

No. of Pages 22
Date of Refers May 1988
Initials of Referees
LWS.

Tamil Nadu Government

Public Works Department
Judicial

Go. Ms. 805-806 W. dt 17-4-1978

Poz

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

17th April 1878, Nos. 805 & 806.

Whipping Act.

Read the following paper:—

No. 94. *From T. WEIR, Esq., Acting Registrar of the High Court of Judicature at Madras, Appellate Side, to the Chief Secretary to Government, dated Madras, 27th March 1878, No. 657.*

I am directed to make the following communication to Government on the subject of certain provisions of Act VI of 1864 (the Whipping Act).

Section 2 of the Act provides that "whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code."

The offences enumerated are:—

1. Theft, as defined in Section 378 of the said Code.
2. Theft in a building, tent, or vessel, as defined in Section 380 of the said Code.
3. Theft by a clerk or servant, as defined in Section 381 of the said Code.
4. Theft after preparation for causing death or hurt, as defined in Section 382 of the said Code.
5. Extortion by threat, as defined in Section 383 of the said Code.
6. Putting a person in fear of accusation in order to commit extortion, as defined in Section 389 of the said Code.
7. Dishonestly receiving stolen property, as defined in Section 411 of the said Code.
8. Dishonestly receiving property stolen in the commission of a dacoity as defined in Section 412 of the said Code.
9. Lurking house-trespass or house-breaking, as defined in Sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section.
10. Lurking house-trespass by night or house-breaking by night, as defined in Sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section.

The following section (Section 3) provides that "whoever, having been previously convicted of any one of the offences specified in the last preceding section, shall again be convicted of the same offence, may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence be liable under the Indian Penal Code."

Shortly after the introduction of the Act or in November 1864, the High Court had occasion to consider the effect of these two sections in a case coming before them as a Court of Revision. The accused had been convicted of the offence of theft in a building and had been sentenced to both imprisonment and whipping on the ground that he had been twice before convicted of theft.

The High Court after full consideration arrived at the conclusion that the sentence of whipping in addition to imprisonment was illegal, inasmuch as the previous convictions and the subsequent conviction had not been of the same specific offences.

This construction of the law the Court have since adhered to.

The High Courts of Calcutta and Bombay have also arrived at the same conclusion in the following reported cases:—4 Sutherland's Weekly Reporter, Criminal Reports, page 20, *Queen versus Amarut Sheikh*; and 4 and 7, Bombay High Court Reports, Crown Cases, pp. 5 and 68, *Regina versus Biljivalad Dapu and Regina versus Chingivalad Shumia*.

The concurrence of the three High Courts must be regarded as settling the question of the construction of the Act.

It seems however probable that the framers of the Act may not have intended or foreseen the effect which has thus been given to these two provisions of the enactment.

The result is that the Act is to a general extent inoperative, and the special form of punishment which was contemplated cannot be inflicted in the very circumstances in which it would seem to be most appropriate, that is to say, after a second conviction of an offence substantially (though not technically) of the same character.

Another evil is that the Act is constantly misconstrued and misunderstood by the Magistrate. Illegal sentences of whipping in addition to imprisonment are every day passed by the Subordinate Magistracy, and under the operation of Section 310 of the Code of Criminal Procedure, these sentences are frequently carried into execution before the High Court can interfere as a Court of Revision. It seems to the High Court that an amendment of the law is certainly called for. The form which the amendment should take is, of course, a matter for the consideration of the Legislature and not of the Court.

Mr. Justice Kindersley would however suggest that whipping should be permitted as an additional punishment when the second offence is the first offence with a circumstance or circumstances of aggravation—as for instance, when the first offence was simple theft and the second theft in a dwelling or robbery.

Mr. Justice Keran desires to state that he is not in favor of the infliction of whipping except in cases of violence.

There is also another matter in which it appears to the Court that the Act requires to be amended or at least freed from ambiguity and that is in regard to the liability to whipping as an additional punishment attaching to a second conviction instead of to the circumstance of the punishment for a previous offence having been (ineffectually) undergone. As the law stands, a person who is convicted of having committed two thefts in succession on the same day is liable for the second offence to whipping in addition to imprisonment.

This at least is the construction which has been put upon the Act by the Madras High Court (5 Madras High Court Reports, Appendix p. xviii). A different construction has no doubt been arrived at elsewhere (*Queen v. Udai Patnaik*, and two others, 4 B. L. Rep. Cr. l. page 5).

The intention of the Legislature probably was to make the liability to whipping attach to the circumstance of the punishment for the previous offence having been undergone.

The Law of England, at the time the Whipping Act was framed (7 and 8 George IV, Chap. 28 and 12 Viet. Chap. 11) confined the punishment of whipping in express terms to offences committed after a previous conviction, and it may perhaps be assumed that the framers of Act VI of 1861 intended that the provisions of the Indian Whipping Act should correspond with those of the English Statutes on the same subject.

I am to request that these observations may be communicated to the Government of India in the Legislative Department with a view to such steps being taken as the Government of India may deem called for.

No. 95.

ORDER THEREON, 17th April 1878, No. 805.

The desired reference will be made accordingly.

(Signed) D. F. CARMICHAEL,
Chief Secretary.

No. 96.

To the Secretary to the Government of India, Home Department, dated
Ootacamund, 17th April 1878, No. 806.

In submitting to the Government of India copy of a letter from the High Court of Madras, dated 27th March ultimo, No. 657, I am directed by His Grace the Governor in Council to request that the question of amending the Whipping Act in the direction indicated may receive early consideration.

(Signed) D. F. CARMICHAEL,
Chief Secretary.

Exd. T. O'Connor.

N^o 657.

3/5.06

From
J. Weir Esquire,
Acting Registrar of the
High Court of Judicature
at Madras.

To
The Honorable P. J. Carmichael,
Chief Secretary to
Government.

Honorable Sir,
I am directed to make
the following communication to
Government on the subject of
certain provisions of Act VI of
1864 (The Whipping Act).

Section 2 of the Act
provides that whoever commits
any of the following offences
may be punished with whipping
in lieu of any punishment to
which he may for such offence be
liable under the Indian Penal Code.

Cont. of 1878

JUDICIAL.

THE ACTING REGISTRAR

OF THE HIGH COURT,

MADRAS.

Recd April 1898.

Recd

Recd

Recd

G.O. 170 April 1898, No. 8036.

APRIL

MCS. 54-23.

377. 1898. 4. 23. - The High Court informed that
the enclosed reference to the Government of India
for the purpose of the Whipping Act
will be in the enclosure.

The offences enumerated,

1. Theft, as defined in Section 378 of the said Code.

2. Theft in a building, tent, or vessel, as defined in Section 380 of the said Code.

3. Theft by a clerk or servant, as defined in Section 381 of the said Code.

4. Theft after preparation for causing death or hurt, as defined in Section 382 of the said Code.

5. Extortion by threat, as defined in Section 388 of the said Code.

6. Putting a person in fear of accusation in order to commit extortion as defined in Section 389 of the said Code.

7. Dishonestly receiving stolen

property, as defined in Section 411 of the said Code.

8. Dishonestly receiving property stolen in the commission of a Dacoity, as defined in Section 412 of the said Code.

9. Lurking-house-trespass, or house-breaking, as defined in Sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this Section.

10. Lurking-house-trespass by night or house-breaking by night, as defined in Sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whippings under this Section.

The following section (Section 3) provides that whoever, having been previously convicted

of any one of the offences specified
in the last preceding section,
shall again be convicted of the
same offence, may be punished
with whipping in lieu of or
in addition to any other punish-
ment to which he may for such
offence be liable under the
Indian Penal Code."

Shortly after the in-
troduction of this Act on the
11th November 1861, the High Court
had occasion to consider the
effect of these two sections in
a case coming before them
as a Court of Revision. The
accused had been convicted
of the offence of theft in a
previous case and had been sen-
tenced to both imprisonment
and whipping on the ground
that he had been twice before
convicted of the ft.

It is not until the 1st of January 1862 arrived at
the conclusion that he was not liable to whipping in addition to
the sentence of imprisonment on the ground of previous convictions
in a case of theft in which he had been twice before convicted of the same offence.

This construction of the law the Court have since
adhered to.

The High Courts of
Calcutta and Bombay have also
arrived at the same conclusion
in the following reported cases:-
1. Sutherland's Weekly Reporter,
Criminal Rulings, page 20, in
Queen Versus Amant Sheikh
and 4 and 7, Bombay High Court
Reports, Criminal Cases, pp. 5 and
68. Regina Versus Balaji vada
Bapu and Regina Versus
Changia vada Shumias.

The concurrence of the
three High Courts must be re-
garded as settling the question
of the construction of these Acts.

It seems however pro-
bable that the framers of the
Act may not have intended
or foreseen the effect which
has thus been given to these
two provisions of the enactment.

The result is that the

Act is to a general extent inop-
erative and the special forms of
punishment which were contem-
plated cannot be inflicted in
the very circumstances in which
it would seem to be most ap-
propriate, that is to say, after
a second commission of an offence
substantially (though not tech-
nically) of the same character.
Another evil is that

the Act is constantly mis-
understood and misapplied by
the Magistracy. Illegal sentences
of whipping in addition to im-
prisonment are every day passed
by the subordinate Magistracy
and under the operation of Sec-
tion 310 of the Code of Criminal
Procedure these sentences are
frequently carried into execution
before the High Court, and in-
stead of being a Court of Revision

It seems to the High Court that an
amendment of the law is, certainly,
called for. The forms which
the amendment should take
is of course a matter for the
consideration of the Legislature
and not of the Court.

Mr. Justice Kindersley
would however suggest that in
whipping should be permitted
as an additional punishment
after the second offence, not in
the first offence with a circumstance
or circumstances of aggravation
as for instance when the first
offence was simple theft and
the second theft in a dwelling
or robbery.

Mr. Justice Kerr
desired to state that he is not
in favor of the infliction of
whipping except in cases of
violence.

There is also another
matter in which it appears to
the Court that the Act requires
to be amended or at least freed
from ambiguity and that is in
regard to the liability to whipping
as an additional punishment
attaching to a second conviction
instead of to the circumstance
of the punishment for a previous
offence having been (ineffectually)
~~done~~ ^{undergone}. As the law stands,
a person who is convicted of
having committed two thefts in
succession on the same day is
liable for the second offence to
whipping in addition to im-
prisonment.

This at least is the con-
struction which has been put
upon the Act by the Madras
High Court (5 Madras High Court
Reports, ^{construction} Appendix, p. XVII). A
different ^{construction} has no doubt been
arrived

arrived at (see *Queen v. Pataik*, and 2 others 4 B. L. R. 100
page 5.)

The intention of the
Legislature ^{probably} was to make the
liability to whipping attach to
the circumstance of the puni-
ment for the previous offence
having been undergone.

The Law of England
at the time the Whipping Act
was framed (7 and 8 George IV.
chap. 28, and 12 Vict. ch. 11)
continued the punishment of
whipping in various cases of
offences committed after a
previous conviction and it
may perhaps be assumed that
the framers of a Bill of 1864
intended that the provision
of the Indian Whipping Act
should correspond with those
of the English Statute on the
same subject.

I am to request that

These observations may be com-
municated to the Government
of India in the Legislative or
Department with a view to
such steps being taken as the
Government of India may deem
called for.

High Court of - I have the honor to be,
Judicature, Madras, Honorable Sir,
27 March 1878. Your most obedt. servt.

CC
Acting Registrar,
Appellate Side.

20-5-88
B

No.

906 Just 9 DEPART
with

From

Dated

267 - 3 - 5

FOR ORDERS.

Lesson 1st: we may
send this up according to

Cordially Thanking.



72 - Nov 28 / 20

149

Prof 11/14

judicial 1878 D/arrth

790
Wapping cut /
Thames

The City Register of the
High Court of Judicature

7-19/2020

To the Chief Secretary to
Government

Dec 27th - March 1878

10657

1000

on the subject of
communication to Govt.
on the subject of
communication to Govt.

of Oct 1st of 1864, the
Michigan Act.

17 Aug. 1898.

to the - 4. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851.

22

FOR ORDERS.

To G. I. Home Sept

No 206.

70

Lin, In submitting to the
G. I. copy of the letter from
the H. C. of Ind. as of 27 &
March ults, No 65, for the
purpose of the same to be
by H. C. Ind. to request that
the question of amending the
Whipping Act in the direction
indicated may receive the
early consideration.

L. 7. 2. 16. C. 2.
S. 5 & 11. 1. 2.

75

Cr 7/3 15/4

of 6th 17th 1875. 18/12-8.

11
805-06

Cobl. of 1878 Madrid.

Pr. A. ✓

C.O. 17 April 1878, 8052

Nos. 94-96

Whippack. The
High Court informed
that the desired re-
ference to the Lord of
India regarding the
circumstances of the
Whippack, will be
made accordingly.



cr 8/3 15/4