

# MADRAS RECORD OFFICE.

Government of Madras.

*Judicial* DEPARTMENT.

|          |       |                 |
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| G.O. No. | 1169  | Press           |
|          |       | <del>Mis.</del> |
| Dated    | 31-7- | 19-1866         |

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Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department,  
31st July 1866.

Read the following:—

No. 245. Letter from Colonel J. W. BAYLEY, Commandant, 31st Regiment, or Trichinopoly Light Infantry, to the Adjutant General, Head Quarters, Ootacamund; dated Waltair, 9th June 1866, No. 165.

I have the honor to request that you will be good enough to submit this letter and its accompaniments to His Excellency the Commander-in-Chief, with a view, should it meet his approval, that the case of Private Byraghee may be brought before Government.

|                                       |           |
|---------------------------------------|-----------|
| Letter from Sub-Magistrate            | marked A. |
| Extract of the Register               | do. B.    |
| Letter from Magistrate of Vizagapatam | do. C.    |
| Summary of Evidence                   | do. D.    |
| Letter from Magistrate of Vizagapatam | do. E.    |
| Letter to Brigade Major N. D.         | do. F.    |
| Letter from Brigade Major N. D.       | do. G.    |
| Appeal of Private Byraghee            | do. H.    |
| Order thereon                         | do. I.    |
| Translation of Record                 | do. K.    |

1. Private, No. 2343, Byraghee, of the Regiment under my Command, has suffered a corporal punishment of 60 lashes, in accordance with an award of the Native Sub-Magistrate here, as follows:—

“The Court finds that the prisoner is guilty of the offence specified in the charge, namely, that he, at about 1 o'clock at night of the 26th April, committed ‘lurking house trespass’, in order to the committing of theft, punishable under Section 457 of the Indian Penal Code, and directs that, in accordance with the provisions of Sections 2 and 10 of Act VI of 1864, the prisoner be punished with whipping of 72 lashes with cat-o-nine tails.

“The Medical Officer, present at the time of execution of the sentence, having certified that the prisoner is not in a fit state of health to undergo the full punishment awarded, the Court directed the above punishment to be mitigated to the whipping of 60 lashes only, and the prisoner discharged.”

2. In consequence of the statement made to me by Private Byraghee, I wrote to Mr. Carmichael, the Magistrate of Vizagapatam. The following is an extract from my letter:—

“He (Private Byraghee) has served eight years, and is of irreproachable character, there not being an entry of any kind against him in the Defaulter's Book.

“I think that he has been harshly dealt with. Redress, as far as he is personally concerned, is impossible, the punishment having been inflicted. The stain might possibly be removed from his character if further inquiry is made, and I appeal to you on his behalf to make such inquiry.”

The following is an extract from Mr. Carmichael's reply:—

“4. If I had dealt with the case, I should certainly have convicted the prisoner ‘of lurking house trespass by night,’ the punishment for which may extend to ‘3 years’ rigorous imprisonment, but I should *not*, I think, have found the intent *to steal*; the accused being tipsy, and not belonging to any of those classes who live by crime, or who are driven to it by the present high prices of food. But I cannot condemn the Sub-Magistrate; for the circumstances of the case are sufficiently suspicious to justify a conviction on a charge of intent to commit theft. The practical difference is that, in the latter case, the prisoner became liable to the sentence of whipping, under Act VI of 1864.”

*Proceedings of the Madras Government, Judicial Department,*  
31st July 1866.

3. The matter was then submitted by me to the Brigadier General Commanding Northern District; and subsequently an appeal was made by Private Byraghee to Mr. Carmichael. The following is an extract from the appeal:—

"In consequence of this procedure, it has become a great stain to my character, I therefore beg that the above sentence be made void, and that I be proved not guilty."

4. The appeal was rejected by Mr. Carmichael as follows:—

"Order."

"There is no appeal here, it being impossible to remit the whipping which the accused has undergone under Act VI of 1864.

"2. I have already gone through the papers and given my opinion in writing to the Commanding Officer in the case, and have nothing more to say about it."

5. Private Byraghee stands convicted of having committed "Lurking House Trespass by night with intent to steal," for which he has suffered a disgraceful punishment. He is, therefore, unfit to remain in the Regiment; but it seems to me that to discharge him would be a cruel aggravation of punishment for an offence, the commission of which has not been clearly proved against him.

6. With reference to paragraph 4 of letter No. 191, from the Brigade Major, Northern District, to my address, it has not been usual to watch the Proceedings of trials of men of the Regiment in Civil Courts.

7. The offence is said to have been committed during the night of the 25th April. The case was inquired into at the Police Station on the forenoon of the 26th, and about 12 o'clock Private Byraghee was handed over to the Regimental custody. In the afternoon of the following day, Friday, the 27th April, the letter from the Sub-Magistrate, accusing Byraghee of having committed a breach of Section 456, was received, and he was handed over to civil custody.

8. On the following afternoon, Saturday, the 28th, Byraghee was tried under Section 457, convicted, and at once punished. The alteration in the charge against him was not brought to my notice: had he been tried on the charge specified in the Sub-Magistrate's letter, he could not have been flogged.

(Countersigned) R. N. FAUNCE, Brigadier General,  
Commanding Northern District.

WALTAIR, 11th June 1866.

A

From the Sub-Magistrate of Vizagapatam, to the Commandant, 31st Regiment L. I., Vizagapatam; dated Vizagapatam, 27th April 1866.

Tauthina Byraghee, a Private, No. 2343, of the 8th Company of the Regiment under your command, has been charged with having committed "lurking house trespass by night," under Section 456 of the Indian Penal Code. He was caught in the act, and committed to the custody of Adjutant Jemadar of your Regiment. I have now the honor to request that you will be good enough to make him over to the custody of these Constables, to enable me to complete the trial.

*Proceedings of the Madras Government, Judicial Department,*  
31st July 1866.

B

Extract from the File Register of the Sub-Magistrate's Office at Vizagapatam, 1866.

| No. on the File. | Name of the Prisoner.                           | Nature of the offence.                                                                                                                  | Evidence adduced.                                                                                                                                                                                                                                                                                                                                                                                                       | Sentence.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|------------------|-------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 199 of 1866.     | T. Byraghee, Private 8th Company 31st Regiment. | Committing lurking house trespass by night, in order to the committing of theft, punishable under Section 457 of the Indian Penal Code. | The complainant and three witnesses depose that the prisoner having entered, at about 1 o'clock at night of the 26th April, into the house of one named G. Varadacharyulu, the complainant, stepped into the room where the complainant slept, and ran away, on being asked who he was. The prisoner says that he was drunk, and consequently did not know what he had done, which fact, though true, is not excusable. | The Court finds that the prisoner is guilty of the offence specified in the charge, viz., that he, at about 1 o'clock at night of the 26th April, committed lurking house trespass in order to the committing of theft, punishable under Section 457 of the Indian Penal Code, and directs that, in accordance with the provisions of Sections 2 and 10 of Act VI of 1864, the prisoner be punished with whipping of 72 lashes with cat-o-nine tails.<br>The Medical Officer, present at the time of execution of the sentence, having certified that the prisoner is not in a fit state of health to undergo the full punishment awarded, the Court directed the above punishment to be mitigated to the whipping of 60 lashes only, and the prisoner discharged. |

VIZAGAPATAM, SUB-MAGISTRATE'S OFFICE,  
30th April 1866.

(Signed) A. BALAKRISTNAMAH,  
Sub-Magistrate.

C

From Colonel J. W. BAYLEY, Commandant, 31st Regiment, or T. L. I., to the Collector and Magistrate of Vizagapatam; dated Waltair, 3rd May 1866, No. 136.

I have the honor to forward a complaint (with summary of evidence) made before me yesterday by Private Byraghee, of the 31st Regiment L. I., who, in accordance with an award\* by Sub-Magistrate Balakristnamah, underwent

\* Copy attached.

corporal punishment on the afternoon of the 28th ultimo.

2. It appears to me that due inquiry was not made into the case by the Sub-Magistrate, and that there is not a shadow of evidence to prove the intent to commit theft.

3. The Private was handed over to the civil power, in compliance with letter† of 27th ultimo, from the Sub-Magistrate, in which it is stated that the man was caught in the act.

† Copy attached.

4. It seems doubtful if the man entered any room in the building; it is pretty certain that he was not caught therein.

5. It is clear that two, if not three, of the eight rooms composing the front of the building were a short time ago in the occupancy of prostitutes.

\* Vide award.

6. The Sub-Magistrate admits\* that when he gave his award, he believed that the man was drunk at the time of the offence.

7. There is nothing extraordinary in a man under the influence of liquor finding his way to the residence of prostitutes, or to a house which had been to his knowledge occupied by such.

8. There was a bright moon; the building is on the main road leading to the town, and liable to constant patrol by the Police.

9. The Private does not even avail himself of the excuse (if such it be) of drunkenness. He says that he had been drinking, but knew quite well what he was about. He has served eight years, and is of irreproachable character, there not being an entry of any kind against him in the defaulters' book.

10. I think that he has been harshly dealt with. Redress, as far as he is personally concerned, is impossible, the punishment having been inflicted. The stain might possibly be removed from his character if further inquiry is made, and I appeal to you on his behalf to make such inquiry.

11. It is simply disgraceful that a man in the position of the Vakeel of the Rajah of Bobilly should be the owner of a building, portions of which were lately occupied by common prostitutes, and where vacant rooms are still available for the temporary occupancy of prostitutes and their male friends.

12. The building referred to has eight rooms facing the street, with a long open verandah from end to end. This verandah is available for poor travellers to sleep in, and is freely used by them.

13. It is, therefore, the most unlikely locality for any one acquainted with it to resort to for the purpose of thieving.

D.

Summary of evidence regarding a complaint preferred by Private Byraghee, 31st Regiment, or T. L. I., against the Sub-Magistrate, Vizagapatam.

Private Byraghee states:—"On the night of the 25th April, at about 12 o'clock, I was on my way to visit a woman who had invited me to do so. I went up the steps and tapped at the door of the room where I expected to find her."

"Not receiving an answer I came down into the middle of the road. As I was turning away from the door, an alarm of 'thief,' 'thief,' was raised. As I stood in the road several Brahmins came down the steps and seized me, calling me a 'thief'; they handed me over to some Constables, whom I told that I had not come to steal, but to visit a woman at her invitation."

"I was taken to the Station House. On the following morning (the 26th), the Police Inspector inquired into the offence with which I was charged. I told him what had happened, and he directed that I should be handed over to the Regimental authorities."

"I was sent to the Regiment about noon on that day."

"On the afternoon of the 27th, I was delivered to the Police, confined that night in the Station House, and taken before the Sub-Magistrate at 3 p. m. on the 28th. In answer to the Sub-Magistrate's question as to what I had been doing, I told him what had happened, i. e., that I had gone to the house at the invitation of a woman. After I had said this, the complainant (a Brahmin, name unknown) and Seenavassa Row, Vakeel of the Bobilly Rajah, came in. The Vakeel urged the Sub-Magistrate to punish me severely, as I had brought disgrace upon them. The Complainant charged me with having entered into his house to steal; I answered that I had not gone to steal, and that I had witnesses. The Vakeel prevented my speaking more. The Sub-Magistrate said to me, "the Complainant has four witnesses, what can yours do?" One of complainant's witnesses, his Waterman, was then called in. He said that I had come to complainant's to steal, and was caught inside the house. The Sub-Magistrate ordered me out, saying that I should get six dozen. I went away crying, and on my way out saw Havildar Shanatian, whom I told what had happened. About 5 o'clock that afternoon, I was taken to the front of the build-

ing in which complainant lives, tied hand and foot to Triangles, and, in the presence of the Sub-Magistrate and Vakeel, flogged with a cat-o-nine tails. After I had received 5 dozen, Dresser Peddanah interfered, saying that I could not endure more. I was then taken down."

Havildar Shanatian states:—"On the 28th April, I saw Private Byraghee come out from the Sub-Magistrate's Court crying; he said that they would not do him justice, or hear his witnesses, and had unjustly ordered him to get six dozen."

Pensioned Sepoy Rajiah states:—"Having come in from Alumundah to draw my Pension, I was, on the night of the 25th April, as usual, sleeping in the verandah of the building in which the Brahmins occupy a room. About one o'clock in the morning, there was an alarm of 'thief' raised by the Brahmins. Search was made, and no one being found, I went to sleep again. I was again aroused by a cry of 'thief,' 'thief'; I then saw Private Byraghee standing in the middle of the road. It was moon-light at the time. The Brahmins immediately seized him, saying that he was the thief. He denied the charge, saying that he had come to visit a woman. He was taken away to the Station House. I know that about two months ago prostitutes were occupying one of the rooms in the building (which Byraghee was accused of having entered to steal), and that even now rooms, where empty, are available for any one who likes to take a woman inside."

Sawmy states:—"I keep an Arrack shop. At about 1 o'clock on the morning of the 26th April, hearing a cry of 'thief,' 'thief,' from the Brahmins who occupy some rooms in the large building opposite my shop, I went outside and saw Private Byraghee coming from the direction of the Regimental Lines. At that time the Brahmins were running in and out of the different rooms. Byraghee stopped in the middle of the road, when the Brahmins ran up and seized him. He said that he had not come to steal, but had come after a woman. He was taken off to the Station House. Till within the last 2 months, prostitutes were living in the building in front of which Byraghee was seized."

Constable Lutchmiah, No. 1260, states:—"About 1 o'clock on the morning of the 26th April, hearing an outcry in the direction of the large building belonging to Seenavassa Row, Vakeel, I proceeded thither, and found some Brahmins in the road in front of the building, holding Private Byraghee, and accusing him of theft. At the requisition of the Brahmins, I took Byraghee to the Station House. Byraghee declared that he had not gone to steal, but was after a woman."

WALTAE,  
1st May 1866.

(Signed) J. W. BAYLEY, Colonel,  
Commandant, 31st Regiment L. I.

E.

From D. F. CARMICHAEL, Esq., Magistrate, Vizagapatam District, to the Commandant, 31st Regiment L. I., Waltair; dated Vizagapatam, 4th May 1866, No. 87.

On receipt of your letter, No. 136, of yesterday's date, I sent for the Record of the Sepoy's case from the Sub-Magistrate's Office (which you do not appear to have seen), and, after perusing it, I visited the house in respect of which the Sepoy is charged with felonious entry, and further personally questioned the inmate who first gave the alarm of "thief" together with the Arrack Seller who lives on the opposite side of the street, and the Constable who took the Sepoy into custody.

2. The Sepoy gives you to understand that he was after a woman, who had invited him to come there at midnight; that after going up the steps which lead into the verandah and tapping at the door of one of the front rooms facing the street, he came down again, not finding the woman there; and was then seized for a thief, as he was turning away.

3. All this appears to be false. The Brahmin who gave the first alarm was sleeping in an out-of-the-way room, at least fifty yards distant from the front door. After passing up the steps into the verandah, the Sepoy must have passed through the front door-way up a long passage straight before him, then have turned to the right, and traversed an open Court yard, and then turned finally up another passage to the left, and so have entered the room where the Brahmin and his friends were sleeping. This Brahmin explained that on challenging the "thief," by the sound of whose footsteps at the door of his room he was awakened from sleep, the thief ran away;

that he "followed" him out into the street, crying out for help, but lost him; that the "thief" all the time was hiding in one of the little rooms opening out of the Court yard, where he was collared by two other inmates; that he escaped from these and ran into the road, where he was ultimately seized and made over to the next Constable that passed.

4. The other two people I questioned merely speak to the hubbub in the street. Both agree that the Sepoy had been drinking; he was, it seems, a little fresh, but had his wits about him.

5. That prostitutes live in the building is utterly denied; and from the prejudices of the Brahmins, who lodge there in great numbers, we may be certain that they do not. All castes, of course, resort freely to prostitute's houses, for commerce with the women; but no Brahmin will live in the same house with people who kill and cook fowls, have fish in their kitchen, and so forth. The sole ground for the statement appears to be the fact of a wealthy prostitute, on her return from Moulmein by the Steamer, having lodged in one of the front rooms, some months ago; but this was while the house was building. Since its regular occupation by Brahmins, which dates more than two months ago, no prostitutes have lived there.

6. If I had dealt with the case, I should certainly have convicted the prisoner of "lurking house trespass by night," the punishment for which may extend to three years' rigorous imprisonment, but I should not, I think, have found the intent to steal; the accused being tipsy, and not belonging to any of those classes who live by crime, or who are driven to it by the present high prices of food. But I cannot condemn the Sub-Magistrate; for the circumstances of the case are sufficiently suspicious to justify a conviction on a charge of intent to commit theft. The practical difference is that in the latter case, the prisoner became liable to the sentence of whipping, under Act VI of 1864.

## F.

From Colonel J. W. BAYLEY, Commandant, 31st Regiment L. I., to the Brigade Major, Northern District, Waltair; dated Waltair, 9th May 1866, No. 139.

I have the honor to report, for the information of the Brigadier General, Commanding the

Letter from Sub-Magistrate to Commandant, 31st Regiment, L. I.  
Extract from the File Register of the Sub-Magistrate's Office.

Summary of Evidence.  
Letter from Commandant, 31st L. I., to the Magistrate, Vizagapatam.

Letter from the Magistrate of Vizagapatam, to the Commandant, 31st L. I.

District, that a Private of the Regiment under my Command has been subjected to corporal punishment, in accordance with an award by the Native Sub-Magistrate of Vizagapatam.

2. The accompanying correspondence, Summary of Evidence, &c., &c., will explain the case.

3. I am still of opinion that the punishment was awarded without full inquiry.

4. The Private still declares that his witnesses were not examined, and this is, to a certain extent, supported by the statement of Havildar Shanatian, who met the Private as he was leaving the Court.

5. There, of course, will be no evidence forthcoming to support the assertion of the Private that the Vakeel of the Bobilly Rajah urged the Magistrate to award severe punishment, but the presence of the Vakeel in the Court, his attending at the spot where the punishment was inflicted, and his being the owner of the building in which the trespass is said to have taken place, sufficiently indicate the interest he took on the matter.

6. In his reply to my letter, Mr Carmichael admits that the intent to steal was not proved, and that it was only on the proof of the intent to commit theft that the Private was liable to "whipping."

7. Mr. Carmichael appears to have misread my letter. I do not state in it that prostitutes now reside in the building, but that they did so sometime ago. The building is not yet fully occupied, and the people in the neighbourhood consider that the vacant rooms are available as I have stated.

8. It is said, and I believe truly, that the Private was in the habit of visiting the wealthy prostitute from Moulmein, while she resided in the building.

## G.

From the Brigade Major, Northern District, to the Commandant, 31st Regiment L. I., Vizagapatam; dated Waltair, 10th May 1866, No. 191.

Having submitted your letter, No. 139, of yesterday's date, with its enclosures, to the Officer Commanding the District, I have the honor, by order, to reply as follows:—

Private Byraghee appears from his own statement to have been made a prisoner at midnight of 25th April 1866; transferred as such by the Police to the Quarter Guard of the Regiment about noon of the 26th idem; again taken away as a prisoner on the after-noon of the 27th; and kept as such in the Station-house till the afternoon of the 28th, when he was tried, convicted and punished.

3. General Faunce cannot understand how, if the complainant *was* innocent and *could* produce evidence *he was so*, why he never attempted to call any. He had a clear 60 hours from the time he was apprehended until his trial took place, and yet, from a careful perusal of the documents accompanying your letter, the complainant does not appear *ever* to have attempted to call evidence on his own behalf, *not even of the woman*, who he says had requested him to meet her, and whose evidence would most materially have tended to corroborate his account of the transaction.

4. General Faunce further desires me to say that he considers the Jemadar Adjutant or some one Native Commissioned or Non-Commissioned Officer of the complainant's Company should have been sent with the accused to the Sub-Magistrate's Court, to watch the case, and see that the man had his witnesses (if any) duly produced. Had such been done in the present case, it never could have been stated that the Sub-Magistrate had refused to hear the complainant's witnesses, or to delay the case until they were duly summoned; but now there is nothing but the complainant's mere assertion to support this very serious charge against the Sub-Magistrate.

5. From the papers forwarded by you, it appears that you have already referred the case to Mr. Carmichael, the District Magistrate, but General Faunce desires me to say the regular course to be pursued in seeking redress would seem to be for the Private himself to appeal the case, and thereby bring the Sub-Magistrate's decision regularly before Mr. Carmichael, Magisterially, by whom, after perusal of the evidence, the sentence perhaps might be reversed, and complainant's character cleared of the imputation of intent of theft.

6. General Faunce further desires me to add that he trusts a portion of your letter to Mr. Carmichael was written hastily; for, on reflection, he hopes you will admit that its tone was not correct. I allude especially to the paragraph about the Bobilly Rajah's Vakeel, commencing "it is simply disgraceful, &c." You make a distinct charge therein, but do not support it by any evidence. Under such circumstances, General Faunce considers the paragraph should have been omitted.

## H.

TO THE HEAD MAGISTRATE OF VIZAGAPATAM,

&c., &c., &c.,

Vizagapatam.

File of Vizagapatam 1st Class Subordinate Magistrate's Cutcherry, 1866, Criminal. Appeal Petition of No. 199, named Tanthina Byraghee, Private in the 8th Company of the 31st L. I., regarding a Criminal Procedure according to Sections 412, 415, and 416.

Plaintiff, Gomadam Varadacharyulu, stated that, on the night of the 25th of April 1866, I entered his house with an intention of robbing, on which charge the Vizagapatam Sub-Magistrate sentenced me, on the 28th of April 1866, to a punishment of being flogged six dozens, and on the same day got me flogged five dozens with a cat-o-nine tails, and the remaining one dozen was then excused on the Medical Officer stating that there would be danger of life if the other dozen was flogged. In consequence of this Procedure, it has become a great stain to my character; I therefore beg that the above sentence be made void, and that I be proved not guilty.

By my annexing the Proceedings of the Court, I beg that the following appeal will be taken into consideration.

*Causes.*

I being a Private, and having nothing in the shape of housebreaking articles, is a strong proof that I was not a rogue.

In the Deposition that the Plaintiff gave, it does not appear how he knew who I was. He stated that I went into the room, and that he apprehended me in the verandah.

The first witness of the Plaintiff states that I threw open the room-door, that I crept into the room, and that he, the Plaintiff, questioned me, and that the Plaintiff went into the street for me, but did not mention, as Plaintiff did, that I had been in the room. The second witness stated that Plaintiff, third witness, and himself caught me in the room they were sleeping, but did not know why I came there.

The third witness states that, on my being caught in the room, and on Plaintiff calling out "rogue", "rogue" I made my escape. Plaintiff never stated that he cried out "rogue"; therefore, there being a difference in their statement, it is impossible to believe this.

I mentioned that I was intoxicated, and that I had come on a prostitute promising to allow me my desires. I have many witnesses that I was apprehended while in the street. The Court not taking into consideration to examine my witnesses wrote in their Proceedings that I did not give proof, and while I was mentioning that I would make an appeal, and there being sufficient time for punishment according to Act No. VI, Section 9, of 1864, it was unjust to flog me immediately.

In 1864 Act No. VI, Sections 2 and 10 of the Indian Penal Code, Section 457, [Sic.] does not mention about flogging, as that Section is not mentioned in it; but regarding this crime it does not appear just that Section 457 should be brought in force for other Sections. Therefore, I beg to state that upon these Sections, &c., being properly looked into, it will come to light that the sentence was a mistake. Should your Honor have any suspicion, I beg that, according to Section No. 422, my witnesses will be investigated and justice given me.

VIZAGAPATAM  
23rd May 1866.

(Signed) TAUTUNA BYRAGHEE,  
Sepoy No. 8 Company, 31st L. I.  
( .. ) NARRAINSAWMY,  
Havildar Major, 31st L. I.  
( .. ) W. S. BAILEY, Lieutenant,  
Officiating Adjutant 31st L. I.

*I.*

Copy of the Order of the Magistrate, dated Vizagapatam, 25th May 1866, in Appeal Case No. 11 of 1866, on his file.

*Order.*

There is no appeal here, it being impossible to remit the whipping which the accused has undergone under Act VI of 1864.

2. I have already gone through the papers, and given my opinion in writing to the Commanding Officer in the case, and have nothing more to say about it.

(True Copy).

(Signed) D. F. CARMICHAEL,  
Magistrate.

Copy applied for 25th May 1866.  
Copy ready for delivery 25th May 1866.

*K.*

1st Witness Peesapatee Jogiah, now residing at Vizagapatam, having taken his oath, deposes as follows:—

"About four days since, on the day of Ekadasi (or the 11th day of the increasing moon) as I, Gomadam Varadacharyulu (the tenant of Tarigoppala Sreenivasarows' new buildings), and some others were sleeping in a room, the prisoner came to the door of the above mentioned room, and shoving it, popped his head in. As I was awake at the time, I accosted him saying "who is that," upon which he ran out. I then came into the street, crying out "a thief," "a thief,"

but could not see him. Prisoner was afterwards found, and caught in the verandah by Pattabi Bheemanah and Ramoodoo. There is no gate-door to the house, nor any thing to prevent one's coming in up to the room that we were in, I imagine prisoner came to steal. Four days prior to this, some thieves had stolen a bundle of clothes. I have been living in that house for the last 20 days. I never met the prisoner there."

(Signed) JOGIAH,  
Witness.

28th April 1866.

This deposition was read over to the witness, who was satisfied as to its correctness.  
(Signed in English character)

N. BALAKRISTNAMAH,  
Sub-Magistrate.

*II.*

2nd Witness, Pattabi Bheemanah, having been sworn, states as follows:—

"Three days ago, at about 1 o'clock at night Peesapatee Jogiah, who was living in Tarigoppala Sreenivasarow's house (which had been occupied by the late Moonsiff of Veeravilli Taluq) having cried "a thief," "a thief," I and barber Pursaramadoo apprehended the prisoner in that house. Prisoner having got out of our hands and run as far as the verandah, we again laid hold of him, and made him over to the Constables that had come there. I do not know why the prisoner came there. He never came to the house prior to this. I do not know of any thing being lost in that house."

28th April 1866.

(Signed) PATTABI BHEEMANAH,  
Witness.

This deposition was read over to the witness in the Telugu language, and was understood by him, and he approved of its correctness.

(Signed in English character)  
N. BALAKRISTNAMAH,  
Sub-Magistrate.

*III.*

3rd Witness, Pursaram Behra, deposes upon his oath as follows:—

"Three days ago, at about 1 o'clock at night, complainant and 1st witness cried out "a thief," "a thief." Second witness and I apprehended the prisoner while he was in the house. Prisoner having got out of our hands and run away, we again laid hold of him, and made him over to the Constables as soon as they came there. I am a servant of the late Moonsiff of Veeravilli, and we have taken up our lodgings in the rented house of Tarigoppala Sreenivasarow. Complainant and 1st witness are also dwelling in a different apartment of the same building. I have never seen the prisoner come to their house, and do not know what he had come for. There is no door to the gateway of the house, and he must have come that way. Ten days ago a bundle of clothes belonging to a Brahmin who lodges in that house had been stolen."

28th April 1866.

PURSARAM BEHRA,  
Witness.

This deposition was read over to the witness in the Telugu language, and was understood by him, and he approved of its correctness.

(Signed in English character)  
N. BALAKRISTNAMAH,  
Sub-Magistrate.

*IV.*

No. 193 of 1866.

Statement of Gomadam Varadacharyulu, residing at present at Vizagapatam, made upon his oath:—

"The day before yesterday, at about 2 o'clock at night, as I and some others were sleeping in a room of the house temporarily occupied by me, a Sepoy called Tautuna Byraghee came into it.

Peesapattee Jogiah, who was in the room with me, being awake in bed, accosted him, saying "who are you?" The prisoner, making him no answer, ran away. We, therefore, imagined that a thief had come in, and, on coming out in search of him, found him in a verandah, and laid hold of him. There is no front door to the house I occupied, and the door of my bed-room was left ajar for coolness when going to bed. There are five or six families living in the house and paying rent. It is about twenty days since I came to live in the house, and the prisoner has never been there before. I am sure he had come for the purpose of robbing.

(Signed in Tamil character)

27th April 1866.

This deposition was read over to the witness in the Telugu language, and was understood by him, and he approved of its correctness.

(Signed in English character)

N. BALAKRISTNAMAH,

Sub-Magistrate.

V.

Question to the prisoner, T. Byraghee.—There is a charge brought against you by Gomadum Varadacharyulu, to the effect that you had clandestinely and unlawfully entered his house at 1 o'clock, during the night on the 25th April 1866, with intention of committing theft, and that you should be punished according to Section 457 of the Indian Penal Code. Are you guilty of this or not?

Answer.—I am not guilty of this offence. As I was that night, about 9 o'clock, passing by in the street, there was a female (a dancing girl or some other woman) seated on the steps of the complainant's house. I asked her if she had a fancy for me. She answered in the affirmative. I then told her that I would be with her in a short time, and asked her where she would be. She replied that she would be in that house. I then went about the street, and got some liquor, which made me quite drunk. As I was returning by that road, I remembered about the dancing girl just by the house, but know not what I did afterwards. I know not whose the house is. I have frequently seen prostitutes seated on those steps, and I don't know by whom the house is occupied.

This defence was taken in my presence and hearing, and contains the whole of the prisoner's statement.

28th April 1866.

(Signed in English character)

N. BALAKRISTNAMAH,

Sub-Magistrate.

VI.

Finding.

It is clearly proved by four witnesses that the prisoner, T. Byraghee, has entered a house clandestinely and illegally, during the night, in an attempt to commit the offence of "lurking house trespass by night."

Prisoner states that he had met with a prostitute seated on the steps, who desired him to come into the house, but that, being stupified a little while after by excessive drink, he does not know what he has been doing, which statement has not been proved. The Court is, therefore, of opinion that the prisoner is guilty of the charge brought against him.

(Signed in English character)

N. BALAKRISTNAMAH,

Sub-Magistrate.

VII.

No. 199 of 1866.

Complainant.

G. VARADACHARYULU.

Defendant.

T. BYRAGHEE.

Sentence.

The Court find the prisoner guilty of the offence mentioned in the charge brought against him by Gomadum Varadacharyulu, viz., that he (the prisoner), at 1 o'clock, on the night of the 25th of April 1866, did enter his house (complainant's), with intent to commit theft. He is, therefore, liable to punishment under Section 457, Indian Penal Code. The Court, in conformity with Sections 2 and 10 of Act VI of 1864, and Section 255 of Criminal Procedure Code, sentences the prisoner, T. Byraghee, to undergo corporal punishment of six dozens of lashes with cat-o-nine tails.

28th April 1866.

(Signed) N. BALAKRISTNAMAH,

Sub-Magistrate.

Medical Officer, K. Peddanah, having certified that the prisoner is not able to bear any more after he has received five dozens of lashes, the remaining lashes have been remitted.

(Signed) N. BALAKRISTNAMAH,

Sub-Magistrate.

(True Translation.)

(Signed) GHOLAM HOSSAIN,

Moonshee, 31st Regiment T. L. I.

(Signed) W. S. BAILEY, Lieutenant,

Quarter Master, 31st Regiment L. I.

No. 323.

MEMORANDUM.

Forwarded for the remarks of the Judge Advocate General.

To be returned.

(By Order)

(Signed) J. M. PRIMROSE, Colonel,

Adjutant General.

ADJUTANT GENERAL'S OFFICE,

HEAD QUARTERS, OOTACAMUND,

23rd June 1866.

To the Judge Advocate General, Bangalore.

No. 306.

MEMORANDUM.

The Judge Advocate General has the honor to return the papers received with the Adjutant General's Memorandum, No. 323, of 23rd instant, in the case of Private Byraghee, 31st Regiment Trichinopoly Light Infantry.

2. From the translation furnished of the Sub-Magistrate's, (Vizagapatam) record of the case against this Private, the manner of his having entered the house and endeavoured to escape therefrom when observed, as described by the witnesses, is sufficient to establish "lurking house trespass by night," under the 456th Section of the Indian Penal Code. But there is no evidence whatever, beyond that given by 1st witness, that he imagined prisoner came to steal, and by the 4th witness, that he was sure he had come for the purpose of robbery, which is insufficient of itself, to establish that he intended to commit theft, and to bring the offence under the 457th Section of the Penal Code.

3. The prisoner, in his defence, states that he, by appointment, went to the house to meet a dancing girl, and had frequently seen prostitutes seated on its

steps, and was drunk when he entered it, and knows not what he did; but he called no witness, by the record, to prove his statement.

4. The finding of the Sub-Magistrate is that it is clearly proved prisoner "has entered a house clandestinely and illegally during the night in an attempt to commit the offence of lurking house trespass by night," and, as prisoner's statement has not been proved, "the Court is therefore of opinion that the prisoner is guilty of the charge brought against him," and is liable to punishment under the 457th Section, Indian Penal Code; and "in conformity with Sections 2 and 10 of Act VI of 1864 and Section 255 of Criminal Procedure Code, sentences the prisoner T. Byraghee to undergo "corporal punishment of 6 dozens of lashes with cat-o-nine tails." From the prisoner's state of health only 5 dozen lashes were inflicted.

5. It is certainly peculiar, though it may possibly be the form for the record, that the Sub-Magistrate should state the offence proved was "lurking house trespass by night," but, because the prisoner's statement in his defence was not proved, that he was guilty of one more serious than that proved, namely "lurking house trespass by night with intent to commit theft," and that he should be punished for the latter, which alone subjected him to the infliction of lashes.

6. The prisoner appealed against the finding and sentence of the Sub-Magistrate, under Sections 412, 415, and 416 Criminal Procedure Code, within the regulated period, on 23rd May—the sentence having been passed and inflicted on 28th April last—to the Magistrate of the District, who passed an order, on 25th May, on the appeal, namely—"There is no appeal here, it being impossible to remit the whipping which the accused has undergone under Act VI of 1864."

"I have already gone through the papers, and given my opinion in writing to the Commanding Officer in the case, and have nothing more to say about it."

7. In this opinion in writing, No. 87, of 4th May 1866, the Magistrate states he had sent for and perused the record of the case, and visited the house in question, and personally questioned certain of the parties, and that portions of the statement prisoner had made to his Commanding Officer were false. Further, he adds, "if I had dealt with the case, I should certainly have convicted the prisoner of lurking house trespass by night," the punishment for which may extend to three years' rigorous imprisonment, but I should not, I think, have found the intent to steal; the accused being tipsy, and not belonging to any of those classes who live by crime, or who are driven to it by the present high prices of food. But I cannot condemn the Sub-Magistrate; for the circumstances of the case are sufficiently suspicious to justify a conviction on a charge of intent to commit theft. The practical difference is that, in the latter case, the prisoner became liable to the sentence of whipping, under Act VI of 1864."

8. The Sepoy, in his appeal, stated that "the Court, not taking into consideration to examine my witnesses, wrote in their proceedings that I did not give proof, and while I was mentioning that I would make an appeal, and there being sufficient time for punishment according to Act VI of 1864, Section 9, it was unjust to flog me immediately;" and he requested his witnesses might then be examined, under Section 422 of the Criminal Procedure Code.

9. He seems to be in error as to the provisions of Section 9 of Act VI of 1864, as that has reference only to sentences of whipping combined with imprisonment,

and it is nowhere provided in the Act for any delay in the infliction of sentences of whipping only.

10. From what has been stated in paragraph 2 above, of the want of evidence to establish the intent to steal, and from the admission of the Magistrate of the District, that, had he dealt with the case, he should not have found the prisoner guilty of the intent to steal, the Sepoy appears to have grounds for complaint against the decision and sentence of the Sub-Magistrate of Vizagapatam, as shown in paragraph 5 above, although it is "impossible to remit the whipping the accused has undergone," the reason given by the Magistrate for rejecting the appeal.

(Signed) H. PRITCHARD, Colonel.  
BANGALORE,  
26th June 1866.  
To the Adjutant General.

No. 352.

#### MEMORANDUM.

Submitted to Government, for such notice as the Right Honorable the Governor or in Council may consider that the decision of the Sub-Magistrate, Vizagapatam, in the case of Private Byraghee, calls for.

(By Order.)

(Signed) J. M. PRIMROSE, Colonel,  
Adjutant General.

ADJUTANT GENERAL'S OFFICE,  
HEAD QUARTERS, OOTACAMUND,  
29th June 1866.

To the Secretary to Government, Military Department.

Referred to the Judicial Department.

FORT SAINT GEORGE,  
6th July 1866.

(Signed) H. MARSHALL, Major-General,  
Secretary to Government.

No. 246.

ORDER THEREON, 31st July 1866, No. 1164.

Before finally disposing of this case, the Government resolve to call on the Magistrate of Vizagapatam District to satisfy himself and report whether the Vakeel of the Bobilly Zemindar was, as alleged by the Sepoy Byraghee, present in the Sub-Magistrate's Court during the trial and interfered in the manner stated, and subsequently was present at the infliction of the punishment. He will inform Colonel Bayley that the Sepoy is at liberty to substantiate his allegation in this respect if possible.

2. The Sub-Magistrate will also be required to explain specifically the grounds on which he found the "intent to steal" established, and his explanation will be forwarded to Government.

3. Pending further orders, the Government suspend the operation of their Order, dated 8th September 1865, No. 1283, Judicial Department, conferring on the Sub-Magistrate the first class powers under which he obtained authority to apply the Whipping Act in cases tried by him.

(True Extract).

Chief Secretary.

To the Magistrate of Vizagapatam.  
" Military Department.  
Edw. J. H. Burns.

6. With reference para 4 of letter No 191 from the Brigade Major Northern District to my address, it has not been usual to watch the Proceedings of trials of men of the Regiment in Civil Courts.

In this case Court to be held by War of Criminal Law

4. The offence is said to have been committed during the night of the 25<sup>th</sup> April.

The case was inquired into at the Police station on the forenoon of the 26<sup>th</sup>, and about 12 o'clock Private Pyraghee was handed over to the Magistrate's custody. In the afternoon of the following day - Friday, the 27<sup>th</sup> April, the letter from the Sub Magistrate, accusing Pyraghee of having committed a breach of section 456, was received, and he was handed over to Civil custody.

On the following afternoon - Saturday, the 28<sup>th</sup> Pyraghee was tried under section 457, convicted, and at once punished. The alteration in the charge against him was not brought to my notice: had he been tried on the charge specified in the Sub Magistrate's letter, he could not have been flogged.

Have the honor to be, Sir,

Yr. Obedt air  
9 June 1866

Your Obedt Servt  
J. J. B. Colonel  
Commandant 31<sup>st</sup> Regt. of I. & L.  
No. 402 Head Quarters Mysore Dist  
Walter 11 June 1866

W. J. M. B. Brigadier General  
Commanding Northern Dist

"liable to the sentence of Whipping,  
"under act VI of 1864."

3. The Matter was then submitted by  
me to the Brigadier General Commanding  
Northern District, and subsequently  
an Appeal was made by Private  
Byraghee to Mr. Carmichael. The  
following is an extract from the Appeal.

"In consequence of this procedure it  
has become a great stain to my Character.  
I therefore beg that the above sentence  
be made void and that I be proved  
"not guilty."

4. The Appeal was rejected by  
Mr. Carmichael as follows:  
"Order."

"There is no Appeal here, it being  
"impossible to remit the whipping  
"which the accused has undergone  
"under act VI of 1864."

"2. I have already gone through the  
"papers and given my opinion in writing  
"to the Commanding Officer in the case,  
"and have nothing more to say  
"about it."

5. Private Byraghee stands convicted  
of having committed "Lurking House  
Theft" by night with intent to steal,  
for which he has suffered a disgraceful  
Punishment. He is therefore unfit  
to remain in the Regiment; but it  
seems to me that to discharge him  
would be a cruel aggravation  
of punishment for an offence the  
commission of which has not been  
clearly proved against him.

No. 3115 of 1866.

(9)

It is to be remarked in passing that  
during the time that the Sub Magistrate  
N. Balakrishnamma is a Sub Magistrate  
of the 1st or 2nd class.

If he is of the 2nd class, the papers fail  
to show whether he has been expressly  
empowered by Govt. to pass sentences of  
whipping. (S. Act VI of 1864.)

If of the 2nd class, & not so empowered,  
his sentence was an illegal one and will  
warrant a severe notice.

In the Sub Magistrate's first communication  
to the Sepoy Prisoner's Commanding Officer  
forwarded earlier, instead of a formal  
summons, the charge made against the Sepoy  
is represented to be "Lurking House Theft  
by night" under Section 456 of the P. Penal  
Code, involving a punishment of  
only imprisonment.

Lu

In the Extract from the Calendar of the  
Submagistrate's trial, that the former accusation  
has been changed in Col 3, into "looking  
House Trespass in order to the commission  
of Theft under Section 457" for which  
offence a much heavier period of imprisonment  
may be awarded, or whipping.

No reason whatever has been assigned  
by the Submagistrate for this important  
alteration to the detriment of the Prisoner,  
and in the correspondence it has passed  
the case has not attracted attention.

It is of some importance, I think, that  
it was clearly competent to the S. M. to  
frame the former charge after hearing  
evidence for the prosecution. I call on the  
Prisoner to plead to this, as has been  
done: (Chapter 14 Section 250-55 Crim  
Proc Code).

I am quite of opinion with the Dis-  
tinguished Magistrate, as he <sup>has</sup> expressed it  
in para 4 letter to Col. Bayley 4<sup>th</sup> May last.

That the Prisoner should have been convicted  
of only "looking House Trespass" according to  
the character of the Prisoner, it might to be said  
have been admitted & affording to him a  
full opportunity of making up for his character  
I think a very brief period of imprisonment  
would have sufficed as punishment.

But I go far further than the Dis-<sup>tinguished</sup> Magistrate  
in respect of whether the Submagistrate may  
be condemned for this punishment - that was  
passed & given. I see nothing whatever  
in the circumstances attending the Prisoner's  
trespass into the Prisoner's house, - a house  
without an entrance door - only partly  
furnished - occupied by several families -  
close to the public road with a long  
open verandah ready for visiting & passing  
by to sleep or repose themselves - and  
it undoubtedly had been haunted by  
a prostitute at a late period - I see  
nothing in a half-litiged & pay being  
into a house of that kind it should  
have been accepted as indicating an  
intent to steal - and I do not think

a sample of moderate intelligence would have treated the case as <sup>involving</sup> at least a trial, had he been left to his own judgment.

If the Repay's representation to Colonel Bayley be true; viz: that the Vahedi of the Bahetty Zimmudar <sup>Major in the S. M. Co. of</sup> demanded severe punishment from the Sub Magistrate because the Repay had displaced him; we have a key to the whole affair & it cannot be considered he lied that the Sub Magistrate has abused his magisterial power.

I would therefore before finally disposing  
of the matter, call on the West & may be  
to satisfy himself <sup>report</sup> whether the value  
in question <sup>was in the Civil Court and</sup> ~~was paid~~ <sup>was</sup> ~~unimpaired~~  
in the way alleged of the Sepoy Prison,  
whose Comd. Officer Col. Bayley should  
be informed that the Sepoy is at  
liberty to substantiate his allegation  
in this respect; if possible.

Sw'd also inform the Sub may be specifically  
to explain the fraud on it he considered  
the intent to steal was established.  
Sending further inform Sw'd cancel any  
special authority given to the Sub except to apply  
the shipping act - 12/7/66 WDR

11. 27  
Judicial Department.

PROCEEDINGS of the MADRAS GOVERNMENT.

Read Memo. from  
Adjutant General, thro Milg Dept.  
Here enters 29<sup>th</sup> June 1864 No 352.

Order thereon 31<sup>st</sup> July 1866 No 1164

Before finally disposing of this case, the Government resolve to call on the Magistrate of Vizagapatam District to satisfy himself and Report whether the Value of the Robbery Zemindar was, as alleged by the Sepoy Buraag, present in the Sub Magistrate's Court during the trial and interfered

W. M.

in the manner stated,  
and subsequently was  
present at the infliction  
of the punishment. He  
will inform Colonel  
Boyley that the Sepoy  
is at liberty to substantiate  
his allegation in this  
respect if possible.

2. The Sub Magistrate  
will also be required  
to explain specifically  
the grounds on which  
he found the "intent  
to steal" established,  
and his explanation  
will be forwarded to  
Government.

3. Pending further  
orders the Government  
suspend the operation  
of

(2)

28

of their Order dated  
8<sup>th</sup> September 1865 No.  
1283, Judicial Department  
conferring on the Sub  
Magistrate the first  
class powers under  
which he obtained  
authority to apply the  
whipping Act in cases  
tried by him.

LB

To the Magistrate of Vizagapatam. } depd 2/8  
" Military Department } 29/12/65

Division of the  
of Publications  
and

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Industrial 1860. Department.

No. 1161.

PROCEEDINGS OF GOVERNMENT.

Office 1902.

Dated 31 July 1888.

Press No. 4206, G. M.-12-4-00-500.

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