

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1148

Press
~~MS.~~

175-176

Dated 21.7.1862 ~~th~~

5/6

Not to be folded or roughly handled

103

Proceedings of the Madras Government, Judicial Department,
21st July 1862.

Read again letter from Colonel H. PRITCHARD, Judge Advocate General of the Army; to the Secretary to Government, Military Department.

(Here enter No. 274 of 1862.)

No. 175. Read also the following letter from JOHN MILLER, Esq., Acting Government Solicitor, Madras; to A. J. ARBUTHNOT, Esq., Acting Chief Secretary to Government, Madras, dated 9th July 1862, No. 329.

1. I have the honor to acknowledge the Proceedings of Government noted in margin and the papers which accompanied them.

2. I submitted them together with the previous correspondence on the subject for the consideration of the Advocate General, and I now forward a copy of his Observations and Opinion.

COPY--OBSERVATIONS.

I presume that Government were not aware, when passing their Order in the Judicial Department, under date the 1st July 1862, No. 1,028, that the matter had been already referred to me by the Judge Advocate General of the Army, I presume by order of the Commander-in-Chief, on the 21st May last, and that I had given my opinion thereon.

I am not aware that I can add any thing to that opinion, and I therefore now transmit a copy of it, to be laid before Government. I quite agree with His Excellency the Commander-in-Chief that the miscarriage of justice in this case arose from the Subordinate Court not confining itself to what it was desired to do, viz., merely attaching Mr. Barclay's person and reporting the same—but instead thereof, proceeding erroneously to adjudicate in the matter.

(Signed) T. SYDNEY SMYTH,

Advocate General.

July 7th 1862.

COPY--OPINION.

Miscarriage of justice will sometimes happen and cannot be prevented by anything, the Supreme Court, or any other Court can possibly do. The proverb about bringing a horse to water is really a case in point. An unwilling witness may be brought into Court, but, if he is bribed to silence, it is impossible to make him speak, if he is determined not to do so; the Court can only punish him by committing him for contempt of Court.

2. In the present case it might reasonably have been hoped that, when the witness Barclay saw that he was to be attached, he would have yielded. As however he did not, the fact should have been mentioned to me, as, I think, paragraphs 5 and 6 of the Government Solicitor's letter and paragraph 2 of the Order of Government sufficiently suggested. The better course would have been for the Court instead of fining him Rupees 100 and committing him for one month merely in case of default of paying the fine to have attached and committed him to Jail, and then, while he was in Jail, if I had been informed of the fact, I could have moved the Supreme Court upon affidavit for a writ of *Habeas Corpus ad testificandum* (1 Starkie on Evidence, page 81, 3rd edition) and so had him brought down here; and when once before the Court Martial, if he refused to answer I think the Court itself would have authority to commit him for contempt of Court as often as he should refuse to answer; or at all events, the Supreme Court might attach him afresh upon each refusal, and the Court Martial might be adjourned from time to time, and a fresh writ moved for each time to bring him up.

3. I can only give it as my opinion that this course might have been pursued, for I cannot learn that it ever has been actually put in practice, and it clearly could not be done, unless the witness were a British subject, for the Supreme Court has no power over Native witnesses not inhabitants of Madras.

4. If the case were to occur again, I should be disposed to proceed at once by a writ of attachment from the Supreme Court. In that case the application must be upon affidavit, the essential contents whereof are laid down in 1 Starkie, 80 and 81, in the text, and in the notes. I will mention the leading particulars. The affidavit must state personal service of the Subpoena

Proceedings of the Madras Government, Judicial Department,
21st July 1862.

and tender or payment, at the time of service, of reasonable expenses for his journey to and fro, and his sojourn at Madras during the trial; and that the witness was a material and necessary witness. Paragraph 5 of the Government Solicitor's letter shews what steps would be necessary to obtain such an affidavit, unless indeed the persons to make the affidavit were all brought down here.

5. As regards the last question, nothing can be clearer than that Section 5 of the Penal Code shews that the Code does not affect the Articles of War which are made under the authority of the Mutiny Act, and must be judicially noticed by all Courts and Judges whatever.

(Signed) T. SYDNEY SMYTH.

May 23rd 1862.

(True Copy.)

(Signed) JOHN MILLER,
Acting Government Solicitor.

No. 176.

ORDER THEREON, 21st July 1862, No. 1,148.

With his letter the Acting Government Solicitor forwards Observations and Opinion of the Advocate General on the course pursued by the Subordinate Court of Ootacamund in the case of Mr Barclay who had refused, after being duly summoned, to appear and give evidence before the General Court Martial lately assembled at Fort Saint George for the trial of Ensign F. W. Robins, 3rd Battalion 60th Rifles.

2. The Government resolve to forward these papers to the Judges of the Court of Foujdaree Udaltut with a view to their pointing out to the Joint Magistrate of Coimbatore and the Subordinate Court the error committed in this case.

3. All that was required was that Mr. Barclay's person should, on his persisting in his refusal to attend as a witness, be attached and the attachment reported.

(Signed) A. J. ARBUTHNOT,

Acting Chief Secy.

Exd. F. Cartledge.

*Fortresses Subpoenaed to
appear before Court
Martial*

*The only thing done
here - is to send the papers to
the & the Magistrate there to
point out to the J. C. M. C.
that the law is not
the same as in the J. C. M. C.
leading - I wonder under what
law it was supposed that the
papers - were*

The Subordinate Court of

Proceedings of the Madras Government, Judicial Department
21st July 1862.

and tender or payment, at the time of service, of reasonable expenses for his and his sojourn at Madras during the trial; and that the witness was a mal witness. Paragraph 5 of the Government Solicitor's letter shews what steps were taken to induce the persons to make the affidavit.

Proceedings of the Madras
Govt.

Read again letter from
Col. H. P. Bullock Judge
Advocate General of the
Army to the Secy to Govt.
Military Dept.

(Hence enter No 274 1862)

Read letter from the Ady.
Govt Secy to the Ady Chief
Secy to Govt.

329
Hence enter No 329 1862.

Order thereon 21 July 1862 No 1148.

W. M.

In his letter the Ady
Govt Solicitor forwards obser-
vations and opinion of
the Advocate General on
the course pursued by
the subordinate Comd of

obtained in India
1st Lt. Hawley who had
upon, upon being duly
summoned, to appear
before the
General Court Martial
held at Fort
Belvoir for the trial
of Major F. W. Perkins
3rd Bat. 60 Rifles.

2 The Court resolved to forward
these papers to the Judges
of the Court of F. M.
with a view to their
pointing out to the
Joint Magistrate of
Coimbatore & the Subordinate Court
the error

committed by him, and
by the Subordinate Court
in this case.

All that was required was
that Mr. Hawley's person
should, on his persisting
in his refusal to attend
as a witness, be attached
and that the attachment
reported:-

M. S.

to Judges of the Court of } kept 22nd
F. M. & Subordinate Court.

Proc. of Acad.
Nov. 1862 Oct 1862

No. 1128.

Proceedings of Acad.

Oct 1862

1759-176