

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1406

Press
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Dated 28-9-1865 19

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Not to be folded or roughly handled

*Proceedings of the Madras Government, Judicial Department,
28th September 1865.*

No. 315. Read the following letter from J. GRAHAM, Esq., Officiating Advocate General, Calcutta, to the Under Secretary to the Government of India; dated Calcutta, 19th August 1865.

In reply to your letter, No. 865, of 10th instant, with enclosures (herewith returned), I have the honor to state that the point is one which turns entirely upon the meaning of the words "*made punishable by the Code*," in the definition of "*offence*," in the 40th Section of the Penal Code.

2. The expression is ambiguous as to the words "*made*" and "*by*". It may either mean in an active sense expressly made punishable in the words of the Code itself, or it may mean also made in the sense of rendered or treated as punishable by the Code. I think the latter is not only the reasonable construction, but also the correct interpretation, of the expression in the Code taken as a whole.

3. I understand the subject of the Penal Code to comprehend all offences. As to certain of them, the Code contains express detailed provisions. As to the rest, it is assumed that some local or special laws already sufficiently deal with them; and the Code, in effect, though not in words, treats those laws as a part of its own system. Offences under local and special laws are thus also in a sense made punishable by (though not in the terms of) the Code. The Code, purporting to deal with the whole category of offences, recognizes the binding force of those laws by necessary implication, and directs that they shall be observed as theretofore.

4. This may seem a strained interpretation, but the point raised is itself hypertechnical, and Courts would not willingly entertain it. If constrained to do so, I think they would be astute to reject it, seeing that there can be no doubt whatever as to the true reason and sense of the matter.

No. 1725.

Copy forwarded to the Government of Fort Saint George, with reference to letter therefrom, No. 974, dated 13th July.

(By Order).

SIMLA, HOME DEPARTMENT,
6th September 1865.

(Signed) A. P. HOWELL,
Under Secy. to the Govt. of India.

No. 316. ORDER THEREON, 28th September 1865, No. 1406.

Resolved that the foregoing paper, with the previous correspondence on the subject, as contained in the Proceedings of Government noted in the margin, be furnished to all Magistrates of Districts, for their information and guidance.

Proceedings, 27th April 1864, Nos. 289 to 290A.	
" 12th July " " 135 to 138.	
" 17th Sept. " " 110 to 112.	
" 3rd Decr. " " 23 to 25.	
" 13th July 1865, " 75 to 78.	

(True Extract):

To the Magistrate of
with correspondence.
,, Inspector General of Police,
with correspondence.

Acting Secretary to Government.

*Proceedings of the Madras Government, Judicial Department,
27th April 1864.*

Read the following papers :—

No. 289. From L. C. INNES, Esq., Session Judge of Ootacamund, to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Judicial Department, Fort Saint George; dated Ootacamund, 16th April 1864, No. 86.

I have the honor to point out what appears to me to be a serious defect in the Indian Penal Code, and which was brought to my notice by Captain Weldon, Superintendent of Police of the Coimbatore District.

2. Section 224 provides that “ whoever intentionally offers any resistance or “ illegal obstruction to the lawful apprehension of himself for any offence with “ which he is charged, or of which he has been convicted, or escapes or attempts “ to escape from any custody in which he is lawfully detained for any such offence, “ shall be punished, &c.”

3. Substituting for the word “ offence ” the definition of the meaning of that word as given in Section 40, the provisions run as follows :—“ Whoever intention- “ ally offers any resistance or illegal obstruction to the lawful apprehension of him- “ self for *anything made punishable by this Code* with which he is charged, or of which “ he has been convicted, or escapes or attempts to escape from any custody in which “ he is lawfully detained for *any such thing made punishable under this Code*, shall be “ punished, &c.”

4. It is provided in Section 5 that “ the Act (Indian Penal Code) is not intended to repeal, vary, suspend or affect ” the provisions of certain other laws which it specifies, or the provisions of any special or local law : but this does not render offences against such other laws punishable under the Indian Penal Code. Consequently such offences cannot be within the meaning of Section 224 ; and an escape by a person in custody under a charge or after conviction of an offence punishable under a special or local law, as for instance by an officer of the Postal Department for fraudulent appropriation of a letter (Section 50, Act XVII of 1854), would not be punishable under this Section.

5. The former laws (Regulation VI of 1822, Section 5, Clauses 2 and 3, Madras, and Regulation XII of 1818, Bengal) under which escape from lawful custody was punishable, have been repealed and no other has been substituted but Section 224 of the Indian Penal Code, which, as above shown, is inoperative except as to escapes by persons under charges of acts or illegal omissions punishable under the Indian Penal Code.

Referred to the Advocate General for his opinion.

FORT SAINT GEORGE,
20th April 1864.

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

*Proceedings of the Madras Government, Judicial Department,
27th April 1864.*

No. 290. From J. R. BOYSON, Esq., Government Solicitor, Madras, to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George; dated Madras, 23rd April 1864, No. 203.

I have the honor to acknowledge the Order of Government noted in the margin, relative to the meaning of Section 224 of the Indian Penal Code.

Dated 20th April 1864, and made upon letter from the Session Judge of Ootacamund to Government of 16th idem, No. 86.

2. I submitted the matter for the consideration of the Advocate General; and,

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

COPY—OPINION.

I am quite unable to feel the force of the objections suggested to the Sessions Judge of Ootacamund by the Superintendent of Police at Coimbatore, and concurred in by the Judge.

2. It is true that Section 40 of the Indian Penal Code says, that "the word" offence "does denote a thing" (a queer phrase enough) "made punishable by this Code;" but it does *not* say that the word "offence" denotes *only* a thing made punishable by this Code; on the contrary, Section 5 expressly recognizes the existence of *other* "offences" *not* punishable under the Indian Penal Code; I am therefore wholly unable to understand how the Judge and Superintendent of Police have come to the conclusion that a person resisting lawful apprehension, or escaping from custody, for an offence against a special or local law not repealed by the Penal Code, would not be punishable under the 224th Section. In my opinion he would clearly be so punishable.

3. The instance supposed, viz., that of an officer in the Postal Department, fraudulently appropriating a letter (Section 50, Act XVII of 1854) seems to me a rather unfortunate one; for, under Section 381 of the Penal Code, an offence of this nature would, in my opinion, be clearly cognizable, and the punishment almost precisely the same as under the Post Office Act.

22nd April 1864.

(Signed) T. S. SMYTH,
Advocate General.

(True Copy.)

(Signed) J. R. BOYSON,
Government Solicitor.

No. 290A. ORDER THEREON, 27th April 1864, No. 600.

The Governor in Council directs that the foregoing opinion be communicated to the Session Judge of Ootacamund, and to the Inspector General of Police.

(True Extract).

A. J. ARBUTHNOT,
Chief Secretary.

*Proceedings of the Madras Government, Judicial Department,
12th July 1864.*

Read the following papers:—

No. 135. From L. C. INNES, Esq., Session Judge of Ootacamund, to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Judicial Department, Fort Saint George; dated Ootacamund, 3rd May 1864, No. 106.

Adverting to my letter, dated 16th ultimo, bringing to notice what appeared to me to be a serious defect in the Indian Penal Code, to the opinion of the Advocate General thereon, and to the Order of Government of the 27th ultimo, I have the honor again to request the consideration of the Government upon the subject.

2. The Advocate General observes: "It is true that Section 40 of the Indian Penal Code says that the word 'offence' does denote 'a thing made punishable by this Code;' but it does not say that the word offence denotes '*only* a thing made punishable by this Code.'"

3. The Advocate General has apparently overlooked Section 7, in which it is set forth that "every expression which is explained in any part of this Code is *used in every part of this Code in conformity with the explanation.*" Now the word offence is explained to be "a thing made punishable under this Code."

4. This therefore is the only sense which the word "offence" can bear in any part of the Code and it therefore, must bear this sense in Section 224; so that in fact the word offence in Section 224 must be read (as in my letter of the 16th ultimo I pointed out that it should be read) by the substitution of the definition given in Section 40 of the word "offence."

5. The Advocate General observes that Section 5 of the Indian Penal Code expressly recognizes other offences. I cannot see how this affects the question.

Section 5 recognizes the validity of local and special laws; but it cannot in any sense be taken to *make punishable* the acts which those laws declare to be offences. The section is merely intended to declare that the provisions of such laws are not affected by the Indian Penal Code.

6. If therefore Section 5 does not *make punishable* the offences punishable under the special and local laws therein referred to, but merely declares that the Indian Penal Code does not interfere with those laws, it is not very clear how acts, which are offences only under those laws, could be brought within the definition of the word "offence" under Section 40 of the Indian Penal Code, when that definition is applied as required by Section 7.

7. Doubtless the act of fraudulent appropriation of a letter, specially punishable under Section 50, Act XVII of 1854, might, as observed by the Advocate General, be brought under Section 381 of the Indian Penal Code. I offered this merely as one among many illustrations that might be given of offences punishable under special and local laws, the most of which could not be met by any provisions of the Indian Penal Code.

8. I would submit, therefore, with all respect for the opinion of the Advocate General, that Section 224 does *not* provide for the punishment of escapes from lawful custody, unless the offence under which the person is subject to detention is *made punishable* under the Indian Penal Code; and that Section 5 of the Indian Penal Code does not *make punishable* the acts which are "offences" under the special and local laws, which, in Section 5, are merely stated to be unaffected by the Code.

Proceedings of the Madras Government, Judicial Department,
12th July 1864.

Referred to the Advocate General for his remarks.

FORT SAINT GEORGE,
2nd July 1864.

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

No. 136. From J. R. BOYSON, Esq., Government Solicitor, Madras, to J. D. SIM, Esq., Acting Chief Secretary to Government, Madras; dated 7th July 1864, No. 384.

I have the honor to acknowledge the order of Government noted in the margin, and its enclosures, relative to the construction of Section 224 of the Indian Penal Code.

Dated 2nd July 1864, and made on letter from Sessions Judge of Ootacamund to Government of 3rd May 1864, No. 106.

2. I submitted the matter 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 above noted.

COPY—OPINION.

I think the construction of the Sessions Judge of Ootacamund is correct. Mr. Smyth does not, in his opinion, refer to Section 7, which does not appear to have been brought to his notice by Mr. Innes' former communication.

2. I think that taking Sections 7, 40 and 224 together, it is impossible to make the last of the three applicable to any other "offences" than those committed against the Indian Penal Code.

3. Inconvenience may arise from this construction. Possibly the Legislature intended Section 224 to apply to any offences. By the repeal of the older Regulations under which escape from lawful custody was punishable, the Legislature appears to have thought that the law, as declared by the Indian Penal Code, was wide enough for the punishment of all escapes, &c., be the offence for which the party was in custody what it might.

4. But the construction of the Act must be gathered from its terms; and if the Legislature intended this, it is a case of *quod voluit non dixit*.

MADRAS, 7th July 1864.

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

(True Copy).

(Signed) J. R. BOYSON,
Government Solicitor.

No. 137. ORDER THEREON, 12th July 1864, No. 1039.

Ordered that the Advocate General's Opinion be communicated to the Sessions Judge of Ootacamund, and to the Inspector General of Police.

2. Ordered, also, that the correspondence on the subject be communicated to the Government of India.

(Signed) J. D. SIM,
Secretary to Government.

No. 138. To the Secretary to the Government of India, Home Department, Simla, dated Fort Saint George, 12th July 1864, No. 1040.

I am directed to transmit to you, for the purpose of their being laid before the Right Honorable the Governor General of India in Council, the enclosed copies of correspondence relative to the con-

Proceedings, 27th April 1864, No. 600.
" 12th July " " 1039.

Proceedings of the Madras Government, Judicial Department,
12th July 1864.

struction of Section 224 of the Penal Code, or the Section which makes escape from legal custody punishable. It will be seen from these papers that, in the opinion of the Sessions Judge of Ootacamund, which is concurred in by the present Acting Advocate General, this Section does not apply to any case in which the prisoner who is charged with escape was in custody under a charge or after conviction of an offence punishable by any special or local law.

(Signed) J. D. SIM,
Secretary to Government.

17th September 1864.

No. 110. Read the following letter from E. C. BAYLEY, Esq., Secretary to the Government of India, to J. D. SIM, Esq., Secretary to the Government of Fort Saint George ; dated Simla, 22nd August 1864, No. 2153.

Home Department.
Judicial.

In acknowledging the receipt of your letter, No. 1040, dated the 12th ultimo, with enclosures, relative to the construction of Section 224 of the Penal Code, or the Section which makes escape from legal custody punishable, I am directed to observe that the point is one of importance and that the Governor General in Council is glad to have had his attention drawn to it.

2. The Governor General in Council, however, is not altogether satisfied that the construction of the Sessions Judge of Ootacamund and the Advocate General of Madras is correct. Without pronouncing a confident opinion the Governor General in Council is inclined to think that in the definition clause "a thing made punishable by this Code" may be taken to include "a thing recognized as punishable by this Code," and that this view is to be preferred to a construction inconsistent with the comprehensiveness of the Code. It is worth noticing that the definitions of "special law" and "local law" follow immediately after that of "offence."

3. If indeed it should hereafter appear that the legal consequences apprehended by the above gentlemen may really be expected to follow, there must without doubt be action on the part of the Legislature.

4. But the Governor General in Council is much disinclined to propose premature and piece-meal amendments of a body of law such as the Penal Code, and suggests that the Government of Madras should move the High Court to call up the point for decision whenever an opportunity offers itself under Sections 403, 404 or 405 of the Code of Criminal Procedure. The power of the Court to do this will, of course, depend on the mode in which the point hereafter arises.

No. 111. ORDER THEREON, 17th September 1864, No. 1372.

Communicated to the Sessions Judge of Ootacamund, and to the Advocate General.

2. Ordered that the correspondence on the subject be furnished to the Chief Justice, with reference to the suggestion in the last paragraph of the foregoing letter.

(Signed) J. D. SIM,
Secretary to Government.

No. 112. To the Honorable Sir C. H. SCOTLAND, Knight, Chief Justice of the High Court of Judicature, Madras, dated Fort Saint George, 17th September 1864, No. 1373.

I am directed to transmit to you the annexed copy of a letter from the Government of India, dated 22nd ultimo, No.

Proceedings, 27th April 1864, No. 600.
" 12th July " " 1039.

2153, together with copies of the correspondence noted in the margin, on the

subject of the construction of Section 224 of the Penal Code, or the Section which makes escape from legal custody punishable, and to request that the question may receive the attention of the High Court on occasion arising, as suggested by the Government of India.

(Signed) J. D. SIM,
Secretary to Government.

*Proceedings of the Madras Government, Judicial Department,
3rd December 1864.*

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.

*Proceedings of the Madras Government, Judicial Department,
3rd December 1864.*

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 Vullaputty 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.

"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 223, 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."

(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.

<i>Prosecutor.</i>	<i>versus.</i>	<i>Defendants.</i>
S. K. Vencatrama Naidu,		1. Alagirisami Naiken.
Police Inspector.		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 Coopen, 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

*Proceedings of the Madras Government, Judicial Department,
3rd December 1864.*

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.

FORT SAINT GEORGE,
15th November 1864.

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

No. 24. From J. R. ROYSON, 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.

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."

*Proceedings of the Madras Government, Judicial Department,
3rd December 1864.*

4. What constitutes imprisonment was thoroughly discussed and laid down in the well known *Hammersmith Bridge* case (Bird v. Jones, 7 Q. B. p. 742.) 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 these 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 recognizance 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 fell within Section 223 of the Indian Penal Code.

19th November 1864.

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

(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 Magistrates of Districts.

(True Extract).

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

*Proceedings of the Madras Government, Judicial Department,
13th July 1865.*

Read the following papers:—

No. 75. From W. ROBINSON, Esq., Inspector General of Police, to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George; dated Madras, 14th June 1865, No. 1135.

General Department.

I have the honor to submit, for the consideration of Government, an extract from a Diary of the Assistant Superintendent of Police in South Malabar, with remarks of Deputy Inspector General and Superintendent.

2. A prisoner convicted by a Pottail, on a charge of petty theft, escaped from custody. He was tried by the Deputy Magistrate, but released, on the ground that the offence did not come under Section 224 of the Indian Penal Code.

3. If this be good law, it is practically the state of the law in regard to all escapes when the arrest takes place, or the offence is charged under a local or special law, or where, as in the above case, special procedure is provided under a local law. How are those offences to be dealt with?

4. It has been held, also, that escapes from arrest under certain Sections of Chapter IX of the Procedure Code are not cognizable under Section 224 of the Penal Code.

5. Escapes are increasing in number; but under the circumstance, neither the person who escapes, nor the Constable who negligently permits it, can be tried.

Extract from the Diary of the Assistant Superintendent of Police in South Malabar.

By Deputy Inspector General. "I should feel obliged by being informed whether a man who has been ordered into confinement by the Head of a Village, and escapes from custody, can be tried under Section 224, Penal Code, for escape from lawful custody? On 31st March last, a man had been sentenced by Pottail of the Perreavoor Amshom to six hours confinement for petty theft, and escaped before the time of his imprisonment was up. He afterwards was re-arrested on Sub-Magistrate's warrant, and committed to the Deputy Magistrate, who did not consider that the offence fell under Section 224, and accordingly released the prisoner."

By Superintendent. "Taking Section 224 with Section 40, Penal Code, the person must have been punished for an 'offence' or thing punishable under the Penal Code. As the man you alluded to was punished for an offence under a special law, I suppose he could not be tried under Section 224, Penal Code. If so, how are these escapes to be dealt with?"

W. S. D.
A. M. D.

(True Extract).

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

No. 76.

MEMORANDUM.

The undersigned is directed to inform the Acting Secretary to Government, in reply to his Memorandum, dated 22nd instant, that the point referred to in Mr. Secretary Sim's letter, dated 17th September last, No. 1373, has not yet come before the High Court for decision.

HIGH COURT OF JUDICATURE,
MADRAS, 24th June 1865.

To the Acting Secretary to Government.

(Signed) P. P. HUTCHINS,
Registrar Appellate Side

*Proceedings of the Madras Government, Judicial Department,
13th July 1865.*

No. 77. From W. ROBINSON, Esq., Inspector General of Police, to the Honorable A. J. ARBUTHNOT, Chief Secretary to Government, Fort Saint George; dated Madras, 1st July 1865, No. 1281.

General Department.

I have the honor to submit a Memorandum by the Superintendent of Police of Madras District, reporting the escape of a person arrested by the Police on suspicion of theft.

2. He was being escorted, for the purpose of pointing out the stolen property, and escaped, probably with the connivance of the Policeman. Both were put up for trial; but both escaped as the offence is not provided for by the Indian Penal Code.

3. Several Police officers have urged the necessity of early measures being taken to obviate the anomalous state of the law in this respect, and I beg to solicit the early attention of Government to it.

4. The offences of escape from custody and negligently permitting escape are on the increase. The Deputy Inspector General of the Western Range remarks, in his Administration Report of the year, that the increase in the number of these offences (nearly double those which occurred in 1863), is to be accounted for "partly by the interpretation which has been put upon Sections 223 and 224, Indian Penal Code, whereby a person arrested on suspicion by the Police, and escaping from their custody, prior to his being taken before a Magistrate and duly charged, cannot be prosecuted for 'escape'; a like impunity extending to the Police officer permitting him to do so. Dread of punishment is as yet the only incentive for the energetic performance of his duty by an Indian Policeman, and lack of energy on his part in matters of this kind is at once apparent." I agree in the view he takes.

5. I append a copy of the Circular Memorandum alluded to by Captain Cloete. The opinion annexed to it is that of Mr. Collett.

MEMORANDUM.

Agreeably to C. M., No. 160, P. W. C., No. 8, of 1865, I beg to bring the following to notice:—

One Sooben was arrested, on suspicion of having committed theft, and sent in charge of Constable No. 498 to a neighbouring village, for the purpose of pointing out the stolen property; within 24 hours of his arrest, on the way to the village, the prisoner escaped (I believe wilfully allowed by the Constable). The prisoner was re-taken, and put up before the Acting Joint Magistrate, Mr. Webster, under Section 224, and the Constable, under Section 223. The Acting Joint Magistrate remarks on the charge sheet as follows:—

"As he was in custody on suspicion, without having been charged with, or convicted of, an offence, he neither can be punished for the escape under Section 224, nor can the Constable be punished under Section 223, Indian Penal Code;—charge dismissed, under Section 67, Criminal Procedure Code.

(Signed) H. D. CLOETE, Captain,
Superintendent of Police.

24th June 1865.

CIRCULAR MEMORANDUM, No. 160, 25th FEBRUARY 1865.
Escape of Prisoner arrested as a Vagrant.

Extract from the Diary of the Superintendent of Police—

"Another legal point has arisen in another case, on which subject the Supreme Government only recently gave orders that, if occasion required, the matter should be sent up for argument

*Proceedings of the Madras Government, Judicial Department,
13th July 1865.*

"before the High Court. A prisoner arrested as a Vagrant is sent to — from —. He "escaped, but was recaptured. He was sent up to the Magistrate, for trial for escape, but is "released, on the grounds that he had not committed an offence punishable under the Code."

2. The case does not appear to have been pressed on for argument. Many cases of the kind have occurred, and the sooner the point is decided the better. On the recurrence, therefore, of a similar case, officers will use their endeavours to get the case sent up through the regular channel. They will have the goodness to make an early and special report (with copy of decisions) of any such case to Inspector General. A legal friend thus discusses the point:—

I expect that the release was right. The being a person described in Clause XIX is not an offence, nor is the taking of security intended as a punishment. Why Section 224, Penal Code, was worded in the way it is, I am at a loss to understand; the offence consists in escaping from lawful custody, and it cannot matter why a man is in custody, if only the custody was lawful. I expect that the desire may have been to avoid including an escape from custody under Civil process, and so the restraining words have been made wider than they would have been if the Criminal Procedure Code had at the time been matured. On principle, though, I do not see why an escape from every kind of lawful custody should not be punished criminally; it certainly is a wrong against public justice, in which the public is somewhat concerned; though it may be that those who negligently or wilfully suffer an escape from custody under Civil process should not be held liable otherwise than civilly. However, as Section 224, Penal Code, now stands, I expect an escape by one in custody, in default of giving security, is not within it. The nicer question would be, whether if one escapes who is in custody for an offence under a special or local law, Section 40 and Section 7, Penal Code, would not have to be applied to Section 224, so as to exclude even such a case.

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

(True Copy).

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

No. 78. To the Secretary to the Government of India, Home Department; dated Fort Saint George, 13th July 1865, No. 974.

Adverting to Mr. Sim's letter of the 12th July 1864, and to your reply under date the 22nd August last, relative to the construction of Section 224 of the Indian

Penal Code, I am directed to submit, for the consideration of His Excellency the Governor General in Council, the annexed copies of a correspondence which has since taken place on the subject, and from which it will be seen that the of-

fences of escape from custody and of negligently permitting escape are on the increase, and that this is attributed to the interpretation which has been put upon the Section in question.

2. As suggested in your letter above referred to, the High Court were requested to call up the point for decision, whenever an opportunity offered, but this it appears has not yet been done, and it is impossible to say when the point will be decided by the High Court. Under these circumstances, I am directed to submit, for the consideration of the Government of India, the expediency of amending the law on the point in question.

(Signed) W. HUDLESTON,
Acting Secretary to Government.

(Copy)

To
The Under Secy to the Govt of India
Calcutta 19th August 1865.

Sir,

In reply to your letter No. 865 of 10th instant with enclosures (herewith returned) I have the honor to state that the point is one which turns entirely upon the meaning of the words "made punishable by the Code" in the definition of "offence" in the 4th Section of the Penal Code.

The expression is ambiguous as to the words "made" and "by". It may either mean in an active sense expressly made punishable in the words of the Code itself, or it may mean also made in the sense of rendered or treated as punishable by the Code. I think the latter is not only the reasonable construction but also the correct interpretation of the expression in the Code taken as a whole.

I understand the subject of the Penal Code to comprehend all offences. As to certain of them the Code contains express detailed provisions. As to the rest it is assumed that some local or special laws already sufficiently deal with them, and the Code in effect though not in words treats those laws as a part of its own system. Offences under local and special laws are thus also in a sense made punishable by (though not in the terms of) the Code. The Code

The Magistrates of all Districts
with correspondence } despatched 7/10
Inspector Genl. of Police. with do-
Genl. Solicitor } despatched 7/10 Subj. despatched 8/10

Initialed

2404

Pro: John
Bridal 186. Department.

No. 1408

PROCEEDINGS OF GOVERNMENT.

Dated 29 September 1865

I am, Sir,
 Yours, &c.
 J. H.

C 23 dy.
R 27 "