 83, it may be inferred that if the facts had raised the question, the Court would have decided it in the affirmative."

* * * * * *

It is further contended on behalf of the defence that the train in which the accused travelled was a race special, and that as passengers were not allowed to get in at intermediate stations between Bombay and Poona and between Poona and Bombay, the carriages of that train would not come within the meaning of the word "public place". Mr. Muirhead, the Traffic Manager of the G. I. P. Railway Company, was examined as to rules and orders in connection with the running of Race specials. From the evidence and documents produced, it appears that the stoppages of these trains at Karjat, Reversing and Lonávla are for engine purposes only and that they are not to stop at any intermediate stations to pick up or set down passengers. Had it been possible to run these trains without stoppages for engine purposes they would have run between Bombay and Poona as ordinary trains run between two stopping stations where passengers are picked up and set down. Such being the case the argument for the defence that public had no access to these race specials has no significance. Like ordinary trains the public have access to these race

specials both at Bombay and Poona. At the former for second class race specials sufficient passengers have to offer the day before the train is due to run. At the latter passengers were booked on payment of single journey fare provided there is room. It is nowhere ordered that a particular class of passengers are to travel by these trains. Any man can join it at Bombay if he offers the day before and any man can get into it at Poona if there is room available. The condition of offering oneself at Bombay the day before the train is due to run, is imposed only in order that the Railway authorities may know beforehand whether there are sufficient passengers to run a train. In these circumstances I do not think that the race specials differ in any way from the ordinary trains in point of access to the public.

Against the said convictions and sentences the accused applied to the High Court under its criminal revisional jurisdiction urging *inter alia* that section 12 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887) was not applicable, that the Magistrate erred in holding that the Railway carriage in which the accused were travelling was a "public place" within the meaning of the section notwithstanding the fact that the carriage was attached to the Poona race-express which admitted no passengers on its journey between Bombay and Poona and *vice versâ* and that the Magistrate was wrong in holding that the said Act applied to the spot where the accused were arrested. The application was admitted and a notice was issued to the District Magistrate of Poona intimating that the High Court had decided to hear the application on the date mentioned in the notice or thereafter.

Branson (with *F. Oliveira*) appeared for the applicants (accused):—The main question is whether the carriage in which the accused were travelling was a public place within the meaning of section 12 of the Bombay Prevention of Gambling Act. The expression in the section is "public street, place or thoroughfare." Taking into consideration the position of the term "street" in the expression and the adjective "public" preceding the three terms "street, place or thoroughfare", we contend that the term "place" means a public place such as a street or a thoroughfare, Maxwell on Statutes, 3rd edition, p. 461. The meaning put by the Magistrate on the term "place" cannot be sustained. The Magistrate has expressed his opinion that a railway carriage is not a public street or a thoroughfare. If so,

1905.

EMPEROR v. HUSSEIN.

how can a railway carriage to which the public in general have no access be a public place within section 12 of the Act? Further the Act being penal its sections must be very strictly construed. The Magistrate failed to do so and has given to the section a wider scope by drawing upon section 3 of the Vagrant Amendment Act, 36 and 37 Vic. c. 3. The words of that section are wider than those of section 12 of the Bombay Prevention of Gambling Act. The Magistrate was not justified in importing the words of the English statute in the Gambling Act.

If a railway carriage attached to an ordinary train is not a public place within the meaning of section 12, much less will be so a carriage attached to a race special which took only a limited number of passengers and did not stop at any intermediate station between Poona and Bombay. Such a train having once started the public can have no access to it.

Ráo Bahádur V. J. Kirtikar, Government Pleader, appeared for the Crown:—The expression "public street, place or thoroughfare" in section 12 of the Bombay Prevention of Gambling Act is wide enough to include a railway carriage on the line. The railway line is, according to the scope of section 12 of the Act, a thoroughfare. The Act makes gambling in a public place or thoroughfare penal. Therefore the conclusion arrived at by the Magistrate was correct. The carriage in which the accused travelled was not reserved for the party of players. There were other persons in the carriage who did not take any part in the play.

JENKINS, C. J.—The accused in this case have been convicted as being persons found playing for money against the provisions of section 12 of the Bombay Prevention of Gambling Act, 1887, in a railway carriage forming part of a through special train running between Poona and Bombay.

The only question is whether it was in a public place that the accused were so playing. This depends on the meaning the word "*place*" has in section 12 of the Act. The word "*place*" is, I think, qualified by the word "*public*" and having regard to its context and its position in that context, it must, in my opinion, mean a *place* of the same general character as a *road* or *thoroughfare*, else it was pointless to use the words *street* or *thoroughfare*

1905.

EMPEROR v. HUSSEIN.

as they are there used. To the Railway track as such the public have no right of access except as passengers in the Company's train. Therefore I need not seriously consider the suggestion that the accused were found playing in a public place, because the carriage in which they were playing was on the railway track. To support the conviction it must be shown that the railway carriage was a public place of the same general character as a public street or thoroughfare. I would be slow to place on the section an interpretation that would curtail its legitimate scope, but I am unable to regard the railway carriage, in which the accused were, as possessing such characteristics of, or bearing such a general resemblance to, a street or thoroughfare as to justify us in holding that it was a public place within the meaning of section 12 of the Act, with which alone we are concerned.

The conviction and sentence must therefore be set aside and the fine, if paid, refunded.

RUSSELL, J.—In this case the accused were charged and convicted of the offence of gambling in a Special Race Train on the way from Poona to Bombay on the 2nd day of September 1905. The train was a second class one and the Police made their raid on it at what is well known as the "Reversing Station" between Khandála and Karjat. The game they were playing was one known as Heart Crown and Anchor and it was not disputed before us that they were gambling.

The only question is were the accused gambling in "a public street, place or thoroughfare" within the meaning of section 12 of the Bombay Gambling Act.

In the Court below and before us the case was argued as if the only point was whether the carriage, in which the accused were, comes within those words in the section. But it appears to me that there are two questions involved.

1. Was that part of the railway line on which the train was where the accused were arrested, "a public street, &c."

2. Was the carriage in which the accused were playing "a public street, place or thoroughfare."

I propose to deal with these two points in their order.

1905

EMPEROR v. HUSSEIN.

If either of these questions is answered in the negative the conviction is bad and must be set aside.

1. In my opinion Mr. Branson was correct in saying that the adjective "public" applies to all the three nouns—street, place or thoroughfare and it is clear that the railway line certainly cannot be described as a "public street or thoroughfare" inasmuch as it is not and cannot be used by the public in the same way as they are in the habit of using "public streets" and "thoroughfares."

Railway Act IX of 1890, section 122, provides *inter alia* "if a person unlawfully enters upon a railway, he shall be punished with fine which may extend to 20 Rs." and "unlawfully" seems to mean without the leave of the railway administration: see the second clause of this section. Section 125 provides a penalty when the owner or person in charge of any cattle permits them to stray on a railway provided with fences suitable for exclusion of cattle. Section 13 provides for the railway administration putting up (*a*) boundary marks or fence, (*b*) works in the nature of a screen near to or adjoining the side of any public road for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway; (*c*) provides for the erection of suitable gates, chains, bars, stiles or handrails where a railway crosses a public road or the level and (*d*) provides for the employment of persons to open or shut such gates, chains or bars. These provisions, in my opinion, clearly show that the Legislature did not intend the premises of a railway to be public and therefore it is impossible to describe the railway line and the ground adjoining it between the places as either a public street, place or thoroughfare. This view is borne out by the case of *Imperatrix* v. *Vanmali and others*[1], where a company which owned a mill on the one side of the B. B. & C. I. Railway and a ginning factory on the other, and whose servants had entered on the railway premises without permission of the Railway Company to repair a pipe (which had been laid beneath the railway line) and reservoirs (built on each side to preserve the proper level of water), and it was

(1) (1896) 22 Bom. 525.

held by this Court that as the pipes and reservoirs belonged to the mill company and were kept in repair by them, they as owners of the dominant tenement, had a right to enter on the premises of the railway company, the owners of the servient tenement, and effect any necessary repairs, and that the entry in question being in the exercise of that right, could not be called unlawful. The Magistrate in this case had convicted the accused under section 122 of the Railway Act (IX of 1890) and sentenced them to a fine of four annas each. Parsons, J., in delivering his judgment observed: "But it appears to us that as the pipe and reservoirs belong to the (mill) company, and are kept in repair by them, they, as the dominant owners, would have a right to enter on the premises of the Railway Company, the servient owners, to effect any repairs that might be necessary. See the Indian Easement Act, section 24, and Illustration (*a*), and *Colebeck* v. *Girdlers Company* [1]. The evidence shows there was such necessity at this time, the flow of the water through the pipe being stopped. An entry in exercise of a right cannot be called unlawful". From this case it follows that an entry upon railway premises not in exercise of a right or by permission of the railway administration would be unlawful: compare *Foulger* v. *Steadman*,[2] where a cab driver was held not justified in refusing to leave the Railway Company's premises when requested on behalf of the company to do so although he believed himself entitled to remain thereon because other drivers did so on payment of certain sums to the Railway Company.

It would be impossible for the Railway Company to work its lines were we to hold that the public should have access to them inside the fences without the permission of the company. The place at which the accused were caught gambling, *viz.*, the Reversing Station (at which from the evidence it is clear the train stopped for engine purposes only) was not a place generally accessible to the public, who would not have any right without the permission of the Railway Company to be on the line at all.

2. The next point to consider is whether the Race Train in which the accused were caught at the Reversing Station was a "public place".

(1) (1876) 1 Q. B. D. 234.

(2) (1872) L. R. 8. Q. B. 65.

1905.

EMPEROR v. HUSSEIN.

Looking at all the circumstances under which the train was being run and the evidence of Mr. Muirhead I am of opinion that it was not. It was a *Special* train—not bound to run unless a sufficient number of passengers applied, it took no passengers in between Poona and Bombay, and I cannot think that it would be described as a train for the "public" carriage of passengers. At the same time a good deal of the evidence that was given was irrelevant, the point to be decided being whether the train at that place, *i. e.* the Reversing Station could be called a "public place". What it might be at other places between Poona and Bombay seems to my mind irrelevant.

Several cases were referred to in course of the argument. The first was *Langrish* v. *Archer* (1) where it was held that the railway carriage while travelling on its journey was an "open and public place" or "an open and public place to which the public have or are permitted to have access".

Now if the words in the statute before us were the same as in that, of course the accused would have been rightly convicted, but in the statute there referred to (36 & 37 Vic., c. 38), the words used are "open place to which the public have or are permitted to have access." The judgment of Lord Coleridge shows that if these words had not been used the decision would have been the other way.

In *Ex parte Freestone* (2) the prohibition (St. 5 Geo. IV, c. 83, s. 4) was from playing or betting "in any street, road, highway or in any other open or public place" and the conviction alleged that the defendants played in an open and public place, to wit, a third class carriage used on the L. B. and S. C. Railway. It was held that the conviction could not be supported as it did not appear that the carriage was then used for the conveying of passengers. There Alderson B. says "these convictions ought to be framed strictly within the words of the Act, the object of which was to prevent nuisances and gambling in the public highways." It was also held that it was consistent with the conviction that the offence might have taken place in the third class carriage which although occasionally used on the Railway was

(1) (1882) 10 Q. B. D. 44.

(2) (1856) 25 L. J. M. C. 121

then shunted away in the yard. There however the words used "other open and public place," appear to me to distinguish that case from the present one.

In *Emperor* v. *Jusab Ally* (1) Mr. Justice Batty who delivered the judgment says at page 389, referring to 36 & 37 Vic. c. 38 and s. 12 of the Bombay Gambling Act; "In these two enactments, however, the offence is, not that the individual members are making a profit at all, but simply that they are carrying on their gambling with such publicity that the ordinary passer-by cannot well avoid seeing it and being enticed—if his inclinations lie that way—to join in or follow the bad example openly placed in his way. In the one case comparative privacy for profit, in the other the bad public example and accessibility to the public, would seem to constitute the gravamen of the offence. Thus, the very fact that special accommodation and privacy had been furnished, which would be essential in a case under section 4 of the Bombay Gambling Act, would be a ground for excluding the case from the purview of section 12. If people *gratuitously* allow gambling on their private premises, the law does not interfere with them, presumably because in that case they have no special inducement to tempt outsiders to join them. The law does interfere, however, if, whether for private gain or not, they expose temptation where the general public have a right to come."

In *Khudi Sheikh and others* v. *The King Emperor* (2) it was held that the word "place" as used in section 11 of the Gambling Act, (Bengal Code, 2 of 1867) must be a public place and was *ejusdem generis* with the other words in the section, public market, fair, street or thoroughfare. Consequently a *thakurbari* surrounded by a high compound wall is not a public place as contemplated by that section. In that case the learned Judge says:—"The place must be of the same character as public market, fair, street or thoroughfare. Now the gambling in this case took place within a *thakurbari* surrounded by a high compound wall. It is not a place where any member of the public is entitled to go. The Sub-Divisional Magistrate,

(1) (1905) I. L. R. 29 Bom. 386: 7 Bom. L. R. 332.

(2) (1901) 6 Cal. W. N. 33.

1905.

EMPEROR v. HUSSEIN.

who convicted the accused, has held that it is a public place because 'anybody and everybody was allowed to go in and come out'. The ground, as stated by the Magistrate, cannot be supported. Though in a *thakurbari* belonging to a Hindu anybody and everybody would be allowed to go in, yet the owner of the *thakurbari* is entitled to prevent any particular individual going in if he so chooses and as a matter of fact men who are not Hindus are not allowed to go into a *thakurbari*." See also *Durga Prosad* v. *The Emperor* (1). I am therefore of opinion, taking the object of the section before us to be what Mr. Justice Batty says it is the mischief aimed at by that section cannot possibly be said to have risen in the present case. The second class carriage in a Special train in which the accused were playing cannot in my opinion be considered to be a "public place" within the meaning of the Act. To get to that carriage it would be necessary to trespass upon the line unless the person so doing had permission from the Railway Company to cross the line. It is well-known that persons standing on the line could not possibly see into the carriages in which these people were gambling.

Under these circumstances I am of opinion that to call or describe either the railway line at the spot in question or the carriage in which the accused were playing as coming within any of the terms, "public street, place or thoroughfare" would be to place a wrong interpretation upon those words.

For these reasons I am of opinion that the conviction recorded and sentence passed upon the accused must be set aside. Fine, if paid, to be refunded.

Conviction and sentence reversed.

G. B. R.

(1) (1904) 8 Cal. W. N. 592.