Judicial (1895) Department.

ORDINARY MS.

G.O., No. 833.

Dated 23rd Apr 1895

INDEXED.

[Despatch Abstract.]

REMISSION OF SENTENCES.

Directing the--of two years and eight years rigorous imprisonment finally passed on convict No.6693, Thottikalavan, for the offences of which he was convicted in Madura Sessions case Nos.24 and 25 of 1890, respectively, and that he be set at liberty.

BACK PAPERS.

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

FURTHER PAPERS.

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

146

Petition from a Convict

Judicial {189 } Department.

No.

FROM

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

Dated 21st March } 1895.
Received 23
Regd 25

No. 666 Judl.
Enc Three

CHIEF SECRETARY
23 MAR. 1895
GOVERNMENT OF MADRAS

Forwarding the opinions recorded by the Hon: the Chief Justice & Mr. Weir asked for in the Proceedings of the Madras Government dated 25th ultimo R.No. 231.

H.M. & Hon. Mr. Grose

For orders

Ed
26/3/95

This current contains the opinions of the Chief Justice & Mr. Weir as to the guilt of the Petitioner. H.M. called for these in the routine G.O. beneath.

D
26.3.95

27/3/95

The petr. should be released in deference to the opinion of the Honble the C.J.

Should the thanks of Govt. be conveyed to the C.J. (and to Mr. Weir) for their careful examn. of the evidence? I don't know what is usual in such cases

28/3/95

The petr. shd be released I think we shd acknowledge the care wh. the C J & Mr. Weir have shown in examining the evidence

JG 1/4

C 28/3 | C 1/4
R 29/3 | R 2/4

No. 158   Court of Session, Coimbatore D:
18th March 1895.

From J. Cozier Esq.,
Sessions Judge,
Coimbatore.

To
D. W. G. Cowie Esqr.
Acting Registrar, High Court,
Appellate Side, Madras.

Sir,

I have the honor to acknowledge the receipt of your letter, dated 12th March 1895, No. 573 Judicial, forwarding together with certain records Copy of the Order of Government, dated 25th February 1895 R. No. 231, and requesting me to state for communication to Government my opinion on the matter referred to in Order of Government—namely—the judg of one Thoti Kalavan who was convicted of the offence of dacoity in

5. The second point, including the alleged professional animus of the Police against the Kilapudi Villagers, seems scarcely of any weight in itself.

6. In connection with this point it is observed that the Petitioner in his Appeal to Government for Clemency mentions that his conviction is attributed to the Village Roster produced by the Village Munsiff in which he was shown as having been absent from Kilapudi between the 1st and 25th January. He also mentions that the Village Munsiff was at enmity with him as also the approver and his relations. He made these allegations of enmity, it is observed, in his statement before the Committing Magistrate (See

page

page 34 of printed record) and he at the same time stated that he was in his village of Kilapudi on the date of the robbery.

7. As regards these allegations the remark which suggests itself is that they are entirely unsupported by any evidence. An examination of the record discloses that no questions whatever were asked in cross-examination either of the approver or of the Village Munsiff to establish animosity or enmity on their part towards the petitioner. (See pages 11, 12 & 16 of printed record).

8. The matters alleged - and more especially the statement of the Petitioner that he was present in his Village on the date of the offence were all matters which, if well-founded -

were capable of being proved by testimony - The petitioner, however - as appears from the record, called no witnesses - His assertion in his Appeal to Government that he produced 22 witnesses to prove his innocence is clearly unreliable - His statement before the Committing Magistrate - already referred to (page 34 of the printed record) shows that he named some witnesses but he and the other accused were all defended by a Vakil and no defence witnesses were called. The omission to call defence witnesses cannot be presumed to have been inadvertent or other than intentional.

9. The result is that the material

material fact of the Petitioner's absence from his village at the time of the dacoity - as attested by the Village Roster stands unrefuted and unrebutted.

10. It appears to me, therefore, that the two matters set out in Mr. Ross' Charge which may be thought at first sight to be of some importance in favor of the Petitioner are, in the special circumstances of the case, scarcely capable of being so regarded -

11. Turning now to the direct evidence against the Petitioner and leaving aside the approver's evidence, the evidence against the petitioner appears to be very clear and definite.

12. In the earlier trial (Sessions Case No. 24 of 1890) the Petitioner's active

concern in the dacoity is spoken to by four witnesses.

13. The 2nd Witness (Mr Hughes's servant) deposes that Petitioner beat his master, Mr Hughes when the latter was lying on the ground.

14. Mr Ross appears to have thought this 2nd Witness - unreliable - owing to his apparent excitability.

15. Three other Witnesses - however - against whom no objection is suggested - also speak to the petitioner's concern in the dacoity.

16. The 3rd Witness - the transit-peon - mentions that the petitioner beat Mr Hughes when on the ground and also snatched a rupee from him (3rd Witness).

17 The 4th Witness - the transit driver - says that the petitioner struck him on the forehead.

18. The 5th Witness says that the petitioner took

took

took money from his bag.

19. In the Second trial (Sessions Case 25 of 1890) the Petitioner is said by the 1st Witness to have taken the very prominent part of seizing him (1st Witness) by the throat, while the approver removed the witness' earrings - as to this evidence it may possibly be suggested that it has the appearance of coinciding too closely with the evidence of the approver on the same point.

20. Another witness, however, viz. 5th Witness speaks to the Petitioner having attempted to untie his waist cloth.

21. The 15th witness - the Trichinopoly hotel-keeper also - it is observed - speaks to the Petitioner as being one of the gang who came to her

hotel on the day before the dacoity.

22. The above evidence, if reliable, seems conclusive against the Petitioner.

23. As regards all, evidence of the above class - namely evidence identifying or purporting to identify particular individuals not previously known to the deponents as participators in a mid-night robbery or dacoity - there is - it may be stated, as a general remark - almost necessarily always present a considerable element of doubt and uncertainty. The conditions viz. those of a sudden attack by a band of men - and the consequent confusion and panic fear - frequently on the part of the persons attacked - are not generally

favorable

favorable to cool and careful observation.

24. Conceding the general truth of the view just stated it has to be observed that, if the evidence of the witnesses identifying robbers or dacoits is to be rejected generally in deference to the above considerations, a very large proportion of the convictions for robbery or dacoity - before the Courts of this Presidency must be held to have been arrived at on insufficient grounds - The evidence of the persons attacked - whatever may be its possible defects - is, in the nature of the case, the only evidence available to the Courts

25. In each case however - the probative effect of the evidence must depend on the particular

circumstances disclosed in the evidence - and in the case now under examination there was, it appears, at least one circumstance which was entirely favorable to a reliable identification viz. the night was, it is said, a bright moonlight-night. In bright moonlight the persons attacked had reasonable facilities for seeing well the individuals who - from the facts spoken to (viz. beating - seizing of the throat &c) must necessarily have been close to their persons.

26. It appears to me, therefore, that if weight is to be given at all to the class of evidence put forward in this case (and to hold otherwise would, I respectfully submit, be a matter of very grave consequence to the administration of Criminal

Justice

Justice) better evidence could not be expected than that which has actually been given.

27. In the above examination I have, for obvious reasons, left out of consideration the evidence of the approver.

28. As regards his evidence, it need only be remarked that its general truthfulness in matters of detail was clearly established by the other evidence in the case, and that no question was, as already observed, so far as can be gathered from the record, asked of the approver in cross-examination to show animosity on his part against the petitioner or any of his co-accused.

29. It may, perhaps, be noticed

in case the approver's evidence is accepted – that the petitioner was one of the men who got up the expedition in which the dacoities were committed (See para. 8 of Mr. Ross' judgment in Sessions Case 25 of 1890).

30. On the evidence, therefore, as a whole – and having in view, more especially the petitioner's failure to rebut the definite evidence of the Village Munsiff that he was absent from his village from the 1st to 25th January, I would very respectfully submit that I see no good or sufficient reasons

reasons to doubt that the petitioner has been properly convicted.

I have the honor to be,
your most obedient Servant
(Signed) J. Weir,
Sessions Judge.

A True Copy.

D. Cowie
Ag. Registrar,
Appellate Side.

21/3

22/3

Enclosure II **to the High Court's letter dated** 21st March /95 **No.** 666.

Judicial.

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1467

Sessions Case 24 of 1890.

Thotti Kaluvan was the 3rd prisoner in this and was charged with others with committing dacoity on the 4th January 1890.

The same observations on the identification of the prisoner as I have made in Sessions Case No. 25 of 1890 apply to this case also. Mr. Hughes, the Executive Engineer is unable to identify any of the prisoners. There is no doubt but that a serious dacoity took place and that the approver and some of the other prisoners took part in it. But the case of the 4th prisoner is subject to the same objections that occurred

? 3rd in this case

occurred to me in the former Case and I am of opinion that there is a doubt as to his guilt.

High Court. (Sd) Arthur Collins,
20-3-95.

A true Copy.

D. Cowie
Ag. Registrar,
Appellate Side.

22/3

22/3

S. C. XXII of 1895

Thotti Kaluvan, 4th prisoner in Calenda Case No 25 of 1890 tried in March 1890 by the Sessions Judge of Madura and a jury for the offence of dacoity and convicted. The prisoner appealed to the High Court but the conviction was affirmed - the powers of the High Court in such appeals being limited by Section 423, Clause d, Criminal Procedure Code.

The prisoner on the 12th December 1894 presented a petition to the Governor in Council alleging his innocence and requesting that he may be released from custody. It is somewhat remarkable that the prisoner has waited between 4 and 5 years before presenting his petition for release. The Local Government has under the powers conferred by Section 401, Criminal Procedure Code, referred the matter to me as presiding judge on the hearing of the appeal.

Undoubtedly there was evidence which if the jury believed they were entitled to convict upon and there was no misdirection by the Sessions Judge.

The 1st prosecution witness, Maruthay, one of the persons said to have been dacoited, professes to identify the 4th accused; he says he was held by the neck by the prisoner. This dacoity took place on the 3rd January 1890 but no complaint was made until January 27th. Exhibit A in that statement the witness says "I could well identify two of the men, one was a dark man and short and his whiskers were well

well set; he was a man in the prime of his age; his eyes were slightly sunken in; the other man held me: he was fair. I know him well.

On cross-examination before the Sessions Court this witness explains that "in my complaint A, I said the man who held me was a fair man; by that I meant approver; the 4th prisoner also held me; he is the man I meant as the dark sunken eyed whiskered man in my complaint A."

It must be observed that this witness does not say under what circumstances he next saw the prisoner and was able to identify him. The 5th prosecution witness Kattiyan identified the 4th prisoner as one of the dacoits and says "he tried to untie my cloth but I resisted". In cross examination he says "I had never seen any of these prisoners before this robbery; after the robbery

I did not see them till I saw them at Nilakota; there I identified them when the Police showed them to me near the station."

The 15th witness Meariayee is a hotel keeper and she says that at the last Srirangam festival, 9 men came for refreshment and she supplied food to four, the 4th, 5th, 7th and 8th prisoners; there is no evidence where or under what circumstances this witness next saw the 4th prisoner. The evidence of these witnesses as to the identification is in my judgment not satisfactory.

The 1st prisoner surrendered himself into custody on the 19th January and the 2nd and 3rd prisoners on the 24th January. It is clear that each was anxious to be taken as an approver. The 1st prisoner made a

Confession

confession in which the name of the 4th prisoner was not mentioned and it was stated that 7 men and not 9 committed the dacoity.

The 2nd and 3rd prisoners then made confessional statements and they said that the 1st prisoner had dragged in 2 relatives of 2nd prisoner out of enmity and had omitted 4th, 5th and 6th prisoners out of friendship. I agree with the Sessions Judge that "it just shows how even confessing men will lie."

See para 20 Sessions Judge's judgment.

On the 5th February the 1st prisoner admitted that the above statements of the 2nd and 3rd prisoners were true. These men were, as I said before, anxious to be taken as approvers and were bidding against each other.

The 1st, 2nd and 3rd prisoners having confessed another man engaged in the dacoity presents himself to the Police. His name is Perumal Sevan and before he surrendered himself he knew the three prisoners 1, 2 and 3 had confessed and had implicated him. He says he knows all about approvers as several men had got off being taken as approvers. He describes himself as an old thief and implicates *inter alia* the 4th prisoner in some former thefts. If his evidence is believed there is no doubt of the 4th prisoner's guilt, but if the Police were desirous, as the defence states, to convict the 4th prisoner, Perumal was the approver the Police would select.

The 2nd prisoner after being sentenced by the Sessions Judge is called as a witness for the prisoners and confirms in material particulars Perumal's story. Whether he gave evidence in the

interests

interests of justice or in the hope of receiving some mitigation of his sentence may be doubtful.

A very damaging piece of evidence in the eyes of a Madura jury was the evidence of the Kilagudi Village Munsif. "You all know Kilakudi the thieves' village" says the Sessions Judge "and you all know that the Police have a special mission against Kilakudi. The 4th prisoner and his brothers are admittedly big puttadars in Kilakudi and worth "running in" on such an opportunity." The Sessions Judge evidently made these remarks to caution the jury against accepting too readily the evidence of the Village Munsif but it possibly had a contrary effect. The Village Munsif of Kilakudi says that a roster of suspected characters is kept at the Police Station at Kilakudi and that he examines that roster every night and signs a report setting out who was absent from the village. The 4th prisoner is No 60 in this roster and he was absent from the village until January 25th and was not present on any other day in January.

This Village Munsif declares that there is no enmity between himself and the 4th prisoner but admits that before he was appointed Munsif the 4th prisoner's uncle's son was Munsif. The Sessions Judge says that he should be sorry to express an opinion whether or not that roster is reliable.

The foregoing is the principal evidence on which the 4th prisoner has been convicted. The identification by

by the untainted witnesses is not satisfactory. The tainted witnesses when they made their statements before the Magistrate were one and all struggling to be made approvers, the 1st prisoner even threatens if he is not made an approver to lay the matter before the higher tribunal (Dorai) a suggestion therefore from the Police as to the guilt of the 4th prisoner would be eagerly caught hold of.

The obvious suspicion of the Sessions Judge that the Police would not be unwilling to a run in" a Kilagudi man who was a big puttadar, the refusal of the Judge to express an opinion on the reliability of the Roster produced throw a doubt upon the case. But the question is is there such a reasonable doubt taking the whole evidence into consideration as to warrant me in advising the Local Government to grant the petitioner's prayer. It is with some hesitation I express an opinion as I have only paper evidence to consider and what the demeanour of the several witnesses was like I cannot tell. There does however appear to me to be a substantial doubt as to the guilt of the petitioner and I think I am warranted in advising the Government to grant the prisoner's petition and release him.

(Signed) Arthur Collins.

High Court of Judicature
Madras 20th March 1895

(A true Copy)

D. Cowie
Ag: Registrar,
Appellate Side.

81
22/3.
13/2/3

Enclosure I **to the High Court's letter dated** 21st March /95 - **No.** 666.

Judicial.

5
Enclos. No.
To 1467

No. 666 Judl.

1467

High Court of Judicature,
Madras, 21st March 1895.

From

D. W. G. Cowie, Esquire.
Ag: Registrar, High Court
Appellate Side.

To

The Honorable J. F. Price, C.S.I.
Chief Secretary to Government,
Fort St. George.

Honorable Sir,

I am directed to forward for the consideration of His Excellency the Governor in Council the opinions recorded by the Honorable the Chief Justice and by Mr. Weir, asked for by the Proceedings of the Madras Government dated the 25th Ultimo, R No. 231.

2. The inclosures received are returned.

I have the honor to be,
Honorable Sir,
Your Most Obedient Servant.
D. Cowie
Ag: Registrar,
Appellate Side

15/2/3

[G. / 21]
200—8-2-95.

Jud. DEPARTMENT.

Papers to be read in proceedings:—

Again G.O., dated 25 Feb. 1895, No. 231

Again G.O., dated 189 , No.

Current No. of 189 , dated from

Current No. 1467 of 1895, dated 21 Mar. from The High Court

ORDER. O. 23rd April 1895, No. 833.

In deference to the opinion ~~After considering the opinion~~ s recorded by the Hon. the C.J. ~~& by Mr. Weir~~, H.E. the G. in C. resolves, in exercise of the powers conferred ~~conferred~~ upon him by sec 401 of the C.C.P. 1882, to direct ~~that~~ the remission of the sentences of 2 years rigorous imprisonment & 8 years' rigorous imprisonment finally passed on convict No 6693 Thotti Kaluman ~~upon~~ for the offences of which he was convicted in ~~[illegible]~~ Madura Sessions Cases Nos 24 & 25 of 1890, respectively, ~~be remitted & that~~ & the said prisoner should be set at liberty forthwith.

10/4/95

~~Para. 2. (for approval)~~
~~H.E. the G. in C. desires to convey to the Hon. the C.J. & to Mr. J. Weir his thanks for their careful examn. of the evidence in this case with which they have been good enough to furnish Govt.~~ ~~which they have good enough~~
~~D~~
~~6/4/95~~

copied fair
25/4

To the Hon. the C.J. with C.L. (& 29)
" I. G. of Prisons with judgments } P.&O.
" Supt. " H. M's Penitentiary }
" D. Magistrate. Madura. } P.&O.

29 APL 95
M.S

P.T.O.

Note

Reference is solicited to the precedents put up which show that it is not usual to thank the judges in such cases. Orders are requested.

It is possible that they may take exception to the expression of thanks

D
5.4.95

JT
10/4/95 It is better not I venture to think to say anything as it may look as if in the opinion of Govt. the examination of evidence by the High Courts is not always careful

[illegible]
10/4/95

Better not say anything, perhaps, but cut out para 2

[illegible]
18/4/95 — [illegible] 19/4

Petition from [illegible]

(Form orders)

H.M. & [illegible] Govt.

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Issue without para 2
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