M.R.O. 1—29,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1194 Press Mis.

Dated 4 — 8 — 19=1868

49/5

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Not to be folded or roughly handled

No. 49. Read the following letter from the Magistrate of Nellore, to the Acting Chief Secretary to Government, Fort Saint George; dated Nellore, 14th July 1866, No. 31.

With reference to the Order of Government, in the Judicial Department, of the 11th April last, No. 538, I have the honor to submit the view taken by the Court in the case under consideration, and the doubts I entertain on the question raised.

2. The Judge is of opinion that when two are accused of the same offence, one of them cannot be admitted as a witness against the other, because, under Section 43 of the Code of Criminal Procedure, all witnesses must be sworn, and, under Section 204 of the same Code, no oath can be administered to the accused.

3. The doubt I have is whether Section 204 applies in the general manner laid down by the Judge.

4. Section 203 enacts that if the accused shall propose to confess the commission *by him* of the offence of which he is accused, the Magistrate shall examine him in the same manner as a witness. And Section 204 provides that such examination shall not be preceded by an oath as in the case of an ordinary witness. But this does not, it seems to me, apply to what he may have to say as to the commission by *another* of the offence "of which he is accused."

5. There can be no question as to the competency of the accused as a witness in another case. But unless Section 204 be limited as I propose, there is nothing to show, so far as language goes, that under no circumstances could an accused be sworn and admitted as a witness.

6. And I, therefore, beg to repeat the request conveyed in my letter of the 17th January that, should the Government think fit, their Law Officer be consulted on the point.

7. The difficulty might be met by committing the men separately; but this is not always convenient.

Proceedings of the Session Court of Nellore, dated 10th July 1866, No. 89.

Read letter* from the Magistrate of the District, giving cover to Proceedings of Government, Judicial Department, under date the 11th April 1866, and requesting further information on the point therein referred to.

* Dated 17th April 1866, No. 66.

2. The point for determination is whether of two persons *joined in the same indictment* one is admissible as a witness against the other. The case is briefly this: A. and B. were accused of voluntarily causing a woman to miscarry; A. admitted his guilt, and being in a position and willing to give evidence against B., a solemn affirmation was administered and he was examined as a witness on the part of the prosecution; the case was one triable by the Court of Session, and the preliminary inquiry resulted in the committal of both A. and B.

3. A. thus appeared in the Extract from the Register of Preliminary Inquiry as first accused, and also as a witness on the part of the prosecution; the Court being under the necessity of returning the record, took the opportunity of drawing the attention of the Magistrate of the District to the course adopted by the committing Sub-Magistrate; the case, however, eventually came up in the above form, and on the charge being read over, A. pleaded not guilty; the proceedings held by the

Proceedings of the Madras Government, Judicial Department,
4th August 1866.

Court on perusal of the record prior to the trial have, however, led to the present reference, and I am of opinion that A. having been joined in the same indictment with B. the former became inadmissible as a witness against the latter, and that the Sub-Magistrate's procedure was illegal.

4. A. no doubt cannot be classed among the persons declared by Section 14, Act II of 1855, to be alone "incompetent to testify, but apart from any other consideration, the Code of Criminal Procedure renders A.'s position of an accused a bar to the admission of his evidence against his co-accused B. Section 43 of this Code is imperative; it sets forth that witnesses "shall be" examined on oath or affirmation, &c. A., however, was an accused person, and his admission of guilt did not alter his position as such. While Section 204 is no less imperative than Section 43 and it sets forth "that no oath or affirmation shall be administered to the accused person," A.'s position of an accused thus rendered it illegal to administer an affirmation to him, and without such affirmation he was not admissible as a witness against B. I am accordingly of opinion that though A. did not come within the category of incompetents detailed in Section 14, Act II of 1855, he was on the above ground inadmissible as a witness against B.; his inclusion as an accused in the indictment jointly with B. barred the Sub-Magistrate from taking that step which the Code has rendered indispensible; once in the position of an accused, the administering of an affirmation of any sort to A. in view to his examination relative to the offence of which he and B. stood jointly charged, became illegal, and without it the information he was in a position to give was not admissible in evidence in that specific case.

(True Extract).

(Signed) C. R. PELLY,
Session Judge.

To J. W. B. Dykes, Esq.,
Magistrate of the Nellore District, for his information.

No. 50. ORDER THEREON, 4th August 1866, No. 1194.

The Governor in Council requests that the Advocate General will favor Government with his opinion on the point referred to in the foregoing letter.

(True Extract).

Chief Secretary.

To the Government Solicitor, with Proceedings, No. ~~668~~ 95 of 1866.

Exd. T. Cartledge.

The Governor in Council is not disposed to refer the question raised in the foregoing letter for the opinion of the Advocate General.

To the Magte of Nellore.

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Judicial Department.

List

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following
Letter from the Magistrate of Nellore.
Dated 11th July 1866 No. 31.

Ordered thereon 4th August 1866 No. 1194.

The Governor in
Council requests that
the Advocate General
will favor Government
with his opinion on the
point referred to in the
foregoing letter.

To the Govt. Solicitor - with Pass. No. 538 of 66 dispatched
with a Copy of Proc. of Govt
under Date 11th April last.

List of Aug.

Judicial 1865. Department.

No. 1142

PROCEEDINGS OF GOVERNMENT.

Dated 4 August 1865.

Fasc 1735

End. No. 25-103
11/4/65

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