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MADRAS RECORD OFFICE

GOVERNMENT OF MADRAS

Revenue DEPARTMENT

G.O. No.	29	Press
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Dated	4. 5. 1874	196 .

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*Proceedings of the Madras Government, Judicial Department,
12th April 1874.*

Read again the following Proceedings of Government, dated 30th October 1873, No. 1727:—

Read the following letter from H. S. THOMAS, Esq., Magistrate of South Canara, to the Hon. W. HUDLESTON, Chief Secretary to Government, Fort St. George, dated Sampaje, 2nd October 1873, No. 1682-C:—

At the instance of my Head Assistant, and in consideration of the important public interests at stake, I have the honour to request that the Government will be pleased, under Section 272 of the Code of Criminal Procedure, to direct an appeal to the High Court from the acquittal passed by the Session Judge of South Canara in Appeal Cases Nos. 8 and 9 of 1873, on his file.

His letter, No. 282, dated 3rd September 1873, enclosed.
Calendar Nos. 15 and 17 (1873) on the file of the Head Assistant Magistrate.

2. The facts of these cases are alike, and, the same points of law being involved in both, they need not be detailed and discussed separately.

3. The importation of foreign salt into this district by private traders has of late years increased to a great extent, and has been, to the prejudice of Government revenue, attended with no little smuggling of that highly dutiable article from Goa, under colour of legal importation, owing to the enormous profits it holds out to enterprising men and the little check exercised on it by the inadequate Customs establishment, which, having been organized at a time when such importations were scarcely known, cannot watch effectively the long and easily accessible sea-coast of this district.

4. In February last, however, the Tahsildar of the Udipi Taluq. after many exertions, succeeded in having two vessels detected in the very act of landing on the sea-beach a considerable quantity of Goa salt by night. He tried the smugglers in his magisterial capacity, and, the facts being clearly proved against them in both cases, he convicted them under Sections 24 and 194 of Act VI. of 1863; but, considering that the circumstances of the offence called for a severer punishment than he was competent to award, he referred them, under Section 46, Criminal Procedure Code, to the Head Assistant Magistrate, who, being satisfied of the justice of the convictions, confirmed the same, and sentenced the offenders to various fines, with imprisonment in default of payment thereof.

5. The prisoners having appealed from these convictions, the Session Judge, while acknowledging that "the facts of the case admit of no doubt," quashed the sentences on two legal grounds, viz., (1), that salt, though dutiable, not being a "restricted" article within the meaning of Section 24, the offence did not fall under that section but under Section 194 (which latter was unfortunately omitted in the Head Assistant Magistrate's order, though appearing in that of the Sub-Magistrate), and (2), that there was no power to imprison in default of payment of fine, as laid down in the High Court's Proceedings, dated the 7th December 1866 and 24th April 1873.

6. In reply to the first objection the Head Assistant Magistrate observes that "the use of the word 'restricted' (which is nowhere defined in the Act) in Section 25, where (as in Section 24) it is used in disjunctive juxtaposition to 'prohibited,' plainly shows that 'dutiable goods' may be 'restricted' by any law or notice (Section 23), although the words 'goods subject to a duty,' or restriction,

in Section 24 necessitate the inference that the terms 'dutiabie' and 'restricted' are not convertible; nevertheless, it is plain from Section 16, and indeed from the whole tenor of the Act, that the importation into British India of all dutiable goods is limited to certain places which are recognized by the Government as ports or harbours, and I apprehend that a man would not be legally justified in landing such goods at any other place along the coast. This provision is, to my mind, a restriction within the meaning of the section (24) * * *. The defendants, by landing foreign salt in the way they did, at night, on the sea-beach, at a distance from any port or harbour, did so contrary to restriction, and consequently the sentences passed under Section 24 were good in law."

7. However this may be, the appellate authority having fully agreed with the lower Court as to the truth of the facts stated and expressly admitted that they amounted to an offence ("smuggling") punishable under Section 194, under which section also the defendants were found guilty by the Magistrate who actually tried them, but which had merely escaped recital in the order passed by the Head Assistant Magistrate upon that finding, there seems no reason why the Session Judge should not have viewed this in the light of an error not affecting the justice and fairness of the original decision and confirmed the same under the provisions of Section 283, Criminal Procedure Code.

8. The second objection is a minor one, inasmuch as it affects only the legality of the imprisonment awarded in default of payment of fine, and not the conviction itself or the main part of the sentence; but even on this point the Head Assistant Magistrate's order seems, to my mind, to be right. The High Court's rulings quoted by the Session Judge apparently refer to such Acts as contain no provision on the subject, and not to the Sea Customs Act, Section 225 of which expressly provides for the award of imprisonment of the offender in default of payment of fine, as I cannot imagine that the High Court could have meant to cancel such an express provision of law.

9. The Session Judge's appeal decisions in question, having totally quashed the convictions in both cases, are likely to create a pernicious impression among the people, who do not understand the technicalities of the law, that smuggling of this kind, which already seems to be carried on to a great extent, is not punishable by law, and thereby tend to promote its still greater extension. If detections were, however, less infrequent it would have been easy to wait for the next occasion when we could secure another such conviction, avoiding the present immaterial error, and thus remove the impression left by the present appeal decisions; but as such opportunities are, from the extraordinary difficulties in the way of detection, very rare, they must, if left uncontested, seriously affect the interests of Government. Under these circumstances, I trust that the Government will be satisfied of the necessity for moving the High Court to reverse the appeal decisions in question and uphold the original conviction.

10. Copies* of the original and appeal decisions, and translations of the Calendars of the 2nd-Class Magistrate who tried the cases, are enclosed.

* Enclosure II. to VII.

Under the provisions of Section 272 of the Code of Criminal Procedure the Governor in Council resolves to direct that an appeal be preferred to the High

art by the Government Pleader from the judgment of acquittal passed by the Session Judge of South Canara in Appeal Cases Nos. 8 and 9 of 1873 on file, being Calendar Nos. 15 and 17 of 1873, on the file of the Head Assistant Magistrate.

2. The Magistrate of the district will furnish Mr. Handley with all information necessary for his guidance, and the Board of Revenue will watch the case and advise the Government Pleader fully on the subject.

(True Extract.)

W. HUDLESTON,
Chief Secretary.

84. From J. W. HANDLEY, Esq., Government Pleader, Madras, to the Hon. D. F. CARMICHAEL, Acting Chief Secretary to Government, Fort St. George, dated Madras, 8th April 1874, No. 38.

With reference to the Proceedings of Government in the Judicial Department noted in the margin, directing an appeal to the High Court against the judgment of acquittal passed by the Session Judge of Mangalore in a case of salt-smuggling, I have the honour to report that I filed the appeal accordingly and the same was disposed of on the 31st ultimo by the Chief Justice and Mr. Justice Holloway, the case having been first heard and the record sent for on the 17th February.

2. The Court held that the Session Judge was right in holding that the persons could not be convicted under Section 24 of the Customs Act because the importation of salt was not restricted within the meaning of that section, but wrong in holding that the Act gave no power to enforce payment of a fine inflicted under Section 194 by imprisonment; on the contrary, Section 225 of the Act makes it obligatory upon the Magistrate to fix a term of imprisonment in default of payment of any fine inflicted under the Act. The evidence clearly showed grave offences against the Customs Act had been committed and but for the erroneous procedure adopted there could be no doubt a conviction would have been the result. But the charge upon which the prisoners were tried and convicted was under Section 24 of the Act, which clearly did not apply, and it was impossible to say that the Session Judge was wrong in law in reversing a conviction which was thus admittedly bad in law. He might have exercised a wiser discretion if he had borne in mind the provisions of Section 282 of the Criminal Procedure Code and not reversed the Magistrate's sentence merely because of a technical error in the charge, which probably did not prejudice the prisoners in their defence. But this was a matter within his discretion with which the High Court should not interfere. The case was, therefore, not one for the exercise of the Court's powers, under Section 272 of the Criminal Procedure Code, of disturbing a judgment of acquittal—powers which the Court was of opinion should only be exercised in the gravest cases. The appeal was, therefore, dismissed.

3. This case shows the importance in prosecutions under the Customs Act of framing the charges properly, and I would suggest that in all important cases, where there is any difficulty as to the precise offence committed under the Act, reference should be made to the Law Officers of Government.

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4. Another irregularity of procedure appears to have occurred in the present case which contributed to the failure of justice. The case, or rather cases for there were two arising out of two separate transactions, was first tried before the 2nd-Class Magistrate of Udipi, and before him the charge, though not very precise in its terms, did refer to both Sections 24 and 194. After hearing the evidence and recording a finding of guilty against all the accused with a few exceptions he sent the cases up to the Head Assistant Magistrate, under Section 46 of the Criminal Procedure Code, that a higher punishment might be inflicted than was within his own powers. The Head Assistant did what was quite unnecessary under the section, viz., framed a fresh charge and tried the cases over again *de novo*, and he unfortunately omitted all reference to Section 194 of the Customs Act. It should, I think, be understood that, when a case is sent up by a Magistrate to one of higher grade under the above provision of the Criminal Procedure Code, there is no necessity for a fresh trial. The section no doubt empowers the higher Magistrate to hear the evidence again himself, but only for the purpose of satisfying himself that the finding of his subordinate is correct, and it is certainly not intended that the case should be treated as if the charge were instituted for the first time before the higher grade Magistrate.

5. I think it right with a view to future cases to call attention to what appears to me to have been another error of procedure in these cases, which if noticed by the Courts would have been completely fatal to the convictions. By Section 218 of the Customs Act the power of adjudging penalties for certain offences under the Act, amongst which those the subject of the present case appear to be, is given to the officer in charge of the Custom-house, and Section 222 expressly exempts offences cognizable under Section 218 from the jurisdiction of the Magistracy. Apparently, therefore, the proper procedure in the present case would have been for the Customs Officer to have adjudged the penalty in the first instance and then, if necessary, to have applied to a Magistrate under Section 224 to enforce the fines by imprisonment. This again may often cause a difficulty in prosecutions under this Act, for the effect of these sections seems to be that where the Customs Officer has jurisdiction to adjudge a penalty the Magistrate has none.

No. 85.

ORDER THEREON, 18th April 1874, No. 678.

Ordered to be communicated to the Magistrate of South Canara and to the Board of Revenue with reference to G. O., dated the 30th October 1873, No. 1727.

2. Ordered also that the Government Pleader's letter, together with the Government Order above referred to, be communicated to all Magistrates and their attention expressly drawn to paragraph 3 of the Government Pleader's letter.

(True Extract.)

For Acting Chief Secretary.

To the Board of Revenue.
,, all Magistrates of districts.
,, the Revenue Department.
,, the Government Pleader.

Exd. A. S. Rodgers.

5/11/1874

N^o 1412.
Revenue Department
Govt. of 1874 Madras.

JUDICIAL.

To

THE BOARD OF REVENUE,

&c.,

&c.,

&c.

Dated April, 18th.

Recd. 1 May/74.

Encl.

G. O., 18th April 1874, No. 678.

APRIL.

Nos. 84-85.

Self-smuggling.—The Government Pleader's Report of the result of the appeal to the High Court against the judgment of acquittal passed by the Acting Session Judge of South Canara in certain cases of self-smuggling, communicated to the Magistrate of South Canara and to all Magistrates and their attention drawn to the remarks of the Government Pleader in paragraph 3 regarding the proper framing of charges in prosecutions under the Customs Act.

1874
sd/sd
4 May/74