DESPATCH

No. 662
1905
Dec.

(Subject.)

re a of dlle Cormick
complaint agst Administration

Ir copy of report by Judge Hamilton & of judgment delivered by the Court of appeal

(Minutes.)

Mr Risley
Mr Read

There is no reasonable doubt that these two men Mr Cormick & Mr Lush were capable of rogues & that the 6 mos imprisonment to which they were sentenced for labelling their native boys to compel the × girls to labour against their will was a good deal less than they deserved. They have since had 6 mos imprisonment for gaol breach.

× They were no doubt guilty of much worse malpractices

We may very highly approve the Comm^r's action in Mr Cormick's and

to H. Mc Cormick (who addressed Mr Morley on the subject), that the petition has been carefully considered by Lord Elgin, who has received a report from the Commr on the subject, and that he sees no reason to advise the Commr to amend the sentences in whole or in part.

You will see that two of the evidence against the conviction which was considered & rejected by the Court of Appeal was that the accused were tried before a jury instead of common & that the notice calendars were not the same as in the Nelson case. It will be well to put these elementary matters on a surer basis when we settle

Upr
H.J.R

VB Please have a copy of the judgment made and sent to me as soon as possible, in order that I may transmit it to the Treasury solicitor privately. I think counsel for the Crown in the Cockburn appeal may find it of use for their assignment

H.R. 25/1

H.J.R
25/1

Mr Anderson
Refer and return

HBB
25/1

HBB Jan 27
Told
1/2 accordingly.

Commissioner's Office,
Mombasa,
December 27th

EAST AFRICA PROTECTORATE.
No.668
(Incl.1.)

My Lord,

With reference to Mr.Lyttelton's despatch No.487 of the 2nd ultimo transmitting a complaint against the Administration of this Protectorate preferred by one A.Y.McCormick I have the honour to enclose herewith copies of the report on the case furnished to the Court of Appeal by Judge Hamilton and of the judgment delivered by that court.

2. It appears from these papers that Mr.McCormick was justly punished for a very serious offence, but that, but for lack of evidence and the difficulty experienced in obtaining a conviction against a European where natives are concerned, he would have been

The Right Hon.
The Principal Secretary of State
for the Colonies,
Downing Street,
LONDON.

been found guilty of even graver charges.

3. There is nothing more calculated to injure our prestige and create disturbances in outlying districts than the conduct of so-called traders like McCormick. They are extremely difficult to apprehend and perhaps even more difficult to convict. When therefore a charge is proved against one of them the sentence should be exemplary.

4. As regards the condition of the Nairobi jail Mr. McCormick's remarks, I need scarcely say, are entirely misleading. It is not a magnificent building and is very possibly rather hot, but it is of course kept perfectly clean. It is the only up-country jail in which Europeans can be confined, and if they have to serve long sentences, they are always brought down to the Mombasa Prison, where Mr. McCormick now is.

I have the honour to be,

With the highest respect,

My Lord,

Your Lordship's most obedient,

humble servant,

Percy Girouard

been found guilty of even graver charges.

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4. As regards the condition of the Nairobi jail Mr. McCormick's remarks, I need scarcely say, are entirely misleading. It is not a magnificent building and is very possibly rather hot, but it is of course kept perfectly clean. It is the only up-country jail in which Europeans can be confined, and if they have to serve long sentences, they are always brought down to Fort Jesus Prison, where Mr. McCormick now is.

I have the honour to be,

With the highest respect,

My Lord,

Your Lordship's most obedient,

humble servant,

Hayes Sadler

C.O.
1945

Out District Sessions Case No. 2 of 1945 at
H.B. [illegible] Appeal for Eastern Africa at Nairobi.

Criminal Appeal No.4 of 1945.
Report in the case of

McCormick and
Rex v.
Woleish (alias Munro)

The two accused were committed for trial by Mr. Bate, Sub Commissioner, Fort Hall on 26th January 1945 on the following charges:-

(1). (Both) entering outlying district without leave. There being two separate offences charged against Woleish under this head.

(2). (McCormick) shooting an elephant without a license.

(3). (Both) omitting to attend in answer to a summons.

(4). (Both) kidnapping women knowing it likely they would be forced into illicit intercourse.

(5). (Both) in the alternative with kidnapping minor girls from lawful guardianship.

(6). (Both) with unlawfully compelling women to labour against their will or with abetting these boys in so doing.

(7). (Both) with deceity with murder.

These charges did not arise out of one set of events, but a series of independent actions which took place at intervals of time on a safari lasting some months.

A special sitting of the Sessions Court was held at Nairobi on 4th March for the trial of the case to prevent delay.

Both accused were defended by counsel, and tried

by a jury of five Europeans.

The trial was by agreement divided into parts, and the Crown Advocate having withdrawn the charge of omitting to attend in answer to summons, the charges of the Outlying District and Game Regulations were taken first.

The accused were acquitted on both counts by the jury, though my own opinion is that they should have been found guilty of a breach of the Outlying Districts Regulations.

They were then tried on the charges of kidnapping and unlawful compulsory labour which arose from their having taken certain girls from a native village and compelled them to join their caravan.

The jury found them not guilty on the charges of kidnapping but guilty in abetting their boys in unlawfully compelling the girls to labour against their will.

In this case I quite agreed, and I had very little doubt that had it not been for the influence of Mr. Keenan, who appeared as witness for the Crown, the behaviour of the accused in the wild country in which they then were would probably have led to the natives putting the girls to death.

The last and most serious charge was that of murder and arose from the occurrence to which I have referred when the accused had the joined certain natives in making a raid on others and lifting their stock, in the course of which death was caused by gun shots the accused being the only persons there provided with fire arms.

The only evidence available being that of the

native accomplices the Crown rightly decided to withdraw the charge and a verdict of 'not guilty' was consequently entered.

All the offences alleged and particularly that on which the accused were found guilty took place many days march from the nearest Government station among savage natives where the ill considered action of one white man may very likely cause the death of the next innocent white man who follows in his tracks. I consequently passed a sentence of 6 months imprisonment with hard labour and a fine of Rs.500/- each and in default of payment 3 months additional imprisonment. Both prisoners are, I believe, Scotch and have worked as blacksmiths or boilermen.

An appeal was entered against the conviction and sentence, and I therefore on the 12th April ordered the prisoners to be admitted to bail pending appeal each in a surety of £100 with two sureties of £50, and bail were not forthcoming to be detained in Jail the execution of their sentence being meanwhile suspended.

Against this order Crown appealed alleging the bail excessive, and the Appeal Court varied the order by reducing the sureties to £50 each. Before the return, however, of the order of the Appeal Court both the prisoners had broken jail and got away to the German frontier. The German authorities, I understand, refused to receive them and they were re-apprehended and brought back to Nairobi in July. They were at once charged before the Town Magistrate, Mr. Donald, with escape from custody and were sent to six months imprisonment with hard labour.

At this time the appeal from the original conviction before the Sessions Court was still pending. The Appeal have been heard in September but owing to the impossibility of forming an Appeal Court it was not in fact heard till the 14th. of October. It was then dismissed. A copy of the Judgment of the Appeal Court is attached hereto.

The prisoners were not sent to Zanzibar to appear in person on the appeal, of course that is never adopted unless on the special order of the Appeal Court.

W. Hamilton

18/12/05

IN H. M. H. COURT OF APPEAL FOR EASTERN AFRICA.

Criminal Appeal No. 4 of 1905.

A. W. MacCormick and E. A. McLeish.....Appellants.

versus.

The Crown.....Respondent.

J U D G M E N T.

12 October 1905.

This is appeal from the Nairobi Sessions held by Judge Hamilton at which the jury found the prisoner guilty of unlawfully abetting their boys in compelling three girls to labour against their will, for which offence the prisoners were sentenced to six months rigorous imprisonment and a fine of Rs 500 or in default a further three months.

The two prisoners have presented a proper petition of appeal drawn up by counsel but no one appeared in their behalf at the hearing of this appeal.

As however the appeal is a Criminal one we have duly considered all three grounds of appeal and will now deal with them in their order.

The first point raised that the Judge should have sworn in nine jury men and not five, as there is no order of the Local Government regulating the number as is required by Section 274 subsection (2) of the Criminal Procedure Code. The section is as follows:-

'In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than three, or more than nine, as the Local Government, by order applicable to any particular district or to any

IN H. M. COURT OF APPEAL FOR EASTERN AFRICA.

Criminal Appeal No. 4 of 1935.

A. V. MacCormick and E. A. McLeish.....Appellants.

versus.

The Crown.....Respondent.

J U D G M E N T.

12 October 1935.

This is appeal from the Nairobi Sessions held by Judge Hamilton at which the jury found the prisoner guilty of unlawfully abetting their boys in compelling three girls to labour against their will, for which offence the prisoners were sentenced to six months rigorous imprisonment and a fine of Rs.7500 or in default a further three months.

The two prisoners have presented a proper petition of appeal drawn up by counsel but no one appeared in their behalf at the hearing of this appeal.

As however the appeal is a Criminal one we have duly considered all three grounds of appeal and will now deal with them in their order.

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'In trials by jury before the court of Session the jury shall consist of such uneven number, not being less than three, or more than nine, as the Local Government, by order applicable to any particular district or to any

particular class of offences in that district may direct."

In our view this does not justify the prisoners contention that 9 any more than 3 is necessarily the numbe if no other is specified by the local Government, but it certainly raises a doubt as to whether a prisoner can be tried by jury at all until the Local Government have specified what they consider to be the right number having regard to local conditions and necessities of the country.

The prisoners however who were defended by counsel though objecting to the number neither objected to be tried by jury in the Court below or nor do they now set up in their memo. of appeal that they should have been tried by assessors rather than by a jury.

We have therefore to decide whether in spite of the absence of such an objection this trial is to be set aside on the ground that until the Local Government fix the number no trial by jury can be held in East Africa. On the whole though the subject is not free from doubt we are of opinion that we ought not to send back this case for retrial on that ground and for the following reasons:-

By Section 11 (a) of the East Africa Order in Council 1897 it is enacted that:-

"Subject to the other provisions of this order and to any treaties for the time being in force relating to the Protectorate, Her Majesty's Criminal and Civil Jurisdiction in the Protectorate shall, so far as circumstances admit, be exercised on the principles of and in conformity with the enactments for the time being applicable as hereinafter mentioned of the Governor General of India in Council and the Governor of Bombay in Council and according to the course of procedure and practice observed by and before

the Courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction and authority etc."

In Bombay the proper number of jurymen has been fixed at 9 and in no parts of India has a greater number been fixed) and up to the date of the 1902 order in Council the Court in East Africa also in practice adopted the number five thus presumably following the procedure of Bombay in accordance with the terms of the said section 11. In 1902 the East Africa Order in Council of ~~1897~~, but it contains a provision in section 28 that where other provision is not made by Ordinance any law practice or procedure established by or under the said repealed order shall remain in force until such other provision is made. As therefore there is no ordinance dealing with this matter it would seem that the old practice and procedure of calling 5 jurymen remains in force. For these reasons it seems to us especially as the prisoners raised no objections to being tried by jury (and there can be no doubt it is the most suitable form of trial for a European accused of a serious offence) that there was justification for fixing the number at 5 and we do not think the verdict should be set aside on that ground. At the same time we think the question of the number should be fixed without delay by the Local Government in accordance with section 274 of the Criminal Procedure Code so there may be no possibility of doubt in such important matters.

The second point as to the ~~[illegible]~~ of the native witnesses also raises a point of some difficulty. The Indian Oaths Act which by the East Africa Order in Council has been made part of the law of the land laws down in

Sections 5 and 6 that all persons with certain exceptions (these natives not being one) shall make an oath when examined as witnesses.

It is however in evidence that the natives from upcountry do not understand the nature of an oath, and not being Christians, Mohamedans, Hindoos, Buddhists or Parsis but being mere savages with no sacred writings of any sort it is difficult to know on what they could be sworn. No form of binding oath was suggested by the prisoner's counsel nor so far as the experience of this Court goes does one exist.

On the other hand it is clear from Section 6 of the Indian Oaths Act that they are not within the exception of those people who are allowed to affirm and this is admitted by the prisoners in their memorandum of appeal. There seems therefore no other course open to the learned Judge than to proceed in the way in which he did. Even if he were wrong in not swearing them in accordance with Section 11: Section 13 lays down that no omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered shall invalidate any proceeding or render inadmissible any evidence whatever and this has been construed by the full Court of Bengal in Reg. v. Bepu Bhogta I.L.R. 14 Benkal page 846 to cover any kind of omission intentional or otherwise. This was approved and followed by the Court of Bombay in Reg. v. Bhara I.L.R. 16 Bombay page 203.

It is true that Courts of Madras and Allahabad have held the contrary in 10 Allahabad page 814, 11 Allahabad page 163 and in Madras page 103 but we prefer to adopt

the decisions of Bombay and Calcutta both on account of their superior weight and more especially because, as we have already pointed out, East Africa Courts are to follow the course of procedure and practice observed by and before the Courts of Bombay.

The third point we have to deal with is as to the severity ~~as~~ of sentence. At first sight 6 months imprisonment seems to be a somewhat severe sentance for merely abetting an offence the punishment for which can only extend to one year. But having considered all the evidence and having regard to the fact that a locus poenitentiae was afforded to the accused on two occasions when Ntaro called to get the girls back ~~with~~ which opportunity they refused to avail themselves of and more especially to the fact that this refusal might have led, but for the self-control ~~and~~ which to considerable bloodshed on one side or the other followed by other serious troubles we do not think the sentance is unduly severe.

We therefore dismiss the appeal and confirm the conviction and sentence.

Dated 18th October 1905.

(Sgd.) Lindsay Smith.

(Sgd.) J. W. Morison.

(Sgd.) Arthur Vincent.

True Copy.

(Sgd.) J. W. Morison.

Asstt. Judge

for Registrar of H.B.M. Court

of Appeal for Eastern Africa.

I Certify that this is a true Copy of the original

Robert Ward

18/Oct/05 Deputy Registrar

Enclosure

in Col. J.H.Sadler's despatch

No. 662 of December 27th 1905.

Comm
1945 Jan

EAP

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DRAFT.

Hugh Mc Connach Esq
49 Virginia St
Glasgow

MINUTE.

Mr. Eddis
Mr. Ryan
Mr. Antrobus
Mr. Orr
Mr. Lucas
Mr. Graham
Sir M. Gwynne
The Duke of Marlborough
Mr. Lyttelton

2 Offices

DRAFT.

EAP

Lord Hyde Parker etc

MINUTE.

Mr. Lucas

Mr. Ryan

Mr. Astrobury.

Mr. Cox.

Mr. Lucas.

Mr. Graham.

Sir M. Ommanney.

The Duke of Marlborough.

Mr. Lyttelton.

8 February 1906.

Sir

I have the honour to
acknowledge the receipt
of your despatch No 62 of
the 27 of December 1905,
enclosing certain papers
relating to the case of
one A.Y. McCormick now
undergoing sentence in
Mandalay Prison.

2. I have carefully
considered the petition
presented by the prisoner,
as therein requested,
but I am unable
to advise His Majesty
to exercise the prerogative
of mercy in his favour.