

Courts 3085
(15)
97

From whom

Chief Magistrate 1649

Place

R.L.

97

L. Adv. 315
77

Date

16. 6. 97

Order from the Judicial Comm's Court to the Magistrate
Kampor to shew cause why a Mandamus should not
issue directed him to allow ~~an~~ advocate to appear in
his Court in Criminal Cases. Asks if the Legal Adviser may be
instructed to shew cause in the matter on behalf of Govt.

FORMER PAPERS.

MINUTES

FINAL PAPER.

1899-97 ✓
490-97 ✓
5624-93 ✓
3067-92 ✓

By Resident.

Place in the hands of the L.A. accordingly
W.H.

L.A. Filed.

I shall be obliged if you will shew cause against
this order on behalf of the Govt.

1897
29. 6. 97

J. H. L. L. L.

1. I should like to have, as soon as possible, a copy of
Mr. Jagan's affidavit in which the order to shew
cause was granted. This could be obtained from the
Court officials, if you direct it.

2. Are there any experienced officials here, who will
make affidavits as to lawyers now having been
allowed in the Courts?

3. Are there any wanted cases in which lawyers
have asked leave to appear and not leave has been
granted? I mean cases prior to 1903.

5624-93

1- JUL 97

T. W. H. L. L.

30/6/97

(Ch. of the State Council must
 see, the report comes under 6.
 to be read at once section 245
 of the Statute ^{to be read at once} (Crime: Peace Code)
 In legislation ^{of the State} President of new meant
 to admit Congress to all the Coms
 and it is only through the power
 made of legislation ad hoc that the
 difficulty has arisen T.H.)

SECRETARY'S
 1-JUL-97
 39/5/97
 read 6. pp. attached.

President.

As a Council meets on later.
 say, I submit this - with reference
 to the P.S. at once. Ch. 6.7

Court

2. He tells me also
 that he recently
 refused a similar
 application from
 Mr. Stewgill, after
 reference to Mr
 A. A.

3. Please supply,
 the A. will all
 information &
 assistance in
 your power

15.7 JK

read 19.

Legal Advisor (to await return)
 I send you these papers
Ch. 6.7
 30.7

Read 21.7.97

I have spoken to the
 Rt General about
 this & he agrees
 with me in thinking
 that it will be better
 to allow this question
 to be just argued in

Gov. Council.

He will then give the judgment about
 you kindly had type-written for me.

T. H. K. H. H.

SECRETARY'S
 29 JUL 97
 39/5/97

President Ch. 6.7

Minute paper No. 3085-

Sheet No.

97

663
20-97

Let Mr. C. M. [unclear] this, & inform
all magistrates that, pending
further instructions, a prisoner
may be defended by counsel
in any criminal case.

J.R.

Chief Magistrate [unclear]
[unclear]

21.

[unclear]

[unclear]

2. I put up a copy of circular issued to Mag^s on
the subject.

a.k.



Present [unclear]
[unclear]

[unclear]

J.R.

[unclear]

[unclear]

4036

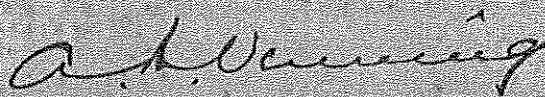
97

Circular to Magistrate.

By an order dated 14th June 1897 the Magistrate Kuala Lumpur was called upon by the Judicial Commissioner to shew cause why a Mandamus should not issue directing him to allow the appearance of Advocates in his Court in Criminal cases.

The case came on for hearing on 26th July, when the Judicial Commissioner decided that the Mandamus should issue.

Section 246 of the Criminal Procedure Code is therefore ruled to be in force in all the Courts of this State.



Az: Chief Magistrate.

Selangor.

Kuala Lumpur,

5th August 1897.

N^o 1649
97

Count 3085

Court House

Kuala Lumpur

DATED

16 June

1897

SUBJECT

Sir,

Referring to your

No.

I have the honour to

forward a copy of an order from the Judicial Commission Court to J. Belfield Esq. Magistrate, Kuala Lumpur, to shew cause why a mandamus should not issue directing him to allow the appearance of Advocates in his Court in Criminal cases.

2. Section 245 of the Criminal Procedure Code is as follows: "Subject to the provisions of Section 7, every person accused before any Criminal Court may or may not be defended by an Advocate."

3. Section 7 alluded to does not affect the present question.

4. In May 1892, a circular was addressed to Magistrates & others requiring them not to admit lawyers to the Court except as silent spectators, and this practice has continued up to the present time except in the newly created Judicial

To The Government Secretary
Kuala Lumpur

Commissioner's Court and in the Chief Magistrate's Court to which advocates have recently been admitted to practise.

5. The Criminal Procedure Code on which Mr Joaquin relies was introduced as law in this State "so far as applicable" by Regulation XI of 1893 Section 26, subject to the provisions ^{of the} Regulations &c: passed by the State Council "and having regard also to established local custom."

6. There can be no doubt what the "established local custom" is, and I think it should be maintained, at any rate for the present.

7. If the Government holds this view, I shall be glad if the Legal Adviser may be instructed to show cause in the matter on behalf of Government.

I have the honour to be,

Sir,

Your Obedient Servant

A. A. Manning

Ag. Chief Magistrate

Cont 3085

97

Cof 4

In the Judicial Commissioner's Court, Kwala Lumpur, Selangor
In the matter of Section 245 of the Criminal Procedure Code and
In the matter of John Parsic K. Joaquim Esquire, Barrister-at-Law, of the Middle Temple, London, England and an Advocate and Solicitor of the Supreme Court Straits Settlements and the Judicial Commissioner's Court, Kwala Lumpur, Selangor.

Upon hearing Mr John P. Joaquim and Messrs Hewgill and Page and upon reading the affidavit of the said Mr John P. Joaquim sworn to this 14th day of June 1897. It is ordered that J. Belfield Esquire Assistant Magistrate of Police, Kwala Lumpur Selangor, do show cause within six weeks from the service of this Order on him why a mandamus should not issue directing him to allow the appearance of advocates in his Court in Criminal Cases.

Dated this 14th day of June 1897

S^r: Lawrence Jackson

Judicial Commissioner
Kwala Lumpur Selangor.

In the Judicial Commissioner's Court,
Kuala Lumpur,
S e l a n g o r.

*Case argued 26th July 1957
Judgt. allowed 27th July 1957.*

In the matter of Sec:245 of the Criminal
Procedure Code, and

In the matter of John Parsick Joaquim, Esqre,
Advocate.

There seems to me to be in this case two questions to be decided.

1. Did the Straits Settlements Criminal Procedure Code, Ordinance VII of 1892 by sections 7 and 245 give Advocates in those F.M.S. in which the Code is adopted a right of Audience in any Criminal Court of the State, and
2. Does the express power given by the Legislature to admit Advocates to the Judicial Commissioner's Court by implication exclude the right of Advocates to appear in other Courts.

As to the first point the S.S. Criminal Procedure Code, 1892, provides by sec:245 that "every person "accused before any Criminal Court may of right be defended by an advocate" and sec.7 provides in every case where on special grounds the public are excluded from any Criminal Court that "the Advocate(if any) of the "Prisoner shall not be excluded without the fiat of the "Attorney General" (there is no such Officer in the F.M.S) "given on grounds of Public Necessity in the interests of "Public Policy to be stated in the fiat."

This Code and these sections were made the Law of Selangor by Reg:XI of 1893 with, in section 26, this limitation:- "subject to and having regard also to established local custom."

For

(2)

For all these States it is contended that there is an "established local custom" by which the Advocates' right of audience is restricted and, until lately, abrogated and that this is shown both by the universal practice of the Criminal Courts and by the Selangor Executive Orders and Notifications 1895 (Circular of 17.5.92) page 59

This reference is to a Circular by the Acting British Resident of Selangor in sec. 2 of which he declares "the settled policy of the Government of the Protected Native States not to admit Lawyers to practise in the States".

To this it may be answered that the universal practice of the Criminal Courts to exclude Advocates is the consequence of this Circular and that no established local custom is shown by a declaration of Government policy followed by a refusal to hear foreign Advocates and that all Advocates were foreign in the Protected Native States (now the F.M.S.) until last year; that whatever the virtue of this Circular of the 17th May 1892, it was wholly illegal and inoperative, because without legislative sanction, it ~~was~~ not merely directs the ^{magistrates to deny the} right of every person accused to be defended by an Advocate but further by sec. 3 actually disqualifies a particular class from being appointees under Powers of Attorney; further it was answered that there could be no local custom established until local Advocates came into existence; that the acquiescence of foreign advocates who were in no way recognised by the State does not bind local Advocates who have been brought into existence and recognised by the State; and that the few months they have been in existence have not sufficed to establish a local custom or acquiescence against them.

For the purposes of my judgment, I take judicial cognizance of the following facts and circumstances:

1st.

1st. That the British Resident of Selangor in 1892 was then the Supreme Judge of that State; entitled to declare and interpret the existing law and to regulate the procedure and practice of the inferior Courts, but I no more believe he could create a custom than that he could promulgate a law.

2nd. I agree with the argument that "the settled policy of the Government of the Protected Native States" is not an "established local custom" within the meaning of sec. 26 of Reg. XI of 1893, but that, as a fact, the consequent directions contained in the Selangor British Resident's Circular of 17th May 1892 have been followed by the Magistrates both in Selangor and elsewhere in the F. M. S.

3rd. That until last year there were no Advocates in any of the F. M. S.; that foreign Advocates were not allowed right of audience in any of the States, but that since last year Advocates admitted to practise in my Courts have had right of audience there and, more lately, this has been extended to the Senior Magistrates' Courts in both Civil and Criminal cases.

The Affidavit sworn by the present Senior Magistrate of Selangor supports the findings which I have placed secondly and thirdly.

Now in my opinion there are many things necessary to constitute an "established local custom": Some of these constituents it is unnecessary to advert to for the purposes of the present case. But it seems to me that in order to establish a local custom to restrict or prohibit a thing the thing must be shown to be in actual existence. The custom could never have been disputed or called in question unless the thing is pre-existent. A merely suppositious state of things will not

not suffice. Now there were no Advocates in the F.M.S. till last year, no accused person could be defended by counsel without recourse to persons outside the State unrecognised by it and under no obligation to it. Therefore the Circular of 17th May, 1892, can not have been the judicial recognition of an "established local custom" but, as appears on the face of it, it was a declaration of a "settled", i.e., as I read it, a predetermined "policy" coupled with directions to the Selangor Magistrates as to what they should do in future circumstances of which Government had pre-vision and, although the Magistrates in all the F.M.S. until this year declared that they would not hear Advocates, I do not think that that constitutes a custom because it was as regards Selangor in obedience to a mistaken interpretation of the law and in ~~deference~~ ^{deference} to a declaration of Government Policy. What may be the operation of sec. 3 of this circular I am not, now called upon to decide. What I do decide is firstly that the Magistrates refused to hear advocates not in accordance with a custom arising from and growing out of universal local assent but in deference to a declaration of Government Policy based, as it seems to me, on a misconception of the existing law; secondly because there were no Advocates to hear until last year and further because the time which has elapsed since the existence of advocates is too short to establish a "local custom". I quite agree that this period, as the Legal Adviser contended, and as the Indian cases which he cited show, can not be as long as is required in England but the time which has elapsed since the recognition of Advocates by the F.M.S. seems to me upon any view of what may be necessary to be insufficient.

The suggested acquiescence of Advocates seems to me immaterial. They know they could not claim to be Advocates

(5)

Advocates in these States, that the Government had ordered its officers not to grant them the right of audience, and even if they did not contest the Orders of Government I do not think such ~~acquiescence~~ ^{acquiescence} under such circumstances can bind the Advocates who are now recognized by the F. M. S.

Again, one of the requisites to an established local custom is that it should be universal within the alleged local limits, but in this case sometime after Advocates came into existence in the F.M.S. they were granted audience in the Senior Magistrates' Court, so that, even if an "established local custom" to exclude Advocates from Criminal Courts ever could have been shown, it has been abrogated and become partial both by Legislative Admissions of Advocates to my Court and by arbitrary change of Policy in the Senior Magistrates' Court. A third essential to establish a "local custom" is that it should be reasonable, but I can not say that I think a "local custom" not to admit lawyers to practise in the Criminal Courts of the States would be unreasonable, because I know that till within what in legal memory is a comparatively recent period, it was thought reasonable even in England for accused persons to be ~~deprived~~ ^{denied} the right of defence by trained Advocates even when prosecuted by the Attorney General and all the resources of the Crown, and also because I know that humane persons of greater authority than myself, much more conversant than I am with the needs of the States, the conditions of Criminal business in the States, and the circumstances of accused persons in the States, think otherwise. At the same time, although I do not think I ought to act upon it judicially, I think I ought not to shirk the duty of saying that I do not myself think it reasonable to deprive an accused person of the services of a trained Advocate

even

even in the lowest Criminal Courts if the accused person is able and anxious to avail himself of such services. The Legal Adviser in argument seemed to admit that it would be unreasonable to do so if the Government prosecuted by Counsel but not otherwise. I do not myself appreciate the distinction: ^{recognized when the right} it was not to be defended was denied to accused persons in England and some Police Officers are quite as familiar with the conduct of prosecutions as any counsel; I have known them far more eager for convictions than any Counsel and they are not subject to professional opinion and discipline. I do not know that we need consider anything but the needs of accused persons in such a matter as this, but I do also think that the services of an experienced and trained Advocate, subject to professional Rules and Professional opinion is not merely useful to his client, but even to the Magistrate; and in a greater degree the less instructed and experienced the Magistrate may be.

Owing to the former practise in England and the opinion of humane and experienced authorities in this country, I cannot say that a custom such as the one contended for by the Legal Adviser would be unreasonable, but for the other reasons I have given, I think that no "local custom" is established making nugatory the provisions of sec. 245 of the Criminal Procedure Code strengthened as that is by sec. 7 of the same Code.

With reference to the second question:

The Judicial Commissioner's Reg: 1396, sec 5 sub-secs: (a) and (b) empowers the Judicial Commissioner to make Rules for the admission of Advocates to his Court and for fixing their fees; other sections of the Regulation to provide for the hearing of Advocates in the Judicial Commissioner's Court and sec. 38 in particular provides

67

provides for the taking of additional evidence by a Magistrate and requires(sub-sec.III)that "the accused "or his Advocate and Solicitor shall be present when the "additional evidence is taken."

It may be argued for the State that the express authority to the Judicial Commissioner to make Rules for the admission of Advocates and the express concession of the right to be present when additional evidence is taken under sec:38 and sub-sec.III before the Magistrate in the specified cases,excludes by implication the admission of Advocates to other Courts or the right to be present in the Magistrates' Courts on other than the specified occasions. It seems to me however,that the Regulation confers a new ^{power} ~~right~~ to regulate the admission of Advocates to what did not exist before,namely, to a newly-created Court and to be present at a newly-created preliminary enquiry before Magistrates. The Legislature might of course prohibit and take away a privilege existing under the Civil Procedure Code but it has certainly not done so expressly by this Regulation;on the contrary when the Legislature creates a new Court and a new sort of enquiry it impliedly recognizes their right of audience, in the one case merely requiring the J.C.to make Rules for their admission to the new Court,also enacting that the Judicial Commissioner shall do certain things only after hearing them and in the other case enacting that they should have the right to be present;apparently in order to defend the accused person: thereby,as it seems to me,again recognizing their utility to accused persons and impliedly extending and enlarging the rights and

privileges

privileges of advocates to the new Court and these new enquiries. It certainly does not abrogate their rights ~~or~~ or substitute the new rights for the old ones expressly and should be very reluctant to diminish the facilities of defence or prosecution of the subject without express and unequivocal enactment. No such enactment has been brought to my knowledge in this case. On the contrary I think I can read a different intention in the sections of the Regulation to which I have referred. Both the creation of the Judicial Commissioner's Court and the process laid down by sec.38 of the Judicial Commissioner's Regulation 1896, sub-sec. III are new and it seems to have been thought that they required new provisions to extend the right of audience and of the presence of Advocates and Solicitors to them also.

It has been contended by the Legal Adviser that Advocates in this State are still foreign except as to the Judicial Commissioner's Court for their admission to which the Judicial Commissioner may make Rules, but they pay fees to the State, they are recognized in the Senior Magistrate's Court as much as in the Judicial Commissioner's Court, and upon enquiries under sec.38 sub-sec. III of the Judicial Commissioner's Regulation I therefore think that they are Advocates of the F.M.S. and as such entitled to whatever privileges the Law concedes.

Having regard to sec:245 of the Criminal Procedure Code, I think that one of these privileges is correlative to the right of every accused person before any Criminal Court to be defended by an Advocate and that the Selangor Legislature merely passed over in silence the existence of this right of audience in all previously-existing Criminal Courts and, impliedly recognizing this pre-existing right, it expressly gave what it believed to be as much a new or larger right in the Criminal Court and

upon

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upon the Criminal enquiries thereby created, as it undoubtedly gave in the Civil jurisdiction thereby created.

I think the Judicial Commissioner's Regulation must be read as giving additional rights of audience to Advocates in Criminal cases and not as restricting their rights or those of accused persons.

This Regulation is remedial and enabling and grants further facilities in the Administration of Criminal Justice both to the State and to accused persons. The implied permission given to admit to one Court and expressly to be ~~(be)~~ present on certain enquiries before Magistrates does not take away or impliedly prohibit admission to and the right of audience in other Criminal Courts; the provision of enlarged facilities does not prohibit whatever accused persons may have been entitled to before.

Upon this consideration of the two questions which it seems to me that I have to decide, I think the Mandamus must go but, as will be seen my opinion is of course limited to any Criminal Court in a State which has adopted this Criminal Procedure Code.

No minutes should
be written on this page.
Separate half sheet to be
used if required.

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ARKIB NEGARA MALAYSIA

NO. FAIL :

Courts 3085/1897

Lamp.

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