

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.	807	Press
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Dated	16. 5. 1867	

Not to be folded or roughly handled

15/6/20

Proceedings of the Madras Government, Judicial Department,
16th May 1867.

No. 188. Read the following letter from H. S. THOMAS, Esq., Acting Session Judge of Chingleput, to the Chief Secretary to Government, Fort Saint George; dated Chingleput, 9th April 1867, No. 189.

The Honorable the Judges of the High Court having declared that it is not their duty to consider the questions involved in the following paragraphs, I conclude I am right in addressing them to you, and I trust the subject may be considered one of sufficient importance to justify my submission of it.

2. My subject amounts to a question, whether or not the majority of the Court of Justice in this Presidency are daily violating the law they profess to administer, by punishing, acquitting, and committing for trial, persons over whom they have really no legal jurisdiction whatever.

3. However chimerical these views may at first sight appear to be, as opposed to established practice and the array of authority against them, I venture to think that I have nevertheless supported them, and that, with the bare possibility of my being right, ordinary wisdom demands that the subject should be at least fairly looked into, and that the difficulty, if found real, should be met before the machinery of Justice is abruptly clogged by the outside public discovering what I consider the illegality of our proceedings.

4. I do not put forward a position from which there is no escape. I simultaneously suggest the difficulty—illegality, and the simple remedy—legislation.

5. You will be aware that I submitted these same views to you a year and a half ago (8th November 1865), but, from the accident of my then position, failed to obtain for them a hearing. This must be my apology for thus pressing their importance.

6. My thesis is that the Subordinate Magistracy in this Presidency have, as the law now stands, no power to take primary cognizance of any offence without special reference in each individual case from the Superior Magistracy; that the Subordinate Magistracy have no authority to commit to the Session Court, till empowered by Government, under Section 38, Criminal Procedure Code; that, in any case, they are prohibited by the local law for this Presidency (Chapter XXIV, Criminal Procedure Code) from committing any but cases triable *exclusively* by the Session Court; and that, if it is considered desirable to give them any of these powers in this Presidency, legislation will be required.

Primary Jurisdiction of Subordinate Magistrates.

7. What I contend for in the first instance is that Subordinate Magistrates of the 1st and 2nd Class are both meant by the Code of Criminal Procedure to be essentially subordinate, primary action being taken by the Police and the Superior Magistracy, and the intervention of the Subordinate Magistracy being called in by the Superior Magistracy.

8. The inference from Section 63 of the Criminal Procedure Code is that a Subordinate Magistrate cannot "take cognizance of an offence without a complaint," and from 66 that he requires to be "authorized to receive such a complaint without reference from the Magistrate of the District;" and these inferences are strengthened by the wording of Section 273, wherein it is again adverted to, that it

must be by some authority or law that he can be made "competent to entertain" *ex suo motu*, and as it has been ruled that he cannot be said to be in charge of a Division, it is only natural that he should not be authorized to take primary cognizance.

9. Chapters XIV and XV of the Criminal Procedure Code are, I believe, the ones under which the Subordinate Magistrates have always been concluded to have the powers I now venture to advance they have not. The wording "a Magistrate" has been relied on as embracing Subordinate Magistrates also (Section 15); but I conceive that it cannot be meant to include them, because there is much in the context, that is as I shall endeavour to show, "repugnant (Section 2) to such a construction."

10. If it be argued that the opening words of these Chapters "a Magistrate having jurisdiction in the case" point to Magistrates of different powers, then I reply that they are intended to point only to local jurisdiction; for Section 256, as I shall show hereafter (paragraphs 14 and 15 *infra*), clears up the question of the extent of powers. The words "having jurisdiction" have the effect of precluding Joint, Head Assistant, Assistant, and Deputy Magistrates from taking up cases out of their own Divisions, and so interfering with each other, and with the Magistrate of the District, who alone has jurisdiction conterminous with the District, and who again is precluded by these words from going beyond the limits of his District. I further argue that, apart from the question of primary jurisdiction, it is necessary to interpret these words as I do, if only to settle the minor question involved in them, that of local jurisdiction.

11. If Chapters XIV and XV applied equally to Subordinate Magistrates, there would have been no necessity for enacting for them the special Chapter XVI, as it would in such case have been, not only redundant, but worse than redundant—it would have been contradictory.

12. Chapter XVI, Section 275, in giving to Subordinate Magistrates their procedure, states in so many words that it is to be that which is contained "in the rules prescribed for the guidance of the Magistrate of the District in similar cases." The "similar cases" are, of course, those separately classed under Chapters XII, XIV, and XV, respectively. It follows, then, that the Magistrate therein referred to is (by Section 275) declared to be "the Magistrate of the District," or, we may add, Magistrate with like powers.

13. Chapter XVI, Section 275, subordinates the Police to the Subordinate Magistrates in all cases referred to them under that Chapter. It must be concluded then that this provision was necessary, the Police not being otherwise subordinated to the Subordinate Magistrates, which, on the contrary, they would already be, if Chapters IX, XII, XIV, XV, &c., included Subordinate Magistrates.

14. Sections 276, 277, 278 of Chapter XIV tell the Subordinate Magistrate what he is to do when he finds the case beyond his jurisdiction. The similar Section (256) contained in Chapter XIV is very differently worded. It takes for granted that there is no intermediate authority between the Magistrate therein referred to and the Session Court; and such a Magistrate can only be a Magistrate with full powers. If Subordinate Magistrates also were referred to, why should a very different course be laid down for them in Sections 276 and 277, Chapter XVI?

15. If, for the sake of an *argumentum ad absurdum*, we admit that Chapter XIV Section 256 does apply to Subordinate Magistrates also, there is a palpable difficulty in the way. What is the Subordinate Magistrate to do when the case is one that he is not competent to try, and at the same time not competent to commit to the Session Court, it not being a case "exclusively triable" by the Session Court, or perhaps not a Session Court case at all, but a Superior Magistrate's? This again shows that Chapter XIV was never intended by the framers of the Code to include Subordinate Magistrates. These difficulties are met in the only Chapter (XVI) that refers to Subordinate Magistrates generally.

16. If it be admitted that Chapter XIV does not apply to Subordinate Magistrates, then it follows that Chapter XII also does not; for Section 225 refers to Chapter XIV as the one under which the Magistrate in question would have to act, and not to Chapter XVI. The Magistrate referred to in Chapter XII must, therefore, be such a Magistrate as is meant in Chapter XIV, *i. e.*, a Magistrate with full powers, and in charge of a Division, and not a Subordinate Magistrate empowered under Chapter XVI alone.

17. Section 209 is another argument that Chapter XII was not framed for Subordinate Magistrates. The special use of the words "the Magistrate of the District, or other Officer exercising the powers of a Magistrate," would appear, at first sight, to indicate that the word "Magistrate," as simply used throughout the rest of the Chapter (XII), without the description here added, could, on the principle *expressio unius est exclusio alterius*, taken in connection with Section 15, be fairly held to mean "all or any Magistrates." But I take it as an indication that the legislators, while framing Chapter XII for Superior Magistrates, did not overlook the fact that they intended, in a subsequent Chapter (XVI, Section 275), to make these powers and this procedure applicable, with a few necessary adaptations, to Subordinate Magistrates in all cases which might be referred to them by the Superior Magistracy, and that, therefore, they purposely reserved the power of expressing themselves more explicitly in Section 209, than elsewhere in that Chapter, in order that it might be clear that that Section (209) was an exception, and that they intentionally and expressly withhold from Subordinate Magistrates the sovereign gift of mercy. That such was the intention of the legislators has been ruled by the High Court.

Proceedings, High Court, of 11th February 1864.

18. Section 36 of the Criminal Procedure Code appears to contemplate the Superior Magistrate withdrawing from a Subordinate Magistrate no cases but those that he and his Subordinates are competent to try. There must, therefore, be a failure of justice, Section 210 notwithstanding, when a Sub-Magistrate is holding a preliminary inquiry in an exclusively Session Court case, in which it is essential to the proof of the case that pardon should be tendered to one of the accused. The Sub-Magistrate cannot tender it himself,

Proceedings, High Court, 11th February 1864.

neither can he apply to the Magistrate with full powers to empower him to grant it. Neither can the Magistrate with full powers withdraw the case from him (Section 36), so as to exercise the powers of pardon himself. If the case is not an exclusively Session Court case, the Sub-Magistrate may himself refer it to the Superior Magistrate (Section 356), and then the Superior Magistrate can act under Section

209, but if it is a case of murder, for instance, an offence triable exclusively by the Session Court, then the Sub-Magistrate has no power to refer the case to the Superior Magistrate, and there must be a failure of justice, simply because the case has unfortunately come before a Sub-Magistrate, instead of a Superior Magistrate. This failure would not occur under Chapter XVI, and is another argument that the legislators did not intend that cases of this nature should come before Sub-Magistrates in the first instance without being referred, and it is a further evidence that these difficulties can only be met by re-legislation.

19. There are, therefore, a multitude of arguments in Chapters XV, XIV and XII, respectively, that a Subordinate Magistrate was not intended to have primary jurisdiction under them. They all cast us back on Chapter XVI, as the origin of the deputed powers of Subordinate Magistrates.

20. But, besides thinking that Subordinate Magistrates have no power to "entertain cases" *ex suo motu*, "without reference" from the Superior Magistracy, I am also of opinion that they are not competent to entertain them even "on the report of a Police Officer" (Section 273).

21. There appears to be no separate procedure in cases brought up by the Police. Chapter IX, which treats of them, does so with reference to the action of the Police alone, and unless it be in Section 68 (in Chapter IV), the Magistrate is no where, that I am aware of, instructed to "take cognizance of any offence which may come to his knowledge" by means of the Police or otherwise. The Magistracy are given no powers under Chapter IX, and are only described sufficiently accurately for Police purposes; even the words "any Magistrate" used in Section 135 are shown by the context not to mean a Subordinate Magistrate, for no Subordinate Magistrate has power under this Act to "depute" another Subordinate Magistrate. The Subordinate Magistracy are, therefore, excluded, as shown in paragraph 8 of this letter.

22. But there is, not only negative, but positive proof that Subordinate Magistrates are excluded from taking action under Chapter IX. The Police are required to lay their information (Section 135) and their cases (Section 158) before the "Magistrate having jurisdiction;" and, as I have already endeavoured to show, a Subordinate Magistrate has no jurisdiction till it is specially deputed to him, in each individual case, by order of the Superior Magistrate, under Section 273—Chapter IX gives the Police no authority to enhance the powers of any Magistrate by laying

Proceedings of Government, Judicial Department, of 20th
September 1865.

General on a question raised by me.

Proceedings of High Court, 24th April 1865.

23. Though the High Court ruling, marginally noted, has immediate reference only to the question then at issue, namely the power to commit, it also touches my argument, in that it rules that Chapter XXIV is such a law as is contemplated in Section 273, and, if this be so, it may be argued that it has the force of giving Subordinate Magistrates in this Presidency power to entertain without reference.

24. The High Court ruling is chiefly based on the use of the unqualified and imperative word "shall." That word, as used in Section 356 (the one relied on),

only affects the class of cases alluded to in that Section. All cases triable by 1st and 2nd Class Sub-Magistrates are, therefore, left unaffected thereby, and the question about the powers of Sub-Magistrates to entertain such cases without reference still remains in the position in which I have left it.

25. The same imperative and unqualified word, "shall," occurs again in the next Section of the same Chapter (XXIV), and lest it should be used against me to dispose summarily of the question, with reference to Sub-Magistrates' cases also, I take leave to point out that this word, "shall," is not peculiar to the special law made for this Presidency. It is equally used in the similar Section, 276, in Chapter XVI, and yet it is not argued that it has the effect of giving Sub-Magistrates primary jurisdiction under that Section or Chapter. If it is not sufficient authority in Chapter XVI, which is specially devoted to Sub-Magistrates, much less would it be so in a Chapter (XXIV) dedicated to a very different object, and silent, I may say (paragraphs 29 to 32 *infra*), about Sub-Magistrates.

26. However, the first Section of Chapter II, which declares the jurisdiction of the several Courts, is careful to provide that, in exercising that jurisdiction, they shall be "guided by the provisions of this Act," and there is nothing in Chapter XXIV to show that the Subordinate Magistrates of this Presidency are specially exempted from such an obligation. Section 356, while it says "shall commit" &c., does not touch the question of their power to entertain; that question is, therefore, unaffected by Chapter XXIV, and remains in *statu quo*. The most, therefore, that can be argued from Section 356 is that Sub-Magistrates in this Presidency "shall commit" such cases as they have legally entertained.

27. I hold, therefore, that the questions anent the power of Sub-Magistrates in this Presidency to entertain and to commit are two distinct matters, and that, whatever may be the decision about one—the power to commit, the other remains unaffected thereby, and still has to be weighed with reference to the arguments I have put forward.

Power to Commit.

28. While on the subject, however, I will venture to question separately whether Chapter XXIV does give Sub-Magistrates in this Presidency the exceptional power to commit to the Session Court, without being empowered under Section 38.

29. Chapter XXIV, I have ventured to state, is dedicated to a very different object, and is silent about Sub-Magistrates. Not only does the heading, but also the whole body of Chapter XXIV, show us that it was framed, not for Subordinate Magistrates, but for the Superior Courts. The Chapter has only four Sections, and, in accordance with the heading, the first and last are devoted to giving Subordinate Judges and Principal Sudder Ameens their powers and their procedure; the second classifies the cases to be committed to them; the third, those which are *not* to be sent to them. The Superior Courts in this Presidency, being different from those in Bengal, it became necessary, I argue, to classify the work to be done by each, with a view more particularly to apportion that to be done by the Subordinate Judges and Principal Sudder Ameens, for whom the Chapter was, I submit, especially framed. According to the usage in this Presidency, the Subordinate Judges and Principal Sudder Ameens' Courts were meant to relieve the Session Courts and Magistracy as much as possible. Hence, in Section 356, the Subordinate Magistrates are positively prohibited from committing to the Session Court any cases that might also be tried by the Subordinate Judges and Principal Sudder Ameens. They are defi-

nitely debarred from exercising the discretion allowed to Subordinate Magistrates in other Presidencies under Section 278; and all the cases in which a Bengal Subordinate Magistrate would exercise his discretion under Section 278, the Madras Subordinate Magistrate is positively directed to send either to Subordinate Judges, Principal Sudder Amcens, or the Superior Magistrates. This, therefore, would account for the use in this place of the imperative word "shall."

30. I argue, therefore, that the word "shall" has force, not in connection with an extraneous matter—the powers of Subordinate Magistrates, but with the immediate subject of the whole Chapter, namely, Subordinate Judges and Principal Sudder Amcens, and the class of cases of which they are intended to relieve the Session Courts, on the one side, and the Magistracy, on the other.

31. But it may yet be argued that the only remaining Section, 357, of Chapter XXIV refers to Subordinate Magistrates, and that, consequently, it cannot be said that no part of the Chapter refers to them. A comparison of this Section with Section 277, the like one in the Subordinate Magistrates' Chapter (XVI); shows that the one is nearly a transcript of the other. There are only two differences: one is the description of the Subordinate Magistrate, in which the words "having jurisdiction" are omitted. The omission would not appear to be intentional, so that any Subordinate Magistrate, even though he had not jurisdiction to try, might still act under this Section, for the word "tried" implies that he had jurisdiction to try; the omission would, therefore, appear to be a casual one, made simply to prevent the sentence being too involved, and would be only another argument that the powers of Subordinate Magistrates being specially provided for elsewhere (Chapter XVI), it was neither necessary nor intended to provide for them here (in Chapter XXIV). The other difference is that, instead of the words "Magistrate to whom he is subordinate," that Magistrate is more accurately defined; and this would appear to be the object in inserting this Section, for, otherwise, it might be open to doubt whether the Magistrate to whom they are subordinate might not also be the Subordinate Judges and Principal Sudder Amcens exercising the powers of a Magistrate under this Chapter.

32. I have said above that Chapter XXIV is silent about Subordinate Magistrates, and that every mention made of them is only with reference to the Superior Courts, whether of the Session or Subordinate Judges or Magistracy, and to this may be added the fact that, while the Chapter does not fail to give to Subordinate Judges and Principal Sudder Amcens their procedure and powers, it, as might be expected from the heading, gives the Subordinate Magistrates neither powers nor procedure. If they are to act under this Chapter, they are no where told how to do so; they can, therefore, act under the only Chapter that is devoted to them, namely Chapter XVI. Chapter XXIV, if it does anything for Subordinate Magistrates, only restricts their powers. It deprives Madras Subordinate Magistrates of the powers that are elsewhere given to other Subordinate Magistrates (*i e.*, under Section 278 in Chapter XVI, see paragraph 29 *supra*).

33. If it be admitted that neither 356, nor any other part of the Chapter XXIV, gives Subordinate Magistrates any powers at all, any powers other than those given in Chapter XVI, then it follows that, like all other Subordinate Magistrates under that Chapter (XVI), they "shall be guided by the provisions of this Act," Section 21, and require to be empowered to commit to the Session Court under Section 38. The power to commit involves the power of issuing an impera-

tive order to the Session Court, and the order is specially framed in the Code—"and I hereby direct that L be tried by the said Court on the said charge"—and the Session Court has no power to contravene this order, by deciding, on a perusal of the record, that the case is unworthy of trial. The Session Court is bound to try it. It is, therefore, proper that the Subordinate Magistrate should derive this authority from some higher power than the Magistrate—some power superior to the Session

Court. Under Section 38, he must derive it from the Government, and the Magistrate cannot give it under Chap-

ter XVI, nor does the Subordinate Magistrate possess it under Chapter XXIV.

34. Madras Act III of 1865 is evidently framed on the presumption that Subordinate Magistrates have power to take primary cognizance of offences created by the Indian Penal Code, and proceeds to give them like powers under all special and local laws. It is, however, only a presumption the grounds of which are no where given. Such presumption cannot, I imagine, be held to affect the direct law to the contrary, and such I have, I trust, shown the Criminal Procedure Code to be.

Summary.

35. The end of my argument, therefore, is that Subordinate Magistrates have no powers given them under Chapter XXIV; that they can only act under Chapter XVI, in cases individually referred to them by the Superior Magistracy; and that, consequently, they must not only be empowered under Section 38, but, on account of the exigencies of this Presidency, they require to be given by law the power to take primary cognizance, and that, though empowered by Government, under Section 38, the Government itself is debarred by Section 356 from giving them power to commit to the Session Court any but exclusively Session Court

Cases; so that if, as would appear from the orders marginally quoted, it is considered desirable that they should be able to commit other cases also to the Session Court, legislation will be required for this purpose also.

36. I know that what I have above argued is opposed to the rulings marginally quoted, but I still venture to submit that, under Section 356, even a Subordinate Magistrate who has been empowered under Section 38 to commit

to the Session Court is nevertheless restricted from committing to the Session Court any but "persons charged with offences triable exclusively by that Court."

37. If it was deemed essential that Sub-Magistrates should have the power to take primary cognizance under special and local laws, and it was consequently found necessary to enact Madras Act III of 1865, much more, I argue, is it necessary that they should have the same powers in this Presidency, with reference to offences created by the Indian Penal Code.

38. My apology for quoting throughout this letter the authoritative rulings of the High and late Sudder Courts is simply that it might not be presumed I had overlooked them, and that they might not be quoted as definite settlements of the question, for they do not profess to make, but simply to declare, the law.

39. I would wish to guard against the possible conclusion that, because I entertain opposite views of my own, I fail to recognize my obligation to obey the

Proceedings Sudder Court, 23rd December 1861.
Do. do. 29th March 1862.
Do. High Court, of 11th April 1865.

Sudder Court Proceedings, of 23rd December 1861.

Proceedings of the Madras Government, Judicial Department,
16th May 1867.

rulings of the High Court. Though for nearly three years dissenting, I trust I have not failed in this respect. I have only ventured to think, not to act, for myself, in a matter wherein I am bound by superior authority.

40. I may also add that the question of primary jurisdiction is one with which the High Court has not yet dealt as a whole, except to declare it one that it is not its duty to consider.

Proceedings of the High Court of Judicature at Madras, 19th February 1867.

Read letter, dated the 9th instant, from the Acting Session Judge of Chingleput, questioning the authority of Sub-Magistrates to entertain complaints without reference, or commit without being empowered; suggesting legislation; and proposing other minor questions.

1. It is not the duty of the High Court to occupy itself with the consideration of such general questions upon the provisions of the Codes as leisure or ingenuity may enable a Lower Court to suggest for discussion.

2. The Acting Session Judge must be content to guide himself by those constructions of the Codes which possess the authority of this Court, and to accept as to other matters the general and established practice recognized by this Court.

(True Extract).

(Signed) P. P. HUTCHINS,

Registrar Appellate Side.

To the Acting Session Judge of Chingleput.

(True Copy).

(Signed) H. S. THOMAS,

Ag. Session Judge.

No. 189.

ORDER THEREON, 16th May 1867, No. 807.

The Government concur in the opinion expressed by the Honorable the Judges of the High Court in their Proceedings of the 19th February last. It is clearly no part of the duty of the Officers presiding over Lower Courts to propound, or of the High Court to solve, abstract questions relative to the construction and scope of the Criminal Procedure Code; still less does it fall within the province of Government to enter upon the consideration of legal questions, on which the highest Court of Criminal Judicature has, in part at least, expressed an opinion.

2. The Government deem it necessary to intimate to Mr. H. S. Thomas that it is his duty, in his capacity of Civil and Session Judge, to deal with the cases which come before him according to the Codes of Civil and Criminal Procedure, as illustrated and explained by the rulings from time to time emanating from, and impressed with the authority of, the High Court, and that any points raised in actual practice must, in the absence of authoritative ruling or precedent, be disposed of by him to the best of his judgment, subject to appeal to, or revision by, the High Court, with whom the authoritative decision ultimately rests, and to whom the Government look to bring to their notice any errors or omissions in the several Codes, requiring legislative action.

(True Extract).

Chief Secretary.

To H. S. Thomas, Esq.

Exd. J. H. Burns.

DEPARTMENT.

No. 783

From

The Acting Session Judge of Chingleput.

Dated

9th April 1867

FOR ORDERS.

*It seems to me that the High Court
has rightly answered the question
and that it is no part of his duty
to propound a question which
is not a question relative to the
construction of the Code of Criminal
Procedure.*

*Certainly it does not belong to
the High Court to say what is and what
is not law - or to entertain such*

consideration of legal questions
in which the highest Court of the
Jurisdiction has a special and
exclusive jurisdiction.

Mr. Thomas shows to show
that it is his business to deal
with the cases which come before
according to the law which he has
interpreted and explained as
a single free time & time
emanating from the High Court.

My point will be still
open to me when they actually
and in practice come before him
disposition of the law of his jurisdiction.

subject to appeal to a revision of
the High Court unless when the
authoritative decision ultimately
is - and to whom the full look
to bring to their notice any error
or omission in the second copy
concerning legislative action.

I concur. It might be said also
that if Mr. Thomas is of opinion that his
own views are correct, it rests with himself
to apply to the court, coming before him for
trial a revision, each of the points of his
thesis, & let them be brought before the court
of an appeal to the High Court who will
then have to determine each point separately.
After such determination he will of course
be content to believe that his own views
are correct, if the High Court accept his
views. W.D. I adhere to the view expressed
by my colleagues.

to enter upon the consideration of legal questions on which the Highest Court of Criminal Judicature has, in part at least, expressed an opinion.

2 The Government deem it necessary to intimate to Mr. N. S. Thomas that it is his duty, in his capacity of Civil and Session Judge to deal with the cases which come before him according to the Codes of Civil and Criminal Procedure as illustrated and explained by the rulings from time to time emanating from and impressed with the authority of the High Court; and that any points raised in actual practice must, in the absence of authoritative ruling or precedent —

he

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be decided by him to the best of his judgement, subject to appeal or revision by the High Court, with whom the authoritative decision ultimately rests, and to whom the Government look to bring ^{them} notice any errors or omissions in the several Codes, requiring legislative action.

73.

to N. S. Thomas Esqr. - depts 21/5
the Hon: the Judges of the
High Court.

188.189

Endowment 1889. Department.

No. 189.

PROCEEDINGS OF GOVERNMENT.

Dated 16 May 1889.