M.R.O. 1—38,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 201 Press Mis.-

55-56

Dated 1—2— ~~19~~ 1855

Not to be folded or roughly handled

201

Proceedings of the Madras Government, Judicial Department, from 25th June to 1st July 1859.

No. 55. Read the following letter from THOS. SYDNEY SMYTH, Esq., Advocate General; to the Chief Secretary to Government, Fort Saint George, dated 21st June 1859.

I have the honor to request that you will bring under the consideration of the Honorable the Governor in Council, with reference to the approaching Criminal Sessions of the Supreme Court, a subject which appears to have already excited the attention of Government, with reference to criminal trials before the Mofussil Courts.

2. I see by the *Spectator* of Monday the 20th Instant, that Lord Stanley has expressed his approval of Government having acceded to the proposition of the Sudr Judges to appoint a Vakeel to conduct the prosecution in such cases, wherever Counsel was retained for the defence. It is also there stated that this step was recommended by the Sudr Court *in lieu* of the appointment of a public prosecutor, *suggested by the Government*, but which the Sudr Court is stated to have considered impracticable for the present.

3. The Judges of Her Majesty's Supreme Court of Judicature have repeatedly and strongly felt and expressed (and I believe no one has felt it more strongly than the present Chief Justice) the great impropriety of their being left to conduct criminal prosecutions, more especially when Counsel was engaged for the defence. The late Chief Justice indeed at last refused to do so, and in all such cases directed the Clerk of the Crown to instruct Counsel to conduct the prosecution, the expense being defrayed from the "Fines Fund" deposited in the General Treasury under the provisions of 9 Geo. 4, C. 74, Section 52.

4. The impropriety of a Judge being as it were pitted against a Counsel must strike every one on the least consideration, but even where no Counsel appears for the defence, there are, especially in this country, very serious objections it appears to me, to obliging the presiding Judge to act as public prosecutor.

5. In cases of life and death this objection was so strongly felt that in the time of my predecessor the Judges expressed themselves very strongly indeed on the subject, which resulted in the Advocate General's saying that he felt the force of their objections so much that, though no part of his official duty, he should always be happy to place his services at the disposal of the Court in capital cases. I have continued to act upon this understanding, and always conduct the prosecutions in cases of this nature.

6. In Bengal, as I have understood, in consequence of official correspondence that took place upon this subject about the time I refer to, Lord Dalhousie decided that the Company's standing Counsel should always conduct the prosecution in cases of life and death, unless where the Advocate General might consider the case to be of such a nature as to call for his intervention.

7. I believe, but have no certain information, that the intervention of the standing Counsel was confined to capital cases. I am not aware that any general arrangement has been made any where in India, for relieving Her Majesty's Judges from the unbecoming position of appearing as the prosecutor of prisoners, while in the eye of the Law he is considered their Counsel.

8. I said that the state of things appeared to me more objectionable here than in England, and for the following reasons. The position, the perfect impartiality and independence of Her Majesty's Judges, is I believe more thoroughly felt and understood in England than in India, especially by the lower and poorer classes. I think it must often be difficult for poor and undefended criminals of this class in this country and for their relations, when they see the presiding Judge acting as their prosecutor, to believe in his perfect and entire impartiality, still less to believe that he is discharging the duty which the Law considers to belong to him, of being Counsel for them—difficult in fact for them to regard him otherwise than as forming just as much as the Police and the Committing Magistrate, part and parcel of the Government machinery employed to ensure his conviction and punishment.

9. This, *per se*, if my remarks be at all well founded, must be admitted to be a grave evil, of no small magnitude; but it appears to me to be materially aggravated by two other considerations—Istly, by the much more defective manner in which depositions, and generally speaking the case for the prosecution, are got up here than in England unless where, which very seldom

happens, the prosecutor himself retains the professional assistance of Attorney and Counsel;—2ndly, by the lamentable prevalence of perjury in almost all Native evidence.

10. It will be obvious that the first of these considerations must impose additional labor on the Judge, and by making an increased demand upon his attention to supply these deficiencies, divert it *pro tanto* from that calm and impartial consideration of the whole case which is as much his primary duty, as it is the prisoner's undoubted due and right.

11. The second consideration obviously shews that a greater necessity exists here than in England for the closest and most undivided attention on the part of the Judge to every word uttered by, and to the manner and demeanour of every single witness, on both sides, while, for the reasons already given, he is perhaps less able to give such attention here than he would be if conducting a prosecution in England.

12. Under these circumstances, I would request the Honorable the Governor in Council to take into his early consideration the question of either appointing at once a public prosecutor, the necessity of which has of late been so generally and publicly recognized almost everywhere —or, at least, as a temporary measure, to authorize the Clerk of the Crown to instruct Counsel for the prosecution in all cases where none have been retained, and moreover, wherever he shall consider the case to require it, to employ an Attorney also, at the public expense. It would probably be found less expensive to make an arrangement each Sessions with some one Counsel to act as Crown prosecutor—as they are called in Ireland—for that Sessions, than to deliver briefs in each case.

13. It appears to me out of the question that the Government Solicitor could possibly discharge this duty, in addition to the numerous onerous and pressing duties already devolved on him.

No. 56.

ORDER THEREON, 1st July 1859, No. 901.

The Government observe that the propositions contained in the above letter from the Advocate General, involve a change of system, which they cannot think it right to make, without further inquiry and deliberation. They resolve therefore to refer Mr. T. S. Smyth's letter to the Judicial Commission for their consideration.

2. Meanwhile they are not prepared to authorize any deviation from the course hitherto followed.

(Signed) T. PYCROFT,
Chief Secretary.

Prd. F. Cartledge.

2

Mr Thomas Pycroft

Has anything
been done in the matter
of appointing a Public Prosecutor
or any similar arrangement
for the next Sessions?

The C.J. is really anxious
to work, but from his looks, I
fear that Dr Paterson says.

I am almost sure he will break down at the Sessions

I cannot understand how Bittleston could think of going back again, after serving the State his colleagues & us. It is not doing justice to the Public, or discharging the duties for which he is so well paid

The main reason for having a Second Judge is that if one is ill, there may always

3

be another on the spot ready to do the duty.

Yours truly

H Lytton Gregory

27th

Emly orders are requested on the Advocate Generals letter relative to the appointment of a Public Prosecutor, which was

his institution some days ago.

27/6/59

June 21/59 4

Stephen Lynch

I have written this letter by the express desire of the Chief Justice — tho' I do not mentioned his name. He wants it answered, if possible, before next Sessions — 12. 5th Inst.

Yours truly

My Lord

That a Public Prosecutor,
discharging, in my earnestly asked for
reasons, the arduous task of
Judges have been very frequently
sent at short notice from
Calcutta to the Districts of the Chief
Crown Cases of Public Prosecutor

The Machinery is ready & well
here as I petitioned for. Jesse
Edwards would be eligible for the
important duty - a duty
which if not well performed
would cause much heart-
burning - I have spoken to
Mr Sheriff Hopper & he joins
in & the Attorney Advocate Gen-
eral do not desire to part as
the Miss Marie above admits
It might not be possible, when
the occasion offered to get

an eligible Assistant to act as
a Public Prosecutor -
The Salary of the Clerk of the Crown
would require to be increased -
Heads even if it were raised to
say £600 per annum above its
present rate - I am indebted
to Mr Hart for the cost to him
Rate would be less than £
Gaoler's Wife would furnish
boat in cash rate - the steady
The work would be beyond the
powers

I have read Mr Moreheads Mi-
-nute. The Advocate Generals proposition
involves a change of system, which
I cannot think it right that we
should make without further
inquiry and deliberation. Meanwhile
the duties of the Court can be
conducted as they always have been.

It seems a proper point
for the consideration of our Judicial
Commission.

Ed Mundy gan

20 June 59

I believe the Attorney
& Public Prosecutors to be Special
& the right declaration of criminal
Justice both here & in the Mofussil
I think Mr Moreheads suggestion work

Letters done—
The Advocate General moves
House date act in Calendar
& Political cases—& decide
Assessors—the P. P. would
be his justice
This seems to me the
most satisfactory mode
of dealing with the matter as now
submitted to Court
Will—
27

called to meet the ~~Supreme~~ circuit
of the Supreme Court
28th June 57

From the Advocate-General 21 June 1859.

Order thereon 1st July 1859. No 91

The Government observe that the propositions contained in the above letter from the Advocate General, involve a change of system, which they cannot think it right to make, without pro-viding and reserving deliberation - They accordingly propose to refer Mr T S Smyth's letter to the Indian Commission for their consideration -

2. Meanwhile they are not prepared to authorize any

2 Meanwhile, pending Legislation upon the Report-ing, the Civil

called to meet the ~~Supreme~~ circuit
of the Supreme Court
28th June

deviation from the
consultation to
followed —

Authorize the Clerk of the Crown to appear suggested in the concluding part of Para 12 of the Advo-
-cate-General's letter-
at his discretion
arranging with some
on Counsel for the
Whole Colony, or
delivering Briefs
in each case — except
in Capital cases the prose-
-cution of which will
be directed & conducted
by the Advocate General

Advocate-General. Dispatch
Clerk of the Crown

To the Judicial Commission for enquiring into the Judicial system of the Madras Army. } Dispatch

JP