M.R. O. 1—32,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1730 Press ~~Mis.~~

23-25 Dated 3-12- ~~19~~ 1864

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Not to be folded or roughly handled

Read the following papers:—

No. 23. From W. ROBINSON, Esq., Inspector General of Police; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George, dated Madras, 10th November 1864, No. 2287.

General Department.

I have the honor to submit the accompanying correspondence, with reference to the important point of law involved.

2. The circumstances of the case are as follow:—

Two dacoits were arrested by the Police, stolen property being found in their possession. They offered to make full confession and give up their accomplices, if admitted as approvers at the trial.

3. The Head Assistant Magistrate tendered the conditional pardon under Section 209, Code of Criminal Procedure, and the approvers were sent under charge of Constables to point out the property robbed; but they effected their escape when near the alleged place of its concealment.

4. The Constables were tried for negligent escape, under Section 223, Indian Penal Code, before the Head Assistant Magistrate, and were released on the ground that the dacoits were not in confinement within the meaning of that Section, or in such legal custody at the time of escape as to bring the offence within any Section of the Penal Code.

5. They were arrested without warrant by the Police for an offence for which such arrest can legally be made. Being brought before a Magistrate in custody, they were treated by him as prisoners in custody usually are, and removed from his presence in custody of the Police, as such persons usually are. They were then sent in custody of Constables to fulfil a condition of the pardon proffered, and escaped from such custody.

6. I think they were clearly in lawful custody when they escaped. They were not pardoned. The arrangement with them was conditional, and the conditions were yet unfulfilled. They were practically on remand. Section 209, Code of Criminal Procedure, does not like Section 224 require an order in writing. In all such cases it were obviously expedient to obtain the order in writing, and the Police will be instructed always to obtain an order in writing for custody; but I do not think that its absence affects the merits of these cases.

7. The point at issue is one of very considerable importance, as regards both the escaped persons and guards on escort; for it is a very common practice for persons, who see that the chain of evidence against themselves leaves no fair prospect of escape, to pretend that they will and can give useful evidence against others of the gang; but on sifting their statements, they are either found to be entirely false or of no use, or subsequent inquiry shows that they themselves were really the ring-leaders. If, after leaving the Jail walls, such a person is, in the eye of the law, a free Agent, and his escort are really guilty of wrongful restraint in taking him to discover property which he offers to discover to the Police, serious difficulties arise and connivance of the guards may follow.

8. I think, therefore, that some exposition of the law is requisite.

EXTRACT from the Diary of the Superintendent of Police, Madura.

"On the 6th June last a torch robbery was committed at Thanamaputty village in the Tripatore Division, and as has been reported by the Superintendents six of the dacoits were arrested and sentenced to 10 years' transportation.

"On the 1st July, the Inspector* of the Division found some of the stolen property in "the above dacoity in two mens' houses of Vul- "liaputty village, and the two men, Coopen "and Chinnakottayen were arrested, and they 'offered to turn approvers and point out where the whole of the stolen property was concealed. 'The Inspector brought them to Madura and placed them before the Superintendent, who sent 'them on to Mr. Nelson, who on hearing their statements tendered them pardon, according 'to Section 209, Code of Criminal Procedure, on conditions of their disclosing where the property 'was concealed.

* 6th Class Inspector, Venkataram Naidu, 2nd or Tripatore Division.

"The approvers were sent under charge of three Constables to point out the property, 'and on arrival near the village where the property was said to be concealed they made their 'escape from the custody of the Constables. On this being reported to Lieutenant Cunningham 'he told the Constables he would give them a month to re-arrest the prisoners; and, in the event 'of their failing to arrest the men, they would be charged under Section 223, Penal Code. 'On the expiration of the month, the Constables applied to me for an extension of 10 days. This I "granted them; but they still having failed, I directed the Inspector to appear at Madura, in "order to prosecute in the case before Mr. "Nelson. I accordingly charged the Constables "under Section 223, Penal Code. Mr. Nelson's decision I enclose for the perusal of the Inspector General. The Constables having escaped punishment under Section 224, Penal Code, I have punished them departmentally by dismissing them from the date they were suspended, as it was entirely owing to their carelessness the men escaped, although they were not in lawful custody at the time."

One of the three Constables has absconded, which accounts "for his not being charged with the other two."

(True Extract.)

(Signed) W. ROBINSON,
Inspector General of Police.

Copy of Decision passed by J. H. NELSON, Esq., Acting Head Assistant Magistrate of Madura, in Calendar Case No. 111 of 1864.

Prosecutor.	*versus*	*Defendants.*
S. K. Vencatrama Naidu, Police Inspector.		1. Alagirisami Naiken. 2. Kuppu Naiken.

Substance of the Complaint.

That they, on or about the 10th day of July, in the year 1864, when legally bound to keep in confinement two prisoners, namely, Chinnakottayen and Kuppan, did negligently allow them to escape from their custody, and they have thereby committed an offence punishable under Section 223 of the Indian Penal Code.

Judgment.

Prisoners are Constables, and are charged with having committed an offence punishable under Section 223 of the Indian Penal Code. It is clear, however, that the Section quoted is inapplicable; for prisoners were not keeping the two men, given into their charge, within "certain circumscribing limits," but were simply escorting them from one place to another. Hence the term "confinement" could not be deemed to be expressive of the kind of custody in which the fugitives were being kept at the time when they ran away. Neither would any Section of the Penal Code other than Section 223, nor any Section of the Police Act, appear to provide a penalty for the act, with the doing of which prisoners are charged; for it seems that the men they were escorting were not men newly apprehended on a warrant, or sentenced by a Court of

Justice, or under remand. They had been conditionally pardoned (under Section 209 of the Criminal Procedure Code), being concerned in a case of dacoity, &c., and had been sent off by the Acting Head Assistant Magistrate to point out to the Police some stolen property; and no warrant of any kind had been given to the Constables who escorted them. The Court is of opinion, therefore, that the fugitives were not in legal custody when they escaped; and that, therefore, prisoners were not guilty of any offence in allowing them to run away if they were so minded.

Finding and Sentence.

The Court finds that the complaint of negligently allowing prisoners to escape from lawful custody is not proved, acquits Alagirisami and Kuppu Naiken, and directs that they be discharged.

6th August 1864.

(Signed) J. H. NELSON,
Acting Head Asst. Magistrate.

(True Copy.)

(Signed) J. H. NELSON,
Acting Head Asst. Magistrate.

Referred to the Government Solicitor for the opinion of the Advocate General.

(Signed) A. J. ARBUTHNOT,
Chief Secretary.

FORT SAINT GEORGE,
15th November 1864.

No. 24. From J. R. BOYSON, Esq., Government Solicitor, Madras; to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Madras, dated 22nd November 1864, No. 606.

I have the honor to acknowledge the order of Government noted in the margin (with its enclosures), requesting the Advocate General's opinion as to the construction of Section 209 of the Code of Criminal Procedure, and Section 223 of the Indian Penal Code, and their application to the case detailed in the letter from the Inspector General of Police to Government, No. 2287.

Dated 15th November 1864, and made on letter from Inspector General of Police to Government of 10th idem, No. 2287, General Department.

2. I submitted the papers for the consideration of the Advocate General, with whom I have also conferred; and,

3. I now forward a copy of his Opinion, and return the order and enclosures above noted.

COPY—OPINION.

I am clearly of opinion that the finding of the Acting Head Assistant Magistrate is wrong in law.

2. He seems to think that, in order to constitute "confinement," there must be "certain circumscribing limits;" and as these words are placed between inverted commas, I infer that they are part of a definition of confinement in Johnson's or some other Dictionary.

3. But no such defined limits are necessary to constitute what the law means by "confinement." "Imprisonment" is a stronger word than "confinement;" yet it is not necessary that a man should have been actually placed "in prison," in order to enable him to bring an action of false imprisonment. "False imprisonment," writes Mr. Selwyn in his *Nisi Prius*, "is a restraint "on the liberty of the person without lawful cause, either by confinement in prison, stocks, "house, &c., or even by forcibly detaining the party in the stocks against his will."

4. What constitutes imprisonment was thoroughly discussed and laid down in the well known *Hammersmith Bridge* case (Bird v. Jones, 7 Q. B, p. 712.) I have no doubt whatever that the persons who made their escape were in *confinement*.

5. Nor have I any doubt that they were in *legal* confinement. They had been arrested by the Police without warrant, on the charge of having committed one of those offences for which it is lawful to arrest without warrant. They had been taken before the Magistrate, and though they had been promised a conditional pardon under Section 209 of the Criminal Procedure Code, they had never been discharged out of custody. The mere promise of a pardon does not operate to set the accused at large. So far from it, the accomplice is ordinarily sent to prison with the rest of the prisoners until the trial takes place; or, if that be not done, bail must be taken and the accomplice enter into his recognizances to appear and give evidence at the trial before he is set at liberty.

6. Nothing of the sort appears to have been done here; on the contrary, the Magistrate appears to have ordered the Police to take the prisoners to a place where they professed that they would do an act in part performance of their promise to divulge the whole truth. And it is to be remembered that so far were the parties from being at liberty, that they might have been charged upon their own confession, tried and convicted, in event of their breaking their contract to tell the truth.

7. The order of the Magistrate was one which the Police were legally bound to obey. The original legal custody or confinement had never ceased; the parties were "in confinement," "charged with an offence;" and assuming that there was any *negligence* on the part of the Police in suffering their escape, I am of opinion that the case clearly fall within Section 223 of the Indian Penal Code.

(Signed) J. B. NORTON,
Advocate General.

19th November 1864.

(True Copy.)

(Signed) J. R BOYSON,
Government Solicitor.

No. 25. ORDER THEREON, 3rd December 1864, No. 1730.

The Governor in Council directs that the foregoing Opinion of the Advocate General be communicated to the Inspector General of Police, and to all Magistrate of Districts.

(True Extract.)

Chief Secretary.

To the Inspector General of Police.
„ Magistrate of

Exd. J. Tulloch.

Proceedings of the Madras Govt.
Read the following letters—
From the Inspector Genl. of Police ——— dated 10 Nov. 64 No. 2237
the Govt. Solicitor ——— 22 do ——— 606.
Order — 3rd December 1864 No. 1730.
The Governor in Council directs that the foregoing Opinion of the Advocate General be communicated to the Inspector Genl. of Police & to all Magistrates of Districts.

The Inspector General of Police.
Magistrates of all
} despatch