M.R.O. 1—89,000—15-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No. 108 Press Mis.

Dated 26 - 1 - ~~19~~ 1886

1886/94

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Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department,
26th January 1866.

Read again letter from the Magistrate of Malabar, dated 3rd, and recorded in Proceedings of 26th August 1865, No. 1186.

Read also the following papers:—

No. 186. From the Registrar of the High Court of Judicature at Madras, to the Chief Secretary to Government, Fort Saint George; dated Madras, 21st December 1865, No. 74.

With reference to your letter of the 26th of August, No. 1186, I am directed by the High Court to forward, for the consideration of His Excellency the Governor in Council, copies of the papers noted in the margin, showing the whole of the proceedings in the matter of Case No. 44 on the Calendar of the Session Court of Calicut, both before and after the conviction of the prisoners.

Calendar in Case No. 44 of 1865.
Letter from the Session Judge, dated 16th September 1865.
Translation of the Session Court's Proceedings. (To be returned.)
Do. do. Police Proceedings. (To be returned.)
Notes of the Session Judge in the case. (To be returned.)
Depositions taken by the Magistracy subsequent to the disposal of the case by the Session Court. (To be returned.)

2. Three of the Judges are of opinion that the conviction was the result of a conspiracy, and that the case is a proper one for the exercise of the power vested in Government by Section 54 of the Criminal Procedure Code; but the other two Judges are of opinion that there are not sufficient grounds for the interference of the Executive Government.

Calendar of Persons tried before H. D. COOK, Esq., Sessions Judge of Calicut.

1	2	3	4	5	6	7	8	9	10	11	12	13	14
No. of the Case.	Name and description of the accused.	Copy of the charge, or substance of the complaint.	Name of complainant.	Name of witnesses for the prosecution.	Names of witnesses for the defence.	Statement of the evidence and grounds of conviction.	Finding and sentence.	Date of offence.	Date of complaint.	Date of apprehension or appearance.	Date of commencing trial.	Date of sentence.	Explanation of delay.
44 of 1865.	1. Kadaykel Poker, cultivator. 2. Koryat *alias* Cheriat Mahmod Hadjee, cultivator. 3. Karootedata Komu, cultivator. 4. Allatoor Naraynen, labourer. 5. Alambate Konen, cultivator.	That they, the 1st to 4th prisoners, on the 14th March 1865, at Netoowa Amshom, committed house-breaking by night with intent to commit theft in the house of one Shangaren Cootty Nair, and that they have thereby committed an offence punishable under Section 457 of the Indian Penal Code, and within the cognizance of the Court of Sessions. 2ndly. That they, the 1st to 4th prisoners, on the 14th March 1865, committed theft in a dwelling house by dishonestly taking gold ornaments, the property of one Shangaren Cootty Nair, and that they have thereby committed an offence punishable under Section 380 of the Indian Penal Code, and within the cognizance of the Court of Sessions. 3rdly. That he, the 5th prisoner, on or about the 14th March 1865, dishonestly received a portion of the aforesaid articles, knowing the same to be stolen property, and that he has thereby committed an offence punishable under Section 411 of the Indian Penal Code, and within the cognizance of the Court of Sessions. Committed by Krishna Paniker, 2nd Class Sub-Magistrate of Tirorangady.	P. Shangaren Cootty Nair.	1. Karupen Nair. 2. Chenoo Nair. 3. Narainen Nair. 4. Athen, Deputy Constable. 5. Ayepen Pillay.	For 1st prisoner. 1. Kumbi Moidin Kutti. For 2nd prisoner. 2. Chapengatil Moidin. 3. Maonoo Kundatil Mamod. For 3rd prisoner. 4. Madainbatil Moidin. 5. Kutini Kunhien. For 4th prisoner. 6. Kamail Rumen Nair. 7. Voilil Ayapen Nair.	1. Prisoners plead not guilty. 2. Prosecutor deposes that he has known the 1st to 4th prisoners from youth. The 5th prisoner from date of giving up part of the stolen property; that on the 3rd Meenom he left his house for the purpose of purpurchasing cattle and on his return to his wife's house on the 5th he was informed that his house had been broken into on the night of the 3rd Meenom and property stolen. On going to the house found that it had been entered from the top, and the room where the property was kept had been entered and the box containing the ornaments opened by a false key. As the 2nd and 3rd witnesses had seen the prisoners 1 to 4 near his (Prosecutor's) house the night the theft took place, prosecutor suspected them and gave information to the Police. On searching their houses, No. 2 gold ornaments were found in the house of the 2nd prisoner Nos. 3 and 4 in the house of the 3rd prisoner, and No. 5 in the house of the 4th prisoner. No. 1 was given up by the 5th prisoner, who said it had been pledged to him by the 1st prisoner. The 4th prisoner is intimately acquainted with the interior of his (prosecutor's) house, as he is in the habit of coming to the house from time to time. All the ornaments before the Court, found in the possession of the prisoners 2 to 5, belong to him (prosecutor) and are part of the property stolen from his house. 3. First witness, servant of the prosecutor, deposes that he has known the prosecutor for two years, and has been in his service for a year; that on the night of the 2nd or 3rd Meenom the doors of the house were shut as usual and the inmates (women) and witness went to sleep. In the morning he, witness, observed the doors of the upstair room open, and on examining the room found that the box containing ornaments had been opened and the contents removed; that he, witness, had seen the ornaments placed in the box and those now before the Court are the same which he, witness, had seen placed in the box; knows them perfectly, as he has often seen the women of the house wear them. 4. Second witness deposes that, as he was returning from Perpangady with the 3rd witness and another, as they came near the prosecutor's house saw three men seated near the house; these were the 1st to 3rd prisoners; asked them why they were seated there, and in reply they said there was a festival in the vicinity and they were going there. As witness and his companion were about to go on they saw the 4th prisoner come quickly from the prosecutor's house, and on questioning him he said he had been inquiring whether or not the prosecutor had returned home; that he (2nd witness) is acquainted with the prosecutor's property and identifies the articles before the Court as belonging to prosecutor. 5. Third witness corroborates the 2nd witness' evidence in full. 6. Fourth witness, Deputy Constable, deposes that the prosecutor named the 1st to 4th prisoners as persons he suspected of having stolen his property; the 1st to 4th were apprehended on the 18th and immediately admitted the crime, the 1st prisoner saying he had pledged his share of the plunder with the 5th prisoner; went to his house and asked him for the articles and he gave up No. 1, saying he had advanced 25 Rupees on it. The 2nd and 3rd prisoners were apprended on the 19th, and they also admitted the crime and gave up stolen articles from the places where they had concealed them. 7. Fifth witness fully corroborates. 8. The above recorded evidence fully proves the following points:—1st, that a theft took place from the prosecutor's house; 2nd, that the gold ornaments before the Court are part of the property so stolen; 3rd, that these articles recently after the commission of the theft were found in the possession of the 2nd to 5th prisoners; 4th, the admission of the 1st to 5th prisoners that they, 1st to 4th, committed the theft, and 5th that he received from the 1st prisoner No. 1 and advanced on it Rupees 25. Now possession of the fruits of crime recently after its commission is *primâ facie* evidence of guilty possession, and as these prisoners have failed to account for the possession either by direct evidence or by the attending circumstances, or by their character or profession, the crime must be considered fully proved against them. It is true the 5th prisoner at once gave up No. 1, but he must have received it with a guilty knowledge, inasmuch as he is an intimate of the 1st prisoner (a Moplah), and he must have been well aware that a Moplah in his position could never be honestly in possession of a valuable gold neck ornament exclusively worn by *Nair* women. He advanced not half its value, so the only reasonable inference that can be drawn from these facts is, that he took it from 1st prisoner well knowing that is was stolen property. 9. The 4th prisoner is a youth of about 20 years of age, and was probably gained over by the 1st to 3rd prisoners, they well knowing that 4th prisoner was familiar with the internal economy of the prosecutor's house.	The Court concurring with the Assessors, finds that prisoners 1. Kadaykel Poker. 2. Koryat *alias* Cheriat Mahmod Hadjee, 3. Karootedata Komu, 4. Allatoor Naraynen, and 5. Alambate Konen, are guilty of the offences specified in the charge, viz., that 1st and 4th prisoners committed house-breaking by night with intent to commit theft, and 5th prisoner dishonestly received stolen property, and that they have thereby committed offences punishable under Sections 457 and 411 of the Indian Penal Code, and the Court sentences the prisoners, 1. Kadaykel Poker, 2. Koryat *alias* Cheriat Mahmod Hadjee, 3. Karootedata Komu, and 4. Allatoor Naraynen to (5) five years' rigorous imprisonment, and 5th prisoner Alambate Konen to (1) one year's rigorous imprisonment. (Signed) H. D. COOK, *Sessions Judge.*	14th March 1865.	17th March 1865.	1st, 4th and 5th Prisoners 18th March 1865. 2nd and 3rd Prisoners, 19th March 1865.	4th April 1865.	4th April 1865.	

(True Copy.)

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

From the Session Judge of Calicut, to the Deputy Registrar of the High Court of Judicature, Appellate Side, Madras, dated Calicut, 16th September 1865, No. 232.

I have the honor to acknowledge the receipt of your letter dated 13th instant, forwarding copy of a letter addressed by the Magistrate of Malabar to Government regarding Case* No. 44 on the Session Calendar for 1865.

* Conducted, under instructions from the committing Officer, by the Government Pleader, an able Officer, who had not the slightest doubt of the evidence adduced at the trial.

2. I am to give my opinion upon the "new matter" brought to the notice of Government by the Magistrate, and his reasons for requesting the Government to exercise its prerogative of mercy and to release the prisoners in that case, the alleged victims of a "grievous wrong." It will be observed that the letter of the Magistrate is chiefly based on mere outside rumour, subsequently got up after the case was finally disposed of. These kinds of reports were numerous, and I told the Magistrate I did not believe a word of it. The rumour I heard was that this story, which bears the marks of concoction on its face, was concocted in the office of the Deputy Magistrate by a Tier Gomastah, who is connected in some way with one of the prisoners, but I gave no credence to either report, as I was fully satisfied when I tried the case that it was a good one, and I see nothing in the Magistrate's letter to lead me to a different conclusion.

3. It is to be remarked that not a syllable regarding this story of the Nair girl was ever mooted in the trial. If, as alleged, the 1st prisoner, a Moplah, had interfered with the amours of the Nair girl—a thing most improbable, as the Moplahs have seldom any dealings with the Nairs and take but little interest in their movements—it is curious why he did not state the fact in his *defence*, and bring to the Court's notice that he was innocent of the crime, and the victim of a conspiracy. In his defence he simply pleaded an *alibi* and failed to prove it. He could have no motive to screen the girl's reputation had anything of the kind taken place, and I have not the slightest hesitation in stating it as my deliberate opinion that the whole of the "new matter" brought to light is simply the product of subsequent concoction and quite undeserving of any credit. It is a most injudicious precedent, and I consider the Government would have incurred a serious responsibility in directing the cancelment of a sentence passed by a Sessions Court after a most patient enquiry upon such mere rumour as this letter shews. As regards the deputation of the Ernad Sub-Magistrate and his report I place little faith in that. This story was made up and the information he received was just thrown in his way ready-made. The Deputy Magistrate last year reported to the Inspector General of Police that this officer concocted the evidence in the case of the Palghat Killidar, which was disposed of by the Court. If in such an important case as that he was led astray what confidence can now be placed on his report on this matter, based upon rumour manufactured subsequent to the disposal of the case! No doubt he is a good officer, but he did not try the case, and had no means of testing the truth or otherwise of the evidence before the Sessions Court. It is true the 5th prisoner confessed he got the ornament No. 1 from the 1st prisoner on *pledge*, but he got it under the most suspicious circumstances, as is clearly shewn in my decision which is before the High Court, and can be referred to.

4. I was told that if the Magistrate had proceeded to the spot and made a local enquiry, he would have found out the real facts of the case, and I think he should have done so before hazarding a report to Government, and proposing the cancelment of a sentence by a tribunal to which he is himself subordinate.

5. The Superintendent of Police too mentioned the report to me, and I told him what I had heard. He did not deem it of importance, as I am not aware he even took the trouble of enquiring into the case at all.

6. It is very easy to say little importance can be attached to oral evidence that it can be concocted of any kind, and to support any story is quite true, but after all it is only oral evidence a Sessions Court can go upon, and the testimony adduced in the case at the trial appeared both to the Court and the Assessors, two very good men, very deserving of credence, and it was only after full consideration that the verdict was given. It will also be observed that no appeal, was preferred by the prisoners. It is idle to say they were ignorant of appeal; every Native in Malabar knows that appeals are preferred constantly, and the men, even on the hypothesis that they were ignorant, would not have been half an hour in Jail before they were enlightened. In my frequent visits to the Jail, subsequent to and before the trial, none of the prisoners ever offered one word against the decision or breathed a single word about this story now got up and circulated for other ends. They were neither poorer nor of lower condition in society than the generality of prisoners, and had they wished to appeal there was no obstacle to their doing so at any time. Seeing, therefore, that they took no steps in the matter, I am of opinion that the subsequent action by the Magistrate on the "new matter" is not only irregular but quite uncalled for, and I can place no reliance on it whatever, and I told the Magistrate so at the time he spoke to me about it. I should deeply regret if a "grievous wrong" has been inflicted, and I should be the first to try and rectify, it having been the unwilling but immediate agent in the matter, but after mature consideration both when the matter was first brought to my knowledge, and from subsequent reflection, I am still of the same opinion I had when the case was tried, viz., that it was a true one and the evidence deserving of credit. I am as liable to make a mistake as any one, but I hold I had a far better opportunity of testing the truth of the matter, then before me, than the Magistrate has *now* had whereupon to base his report to Government. The deposition taken by the Magistrate about the Nair girl's movements have nothing whatever to do with the case. Nair women are constantly to be met going to other houses, and so far as this evidence goes, it tells nothing against nor in favor of the prisoners in this case.

7. My opinion, therefore, is altogether adverse to that of the Magistrate in this matter. I can place no reliance whatever on this "new matter," which is simply the product of subsequent concoction to gain a particular end. If the decisions of the Session Court are to be set aside upon the reports of Magistrates, based upon outside talk and flying rumours, the cause of justice will be much impeded and the certainty of punishment altogether rendered uncertain. I am therefore of opinion that there are no good grounds whatever to justify any interference on the part of Government with the decision of the Sessions Court in this case.

(True Copy).

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

No. 187. MINUTE by the Honorable T. PYCROFT, dated 1st January 1866.

It would have been more satisfactory if the Honorable Judges of the High Court had severally obliged Government with their reasons for considering that the judgment of the Session Court should be set aside, or the contrary.

2. In the letter to the Chief Justice, of the 26th August last, it was expressly stated that the Governor in Council would be glad to have the opinion of the Judges *on the evidence*.

3. As, however, we have not been favored with that opinion, we must do as we best can without it.

4. I learn, from good authority, that the majority of the High Court, who, deeming the case against the five prisoners to have been concocted, are in favor of a remission of punishment, are the three Civilian Judges, Messrs. Frere, Holloway and Innes—Officers of much judicial experience in the Provinces, and the two first of whom have long served in the Malabar District. I believe, too, that the two professional Judges, who think that there are not sufficient grounds for the interference of the Executive Government, have been led to that conclusion, not so much from their being satisfied with the correctness of the original conviction, as because they deemed it objectionable in principle that the judgment of a Court, concurred in by the Assessors and not appealed against, should be reversed on information, subsequently obtained by the Magistrate, and not subjected to the examination of the Session Court.

5. I have gone carefully through all the papers in this case, and the result at which I have arrived is that of the three Civilian Judges and of the Magistrate, that the charge against all the prisoners is a false one, the issue of a conspiracy, and originating in malicious and vindictive motives.

6. That the 2nd and 3rd witnesses should have happened so opportunely to have come upon the 1st, 2nd, and 3rd prisoners near the prosecutor's house, on the night of the robbery, and to have met the 4th prisoner coming hurriedly from the house, and that the 1st, 2nd, 3rd, and 4th prisoners, should, at once, on being taxed with the robbery, have confessed and given up parts of the stolen property, are circumstances very suspicious, and just such as parties conspiring to bring a false accusation of robbery would have hit upon.

7. Against the fifth prisoner, as remarked by the Magistrate, no case seems to have been made out in the original record. He produced the property as soon as he was applied to for it, and said throughout that it had been pledged to him by the first prisoner. His alleged confession before the Police is not admissible in evidence, and the circumstances dwelt on by the Session Judge, that the ornaments were not those worn by Moplahs, and that they were received in pledge for a sum much below their real value, although suspicious it may be, are not sufficient for conviction.

8. That the prisoners did not state the truth in their defence before the Court, but resorted to the plea of an *alibi*, which, as such pleas usually do, broke down, may be attributed to the fact that the transaction in which they were engaged, and whereby they became possessed of the ornament pawned to the 5th prisoner, was not a creditable one, nor one easy to prove. The woman of course would not give

evidence to blast her own character, and other testimony it would have been hard to obtain. In fact, it was not got by the Magistrate without some exertion and local inquiry.

9. For a like reason, coupled with that of their poverty and ignorance, the prisoners did not appeal to the High Court.

10. On the whole, I am of opinion that the punishment awarded by the Session Court, in the case of all these men should be remitted, under Section 54 of the Criminal Procedure Code, and the men released.

11. I confess that I have been led to this conclusion very reluctantly, for I do feel that it is, on general principles, very undesirable that the Government should interfere with the judgments of the Criminal Courts, unless on very special grounds. Looking, however, to the opinion of the three Judges of the High Court best qualified to deal with such cases as the present, and to the opinion of the Local Magistrate, and concurring, as I do, with them, that the conviction of the five prisoners is the result of perjury and conspiracy, I think that special grounds do exist for the Government exercising their prerogative in the present instance.

(Signed) T. PYCROFT.

No. 188. MINUTE by the Honorable H. D. PHILLIPS, dated 3rd January 1866.

The evidence to the commission of the alleged robbery would not have satisfied me, had I tried the case in the Session Court, that a robbery of the kind asserted was ever committed at all. Parties in possession of a false key would have used it, without being at the trouble to make a hole in the roof of the house, to enable them to enter and bring the key into play. Doubtless the case is as the Magistrate has put it. If the prosecutor's boxes were opened during his absence, and ornaments stolen therefrom, the act, to my mind, on a consideration of all the surrounding circumstances, must have been that of some member of his household, and not that of the prisoners, who are not persons whose position in life would have given them a knowledge of the ins and outs of the prosecutor's family abode. The hole in the roof, as is too frequently the practice, was, no doubt, an after-thought, and an after-act, to give a color to the robbery which, for family reasons, it was determined to pretend had taken place. The admissions said to have been made by the prisoners to the subordinate Police Officers, I put no faith in at all. I do not believe they were ever made, but if they were made, the law, as it at present stands, does not permit of their acceptance, as evidence against the prisoners, inasmuch as that they were made to Police Constables, and not in the presence of a Magistrate. (Section 148, Code of Criminal Procedure.)

2. The Session Judge, Mr. H. D. Cook, appears to me altogether to have missed the points and mistaken the case. I regard it as a conspiracy throughout, and if that be a correct view, it seems of little importance that Assessors should have brought the prisoners in guilty; for, generally speaking, our Jurors and Assessors are little to be trusted as Judges.

3. I quite concur in the observations recorded by Mr. Pycroft, and fully agree that this is a matter in which the Government should interfere and exercise their prerogative. I would, therefore, remit the unexpired portion of the sentences passed in the Session Court.

(Signed) H. D. PHILLIPS.

No. 189. MINUTE by the Honorable the PRESIDENT, dated 4th January 1866.

Under the circumstances now brought before the Government, I am *not* disposed to agree in the recommendation of the majority of the Judges of the Supreme Court. Two of the Judges are of opinion that there are not sufficient grounds to justify the interference of the Executive Government, and I have, from long experience, been so fully convinced of the impolicy of attempting to re-try cases which have once been decided by a competent tribunal, or of forming an opinion upon them from the mere record of the evidence given, that, on principle, I should always object to remit a sentence passed by the Judge of a competent Court, unless positive evidence could be given of the innocence of the person or persons sentenced. In the present case the prisoners tried to prove an *alibi* and failed utterly; they were convicted; they did not question the correctness of the sentence, or endeavour to appeal against it; and five months after the trial, the Magistrate of the District, acting, I think, most improperly, commenced to pick up such evidence as he could, for the purpose of throwing doubts as to the character of the conviction. I quite agree with the Session Judge that the precedent is a most injudicious one, and calculated to throw doubts upon the purity of the administration of justice. I may observe, in addition, that the whole of the statements made both by the Magistrate and others are mere suppositions; that the evidence adduced is such as may be most easily concocted; and that the so called witnesses have not been subjected to any cross-examination. Under such circumstances, I cannot consent to reverse the sentence passed upon the prisoners, and I think that Mr. Ballard should be warned not to meddle with the decision of the Session Court, unless he has better evidence to give in support of his opinion than that submitted by him.

(Signed) W. T. DENISON.

No. 190. MINUTE by the Honorable T. PYCROFT, dated 4th January 1866.

I admit that there is much force in His Excellency the President's observations; but, on the whole, as I cannot but think that these men are not guilty of the crime of which they have been convicted—an opinion shared by three Judges of the High Court, the Magistrate of the District, and my honorable colleague Mr. Phillips, I am still in favor of releasing the prisoners.

(Signed) T. PYCROFT.

No. 191. MINUTE by the Honorable H. D. PHILLIPS, dated 6th January 1866.

The points on which His Excellency the President has laid stress did not escape my notice, when I went through these papers. I noticed also the very curt, off-hand manner in which the witnesses for the prosecution had been examined in the Court of the Session Judge, from whom no single cross-question appears to have proceeded. No doubt, the general principle of non-interference by the Executive, with matters judicially settled, is entitled to high respect and strict observance; but in this country, where our Courts are presided over in frequent instances by men who have had no professional education or training, and whose abilities as, what may be termed, practical Judges, greatly vary, the Executive must occasionally step in to correct what, in the opinion of more than one Judge of the highest tribunal in the Presidency, is palpable error; and that this was the belief and conviction of the framers of the Code of Criminal Procedure now in force, is quite clear, or its 54th

Section would never have been enacted. I have carefully re-considered the record before Government, with special reference to His Excellency the President's remarks, but with every wish to meet His Excellency's views, and support a general rule of undoubted propriety and necessity, I am unable to divest myself of the strong belief I hold, that justice was not done in the Session Court of Calicut, in the trial under consideration, and that it now has become the duty of this Government to afford relief to the sufferers.

(Signed) H. D. PHILLIPS.

No. 192. MINUTE by the Honorable the PRESIDENT, 8th January 1866.

I have read over my former Minute, and the remarks of Messrs. Pycroft and Phillips, and I cannot but adhere to my former opinion, that the step which it is proposed to take would be productive of very bad effects. It would tend to lessen the confidence of the public in the administration of justice in the Zillah Courts, and it would induce the Magistrates to interfere very much in the same manner that Mr. Ballard has done in the present instance, and to seek out evidence which might contradict that given at the trial, when any feeling was exhibited in the District in favor of the people convicted. In the present instance, the case has practically been *re-tried* by the Judges of the Supreme Court; for their opinion was given, not with reference to the new evidence submitted by the Collector, but upon that forwarded with the record of the case, and which would have come before them very properly had the conviction been appealed against.

2. I regret very much that I acceded to the proposal to submit the evidence forwarded by the Collector to the Judges. The Government thought it desirable to get the opinion of the Court as to the validity of the reasons adduced by the Collector in support of his recommendation to the Government, but, instead of this, it has got a fresh decision, in an informal manner, of the original case.

3. It appears to me that both the Government and the Judges have acted wrong, and that the safest course to pursue would be to allow the original sentence, the justice of which has, practically, been admitted by the prisoners, to stand.

(Signed) W. T. DENISON.

No. 193. MINUTE by His Excellency the COMMANDER-IN-CHIEF, dated 17th January 1866.

I agree with Mr. Pycroft that it would have been very desirable to have obtained from the Judges a statement of the *grounds* upon which, individually, in their opinion, the judgment of the Session Court in this case, should, or should not, have been set aside—an assistance I was always favored with by the Judges in the several Governments I have administered. Considering, however, all the circumstances connected with this case, as they appear to me to now stand, so far as I am able to judge of them after perusal of the several documents submitted to me, including the report of the Session Judge who originally tried the cause, and also after a patient weighing of the merits and nature of the *new matter* subsequently brought forward by the Magistrate, I am distinctly of opinion that no sufficient grounds have been shown for the interference of the Executive, or to

justify them in what I should consider to be equivalent to placing on record a precedent for an *informal* interference on a standard point, on which the practice of the law itself has so carefully defined the proper procedure—that wherever justice may have been held to have failed, the opportunity for "appeal" to the highest Court is always open to a prisoner for redress.

(Signed) J. G. LEMARCHANT.

No. 194. ORDER THEREON, 26th January 1866, No. 108.

On the 3rd August last the Magistrate of Malabar addressed the Government with reference to the sentences passed upon five persons who had been recently tried and convicted by the Session Court of Calicut and sentenced to imprisonment, the first four on a charge of house-breaking by night with intent to commit theft, and the last on a charge of dishonestly receiving stolen property. The Magistrate stated that in consequence of rumours which had reached him shortly after the trial, to the effect that the charges against the prisoners had been concocted, he had caused a further inquiry to be made on the spot, the result of which and of other information which had been given to him by many persons of different ranks and position had satisfied him that grievous wrong had been done. He accordingly recommended that the sentences passed upon the prisoners should be remitted by Government under the provisions of Section 54 of the Code of Criminal Procedure. A copy of the Magistrate's letter was sent to the Honorable the Judges of the High Court, with a request that they would favor the Government with their opinion on the evidence in the case. The Judges accordingly called for the record of the trial and referred the Magistrate's letter to the Session Judge for his remarks. A copy of the Session Judge's reply, translations of the proceedings on the trial, as well as those held by the Police, the Session Judge's notes and the depositions taken by the Magistracy subsequent to the trial, have now been laid before Government, with a letter from the Registrar of the High Court, in which it is stated that three of the Judges of the High Court are of opinion that the conviction was the result of a conspiracy, and that the case is a proper one for the exercise of the power vested in Government by Section 54 of the Code of Criminal Procedure, but that the other two Judges are of opinion that there are not sufficient grounds for the interference of the Executive Government.

Seen. I do not concur in this Order, and refer to my Minutes under dates the 1st and 4th instant.

(Signed) T. PYCROFT.

My opinion in this matter has already been recorded in Minutes dated the 3rd and 6th January. I am therefore unable to concur in the present Order.

(Signed) H. D. PHILLIPS.

2. On full consideration of the papers which have been laid before Government, the Governor in Council concurs in the opinion of the minority of the Judges, that there are not sufficient grounds for the interference of the Executive Government, and he accordingly declines to act on the Magistrate's recommendation.

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

Judicial 6

No. 2744

From The Registrar of the High Court of Judicature at Madras - dated 21st Dec. 1865.

For Orders.

It would have been more satisfactory if the Hon. Judges of the High Court had severally assigned for with their reasons for considering that the finding and the Sessions Court should be set aside, or the contrary —

In the letter to the Chief Justice 26 August last, it was expressly stated that the first ground to which had been the opinion of the Judges on the evidence — in favour of the Government — but that opinion on the merits we have not before us —

I learn for good authority that the majority of the High Court when deciding the case against the

prisoners to have been convicted, on
in favor of a petition of prisoners
on the Civilian Judges, Mr. Ter
Holloway & Davis: officers of much
Judicial experience in the Province
and the two first of whom have long
resided in the Straits Settlements. I
believe too that the two professional
Judges who first tried them are
sufficient grounds for the satisfaction
of the Executive: for, I am bound
to state concisely as to myself for
their being satisfied with the conviction
of the original convictions, as
because they demurred objections
in principle that the judgment of
a Court consisting of the Assessors
and the appeal against should
be reversed on information being
obtained by the Prosecution, not subject
to the examination of the witnesses
were not produced before it.

I have gone carefully through all
the papers in this case and the result
at which I have arrived is that of the
two Civilian Judges and of the Magis-
trate charge against all the Prisoners
is a false one; the crime of conspiracy
and originating in malicious &
vindictive motives.

That the 2d. & 3d witnesses should
have had opportunity to
have communication the 1. 2. & 3d prisoners,
was the prosecution have on the
night of the robbery and the two not
the 4 prisoners coming immediately
from the town — that the 1. 2. 3. &
4 prisoners should all concur in
[illegible] agreed with the robbery, was

confessed and given up Lords of the stolen property. on circumstances being investigated and found sufficient to bring a felony accusation of 20 days would Lawhill upon -

Against the first prisoner, as remarked by the Magistrate, no case seems to have been made out either on first accusation. The prosecutor appearing on summons applied for it, and said that he had been pledged to him by the first prisoner - His alleged confession before the Police is inadmissible in evidence - and the circumstances described on by the Assistant Judge that the ornaments were not known among Gypsies and that they were received in pledge for a sum much below their real value; although this circumstance may be an important fact for consideration -

That the prisoners did not take the watch with any felonious design but with the intention of pledging it and afterwards they became possessed of the ornaments pawned by the first prisoner, was not a conditional one, which calls for proof - The woman if called would give evidence to clear her own character - and other testimony it would have been hard to obtain - In fact it was not got by the Magistrate without being asked -

For a like reason, confined with

that of this thousand ignorance in the
prisoner did not appear to the
Court [illegible]

On the whole I am of opinion
that the punishment awarded by
in the case of all the men should
be [illegible] under S 57 Penal Code
[illegible] and the sentence of

I confess that I have been led
to this conclusion very reluctantly,
for I do feel that it is an unmerciful
principle to act on, desirable that
the Government should in this case
with the fullest concurrence of the Criminal
Court interpose in any special manner
Looking however to the opinion of
the three Judges of the High Court
how generally I deal with such

case as the present - and to the opin-
-ion of the local Magistrate & Col-
-lector as I do with them that
the conviction of the five prisoners
is the result of perjury & conspiracy,
I think that official power should exist
for the former mode of exercising
the prerogative in the present instance

1/1/66. J Bigge

The evidence of the commission of the alleged
robbery, would not have satisfied me, had stood
the case in the lesser Court, that a robbery of the
kind depicted was ever committed at all. -
Parties in possession of a false key would have used
it, without being at the trouble to make a hole in
the roof of the house to enable them to enter
& bring the key into play. Doubtless the case of
an Umbrella has [illegible] it. If the Post Office boxes
became opened during the absence of ornaments stolen
therefrom, the act, by any Court, on a consideration
of all the surrounding circs. must have been that

of some members of his household and not that of the Prisoners who are not persons whose conduct in life would have been likely to be a knowledge of the interior of the Prisoners family abode. The hole in the roof, as a fact personally the prisoner may be doubted an after thought & an after act to give a color to the robbing which for some reason pretended it was determined to say had taken place. — The admissions said to have been made by the Prisoners to the Constabulary Police officers I put no faith in at all. Don't believe they were made at all. But if they were made the law as it at present stands does not permit of their employment as evidence against the Prisoners unless that they were made to Police Constables & not in the presence of a Magistrate (Section 44 Code Crim Proc)

The Prisoners Counsel Mr R O Cock address have attempted to have not taken the case. I submit it as a contention throughout & that he cannot treat it seeing the importance that a person should have brought the Prisoners guilty to immediate punishment on such depositions as have been taken as finding.

I take comfort in the observations recorded by Mr Pycroft & fully agree that this is a matter in the Jurisdiction & because there should be no delay in the settlement hoped in the Prisoners favour.

3 January 66.

under the circumstances now brought before the Govt I am not disposed to agree with the recommendation of the majority of the Judges of the Supreme Court. — two of the Judges are of opinion there are not sufficient grounds to justify the interference of the Executive Govt, and I have, from long experience, been so fully convinced of the impolicy & attempting to retry cases which have once been decided by a competent tribunal, or of forming an opinion upon them from the mere record of the evidence given, on principle, I should always object to remit a sentence passed by the Judge of a competent court unless position of a completely new evidence could be given of the innocence of the person or persons sentenced. — In the present case the Prisoners did tried before a Jury & had an alibi and failed utterly. They were convicted — they did not question the correctness of the sentence, or endeavour to appeal against it, and now five months after the trial the Magistrate of the District, acting with most improperly, commenced to search for such evidence as he could for the

purpose of throwing doubts on the character of the conviction - I quite agree with the learned Judge that the precedent is a most invidious one, and calculated to throw doubt upon the purity of the administration of justice - I may observe in addition that the whole of the statements made both by the Magistrate & others, are mere suppositions - that the evidence adduced is such as may be most easily concocted - and that the so called witnesses have not been subjected to any cross examination - under such circumstances I cannot consent to revoke the sentence passed upon the Prisoner, and I think that Mr Pollard should be assisted first to peddle with the decisions of the Supreme Court until he has better evidence to give in support of his opinion than that submitted by him -

I admit that there is much force in HE the President's observations, but on the whole as I cannot but think that there remains not

guilty of the crime of which they have been convicted - an opinion I share & then Judges of the High Court - the Magistracy of the District & my Honorable Colleague Mr Phillips - I am still in favor of releasing the Prisoners

The position on which H.E. the Pres.t lays stress, did not escape my notice when I went through these papers. I noticed also the anxiety, off hand manner in which the topics for the prosecution had been examined in the Court of the Supreme Judge, from whom no single cross question appeared to have proceeded. — No doubt the general principle of non interference by the Executive, with matters judicially settled, should be respected & strictly observed in this country, where our Courts are presided over & prosecutions conducted by men who have had no professional

education or training of those abilities as, what may be termed, practical Judges, really using the executive must occasionally step in to correct what is in the opinion of more than one Judge of the highest tribunal in the Province is palpable error - and that the very object of the framers of the Code of Criminal Procedure now in force, & Parliament in 54th Victoria would not have been frustrated.

I have carefully reconsidered the record before Govt with especial reference to H Ex the President's remarks, but with every wish to meet H Ex's views, & support a general rule of the strictest propriety & caution, I am unable to divest myself of the strong belief that justice was not done in the Supreme Court of Calcutta on the trial under consideration and that it now has become the duty of this Govt to afford relief to the sufferers.

6 Jany/66.

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I have read over my former minute & the remarks of Mess[rs] Dyenfort & Phillips, and I cannot but adhere to my former opinion, that the step which it is proposed to take would be productive of very bad effects - it would tend to lessen the confidence of the public in the administration of justice in the Zillah Courts. it would induce the Magistrates to interfere, very much in the same manner that Mr Ballard has done in the present instance, and to seek out evidence which might contradict that given at the trial, when any feeling that power at the time exhibited in favour of the people convicted. - In the present instance the case has practically been retried by the Judges of the Supreme Court & their opinion was given not with reference to the new Evidence submitted by the Collector, but upon that forwarded

both the record of the Case, and which would have come before them duly properly had the convictions been appealed against —

I regret very much that I acceded to the proposal to submit the evidence forwarded by the Collector & the Judges — the Govt thought it desirable to get the opinion of the Court as to the validity of the reasons adduced by the Collector in support of his recommendation to the Govt but instead of this, it has got a fresh decision in an informal manner of the original case.

It appears to me that both the Govt & the Judges have acted wrong, and that the safest course to pursue would be to allow the original sentence the practice of which has, practically, been admitted by the Prisoners to stand

WD

Forwarded Sapurji Coming in Chief 13

WD

I agree with Mr Sapurji. That it would have been very desirable to have obtained from the Judges a statement of the grounds upon which, individually, in their opinion, the judgment of the Supreme Court in this case, should, or should not, have been set aside. — on questions of law forwarded with the Judges in the several documents there submitted, — Considering however, all the circumstances connected with this case, as they appear to me, to understand. So far as I am able to judge of them after perusal of the several Documents submitted to me — including the report of the Supreme Judge — who originally

tried the cause - and also - after a patient weighing of the merits & nature of the "new matter" subsequently brought forward by the Magistrate.

I am distinctly of opinion, that no sufficient grounds have been shown for the interference of the Executive, - or to justify them - in what I should consider, to be equivalent to placing on record - a precedent for an informal interference - on a standard point, on which the practice of the Law itself has so carefully defined the proper procedure; - That wherein Justice may have been held to have failed the opportunity for "appeal" to the highest Court is always open to a Prisoner in Reference

D.f. La Trobe - 17th Jan 1868

Judicial 1866 Sept 10

Minute by Dumbleton & Pycroft
of 15 January 66 No 206

Minute by Hon'ble H.D. Phillips
3 January 66 No 207

Minute by Hon'ble the President
No 208

Minute by Hon. D. Pycroft
of 24 January 66 No 209

Minute by Hon. H.D. Phillips
of 26 Jany No 210

Minute by Hon'ble President
No 211

Minute by H.E. the Comm.-in-Chief
of 27 January 66 No 212

Containing opinion as to the validity of the sentence awarded in a case of house-breaking & theft in Malabar

1866 193.

Judicial Department.

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PROCEEDINGS of the MADRAS GOVERNMENT.

Read again letter from the Magistrate of Malabar dated 3d & recorded in Proc. of 26 August 1865 No 1186.

Read also letter from the Registrar of the High Court dated 21st Decr 1865 No 74.

Order thereon 26 January 1866 No 108.

On the 3d August last the Magistrate of Malabar addressed the Govt with reference to the sentences passed upon five persons who had been recently tried and convicted by the Session Court of Calicut and sentenced to imprisonment, the first four on a charge of house-breaking by night with intent to commit theft, and the last

Sent. I do not concur in this order and refer to my minute dated 11th inst.

J.P.

My opinion on this matter has already been recorded in Minute dated the [illegible] Dec. Sessions Calicut to which I refer as the Govt will order

last on a charge of dishonestly receiving stolen property. The Magistrate stated that in consequence of rumours which had reached him shortly after the trial to the effect that the charges against the prisoners had been conceted, he had caused a further enquiry to be made on the spot, the result of which and of other information which had been given to him by many persons of different ranks and position had satisfied him that grievous wrong had been done. He accordingly recommended that the sentences passed

passed upon the prisoners should be remitted by Govt. under the provisions of Section 54 of the Cod of Criminal Procedure. A copy of the Magistrates letter was sent to the Honorable the Judges of the High Court with a request that they would favor the Govt with their opinion on the evidence in the case. The Judges accordingly called for the record of the trial and referred the Magistrates letter to the Session Judge for his remarks. A copy of the Session Judge's reply ~~was~~ a translation of the proceedings on the trial as well as those held by the Police, the Session Judge's notes and the deposition

depositions taken by the Magistracy subsequent to the trial, have now been laid before Govt, with a letter from the Registrar of the High Court in which it is stated that three of the Judges of the High Court are of opinion that the conviction was the result of a conspiracy and that the case is a proper one for the exercise of the power vested in Govt by Section 54 of the Code of Criminal Procedure, but that the other two Judges are of opinion that there are not sufficient grounds for the interference of the Executive Government

On

2. On full consideration of the papers which have been laid before Govt, the Governor in Council concurs in the opinion of the minority of the Judges that there are not sufficient grounds for the interference of the Executive Govt, and he accordingly declines to act on the Magistrate's recommendation.

The Hon. the Judges of the High Court
- Magistrate of Malabar

Judicial 1866. Department.

No. 108.

PROCEEDINGS OF GOVERNMENT.

Dated 26 January 1866

Press No. 2755, G. M.—14-11-65—500.

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