

MADRAS RECORD OFFICE.

Government of Madras.

Insult DEPARTMENT.

G.O. No.	1594	Press ~~Mis.~~
Dated	10 10	1866

118-119

8/9

Not to be folded or roughly handled

No. 118. Read the following letter from the Magistrate of Vizagapatam, to the Chief Secretary to Government, Fort Saint George; dated Vizagapatam, dated 23rd August 1866, No. 206.

I have the honor to acknowledge Government Order, Judicial, No. 1164 of 31st July, ultimo, passing certain orders in the case of Sepoy Byraghee, of the 31st Native Infantry.

2. I am directed to report "whether the Vakeel of the Bobbili Zemindar was, "as alleged by the Sepoy, 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." I informed Colonel Bayley, that the Sepoy was at liberty to substantiate his allegations in this respect, if possible. I enclose his statement, with the statement of the witnesses he cited. It will be seen they come to nothing at all.

3. I then called upon the Sub-Magistrate to explain, specifically, the grounds on which he found "the intent to steal" established. His reply on the point is herewith submitted. I beg to say it is not a translation, but the original paper written in his own hand, nor has he had any assistance in preparing it. He is not the Sub-Magistrate of this town, but was at the time acting here temporarily, from his own Taluq of Sringuvarpukota, during the absence of the permanent incumbent. I selected him specially as one of the best men I have.

4. In the Judge Advocate General's Memorandum on this case, there occurs the following passage:—"There is no evidence whatever "establish that the prisoner intended to commit theft, and to bring the offence under "the 457th Section of the Penal Code." On the other hand, I submit that there is such evidence, and am unable to recede in the least from the conclusion arrived at in the last paragraph of my letter to Colonel Bayley, viz., that, though I might not myself have found such intent, I "cannot condemn the Sub-Magistrate, for "the circumstances of the case are sufficiently suspicious to justify the conviction." If the Government entertain any doubt in the matter, I trust they will refer the question for a legal opinion in the high quarter usually consulted in such cases, because after all it is a point of law. It seems to me that I am only soliciting an act of simple justice to the Sub-Magistrate and myself, when I ask this much. Personally I feel aggrieved that my opinion should be so unreservedly set aside in favor of Colonel Pritchard's.

5. When the Government are satisfied on this head, I trust that the Sub-Magistrate may be restored to his former position, as a 1st Class functionary. The suspicion that this respectable public servant was acting with partiality or corruptly, is not only not proved by the evidence now taken, but is left without any reasonable presumption whatsoever. In regard to the Sepoy, as he has served eight years without an entry against him, I desire to say nothing harsh, but his misconduct on the night laid in the charge certainly appears to show the fallacy of the axiom of '*nemo repente fuit turpissimus*'; for

(1.) *Ex concessis*, he was absent from the Lines without leave at midnight.

(2.) *Ex concessis*, he was intoxicated, always an uncommon offence in the Native Army, and as all the liquor shops should be closed at gun-fire, it is obvious that he had further abetted a breach of the Abkarry Laws.

Proceedings of the Madras Government, Judicial Department,
10th October 1866.

(3.) *Ex concessis*, he was (if we believe him) after prostitutes. Not a Military offence, I am aware, but one which, from my experience as a Magistrate, I can certify is at the root of half the crime in the country; he appears indeed to be addicted to the practice—vide paragraph 8 of the Colonel's letter to the Brigadier Major.

Statement of *Tatina Byraghee*, Sepoy, No. 2343 of 31st L. I., of the 'Kapn' caste. Examined in Telugu.

Q. State what you have to say about the interference of the Bobbili Vakeel during your trial before the Sub-Magistrate.

A. He came in after the 1st witness had been examined, and handed a chit to the Sub-Magistrate. He also whispered something to him. I don't know what was in the chit, or what he said. When I asked the Sub-Magistrate to examine my witnesses, the same two who deposed before the Colonel afterwards, he replied it was of no use. There was nobody present in the Sub-Magistrate's Court, but one of the Sub-Magistrate's own Peons and a Head Constable. I don't know their names, but I should recognize them.

It was 4 o'clock in the afternoon when the trial was over. I was flogged at 5½ o'clock, opposite the house where I had been apprehended the night before. The Bobbili Vakeel was present. The house is his.

[Is sent out to identify the Head Constable and Peon mentioned above as having been present during his trial. He returns with two men and says, "These are they".]

Koppula Appadu.—I am Head Constable of Vizagapatam Police Station. I was present during this Sepoy's trial about three months ago. The Bobbili Vakeel, I remember, came into Court; he often comes there, as do the other Vakeels; he came in just as the case was being closed; I did not see him give a chit to the Sub-Magistrate, nor did I notice him speaking to him. The Sepoy said the prostitute was his witness, but on being asked if he knew where she could be found, he said no. I was not present when the Sepoy was flogged.

By the Magistrate.—People were going in and out of the room; the Sub-Magistrate's Gomastahs were in the next room; one or two Peons of his were present.

Pakala Venkata Reddi.—I am one of the Sub-Magistrate's Peons. I came into the Court when the trial was nearly over. I did not see the Bobbili Vakeel at all.

The Sepoy here says he forgot to say before that he has three other witnesses, Sepoys of the Regiment. The Jemadar Adjutant, who is in charge of the case, is directed to bring these three men to-morrow. Case adjourned.

VIZAGAPATAM, 9th August 1866.

Sebastian.—I am a Havildar of the 31st N. I. I am a Roman Catholic. I was sent for to the Sub-Magistrate's case, the day this Sepoy was tried, as witness in an assault case. I waited downstairs while his case was going on. As he came down the steps he told me he was to be flogged unjustly. I was not present during his trial.

Vedam.—I am a Sepoy of the 31st N. I. I am a Roman Catholic. I do not know Telugu. I will state in Tamil. [He then says the same as last witness.]

Mutti Viranna.—I and a Private of the 31st L. I. says the same as the two preceding Witnesses.

10th August 1866.

(Signed) D. F. CARMICHAEL,
Magistrate.

MEMORANDUM.

Being called upon to state the reasons for my finding that, in the case No. 199 of 1866, of Vizagapatam Sub-Magistrate's Court's file, the prisoner Byraghee, Private, 8th Company of the

Proceedings of the Madras Government, Judicial Department,
10th October 1866.

31st Regiment, had committed lurking house-trespass by night *with intent to commit theft*, I beg to offer the following explanation:—

It was established by direct evidence that the prisoner had committed lurking house-trespass by night. A person who enters another's house lurking by night must necessarily have a criminal intent, the maxim of Law being that an unlawful act was done with an unlawful intent. Here, therefore, it is certain that the prisoner had entertained a criminal intent. It is necessary to find out what that intention was. There can possibly be no direct evidence to prove the intention in such cases, especially before the commission of the act intended. The intention is, therefore, to be inferred from circumstantial and presumptive evidence.

2. From the circumstances of the case, such as the time when, and the place to which, the prisoner had entered the house, the manner in which he was arrested, his silence when he was arrested, the facts stated in his defence after the trial of the case, his private character found from the facts stated in his defence, I came to the conclusion that the prisoner had entered the house with no other than the intention to steal.

3. The house which the prisoner had trespassed is a fine large building quite distinguished from the neighbouring huts and houses. It is also very contiguous to the Cantonment in which the prisoner resides. It was then occupied by the great and respectable men of the (1) District Moonsiff of Veeravilly, (2) Sreeman Antervadi Condala Coomara Venkata Charloo Garoo, (3) Vakeel of the Zemindar of Madoogoolah, (4) Pleader of the District Moonsiff's Court of Vizagapatam. The prisoner was aware that it was occupied by such men with their properties. The prisoner, therefore, who entered that house at night, at about one o'clock, shall have had an intention of committing an offence against either person or property.

4. He had with him, when he entered the house, no offensive or any instrument to think of any intention to kill or do any bodily injury, and besides the prisoner had no enmity, or any connection with the men residing in the house, to think of any offence connected with female sex. Only Sreeman Antervadi Condala Coomara Venkata Charloo Garoo was living in the house with his family. They being Brahmins and of highest rank, and a priestly caste, the prisoner cannot be supposed to have intended to commit any such offence with such persons.

5. Now, he should have, we must presume, an intention to commit an offence with regard to property. There is no reason to think that he should have intended to commit "mischief." It is, therefore, necessary to presume that the offence which the prisoner had intended to commit was theft, there being no other offence which the prisoner could have intended to commit at such a time and place.

6. It is true that the prisoner being a Sepoy, and not belonging to any of those classes who live by crime, or who are driven to it by the present, high prices, could not be thought of having had an intention to steal. But it is also true that the prisoner had accustomed himself to drinking and going with prostitutes, and that it is very common with such persons in this country, though they be of higher classes, to steal any property which can be easily got and give it to their prostitutes in cases when they cannot devote any portion of their professional earnings for such purposes, either for want of money, or on account of a proper check by their parents or other household people. Here the prisoner was aware that the house contains the properties of the several persons occupying the house, and the house having no doors he can have an easy access into the house, and take any thing that he may find there, so the prisoner entered the house at that portion of the night when all persons are supposed to sleep, and having walked over three distinct apartments was peeping into a room, the door of which was not wholly shut, apparently in order to see whether the people within were awake or asleep, and when he was questioned by a man awake in the room who he was, he ran away to a corner of the house where he was arrested by the witnesses. All this the prisoner should not have done if he had no intention to steal; for, when he was arrested, while the 1st witness was crying "thief," "thief," &c., and the other witnesses apprehended him under that impression only, if he had not come to steal, he should have at once said that he is not a thief and told the purpose for which he came there. If it had appeared to the witnesses that he had drunk and came to the house missing, they would have either then and there

Proceedings of the Madras Government, Judicial Department,
10th October 1866.

released him, or stated before me at the trial that he entered the house drunk. Two witnesses on the contrary say that he came there to steal. They stated so from their experience of seeing some property having been stolen a few days previously in the same house under the same circumstances.

7. Law of evidence with regard to presumptions is not silent on this point. Kindersley, in his Manual of Law of Evidence, says, that a stranger who is found in a house at midnight is presumed to have entered the house with the intention to steal. Under all these circumstances, I came to the conclusion that the prisoner had the intention to steal; and I have accordingly framed the charge under Section 250 of the Criminal Procedure Code, and asked the prisoner if he has any defence to make.

8. The prisoner in his defence stated that he went there by appointment to meet a dancing girl, but called no witnesses to prove his statement, and there are also grounds to believe his statement was false, because there were no dancing girls at all living in the house. The prisoner's defence having thus been found to be false he was properly convicted of the offence specified in the charge, namely, the prisoner has committed "lurking house-trespass by night with intent to commit theft."

9. The prisoner being a Sepoy, and probably aided by the instigation of some other Sepoys, who must have been irritated by seeing one of their number was punished to whipping by the Magistracy, made some false statements to the Military Officers; and the District Magistrate, on the receipt of a letter from the Commanding Officer had sent for and perused the record of the case, visited the house in question and personally questioned certain of the parties and others, but I am not aware whether or not he had all the facts stated above under his consideration at the time of his replying to the Commanding Officer.

10. Mr. Carmichael is well aware of my character and conduct in the discharge of public duties. He may have found that I would not have entertained the least intention to do injustice to the prisoner. I had not any dislike or quarrel with the Sepoy (the prisoner) or the Sepoys generally, or friendship with the prosecutor or any one else any way interested in the case. I had not any dishonest motives for sentencing the Sepoy to whipping. In short, and in conclusion, I can say on oath that I sentenced the prisoner to whipping only on the ground of my truly finding him for the reasons stated above, that he had "the intention to steal."

11. I therefore most respectfully beg the District Magistrate will be good enough to submit this my humble explanation to Government, with such remarks and recommendations as he shall deem fit for their approbation of my conduct in this respect and restoring me the 1st Class powers.

N. BALAKRISTNAMAH,

Sub-Magistrate.

No. 119. ORDER THEREON, 10th October 1866, No. 1594.

On a full consideration of all the circumstances of this case, the Governor in Council is of opinion that although the legality of the Sub-Magistrate's decision and his good faith cannot be impugned, he would have exercised a sound discretion in not awarding corporal punishment.

2. The Governor in Council resolves to re-invest Balakristnamah with the powers of a 1st Class Sub-Magistrate, in consideration of Mr. Carmichael's testimony to his character and qualifications, and in the confidence that he will exercise his powers with due judgment and moderation.

(True Extract).

To the Magistrate of Vizagapatam.
,, Military Department.

Ed. J. Tulloch.

Chief Secretary.

No 1902/66.

Sub: Sub.

I sustain the opinion which I originally formed, that there has been a painful misuse by the Sub Magistrate, of the important power given to him by the "Whipping Act."

no doubt the Officer's written explanation is clear and logical. It serves also to show how well we are educating (quarry? over educating) the intelligent folk of Southern India. Still, it does not bring home, amid the conviction, that in the circumstances of the case, the Sub Magistrate can conscientiously have regarded the Sepoy as a trespasser with intent to steal; but even if we were otherwise, the offence was not one which a Magistrate of ordinary discretion & good faith would have punished by the lash. Neither was it one in which legal knowledge was wanted for arriving at a just conclusion, and therefore I would not, as reported!

by the District Magistrate, make a reference
to the Govt. Law Adviser on the legal aspect
of the matter.

Taking an analogous case in England,
a correct judgment would have been
given by any sensible man of the world,
sitting as Magistrate of Sessions; and no
better case have been hoped by the
best lawyer in the land. Any one of
our old friends of Falmouth, who had never
heard the name "Rindley" in connection
with a "Manual of Evidence", would have
thought a small period of imprisonment
punishment enough for the offence and
that is what Sub Magistrate Falmouth should
undoubtedly have awarded.

I would therefore permanently deprive
this Sub Magistrate of the power to inflict
if he happens to be a Sub Magistrate of the First
Class and is held to be legally invested
with the power, under Section VIII. of the
Whipping Act, it will have to be considered,
whether, to deprive him of such legal authority.

he should not be reduced to the grade
of a 2nd Class Sub Magistrate. This step,
I believe, will not affect his salary.

A deprivation of the Whipping power,
will operate as an amende to the Corps,
and the Sub Magistrate belongs and remains the
property to which Colonel Bingley has
referred of ejecting the Sub Magistrate from the
Regiment as having been convicted of
a disgraceful act.

10 Sept 86.

WV

It is admitted on all hands that
the Sub Magistrate committed the offence
he is passing by right -

The question is, did he do so with
intent to steal -

The Sub Magistrate thought he did &
punished him accordingly.

The Judge Advocate thinks that
there was no evidence to establish
criminal intent.

In Carmichael one of our best

Magistrate who has personally
inspected the locality and examined
some of the witnesses & people about, says
that he thinks he did not have con-
-firmed the report of the police charge,
but that at the same time the circum-
-stances were to his mind suspi-
-cious enough to warrant the Sub
Magistrate in arriving at the con-
-clusion that he came.

It is then simply a matter of
opinion - and one on which different
views may fairly be entertained.

For myself although I certainly
should not have found the man
guilty of felonious intent, I am not
prepared to say that the circum-
-stances were not suspicious, and
such as an intelligent & honest

Magistrate might not have borne
false view as Belcher has
done.

No imputation whatever rests
upon his integrity or connection
with this case and Sir (Cantillon)
thinks he is one of his best men.

Under these circumstances
and in view of my own opinion
principally the present position
objection to giving extra force
on the part of the Sub-Magistrate
civil or judicial proceedings
by way of the stone just proposed
I would restore the Sub-Magistrate
first class power & even to

for the 12 months
12/3/62 J.P.

I think that the submagistrate
acted with precipitation and
indiscretion in applying the
penalty of whipping. Nevertheless
as his character is good and his
capacity manifestly considerable
if he into his despair himself
and Mr. Fairbank speaks
well of him I would advise him
with all the powers he possesses
to persevere. His meddling into
his proceedings in this case will

never be

such as an intelligent

12
probably make him more
incurable in future. I
agree with Sir T. Russell
N.

Mr. Russell

Wm. Russell

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following
letter from the Magistrate of Vizagapatnam
(Recd letter 23^d Augt 1866 No. 206)

Order thereon 10 October 1866 No. 1594.

On a full consideration
of all the circum-
stances of this case,
the final opinion
that ~~while~~ although
the legality of the
Sub. Magistrate's decision
and his good faith
cannot be impugned,
he would have ex-
ercised a sound
discretion in not
awarding corporal
punishment.

The final result

Upon further considera-
tion of the whole facts
of the case, the Right
Honorable the Governor in
Council resolves to restore
to Bala Krishnamach
Sub Magistrate of
Srinagarputota, the
magisterial powers with
which he was invested
prior to the commencement
of the present inquiry.

The inference
drawn from the facts
established

that the Enquiry report
by his proceedings in this
case will cause him to
be more circumspect, and
display greater discretion
in future.

JOS

Two orders for choice.

To the Magistrate of Vizagapatnam
" Military Department - } dated 17/10/1907

re-established during the
course of the trial was
necessarily based upon
opinion only, and though
it is doubtful whether
the Submagistrate exercised
a sound discretion in
arriving at the conclusion
he did, there is no reason
to doubt his integrity, or
good faith in the exercise
of his powers.

3 The Government
are glad to notice that the
Magistrate Mr Carmichael
gives Balakrishnamah
a good character for
ability and integrity, but
they are bound to observe
that the Submagistrate
acted with precipitancy
and indiscretion in applying
the penalty of whipping
in the case under considera-
tion, and they trust
that

to re-invest Kala-
-Krisnamah with
~~the~~ powers of a
Sub Magistrate
in consideration of
Mr Carmichael's
testimony to his
his character &
qualifications & in
the confidence that
he will exercise
his powers with due
judgment & moder-
ation

J. D. S.
I prefer this
J. D. S.
I hope I shall differ
I hold entirely contrary
your opinion of the
matter W. J.

Sub. 1. Bill

118-119

Judicial 1868. Department.

No. 1594

PROCEEDINGS OF GOVERNMENT.

Dated. 10 October 1868. R. J. C. K.

Care