Judicial (1895) Department.

ORDINARY MS.

G.O., No. 2437.

Dated 26th Nov 1895.

INDEXED.

[Despatch Abstract.]

SOUTH CANARA SESSIONS CASE 15 OF 1895.

Communicating to the District Magistrate, South Canara, and the Inspector-General of Police, with remarks, letter from the Registrar, High Court, forwarding for consideration a copy of decision of the Sessions Court in--and the order of the High Court directing a retrial, and requesting the District and Sessions Judge of South Canara to forward any remarks he may have to offer upon the High Court's proceedings referred to and to obtain Mr. Slight's explanation as to why he left the enquiry to a Sub-Magistrate instead of taking it up himself.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.
	1806		14/11/96				

Judicial {189} Department.

No.

FROM

THE REGISTRAR OF THE HIGH COURT OF JUDICATURE AT MADRAS, APPELLATE SIDE.

Dated 11 November 1895
Received 14 / 15 Rec'd

CHIEF SECRETARY TO GOVERNMENT OF MADRAS 14 NOV. 1895

No. 2297 Jud'l
Enc six

Forwarding for the consideration of Govt a copy of decision of the Sessions' Court South Canara in Sess. Case no 15/95 and the order of the High Court directing a retrial, together with 6 with Enclosures and drawing the attention of Government to the Conduct of the local officers Concerned.

ms 19/xi

W.O

Print para

Order of 26 Nov: 95 No. 2437
Mis

Communicated to the D

1 S. Canara and the Dy. of P
~~Sent & full~~
~~for report~~. 2. The Dist. Mag

MK 19.xi.95. with be requested to report whether he has anything to to the explanation already submitte by him to the High Court in refer its proceedings dated 4th November No. 2295. Jud. to the Insp. Genl of Police with be requested to obtain forward to Govt. with his remark a full explanation from the Supdt. of Police upon the ~~the~~ allegation m in the 3rd of the points referred to final Progs, & mentioned in the last but three of the H. Ct. order remanding case for re-trial — that he "assau

1 Mis 21.11.95.

The D.M. S. Canara
" Dy. of Police. 3 A with Record
to the Dy. of P
to be forwarded t
D.M. after perusa

Note.

As the Sess. Judge's conduct has been in the High Court's proceedings, it seems unnecessa call for a special report from him. This m

MK 19/11 Concd

all the accused not guilty

all the charges.

JUDGMENT.

In the Court of Sessions, South Canara.

Session Case No. 15 of 1895.

Present: W. C. Holmes Esq.

Queen-Empress *Vs.*

1. Francis D'Mello.
2. Mahomed Usman.
3. Paul Machado.
4. Linga Bhatta.

(Committed by Mr. A. Devappa Punja, Stationary Magistrate, Udipi).

Charge: *Against 1st, 2nd and 3rd.*—Wrongful confinement to constrain a person to cause restoration of stolen property—Sec. 348 I. P. C.

Grievous hurt to constrain a person to restore stolen property—Sec. 331 I. P. C.

Against 4th—Abetment of the above offence—Secs. 109, 348 and 331 I. P. C.

CHARGES ADDED IN THIS COURT.

1st added charge—*Against 1st accused:*—Hurt to constrain a person to restore stolen articles—Sec. 330 I. P. C.

2nd added charge—*Against 1st, 2nd and 3rd accused:*—Hurt to constrain a person to restore stolen articles—Sec. 330 I. P. C.

3rd added charge—*Against all the accused*—Grievous hurt to constrain a person to restore stolen articles—Sec. 331 I. P. C.

4th added charge—*Against 1st and 2nd accused:*—Wrongful confinement of a person to constrain the person to restore stolen articles—Sec. 348 I. P. C.

Against 3rd accused:—Wrongful confinement of a person to constrain the person to restore stolen articles—Sec. 348 I. P. C.

Against 4th accused:—Wrongful confinement of a person to constrain the person to restore stolen articles—Sec. 348 I. P. C.

Assessors: Messrs. (1.) Bhardwaja Shiva Rao (Saraswath Brahmin) and (2.) Martin Souza (Roman Catholic Christian).

Opinion of the Assessors: 1st Assessor found the 1st and 2nd accused guilty of wrongful confinement to constrain a person to restore stolen articles—Sec 348 I. P. C., and found the accused not guilty on all other charges.

2nd Assessor found all the accused not guilty on all the charges.

Finding of the Judge: 1st and 2nd accused guilty of wrongful confinement under Sec. 342 I. P. C.
All the accused acquitted of all other charges.

Sentence or order: 1st and 2nd accused each sentenced to 3 months' simple imprisonment. 3rd and 4th accused acquitted and set at liberty.

Judgment: The first three accused have been committed to this Court charged under Section 348 I. P. C. with having wrongfully confined a man named Shankara Bhatta from the evening of the 26th February last till about the midnight of the 27th February at Tallur village, for the purpose of constraining him to restore certain property. They have also been committed, charged under Section 331 I. P. C. with having committed grievous hurt to Shankara Bhatta during the night of the 27th February for the same purpose. The 4th accused was committed on charges of having abetted the above offence of the 1st, 2nd and 3rd accused.

2. The charges on which the accused were committed were not properly framed and did not comply with the requirements of Section 222 and Section 223 of the Criminal Procedure Code. The charge should, as required by Section 222, state such particulars of the time and place of the alleged offence as are reasonably sufficient to give the accused notice of the matter with which he is charged.

The first charge as framed by the Magistrate mentions the village in which Shankara Bhatta lived as the place where he was wrongfully confined. No doubt a man might be wrongfully confined within the limits of his village, but that is not the allegation, I believe, in this case. The charge should have stated what particular place in the village it was in which it was alleged Shankara Bhatta was wrongfully confined, or if it were alleged that he had been confined in more places than one, the charge should have mentioned all those places.

The 2nd charge should have stated more definitely than "on the night of the 27th February," the time at which it was alleged the grievous hurt was caused. The place where it is alleged the grievous hurt was caused is entirely omitted from the charge. This is directly opposed to the provisions of Section 222 of the Cr. P. C. It is alleged that Shankara Bhatta was beaten three times at three separate places on the night of the 27th, and it cannot be made out from the Magistrate's charge to which alleged beating the charge refers.

These are not merely idle criticisms. After the trial in this case had proceeded for nearly 3 days, the Court was unaware what the exact offences were that the accused were being tried for, except one alleged offence for which the Court had framed a specific charge itself. The Court did not know whether the offences the Court *thought* the prosecution was probably trying to prove were the offences which the prosecution *thought* it was trying to make out, nor indeed whether the prosecution had any definite ideas on the matter at all.

The Code requires (Section 210) that the charge should be read and explained to the accused and that a copy of the charge should, if required by the accused, be given to the accused free of cost. This shows the object of the charge, namely, that the accused should clearly know what the exact offence is that he is to be tried for. If the charge be not framed with sufficient distinctness, the object of this provision of the Code is defeated. I should not say so much about this were it not that I think in cases where there are private prosecutions, Magistrate should be particularly cautious to frame charges correctly. It is extremely unfa

to accused persons to be sent to stand their trial before the Court of Sessions on vague charges and on vague evidence, and when prosecutions are privately conducted—from some cases that have come to my notice—it seems to me that in such cases evidence of a vague and intangible nature is purposely left before the Court and that the object of the prosecution is not, as it always should be, that the truth should be ascertained by true evidence but that somehow or other in the confusion of vague evidence a conviction might be obtained. Magistrates should be on their guard in such cases to prevent confusion and uncertainty. I personally think private prosecutions are as a rule objectionable. In this case the Police reported the charges to be false and the Head Assistant Magistrate ordered a magisterial enquiry. I think when a magisterial enquiry was considered necessary, it should have been conducted either by a responsible officer of Government or by a Vakil who had the confidence of Government.

Besides, when the charges are not properly prepared, there is great waste of time in the Sessions Court. The Public Prosecutor is in doubt what the charges are and cannot properly open the case, and the case is left for considerable time in a state of confusion until the Judge has gone sufficiently into the details of the evidence to be in a position to frame new charges. Thus, the trial in place of being a trial in the proper sense of the word has to take to a greater or less extent the form of a preliminary enquiry as well.

3. In the present case a number of new charges had to be framed and added by this Court. The Court refused to amend the first charge sent by the Magistrate though it would appear to be unsustainable, because to amend it, as was proposed, would have been equivalent to the Public Prosecutor withdrawing from a part of the case as sent up by the Magistrate, and as in a recent case in which the Public Prosecutor abandoned the prosecution Government appealed, the Court would not allow the withdrawal of any part of the case.

This Court refused to add a charge of having caused hurt to Shankara Bhatta's father, because it did not appear that there was either a complaint about that alleged offence or a preliminary enquiry.

This Court added a charge against the 1st accused (for reasons given on page 12 of notes) under Section 330 I. P. C. of having caused hurt to Shankara Bhatta for the purpose of compelling the restoration of property by kicking him on the evening of Wednesday, the 27th February, at about 9 o'clock in the yard of the 4th accused. This charge will be referred to as the first added charge.

This Court also added another charge (the second added charge) against the first three accused that they, at about 9 or 10 P. M. near the house of one Subbi in Tallur village, voluntarily caused hurt to Shankara Bhatta by beating him for the like purpose—Section 330 I. P. C.

The third added charge was against all the accused, and was that they at about 10 or 11 P. M. on the night of the 27th February near the Asvatakatta in Tallur village, voluntarily caused grievous hurt to Shankara Bhatta by beating or kicking him in a way they knew to be likely to endanger his life for the same purpose (Section 331 I. P. C.)

The 4th added charge was for wrongful confinement for the like purpose—

on the morning of the 27th February. The 3rd count charged the 3rd accused with having joined the 1st and 2nd accused in the wrongful confinement from the forenoon of the 27th February.

4. The 1st accused is the Head Constable of Kundapur Police Station. The 2nd and 3rd accused are two Constables attached to the Station. On the afternoon of the 26th February last, the 1st and 2nd accused were engaged at Tallur in the investigation of a theft that was alleged to have taken place in the house of Shanti Murthappa, a schoolmaster living at Tallur—a village 3 miles from Kundapur. The 3rd accused, as it now appears, joined them on the morning of the 27th February. The 4th accused Linga Bhatta's house is next Shanti Murthappa's house, and he interested himself in the investigation into the alleged theft at Shanti Murthappa's. It seems that a woman named Putti had shortly before the 26th February been in occupation of Shanti Murthappa's house, and owing to some alleged intimacy between Shankara Bhatta and Putti's daughter-in-law, it appears that Shankara Bhatta was suspected of having been concerned in the theft. It is certain that Shankara Bhatta was sent for and questioned about the alleged theft.

5. The prosecution case as presented to this Court is that Shankara Bhatta was kept in wrongful confinement during the night of the 26th February and till about midnight on the 27th February, and that hurt was caused to him at two places in Tallur and grievous hurt at a third place close to Tallur and that all this was done with the object of constraining him to restore the stolen property.

6. It is certain that, early in the morning of the 28th February, a cry was raised that Shankara Bhatta had fallen into a well. It is also certain that Shankara Bhatta's body was taken from a well in Shanti Murthappa's yard by the 9th prosecution witness, Kusa Billiya, who had been sent for for the purpose and who got down into the well by means of a bamboo. It is also certain that Shankara Bhatta's father Ramakrishna Bhatta (1st prosecution witness) went to the Potail and made a complaint to him about his son having been beaten and the Potail came in the morning and an inquest was held and a report made that Shankara leapt into the well and committed suicide, but that as the relations of the deceased questioned this decision, the body was sent to the Kundapur Hospital for examination.

7. The 2nd prosecution witness A. S. Vittal Rao, Apothecary in charge of the Kundapur Hospital, held the *post mortem* examination of Shankara Bhatta's body. The examination began at about 5.20 P. M. on the 28th February. It was partly conducted by lamp-light.

The following external injuries were found on the body:—

(1) a group of small bruises on the right upper arm near the shoulder joint—the diameter of the whole group being about 1 inch.

(2) a similar group of bruises about 1½ inch in diameter a little lower down the right arm.

(3) a similar group of small bruises on the right scapular region 1½ inch in diameter.

(4) a similar group of small bruises on the lower part of the left side of the back or on the upper part of the left leg. The group was 2 inches in diameter.

broad on the front of the left leg below the knee, and two other small bruises near the right ankle.

There was also a bruise below the left breast 1 inch long and ½ broad, and a bruise 1 inch long by ½ broad below the right breast, and 5 smaller bruises ½ inch long by ¼ broad and ¼ inch distant from one another above the right breast.

Internally, it was found, according to the witness, that there was an oblique rupture about ½ inch long on the left pulmonary artery—about 2 inches from the bifurcation of the pulmonary arteries. The rupture was below the interspace between the cartilages of the 2nd and 3rd left ribs.

Both lungs were found congested and the membranes of the brain were also congested.

Everything else was normal.

8. The rupture of the left pulmonary artery might possibly in the witness's opinion have been the result of the blow that caused the bruise below the left breast. But as that bruise was between the 6th and 7th ribs and so 3 or 4 inches from the alleged rupture, it cannot be said to be at all probable that that blow caused the rupture.

The congestion of the lungs could not possibly be a result of the rupture of the pulmonary artery. How in this case there can have been *both* congestion of the lungs *and* rupture of the left pulmonary artery has not been satisfactorily explained by the prosecution. The defence theory is that there was no rupture of the artery but that the artery was cut in the *post mortem* examination, and it is argued in support of the theory that an injury to the artery that was oblique (as the injury was in Shankara Bhatta's case) and not either across or along the line of the artery was unlikely to have been caused by a blow or by external violence. In support of the theory it is further argued that the Apothecary did not dissect the body himself, but allowed the hospital sweeper to do so, and in support of the argument it is pointed out that the Pariahs who brought the body did not bury it and this was, it is argued, because the body was touched by a person of the sweeper class. As to this theory of the defence it is not necessary for me to say more, for, as will presently appear, it will not be necessary for me for the purposes of this case to come to any decision about the cause of the injury to the artery.

THE 3RD ADDED CHARGE.

9. The most serious charge in the case is the 3rd added charge.

The prosecution theory is that the four accused took Shankara Bhatta to a hill close to Tallur and there near an Asvatakatta (a seat under a Peepul tree) caused grievous hurt to Shankara Bhatta, that they carried him back to Tallur and after keeping the body for a short time resting against a pyal at the entrance to Shanti Murthappa's yard, they threw the body into the well in the yard and then raised a cry that Shankara Bhatta had fallen into the well.

This charge, I find, is not supported by any reliable evidence.

Subbi, an old woman aged 60 with bad eyesight, deposes that as she was sitting in the veranda of her house one night, she heard a cry "Ayyayyo" in front of her house and that she knew it was Shankara Bhatta's cry and that he was taken by [illegible] well and took out Shankara [illegible]'s body. There is also no doubt that attempts

woman is of the prostitute class and is a servant of the temple of which Ramakrishna Bhatta is a Moktessor and she lives on temple land. So that practically no weight whatever can be given to her evidence simply because she gave it. If the prosecution wished to have any weight given to her evidence, the prosecution should have made her tell her story in the minutest detail. In place of that her story was vague and indefinite. Her story is in itself very improbable. It is much more likely that if any one was being beaten near her house, she would have gone inside and shut the door than have paid any attention to the beating. It is highly improbable that she would have gone outside to watch what was going on when the men were, as is alleged, returning; and she said nothing to the Police Inspector, who investigated the case, about her having done so.

The other witness whose evidence bears directly on this part of the charge is Timmanna. He is a nephew of the complainant Ramakrishna Bhatta. Timmanna says he was sleeping on the pyal of a temple close to his house, that he heard Shankara Bhatta cry out and that he went first to a tamarind tree and then to a lane and from the lane, he says, he saw the beating that is the subject of the charge now under discussion.

The Magistrate of Kundapur went to Tallur on the 1st March and made enquiries as to Shankara Bhatta's death. The witness says he told the Magistrate what he saw but that the Magistrate did not record his statement. It is impossible to suppose that that can be true. At any rate, the prosecution has not called the Magistrate to corroborate the witness. The Police Inspector deposed that the witness showed him the place where he said he stood and that it would have been impossible to have seen from there a beating going on at the Asvatakatta. It was argued for the prosecution that the Police Inspector was unreliable, but he seemed to me to give his evidence in a perfectly straightforward and satisfactory way. Timmanna told the Inspector that after he heard Shankara Bhatta's cry he wakened his mother. Before this Court he denied it. Timmanna also told the Inspector that he took a stick with him. Before this Court he denied it.

In my opinion Timmanna Bhatta's evidence cannot be credited. It is probably totally false.

The charge really rests on the evidence of Subbi and of Timmanna Bhatta, and as their evidence cannot be believed the charge must fail. There is, however, some other evidence bearing on the charge to which I shall now refer.

There seems to be no doubt that the 5th prosecution witness Rama Bhatta was sent for on the night of the 27th of February. He took with him to Linga Bhatta's house 5 rings that Shankara Bhatta had given him, but as soon as Shanti Murthappa said they were not his rings, the rings were returned to him. This witness told the Inspector that as soon as his rings were returned he was told to go, and that he went home. This was very likely. But in this Court he deposed he was told to stop at Linga Bhatta's and that he sat on the chavadi of Linga Bhatta's house while Shankara Bhatta was taken away and that he heard cries and after some time Linga Bhatta, 4th accused, came back and he was told to go and he left. I think it is much more probable that the story he told the Inspector was the truth, for it does not appear that the Police could have [illegible]

a servant when he was at Tallur. He deposed that some one of the 3 Police men told him to sit on the pyal in Shanti Murthappa's yard, that he did so, that the 3 Police men took away Shankara Bhatta towards the Asvatakatta, that he heard cries of "Ayyayyo" and that afterwards the Police carried Shankara Bhatta back and put him sitting leaning against the pyal, and he was told to go. Before the Magistrate he deposed he saw from the road Shankara Bhatta's body thrown into the well, but before this Court he denied it, that is to say, he said nothing about it and said he did not know where Shankara Bhatta was when he left.

Devadiga Venkata's evidence so far as it has any bearing on this charge is probably totally false. There is no reason why he should have been made to sit on the pyal, and it is the last thing the Police would have been likely to have ordered him or to have allowed him to do. If they were going to beat Shankara Bhatta, the witness would have been sent home. He was examined by Police Inspector Boyer, but told him nothing that he now deposes to in support of the charge of grievous hurt.

Another witness, Venkatesha Prabhu, also deposed that he was in Linga Bhatta's when Shankara Bhatta was taken away and he heard cries and was afterwards told by Linga Bhatta to go and he went. He did not tell anything about this to Inspector Boyer. He told Inspector Boyer that after Putti was brought to Linga Bhatta's, Shankara Bhatta prostrated himself at Putti's feet and asked her to return the jewels and that when the Police were questioning Shankara Bhatta, he ran away and threw himself into the well. This story is totally different from what he told this Court. He told this Court that he did not see Putti at Linga Bhatta's that night at all.

Ramakrishna Bhatta, the father of Shankara Bhatta, in this Court deposed that he was asleep on the pyal of Subraya Prabhu's house near Linga Bhatta's, and that he heard Linga Bhatta cry out "Shankara Bhatta died having fallen into a "well" and that as he was going to the place some one cried out "Who is that?" and that he got afraid and went home, told his brother to go to Kundapur and he went to the Potail's. There is no doubt that the witness has suppressed almost all that he knew. He told a different story on this point to the Kundapur Magistrate on the 1st March and afterwards to the Inspector.

10. It would generally be enough to say that the evidence in support of the charge is unreliable, but in this case I must say a few words about the final part of the theory of the prosecution, namely, that the accused threw Shankara Bhatta's body into the well with the object of representing that he committed suicide. Before this Court no witness gave any evidence in support of this theory. But before the Magistrate, as I have said, the 3rd prosecution witness Devadiga Venkata deposed that he saw this being done. Before this Court he denied it.

On the 1st March Linga Bhatta, the 4th accused, made a sworn statement before the Kundapur Magistrate who went to Tallur to hold an enquiry about Shankara Bhatta's death, and the statement has been filed by the prosecution and marked as Exhibit D. He said that after Rama Bhatta left with the rings, Shankara Bhatta went towards the pyal of Shanti Murthappa's house and a moment after the people of the house cried out that something had fallen into the well, and a torch was got and a sound was heard in the water of the well and after that Kusa Belliya descended into the well. Kusa Belliya was examined as the 9th witness before this Court. He lives some little distance from Shanti Murthappa's house and there is no doubt that he was called that night and that he got into the well and took out Shankara Bhatta's body. There is also no doubt that attempts

according to native ideas were made to restore animation and that with that object the body was covered with rice. The defence did not call witnesses because probably the defence wanted to have the last of the arguments, so that there is hardly any evidence before this Court in support of the theory of suicide. I think I have stated all the evidence there is. The Medical evidence is not in my opinion in conflict with the theory. Even if the pulmonary artery were ruptured, the rupture may have been caused by the force of the blow with which the water was struck. The blow would be of very considerable violence as the well was rather deep—perhaps 15 feet or 16 feet to the level of the water. There were roughly dressed logs across half the mouth of the well and the diameter of the well was only 6 feet. It was partly cut in laterite rock, and partly built up of laterite stones, and at the bottom of the well there were some loose laterite stones. The depth of the water in the well was up to Kusa Belliya's neck *i. e.*, less than 5 feet. Under these circumstances, the difficulty is rather to account for there being so few and so trifling injuries on the body. The injuries that there were, in several cases, I refer to the groups of smaller bruises, look very much like injuries caused by coming in contact with the uneven surfaces of laterite stones. There is thus on one side the prosecution theory which is not supported by any evidence on which, in my opinion, any reliance can be placed; and on the other side there is the defence theory of suicide which is supported by some evidence and seems, I think, probable.

THE 2ND ADDED CHARGE.

11. This charge rests on the same evidence as the 3rd added charge with which I have just dealt. The evidence is, as I have said, in my opinion totally unreliable.

THE 1ST ADDED CHARGE.

12. This charge is that the 1st accused kicked Shankara Bhatta in the yard of the 4th accused Linga Bhatta's house.

The charge is supported by the evidence of two witnesses who depose they witnessed the assault. These witnesses are Ramakrishna Bhatta and Venkatesha Prabhu.

Ramakrishna Bhatta is the father of Shankara Bhatta, and he deposed he was sitting on a chavadi in Linga Bhatta's yard, that the 1st accused came to the yard of the house dragging his son and that he kicked him on the left side 2 or 3 times, that his son became unconscious and that he interceded and was told to leave, and he left and went to Subraya Prabhu's chavadi.

Venkatesha Prabhu the 4th prosecution witness deposed that he was at Linga Bhatta's and had been questioned by the Police about the theft, that 1st accused came dragging Shankara Bhatta and kicked him on the right side, and he fell down unconscious.

The evidence of these two witnesses was in itself very unsatisfactory. The evidence was chiefly remarkable for the vagueness of the account of what they said happened. Even if the evidence stood alone, the only conclusion possible in my opinion would be that it was not reliable.

But the charge is not supported by the medical evidence. It is in conflict with it. There were no marks on Shankara Bhatta's body of his having been dragged along the surface of a yard, and there was no mark either on the right side or on the left side of Shankara Bhatta's body that was in even a remote degree probably caused by a kick or kicks.

Besides, nothing was said about this alleged offence in the complaint that was presented to the Kundapur Magistrate on the 28th February. On the 1st March when the Kundapur Magistrate examined Ramakrishna Bhatta, the story was first told though not in the exact form now deposed to.

If this charge were really true, that is to say, if the complainant had seen his son dragged and kicked so violently that he became unconscious, would the father have remained quietly seated on a neighbouring pyal? Would he not have at once gone off to the Potail and complained? From his subsequent conduct in this prosecution, it may be assumed, I think, that he would. Moreover, when towards morning after his son's body had been taken from the well he did go to the Potail and made a complaint, nothing was said about this charge. What was said, according to the report, was that Kusa Belliya told him his son had been beaten. If Ramakrishna Bhatta had been an eye-witness to his son receiving 2 or 3 violent kicks, it may be assumed he would have mentioned it.

The evidence on this charge is in conflict with the evidence of Venkata Subbi and of Timanna Bhatta, but I do not attach any importance to that as I altogether discredit these witnesses.

4TH ADDED CHARGE. 1ST COUNT.

13. There is no reason to doubt that the 2nd accused went on the evening or afternoon of the 26th February to Ramakrishna Bhatta's house and brought him and his son Shankara Bhatta to the Head Constable, the 1st accused, at Shanti Murthappa's house. There is also, I think, no reason to doubt that the complainant and his son returned for their meals to their house, but went and slept at Linga Bhatta's house on the night of the 26th February. The incident about Shankara Bhatta and Ramakrishna Bhatta going from there to a neighbouring pyal early in the morning of the 27th, where Shankara Bhatta was questioned by the 4th accused, Linga Bhatta, is also, I think, true. I also consider that from there Shankara Bhatta went to Shanti Murthappa's house and that he sat on the pyal of the house during the day except when (accompanied by the 3rd accused) he went home for meals. I also think that from there he went to Linga Bhatta's house some time during the night of the 26th and 27th February and that he remained there for some time, that is to say, till he (as I think probable) left and committed suicide.

I think the prosecution witnesses have suppressed the truth about the occurrences at Linga Bhatta's that night and have given a totally false account of what happened. After Rama Bhatta had been given back the rings, he, as I think, left. I think it is very likely that the story told to the Kundapur Magistrate that Putti was sent for and examined that night is true. The Police that night continued, I think, to hold their investigation. I also think that it cannot be believed that any serious violence was offered to Shankara Bhatta.

Three main questions arise with reference to this charge:—*first*, was Shankara Bhatta from the evening of 26th February to about midnight on the 27th February kept under restraint by 1st and 2nd accused? *second*, was the restraint wrongful? and *third*, was it restraint with the object alleged in the charge, that is to say, to compel the restoration of the stolen property?

As to the 3rd question, I think there is no sufficient evidence to support it. There is no evidence that the accused or either of them said to Shankara Bhatta "Unless you deliver up the property, you will not be allowed to leave." I do not consider that there are any facts proved from which it could be reasonably inferred that, although such words were not actually spoken, their meaning was conveyed

to Shankara Bhatta. It is not in the least likely that the Police could have had any expectation that in consequence of mere confinement Shankara Bhatta would have given up the property if he had it.

With regard to the first question, I think the evidence shows that Shankara Bhatta was under restraint. On the evening of the 26th, the Head Constable, 1st accused, told Shankara Bhatta to return. It is likely that at that time Linga Bhatta had gone off to Gangoli to consult an astrologer. It is also likely that the Head Constable told Shankara Bhatta to return in case he might be wanted in connection with the information Linga Bhatta might get from the astrologer. Shankara Bhatta came back with his bedding and slept on Linga Bhatta's chavadi. The confinement, if any, would have begun on his return to Linga Bhatta's. Shankara Bhatta slept in the chavadi and it would appear that the Head Constable and 2nd accused slept on the same chavadi—one on each side of him—and that his father was not allowed to sleep on that chavadi. I think it must be held that Shankara Bhatta was then restrained from going wherever he wished. It seems to me impossible to say that he was sleeping voluntarily on the pyal. He had been ordered by the Head Constable to come. He was not merely requested but ordered, and there is evidence the 2nd accused threatened him. I think it must be held he was from the time he came under restraint. I think that restraint continued till midnight on the 27th February, when Shankara Bhatta threw himself, as I think, into the well. There is satisfactory evidence that Shankara Bhatta was most of the 27th February on the pyal of Shanti Murthappa's house. There is evidence that the 2nd accused forced him to sit there. The evidence that the 3rd accused sat on a pyal near that on which Shankara Bhatta was sitting is also, I think, true, and I think it is also true that when Shankara Bhatta went home for meals the 3rd accused accompanied him. It is also, I think, probable that Shankara Bhatta was not allowed to go for night meals on the 27th February to his house, and that he was taken from the pyal of Shanti Murthappa's house to Linga Bhatta's yard. I do not consider it proved that he was taken to the Asvatakatta at all. I think it probable he was at Linga Bhatta's till he left to commit suicide.

Taking the view of the case most favorable to the accused, namely, that Shankara Bhatta was kept at Linga Bhatta's and other places so that he might be further examined as to the theft in case of necessity, it is a question whether the restraint was wrongful. It does not appear that the Head Constable had any power to give Shankara Bhatta a *verbal* order to attend at Linga Bhatta's. Under Section 161 he could have examined Shankara Bhatta, or under Section 160 he could have by a written order required his attendance. The Section (160) does not say for what purpose his attendance could be required, but read with the next Section it would appear to mean his attendance could be required for the purpose of examining him. The power given by Section 160 is far from clear. The word "attendance" implies waiting. But would it be legal at all or for how long would it be legal to keep a person summoned under Section 160 waiting? Does it mean till the examination was finished or till he had leave to depart? If the order under Section 160 is not obeyed, it does not appear that the Police Officer who issued it has any legal power to compel the attendance of the person summoned, that is to say, he could not send a Constable and bring him under arrest. It would also appear, as it seems to me, that a Police Officer has no legal power to retain a person whom he has summoned under Section 160. I think the retention in this case was wrongful.

38 SP

4TH CHARGE—2ND AND 3RD COUNTS.

14. It is argued that there is no evidence against the 3rd and 4th accused in support of these charges.

The evidence against the 3rd accused is that he sat on one pyal and Shankara Bhatta on another in Shanti Murthappa's yard on the 27th and that he followed Shankara Bhatta to his house and back. It was certainly no offence for the 3rd accused *merely to watch* Shankara Bhatta. So far as I see, it must be held that there is no *evidence* he did more.

There is also, I think, no reliable evidence against the 4th accused. It is argued that there was an admission of guilt in Exhibit D, the statement 4th accused made to the Kundapur Magistrate on the 1st March. But that is not so. The alleged admission depends on the meaning of a single word which has been translated "took", but the word does not imply that Linga Bhatta compelled Shankara Bhatta to go with him.

15. The result is that the 1st and 2nd accused are with reference to section 238 Cr. P. C. convicted under Section 342 I. P. C. of having wrongfully confined Shankara Bhatta and that on all other charges there are acquittals.

16. The 1st and 2nd accused are men of long service and good character, but it is a matter of so much consequence that Police Officers should not exceed their powers, that for this reason as well as considering the result in this case that followed the powers being exceeded, I sentence the 1st accused and 2nd accused to 3 months' simple imprisonment.

17. I should remark that I think the powers of Police Officers should be so clearly laid down that there could not be any possibility of their being mistaken. In this case the consequences of this not being done have been most deplorable. One man has committed suicide. The four accused and another man had a false charge of deliberate murder brought against them. The four accused have had to undergo a long trial in this Court—the greater part of the charges being probably false. And the first two accused, who seem respectable men, and who have had a long service in the Police and have each a good character, are each sentenced to a term of imprisonment.

18. The 3rd and 4th accused are set at liberty.

Mangalore,
20th June 1895.

(Signed) **W. C. Holmes,**
Sessions Judge.

Exd. U. Narasinga Rau.

(True copy).

Dwy Comr

Ag Registrar,
App. Side.

IN THE COURT OF SESSIONS, SOUTH CANARA.

SESSION CASE No. 15 OF 1895.

QUEEN-EMPRESS *Vs.* F. D'Mello and others.

Judgment (copy).

I

Enclosure I to the High Court's letter dated 11th November/95 No. 2297.

Judicial.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Wednesday, the thirtieth day of October,
One thousand eight hundred and ninety-five.

PRESENT :—

THE HONOURABLE SIR ARTHUR J. H. COLLINS, KT., *Chief Justice,*

AND

THE HONOURABLE MR. JUSTICE PARKER.

CRIMINAL APPEALS NOS. 296 AND 308 OF 1895.

Francis D'Mello ... ... *Appellant in* 296 (*1st Prisoner*).

Mahomed Usman ... ... *Appellant in* 308 (*2nd Prisoner*).

Appeals against the Sentence of the Court of Session of the South Canara Division in Case No. 15 of the Calendar for 1895.

CRIMINAL REVISION CASE NO. 424 OF 1895.

(Taken up No. 21 of 1895.)

1. Francis D'Mello,
2. Mahomed Usman,
3. Paul Machado and
4. Linga Bhatta.

} Accused in Calendar Case No. 15 of 1895 on the file of the Sessions Court of South Canara.

These Appeals and this Revision Case coming on for hearing on Monday, the 21st Instant after the receipt of the report called for in the order of this Court, dated 5th September 1895, and Counsel not appearing on behalf of the Appellant in Criminal Appeal No. 308 (2nd accused in Criminal Revision Case No. 424) and the 3rd and 4th accused not appearing in person or by Counsel : Upon perusing the Petitions of appeal, and the record of the evidence and proceedings before the Court of Session, and upon hearing the arguments of Mr. H. G. Wedderburn, Counsel, and of the Honorable Mr. C. Sankaran Nair, Vakil for the Appellant in Criminal Appeal No. 296 (1st accused in Criminal Revision Case No. 424), and of the Public Prosecutor in support of the conviction, and the cases having stood over for consideration till this day, the Court made the following

ORDER:—

The Appellants in these two Appeals were the Head Constable and another Constable of the Kundapur Police Station in South Canara and were charged with two others (another Police Constable Paul Machado and one Linga Bhatta) with offences under Sections 348 and 331 of the Penal Code. The two latter were acquitted, but the two former were convicted of wrongful confinement under Section 342, I. P. C., and were each sentenced to three months' simple imprisonment. On the appeals coming on for hearing, it appeared to us that the judgment of the Sessions Court was seriously defective and that many irregularities had taken place. We therefore directed notice to issue to all the four accused to shew cause why they should not be retried, and the whole case is now before us.

It appears that in February last a theft had occurred in the house of one Shanti Murthappa at Tallur and the Police were endeavouring to detect the offender. For some reason which does not appear, suspicion fell upon the deceased Shankara Bhatta, which suspicion appears to have been intensified by the opinion given by an astrologer that he was the thief. That Shankara Bhatta was detained by the Police on the 26th and 27th February is not denied, and the Sessions Judge finds that he was in wrongful confinement up to the time of his death. This occurred about midnight on the 27th of February, the Judge being of opinion that he then committed suicide by throwing himself into a well. What induced Shankara Bhatta to commit suicide the Judge does not ex-

plain, and in his Judgment he has ignored, and practically refused to give any weight to, the medical evidence. But the medical evidence is at all events conclusive on this point,—namely, that drowning was *not* the cause of death. For some reason, which it is impossible for us to understand or appreciate, the Judge at first refused to allow the question to be put, but the description already given by the witness " that the larynx, trachea and bronchi were normal in appearance and that there were no foreign bodies or disease in them " conclusively shews that death was not caused by drowning (See Taylor's Medical Jurisprudence, 3rd Ed. Vol. II, P. 3). The presence of a froth in the pharynx, larynx and bronchial tubes are invariable concomitants of death from drowning. The prosecution evidence was to the effect that Shankara Bhatta had been detained and kicked by the accused, or some of them, in order to make him confess, and that, when they found they had gone too far and that the man was dying, they had thrown him—quite unconscious, but with life not quite extinct—into the well, and then raised a hue and cry that he had committed suicide, in order to conceal the real cause of his death. The medical evidence was that death was caused by rupture of the left pulmonary artery, the result of external violence to the chest, and the apothecary deposed that the body was covered with masses of bruises and that the injuries were not likely to be caused by a single fall. How this evidence can be reconciled with the theory of suicide adopted by the Judge no attempt has been made to explain.

It was apparently argued that there was no rupture of the pulmonary artery but only a cut and that this cut was made after death in the *post mortem* examination. The Judge stated that it was not necessary for him to come to any decision upon this point. In this view we are quite unable to agree. The point appears to us to be one of great importance. Besides this, the Judge should have considered how the masses of bruises spoken of by the medical officer could be accounted for.

The Sessions Judge has dwelt upon the discrepancies in the story as told by the prosecution witnesses, and appears to have relied chiefly upon the evidence of Inspector Boyer (11th witness),—but he has entirely omitted to consider how strongly the medical evidence, unless it can be explained away, supports the prosecution story. The father and friends of the deceased appear to be poor and uneducated rustics and they were placed under every possible disadvantage. It is quite clear that the whole influence and efforts of the Superior Officers of the Police were first directed to prevent any magisterial investigation at all and that when this—through the firmness of the Head Assistant Magistrate—was rendered impossible, the next effort was to prevent, at any rate, a local investigation by the authorities on the spot. Notwithstanding that the Head Assistant Magistrate had refused a transfer, the District Magistrate granted one on the *ex parte* statement of the first accused, forwarded through the Superintendent of Police, to the effect that the Kundapur Magistrate was prejudiced against him. The District Magistrate in his order accepts this statement without calling upon the Head Assistant Magistrate or the Sub-Magistrate for any explanation, and he actually did this on the petition of a public servant, who was at the time evading a warrant and absconding from justice, without requiring that the accused should first surrender to answer to the charge.

In connection with the efforts of the Police to burke enquiry into the complaint against members of the force, we find it necessary to refer to the conduct and evidence of Inspector Boyer. He arrived on the 1st of March before the Kundapur Magistrate had completed his local enquiry. On the 2nd of March the Magistrate left, leaving the Inspector to go on with the enquiry, but the record shows that he gave positive orders that a charge sheet was to be prepared. Those orders were disobeyed, and on the 8th of March the Inspector sent a referred charge sheet to another Magistrate. Mr. Slight, the Head Assistant Magistrate, to whom this was sent, very properly insisted that a Magisterial enquiry should be held and refused to transfer the case. Then followed the successful application to the District Magistrate which was supported by Inspector Boyer and by the Superintendent of Police.

We turn now to Inspector Boyer's evidence before the Committing Magistrate and before the Sessions Court, from which we gather that the Inspector was living in the same house with the accused D'Mello at the time he was conducting the enquiry against him. He accompanied the accused's Vakil to the Court of the District Magistrate on the 18th of March to ask for a

transfer. He admits that he saw the accused on that same day and spoke to him. He admits also that the accused had been absconding *from the 15th of March* and that a warrant of arrest had come into his hands on the 16th of March, yet he never arrested him on the 18th of March, and in fact the accused was at large until April 5th, on which day he seems to have put in a voluntary appearance before the Sub-Magistrate at Udipi, to whose Court the case had been transferred. On March 31st (page 40 of the Magisterial record) Inspector Boyer writes to the Udipi Magistrate that " he learns from the Superintendent of Police that it is not unlikely that the Head Constable would voluntarily appear before the Court at Udipi to which tribunal the case was transferred. The warrants were sent to Udipi for execution."

From Inspector Boyer's evidence it appears that, instead of executing the warrant, it was sent to the Superintendent of Police for orders on the 16th of March. It is thus clear that it was held in suspense from March 16th to 31st. From these facts we find it difficult to refrain from drawing the inference that the Superintendent of Police assisted the Head Constable to evade a local enquiry and at all events passively connived at his absconding after the warrant had been issued for his apprehension.

There is another point as to which Inspector Boyer's evidence calls for notice, as shewing the spirit in which this case has been treated. In his deposition before the Udipi Magistrate he speaks of the case against the Police as " simply a farce." Now even adopting the view most favourable to the defence, Shankara Bhatta was moved to commit suicide after he had been several hours in illegal confinement, there being nothing more tangible against him than the pronouncement of an astrologer. In our opinion such an occurrence is by no means a farce but an event of very serious import demanding the strictest investigation.

We are fully sensible of the difficulties attending a retrial after so great a lapse of time, but the case is so serious and the Judge has lost sight of so much that was important in the evidence that we feel it our duty to direct that the case be further investigated. We set aside the present convictions and direct that the accused be re-tried.

The re-trial will take place before Mr. Holmes's successor in the office of Sessions Judge of South Canara, and the Sessions Judge will of course be at liberty to add any charge which may seem to him expedient.

By the Court.

(Signed) C. G. Todhunter.

Dy. Registrar,
Appellate Side.

Exd. S. R. Subba Row.

(a true copy)

D. W. G. Comie

Ag Registrar,
Appl Side.

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HIGH COURT OF JUDICATURE

AT

MADRAS.

ORDER

IN

CRIMINAL APPEALS Nos. 296 *and*
308 *of* 1895
and
CRIMINAL REVISION CASE No. 424 OF 1895.

(*From Calendar Case No.* 15 *of* 1895.
Sessions Court of the South Canara Division.)

Dated 30*th October* 1895.

Sent

Enclosure II to the High Court's letter dated 11th November 1895 No. 2297

Judicial.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Thurs day, the fifth — day of September,
One thousand eight hundred and ninety- five:

PRESENT:—

The Honourable Sir Arthur J. H. Collins, Kt, Chief Justice.
and
The Honourable Mr. Justice Parker.

CRIMINAL APPEALS Nos 296 and 308 OF 1895.

In criminal appeal no. 296. Francis D'mello (1st Prisoner).
In Criminal appeal no. 308. Mahomed Homan (2d Prisoner).
Appellants
~~Prisoner~~

Appeal against the Sentence of the Court of Session of the South Canara Division in Case No. 15 — of the Calendar for 1895.

These Appeals coming on for hearing, ~~and Counsel not appearing on behalf of the Appellant~~: Upon perusing the Petitions of Appeal, and the record of the evidence and proceedings before the Court of Session, on Wednesday the 4th Instant, and upon hearing the arguments of the Honourable Mr. C. Sankaran Nair vakil for the Appellant in Criminal Appeal no. 296, and of the Public Prosecutor in Support of the Conviction in both Cases and the Appellant in Criminal appeal 308 not appearing in person or by Counsel and the Case having stood over for Consideration

Consideration till this day; the Court made the following

Order:- The appellants in these two Cases were charged under Several Counts with hurt and grievous hurt to one Shankara Bhatta for the purpose of Constraining him to restore Certain Stolen articles, and also with wrongful Confinement of the said Shankara Bhatta. The appellants are the Head Constable of the Kundapur Police Station and a Mussulman Constable attached to that Station. They have been Convicted by the Sessions Judge of wrongful Confinement only under Section 342 of the Penal Code and were each Sentenced to three months' Simple imprisonment. Of the graver Charges they were acquitted.

The

The Complaint of Rama Krishna Bhatta, the father of the deceased Shankara Bhatta, was received by the 2d Class Magistrate of Kundapur on the 28th of February and referred by him to the Police Inspector for report. The 2d Class Magistrate was on the spot on the evening of the 1st of March before the Police Inspector had arrived and he began his enquiries under Section 176 Criminal Procedure Code. He took Statements from the father of the deceased, the Schoolmaster, who is alleged to have lost certain jewels, and from Linga Bhatta (4th accused) who has been discharged. After his arrival the Police Inspector appeared

on

on the spot and on the 2d of March the Magistrate left and ordered the Police Inspector to complete the Enquiry.

On the 4th March the Head assistant Magistrate ordered the 2d class Magistrate to hold a careful enquiry into the matter, and not to leave more than was necessary in the hands of the Police Inspector. This order was received by the 2d class Magistrate on the 5th of March. On the 6th the father of the deceased Ramakrishna Bhatta asked that the enquiry should be withdrawn from the Police Inspector on the ground that the accusation was made against the police. On the 8th of March the

the Police Inspector referred the Charge as false. On the 13th March the Head Assistant Magistrate in Slight refused to accept this Recommendation and very properly ordered a Magisterial Enquiry. His order States that the 1st accused the Head Constable, had objected to the Enquiry being held before the Kundapur Sub-Magistrate, - but the objection was overruled by the Head assistant Magistrate who ordered the Sub Magistrate to Enquire into the Case as a Charge of murder.

Warrants were issued for the accused 1-3 on the 14th March. The 1st accused the Head Constable, then absconded. The police reported on the 16th of March that they

they Could not find him or arrest him. The Complainant Rama Krishna Bhatta thereupon requested that the warrant issued for the arrest of the Head Constable might be entrusted to Some one other than a policeman, since no police officer would execute it and he Represented that the Head Constable was Concealed in the Overseer's house at Kundapur. On the 18th march, the 2d Class Magistrate resolved to go on with the case against the other two Constables. On the 20th March an order was received from the District Magistrate transferring the case to the Udipi Sub magistrate. This order had been passed on the 18th and was passed on a petition presented on the 17th by the Head Constable who was then absconding but who appeared

appeared before the District magistrate by a Vakil Mr Mascurenhas. The order was passed ex parte without calling for any explanation from the Sub magistrate and without notice to the Complainant. On the 31st March the Police Inspector wrote from Kundapur to the Udipi Sub magistrate that he had forwarded the warrant received on the 16th for execution to the Superintendent of Police for orders and had received it back with an endorsement from the Superintendent of Police that it was not unlikely that the Head Constable D'mello would voluntarily appear before the Court of Udipi to which the case had been transferred The magistrate at Udipi on the 3d of May Committed the case to the Sessions

Sessions on the ground that there was ample evidence of torture against the 1st & and 2d accused and that the 3d accused and other Police Constables had acted under their orders and that the 4th accused one Linga Bhatta had abetted the same. He thought that the deceased had drowned himself in the well because the pain of the torture & which he was subjected was unbearable and in order to avoid the liability to being tortured further. The Sessions Judge in acquitting the accused of all the graver charges has wholly ignored the medical evidence, the effect of which is to show that death was certainly not caused by drowning. The body of the deceased Shankara Bhatta

Bhatta appears to have been covered with a mass of bruises and as far as the medical evidence goes the prosecution case would appear to be strongly supported. We are not able to understand why this evidence should have been ignored or on what ground the Sessions Judge has discredited the evidence of the prosecution witnesses, since he finds that Shankara Bhatta was in wrongful confinement at the time of his death. We consider that notice should go to all the four accused to show cause why the charges against them should not be retried.

We will ask the District Magistrate to send up the Petition of the 17th of March 1895 in which the

the 1st accused D'mello Requested transfer of the case from the file of the Sub magistrate of Kundapur and to explain how he considered it Compatible with his duty as a District magistrate to hear such a petition presented on behalf of a person who was at the time absconding from public justice before he had surrendered in obedience to the law. We will also ask the District Magistrate to explain why the transfer was ordered without notice to the Complainant Rama Krishna Bhatta and without giving the Sub magistrate of Kundapore an opportunity of explaining anything that was alleged against him.

With reference to the letter of the Inspector of Police, dated 31st March 1895, to the 2nd Class magistrate

magistrate of Udipi, p: 40 of the magisterial record,- a copy of which will be sent to the District magistrate, we will ask the District magistrate to report whether there is any ground for supposing that the Superintendent of Police was in communication with the Head Constable D'mello while he was absconding and Countenanced that officer's evasion of the warrant which had been issued against him.

By the Court.

(Signed) C. G. Johnston
Deputy Registrar,
Appellate Side.

(a true Copy)

D. Wg. Comie
Ag. Registrar,
Appellate Side.

D.P. 11/11
Full 11/11

Dpty Sec to Govt Police

Enclosure III to the High Court's letter dated 11th November 1895 No. 2297 Judicial.

No. 2296 Jud.

PROCEEDINGS OF THE HIGH COURT OF JUDICATURE AT MADRAS.

Dated 4th November 1895.

41 SP

Read Judgment and records in Sessions Case No 15 of 1895 on the file of the Court of Session of South Canara.

(Here enter H. C. J. No. ~~of 189~~ .)

The High Court does not at all understand the difficulty felt by the Sessions Judge as to the charges in this case. The Sessions Judge had the depositions taken on the preliminary enquiry before him before the trial commenced and if he considered that the charges were imperfectly drawn it was his duty under section 226 Criminal Procedure Code

Jud
Jurisdiction No. 3
No. 5392
G. No.

to de to alter the charges and bring them into proper shape. From the statement of the Sessions Judge that after the trial had proceeded for nearly three days he was still unaware what were the exact offences for which the accused were being tried the High Court can only draw the inference that the Judge had not read the depositions taken before the Magistrate, and that it was himself rather than the Public Prosecutor who had no definite ideas.

2 The High Court regrets to

have again to observe upon the irregular manner in which the examination of witnesses is conducted in the Sessions Court of South Canara. After two or three questions had been asked by the Public Prosecutor of the 9th witness Kusa Beliya the Sessions Judge appears from the record to have taken the examination altogether out of the hands of the Public Prosecutor, and the next two pages (59 and 60) of the printed record consist entirely of an examination by the Court. After that the Public Prosecutor was allowed to ask a few more questions before the cross-examination. Exactly the same course was

(see also copy of evidence sent up from S. Canara page 99 and following pages)

was adopted in the examination of the 11th witness Inspector Boyer. After the Public Prosecutor had asked a single question the examination was taken up by the Court for several pages of printed matter, several of the Judge's own questions being objected to as inadmissible by the accused's Vakil, and the Court disallowing (quite erroneously) its own questions on the ground that they were inadmissible. The High Court cannot but observe that assuming the record to be accurate as to the procedure adopted, such procedure is neither regular

(See copy of evidence sent up from S. Canara)

43 SP

regular nor dignified, and tends to show that the Judge cannot exercise proper control when presiding in his own Court.

3. The question to the medical witness as to whether there were any signs of death by drowning was a quite permissible question, evidence having been already given that the body had been taken out of a well. The proper form of the question would have been "were there any signs of death by drowning? If so describe them" — but the objection of the accused's Vakil (allowed by the Judge) that

that it was a leading question was altogether frivolous.

/True Extract/

/Signed/ D.W.G. Lowie

ag: Registrar,
Appellate Side.

/True copy/

D.W.G. Lowie

ag: Registrar,
Appellate Side.

11-XI.

11/11

Enclosure IV to the High Court's letter dated 11th November 195 No. 2297

Judicial.

1893
Jud. Dept.
Encloss. No. H
To 5892
O. No.

No. 2295 Jud.

PROCEEDINGS OF THE HIGH COURT OF JUDICATURE AT MADRAS.

Dated 4th November 1895.

Read Judgment and records in Sessions Case No 15 of 1895 on the file of the Court of Session of South Canara.

(~~Here enter H. C. J. No. of 189~~ .)

In the order of this Court dated 5th September the District Magistrate was requested to send up the proceedings connected with his order of transfer dated March 17th and to give explanation upon the following points.

(1) How he considered it compatible with his duty as District Magistrate to hear a petition presented on behalf of a person who was at the time

time absconding from public
Justice before he had surren-
-dered in obedience to the
law?

(2) Why he transferred the
case without notice to the com-
-plainant (deceased's father)
and without giving the
Sub: Magistrate of Kundapore
an opportunity of explain-
-ing anything that was
alleged against him?

(3) Whether - with reference
to the letter of the Inspector of
Police dated 31st March 1895,-
there was any ground
for supposing that the Superin-
-tendent of Police was
in communication with
the

the absconding Head constable
De Mello and countenanced that
officer's evasion of the warrant
that had been issued against
him?

2. To the 1st question the Distrct
Magistrate has given no reply
at all, but has merely entered
into the reasons which led him
to assent to the transfer. Such
reasons are obviously beside
the question and from his silence
the High Court presumes that
the District Magistrate has no
explanation to offer. In con-
-senting to receive and hear such
a petition from an absconding
person the District Magistrate

was

was not only irregular in
his procedure but displayed
culpable weakness practically
allowing an absconding accused
to make terms with constituted
authority as to the conditions
under which he would appear.
Such procedure tends to
bring the law into contempt
and the District Magistrate
should have refused to hear
any petition at all until the
accused had surrendered.
3. On the second question
the District Magistrate observes
that he did not call for an
explanation from the Sub:
Magistrate because the only
point

point on which he should have
desired explanation was why
the Sub: Magistrate did not
immediately record a written
complaint. Mr. Welsh states he
was then quite prepared to
discredit the allegations against
the Sub: Magistrate especially
as the Head Assistant Magistrate
had attached no importance
to them, but that he thought the
Sub: Magistrate would be re-
quired as a witness for the
prosecution or for the defence,
or might be called as a court
witness.
4. As to this the High Court cannot
but observe that the District
Magistrate's explanation

is

is contradicted by his own order of March 18th. Not a word is said about the necessity of calling the Sub: magistrate as a witness, nor was any such necessity alleged in the petition of the accused.

The remarks which the District Magistrate makes about the evidence could not have been present to his mind at the time for he had not the record before him and disposed of the application without calling for the record. Moreover it must have been obvious that the fact that the Sub: Magistrate had committed

the case would be no reason why the Sessions Court should not call him as a witness if his evidence was thought necessary. At the time the District Magistrate passed his order the Sub: Magistrate had not been cited as a witness by either side and though afterwards cited he was not called.

5. The sole ground for the transfer alleged in the petition was that the Sub: Magistrate was prejudiced against the accused and wished to ruin him, and that was the sole ground specified in the District Magistrate's order for granting the transfer. The District Magistrate observed

in his order. "It is impossible to say that the objections of the accused person to this Magistrate are without foundation. The application for a transfer is therefore admitted". The High Court finds it impossible to reconcile this language with Mr. Welsh's present explanation that he was then quite prepared to discredit the allegations against the Sub: Magistrate especially as the Head assistant Magistrate had attached no importance to them.

6. The High Court cannot but consider that to pass such an order on the Ex parte petition of

of an absconding accused conveyed a most unmerited slur both upon the Head Assistant Magistrate and upon the Sub: Magistrate of Kundapore, and was obviously calculated to defeat the ends of Justice. Here again the weakness shown by the District Magistrate is most regrettable.

7. In answer to the third question the District Magistrate states he thinks there is no reason to suppose the Superintendent of Police countenanced the Head constable's evasion of the warrant. He states the Superintendent may have seen the pleader of the absconding accused but that he "thinks he understood his

his duty".

8. If, however the Superintendent supported the application for transfer while the accused was absconding it is quite manifest that he did not understand his duty. But the District Magistrate had not called for any explanation of the instructions given by the Superintendent to the Inspector of Police referred to in the letter of March 31st and the High Court will not now ask him to obtain any further explanation since the Court has decided that

that it is necessary to bring the whole matter to the notice of Government.

/True extract/

/signed/ D.W.G. Cowie
Ag: Registrar,
App: Side.

/True copy/

D.W.G. Cowie
Ag: Registrar,
Appellate Side.

Enclosure V to the High Court's letter dated 11th November/95 No. 2297

Judicial.

1895
Jud. Dept.
Enclos. No. 5
in 5392

Disposal No 5317/1895
Magtc.

South Canara, District Magistrate's
Office. Camp. Kirimaiyeshwar
17th September 1895.

From

W. H. Welsh Esquire,
District Magistrate,
South Canara.

To,

The Registrar of the
High Court of Judicature,
Appellate Side,
Madras.

Sir,

In obedience to the order dated the 5th Instant, in Criminal Appeals Nos. 296 and 308 of 1895, on the file of the High Court, I have the honor to submit the petition* dated 17th March 1895 in which the 1st accused D'Mello prayed for transfer of the case from the file of the Sub Magistrate of Coondapoor.

2. I regret that I overlooked the decision of the Hgh Court in Criminal Revision No 413 of 1886. On referring to Section 528 of the Criminal Procedure Code it did not occur to me that notice should be given to the complainant Ramakrishna Bhatta. The prosecution appeared

*With copy of Pro: dated 18th March 1895

appeared to me not a private prosecution but a public one in charge of the Police Department, and the Superintendent of Police, who had communicated with me was, I understood, in favour of the transfer prayed for. It did not occur to me to call for an explanation from the Sub Magistrate of Kandapoor because the only point about which I desired an explanation was why he did not take a written deposition from the complainant when the complainant first came there. about 8-30 A.M. (at page 6, lines 41 and 42 of the printed evidence the time is given as 10, o'clock or 7 o'clock), or shortly after, but waited until a petition had been written about 4. P.M. which gave an opportunity for lawyers to suggest interations. Also I might have asked why he did not finish the investigation under Section 176, Criminal Procedure Code. I was then quite prepared to discredit the allegations against the Sub Magistrate

Sub Magistrate; the Head Assistant Magistrate had evidently attached no importance to them. I merely noted the fact that the accused did question his impartiality. I had not then fully adopted the theory of the Police that the murder charge was false, but that the accused could be proved guilty under Section 330. I.P.C.. I considered that the Sub magistrate would be required as a witness for either the prosecution, or the Court, or the defence.

3. For instance, the medical evidence did not confirm complainants' testimony on an important point. He had said that deceased's penis was split and was bleeding (at page 12, line 22 of the printed evidence, the translation used is "broken"). It seemed that if the Submagistrate had viewed the corpse he might throw light on this point. He was the first official to take complainants' statement and examine

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the ground. Information whether criers on the hill could have been heard in the village was obtainable from him: and also about the situation of the well, the verandahs & sea,- He might be able to assist the prosecution by mentioning other facts within his knowledge such as the details of the complaint upon which deceased had been arrested. The fact that the accused were afraid of him made me believe that he would be able to give useful information.

4. I blame myself for not having at once instructed the Public Prosecutor. But it is not usual for the District Magistrate to act in this matter unless the necessity of doing so is specially reported to him. And the actual Public Prosecutor would probably not have been able to attend personally being otherwise engaged. I afterwards spoke

spoke however about the prosecution with the Inspector-General of Police. He appeared to me that the proper place for this Magistrate in this prosecution was as a witness or an aid to the prosecution rather than as a committing Magistrate, and as the accused, the persons I thought, most concerned, had asked for the transfer it did not occur to me that notice was necessary. But if an order were to be passed, I thought that no time should be lost. It appeared from the Head Assistant Magistrate's order that he and the Jahsildar Magistrate were otherwise engaged, so I selected Mr. Dy. Devappa Dasja B.A. at Udipi, 22 miles away, where there was another Inspector Mr. Dy. Srinivasa and where the intrigues of the Christians of Coondapore would have less play. The complainant subsequently moved that the Police should not be allowed in Court, so they ceased to conduct

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the prosecution and reports were not made
to the Magistracy. Though cited as a witness
the Sub-Magistrate was never actually
examined.

5. With reference to the last paragraph
of the order of the High Court, I am of
opinion that there is no ground for supposing
that the Superintendent of Police
countenanced the Head Constable Dhillo's
evasion of the warrants. With respect to
the question about communication the
petition of the absconding accused was
submitted through the Superintendent
of Police by means of the pleader.
The Superintendent of Police must
have seen the Inspector and may
have also seen the pleader. And
the pleader of course, knew how to
communicate with the absconding
accused as well as with those in
custody. The pleader's knowledge
would not have helped towards
execution

execution of the warrant. It is possible
to evade a warrant transferred from
station to station in the present
strength of the force unless a determ
effort is made to execute it by inter
=tion of the ordinary course of duty.
pleader verbally applied to me for
release of the accused on bail
was refused. It was likely that
absconding man would surrender
soon as he knew that an applic
for bail to me or to a superior
would be futile. I do not know
it was that the Head Constable
at large till after the 31st March
what steps were taken to exec
the warrant. But I presume
I should not await an explicial
from the Superintendent of P
before submitting this report and
have therefore not asked him
think he understood his duty

the duty of the Police in respect of a Magisterial warrant. He received one communication, namely, the petition of 17th March from the absconding man but I cannot say whether he received more.

6. The order of the High Court was received at Camp Wandse in the northern part of the District and the petition was received from Head Quarters only yesterday afternoon, so this report could not have been submitted earlier.

I have the honor to be,
Sir
Your most obedient servant
(Signed) W. A. Welsh.
District Magistrate

(True copy)

Dep. Comm.
Ag. Registrar,
Appellate Side.

Warrant R. No. 11060 of 1894
Magl

To,
W. A. Welsh Esquire,
District Magistrate of
South Leane

Through,
S. P. le. Scott Esquire,
Superintendent of
South Leane

Humble petition of Francis
D'mello 2nd grade Head Constable
of Lundapur
Mangalore 17th January

Respectfully sheweth,

1. That the petitioner is the Constable in charge of the Lundapur Kaska Station.

2. That one Ramakrishna falsely accused petitioner of having his son when petitioner had been to into a Case of theft.

3. That this Complaint tained by the acting Sub-Magistrate

Khudapur, who on the 1st of March began one sort of enquiry, after visiting the locality and continued with it till the Police Inspector of the Khudapur Division arrived at the scene of offence, when the Stationary Magistrate abruptly left the places, leaving the enquiry into the hands of the Police Inspector.

4. The Police Inspector after holding full and detailed enquiry into the Complaint, was satisfied that the Complaint is entirely false and referred the Case as false.

5. The Complainant thereupon put in an objection petition before the Head Assistant Magistrate who without Expressing any disagreement with the Police Inspector's report, has ordered a Magisterial enquiry by the Stationary Sub-magistrate.

6. That petitioner applied to the Head

Head Assistant Magistrate for a transfer of the Case, but the Head Assistant Magistrate has not granted petitioner's prayer. Hence, petitioner is now obliged to approach your Honour with this petition Earnestly trusting that the Case against the petitioner may be withdrawn from the file of the Khudapur Stationary Sub-Magistrate.

7. That there were not good feelings between the Stationary Magistrate and petitioner for some time before the present Case arose.

8. That the Stationary Sub-magistrate has already betrayed a good amount of animus and bias against petitioner and has evinced a great anxiety to get petitioner into trouble. The Stationary Sub-magistrate tried to fetter the discretion of the investigating officer, the Division Police Inspector by asking

king him to put in a charge sheet
and to arrest petitioner, so that the magistrate
may clutch jurisdiction over petitioner.

9. The Conduct of the magistrate at
the alleged scene of offence, the great animus
betrayed by the Sub-magistrate, certain
Expressions given out by the Stationary
Sub. magistrate showing that he wishes
to screen the ruin of petitioner, and his desire
to obtain a charge sheet and to see
petitioner disgraced by an arrest, have made
a decided impression on the public at
large that evidence true or false will be
accepted by the Stationary Sub-magistrate
who has already assumed petitioners guilt.

10. That the facts referred to
in para 9, will encourage the prosecutor
to bring any amount of false evidence
against petitioner, while false witnesses
will also be very much emboldened to
give

give evidence before a biassed magistrate. An
impartial tribunal is not so much resorted
to by false witnesses.

11. Petitioner further submits that the
Case for the defence will be seriously damaged
if it should be in the hands of a biassed
magistrate, who may just in due time
exercise a discretion in adjournment which
may prove probably mischievous to the defence.

12. That no sooner the Head Assistant
Magistrate sent the Case to the Stationary
Sub-magistrate, he issued a warrant of
arrest without any bail clause, and without
taking into Consideration that the Case
has been referred by a responsible officer.

13. That petitioner will be able to
vindicate his character in the judicial
Enquiry, but what petitioner objects to is
that he should be subjected to undeserved
disgrace by being arrested in a false case
and that he should be made a victim

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of the animus of a hostile magistrate.

14. That petitioner will get justice at the hands of any magistrate in the District, Except the Kundapur Stationary Magistrate. Now that the steamers are playing petitioner begs to suggest that the enquiry may be ordered to be held by one of the magistrates at Mangalore, so that your Honour and also the District Superintendent of Police may watch in what way petitioner has been made a victim.

15. That this petition is humbly submitted through the District Superintendent with a prayer that the District Superintendent may be pleased to forward this petition with such remarks as may be considered necessary.

It is therefore prayed that your Honour may be pleased to pass that this Case may be transferred to the file of any other magistrate.

sd J. F. Mascarenhas
Vakil for defence.

A true Copy.

Ag. Registrar
Appellate side.

Disposal No. 128/95 magl

Proceedings of the District magistrate of South Canara, dated 18th March 1895.

Read petition dated 17th instant, submitted by D'Mello, 1st accused in R.C.S. No. 20, dated 8th March 1895, of the Police Inspector of the Coondapur Division, through the Superintendent of Police.

Heard Vakil Mr. J. F. Mascarenhas for petitioner praying that the Case may be withdrawn from the Stationary Sub-magistrate of Coondapur

Order.

It is observed that the Head Assistant magistrate in his Proceedings No. —, dated 13th March 1895, has ordered a magisterial enquiry and has transferred the same from his file to that of the Stationary Sub. magistrate of Coondapur. It is impossible to say that the objections of the accused persons to this magistrate are without foundation. The application

for

for a transfer is therefore admitted. The enquiry will be taken on the file of this Court and transferred to the Stationary magistrate of Ndipi for enquiry under Chapter XVIII Cr. P. Code.

(Signed) W. H. Welsh
Dt. magistrate.

A true Copy.

(sd) W. H. Welsh
Dt. magistrate.

A true Copy.

Dy. Comr
Ag. Registrar
Appellate side.

Enclosure VI to the High Court's letter dated 11th November 1895 No. 2297 Judicial.

G.O. 2437 26/11/95

1895 Jud. Dep. Bundle No. 6 No. 5092

No. 2297 Jud.

5392

High Court of Judicature,

Madras, 11th November 1895.

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From

D. W. G. Cowie, Esquire,

ag: Registrar, High Court,

Appellate Side, Madras.

To

The Honourable Mr. J. H. Price, C.S.I

Chief Secretary to

Government.

Honourable Sir,

I am directed to forward for the consideration of Government a copy of the decision of the Sessions Court of South Canara in Sessions Case No. 15 of 1895 together with this Court's order directing a retrial of the accused persons. Copies of the orders of this Court dated September 5th and of other proceedings as well as of the District Magistrate's Ex-planation and proceedings in the

the transfer case are also forwarded.

2. As the accused have to be retried, the High Court does not offer any remarks upon the merits of the case, but whether the charge be eventually sustained or not the Court thinks it right to draw the attention of His Excellency the Governor in Council to the conduct of the local officers concerned.

I have the honor to be,
Honourable Sir,
Your most obedient Servant,

D W Comil
Ag: Registrar,
Appellate Side.

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Note.

This could then be considered along with the other papers about Mr. Holmes' work.

Mr.

- Xi. and to obtain the explanation of the Hon A.A. Mgte (Mr. Slight) of the reasons which led him to leave the enquiry in this case to a Sub Mgte, instead of taking it up himself.
- To J.G. of Police with cuts records for perusal & transmission at early date to D.M.gte (para 1. & 2)
- D.M.gte S. Canara (para 1. & 2)
- Sessions Judge S. Canara (para 3)

Draft approved, but I have heard something of this case from Mr. Hammick, who, if I remember right, thinks that the Mgte (Mr. Slight) erred in not taking up the case himself, as it occurred close to his headquarters. Let the D.M. also obtain & forward Mr. Slight's explanation on this point.

23/11/95

addition made in the draft accordingly.

Mr 25/11/95

Seen
25/11

the Head Constable to make a local enquiry and at all events passively connived at his absconding after the warrant had been issued for his apprehension."

3. The District & Sessions Judge of S. Canara will be requested to forward to Govt. any remarks that he may have to offer upon the Regs. of the High Court dated 4th Nov. No. 2296. Jud. copy of which has no doubt ere already been forwarded to him.

Mr 24/11/95

25/11/95

Noted 27/11/95

Note.

It appears necessary to draft this reference in the form of a call for an explanation to definite charges, as if the High Court are right in their impressions both the Dist. Mgte & the Supt. of Police will have to hear more of this case.

Mr 24/11/95

Explanations from
(1) Sessions Judge
(2) Dist. Magte.
(3) Dist. Supt of Police
of South Canara in re an
acquittal in a murder case. –

HM.

for orders.

CS. (addition to draft for approval)

Rajabhadur Kukkeri Ramachandra
Mlapy

C 23/11
P 3714

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copied ____
examined ____
signed ____
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EAD AGAIN G.O., No. DATED
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CURRENT No.

ENCLOSURES TO C. No.

ORDER OF GOVERNMENT	A	A	A	A	A	A	A	
LETTER OF GOVERNMENT.								
STATEMENT WITH DITTO.								
PAPERS NOT FILED UP, BEING MEANT FOR DESPATCH IN ORIGINAL.								

N.B.—
A = Copy in full.
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