

is any very long delay in this country
 between the commission of a crime and the
 date of the trial. It is advised that the
 enclosed proposals, as they at present stand,
 should be construed in the same sense as the
 Imperial Act, but

It would, however, be glad if he
 might be favoured with Mr. Samuel's observa-
 tions in regard to the suggestion contained
 in the present correspondence, viz., that the
 age at the date of the commission of an
 offence should be regarded in determining the
 severity of the punishment to be inflicted upon
 young persons (other than those who are by virtue of sec 82 & 83 of the
 Criminal Code liable for commission of offences).
 I am, etc.

H. J. R.

EAST AFR. PROT
 6448

For
 Bedford 7
 1916
 7 Jan
 Previous Paper
 See file 6448

Postings of Junior Officers on
 from
 Deprecates growing practice of enquiries
 respecting

2 March 1916
 Answer 147

T. Raab
 Mr. [Name]

We must urge Sir A. B. [Name] & others
 to refrain from such enquiries in future
 but at the same time there is a
 certain amount of misunderstanding as regards
 the case of Mr. [Name] referred to
 which I shall like to clear up. When
 such enquiries are made it is nearly
 always - because the question of [Name]
 enters into the matter. No requirements
 for various parts of the [Name] differ
 widely and officers wish to get some
 idea of the provisions to which they are
 only in order to avoid [Name]

Next subsequent Paper.

the instructions in pursuance of which the Ordinances were enacted. I am to explain that the discretion given to the Court by these Ordinances to fix the age of the accused has been adopted generally in the tropical colonies and protectorates owing to the difficulty which is usually experienced of proving the age of ^{multiple} natives.

3. It will be seen that the question at issue between the Chief Justice and the Attorney General ^{of the Protectorate} is whether the provisions of the Ordinances interpreted in their strict sense are only applicable to a child or young person who, at the date of trial ^{and sentence}, is under the age of 16, or whether they may also be applied to a person who was under 16 years of age at the time of the commission of the offence ^{but on that age when known at the}.

4. I am to explain that the provisions of Sections 82 and 83 of the Indian Penal Code, which is ^{the} Penal Code of the East Africa Protectorate, sufficiently cover the case of persons in that Protectorate who are under 12 years of age. The provisions of the Sections in question are as follows :-

Section 82

Section 82 "Nothing is an offence which is done by a child under seven years of age".

Section 83 "Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion".

5. The question therefore ^{to} present ^{decision} at issue is whether in East Africa the benefit of the Penal Code Amendment Ordinances should be extended to a person between the ages of seven and twelve who is capax deli and also to a person between the ages of twelve and sixteen ^{should the Court} according to ^{be of opinion that he was under the age of 16} his age ^{in the opinion of the Court} at the time of the commission of the crime, instead of ~~at the time of trial.~~

6. Mr. Bonar Law apprehends that under Section 103 of the Children Act 1908 the age contemplated is the age at the time of sentence. He presumes however that it is only on exceptional occasions that there

Downing Street,
London, W.
February, 1916.

Sir,

I am directed by Mr. Secretary Bonar Law to transmit to you, for the consideration of Mr. Secretary Samuel, the accompanying copy of a despatch from the Governor of the British East Africa Protectorate, ~~enclosing copies of correspondence from the Chief Justice and the Attorney General,~~ relative to doubts which have arisen in the Protectorate as to the correct interpretation of certain provisions of the Penal Code Amendment Ordinances 1909 and 1910.

2. I am to enclose copies of the two Ordinances in question which are founded on Section 103 of the Children Act of 1908 (8 Edward 7 Cap.67) together with copies of a Circular despatch dated the 17th of February 1909, which contained

the

DRAFT.

SECRETARY OF STATE,
HOME OFFICE.

TE.

Mr. Macnaghten 28/2/16

Mr.

Mr. Risley 28/2/16

Mr. Harris 29/2/16

Sir G. Fiddes

Sir H. Just

Sir J. Anderson

Mr. Steel-Maitland

Mr. Bonar Law

Hand 14555

NO 1004
NO VI 2410
Circular 28/2/1909
Copy No 268. 10-2-16
14555-6

Gov. of E.A.P. No. 16 6 Jan. 1916

No X of 1904
No VI of 1910

Circular 28/2/1909

Sub

Repeal.

3. The Penal Code Amendment Ordinance,

1910, is hereby repealed.

ndant.

2. Section 3 of the Principal Ordinance is hereby repealed and the following Section substituted therefor:-

3. In this Ordinance the term "young person" shall mean any person who in the opinion of the Court was under the age of 16 at the time the offence was committed.

Short Title.

1. This Ordinance may be cited as "The Penal Code Amendment Ordinance, 1915" and shall be read as one with the Penal Code Ordinance, 1909.

referred to as the Principal Ordinance.

A BILL

INTRODUCED

ORDINANCE TO AMEND THE PENAL CODE
1909.

Enacted by the Governor of the East Africa
Protectorate with the advice and consent of the
Legislative Council thereof.

opinion incorrectly interpreted the intention of the legislature as expressed in the Penal Code Ordinance 1809. The intention is that no person under 16 years of age shall be condemned to death and not that no person shall be sentenced to death for an offence committed by him when under 16 years of age.

S. J. W. BARTH

ATTORNEY GENERAL.

B.

8.

opinion is in conflict with the terms of the Ordinance, and has asked that the law be amended in the direction indicated in the preceding paragraph on the ground that the accident of the date of the trial, which may and often does, in native cases, occur some years after the offence, ought not to affect the position of the accused if in fact he were under 16 years of age on the date of the offence. It is suggested that such a case should have the protection afforded by the Penal Code Ordinance, 1909.

The principle underlying the suggestion of the Chief Justice appears to be founded on grounds different from those underlying the law in England, i. e. the Children's Act 1908, on which the Penal Code Ordinance, 1909, is based, vide Section 103 of the Act. The law in England has for its object the prevention of the infliction on young persons of the more severe punishments provided by law and the age of the accused at the trial is the factor which decides whether or not the provisions of the Act apply. The principle adopted by the Chief Justice is presumably that a young person is not mentally as responsible as a person of some mature age and that therefore the age at the date of the commission of the offence should be looked to. This point of view seems an advance on the existing law and has much to recommend it.

5. It is in view of this difference of principle that I suggest the opinion of the Secretary of State be obtained.

6. It will be seen that the Chief Justice in his minute of the 14th instant (vide para 5) has in my

advised

N. 564/15.

December 20th 1926.

The Hon: Chief Secretary,

Reference No. S. 1311/16.The Penal Code Ordinance, 1909.

In view of the Chief Justice's remarks I am of opinion that the suggested alteration of the law might be considered and I enclose a draft Bill. It would be advisable to obtain the views of the Secretary of State before introducing the Bill.

2. The object of the Bill shortly is to provide that no person who was in the opinion of the Court under the age of 16 at the date the offence was committed shall have sentence of death pronounced on or recorded against him.

3. The reason for the amendment is that in two instances the High Court has dealt with accused persons who were, when tried, over the age of 16 but who were when the offence was committed under the age of 16 as if such persons came within the definition of a "young person" in the Penal Code Ordinance, 1909, as amended by the Penal Code Amendment Ordinance, 1919. The Chief Justice has stated that in his opinion the construction adopted by the High Court is straining the terms of the Ordinance; such construction in my opinion

3. This reading of the Ordinance formed the subject of discussion between us and I was then of the opinion as I still am that such a construction of the ordinance was a straining of its terms.

In the case in question, however, when faced with a similar set of circumstances I preferred to place a similar construction on the ordinance rather than to read it in its more obvious sense and give a contrary ruling to that which had already been given. At the same time I decided to take the opportunity of asking for the Ordinance to be amended.

4. I agree with the Honorable the Attorney General that there must always be difficulties in correctly ascertaining ages or periods of time from native evidence, but there are not infrequently extraneous circumstances alluded to, as in the present case the Measi move from Laikipia, which enable the Court to arrive with sufficient accuracy at the approximate date at which an event took place.

5. If it is the intention of the legislature that no persons shall be sentenced to death for an offence committed by him when under the age of 16 I submit that it should be left to the Court to say whether in its opinion the accused was under 16 years of age at the time of the offence rather than as now whether the accused is under 16 years of age at the time of the trial.

6. I forward herewith the file of the case as requested.

Sd/- R. W. HAMILTON.

Chief Justice.

HIGH COURT

Bombay,

14th December, 1915.

The Honourable

The Chief Secretary,

Bombay.

Reference your two Memorandums 13111/13/14

of 9th December 1915

Criminal Case No. 69 of 1915

Rex vs Nakutu Kutori.

With reference to the Memorandum by the Honourable the Attorney General I have to state that this is not the first occasion on which the High Court has found difficulty in giving effect to the provisions of the Penal Code Amendment Ordinance 1909.

2. In the case of Sangol Arap Torci tried by Honham Carter J. in 1913 on a charge of murder it was found as a fact that the murder was committed in 1908, and the learned Judge in his report on the case stated

"I sentenced the accused to be imprisoned during His Majesty's pleasure in accordance with Ordinance No. 10 of 1909, as I was of opinion that he was under 16 years of age when he committed the crime".

age of an accused when he committed the offence if the date of such offence cannot be fixed by the evidence before him. A year to a native conveys nothing but a season or a 'long time' and when an event has happened more than a few months before, in my experience, it is absolutely impossible to get a native to give even an approximate idea of the time which has elapsed between the event and the trial.

The Chief Justice provided for the hard case before him by stretching the construction of the law. I am unaware if any other such case has arisen or whether it is considered likely that many such cases will arise to make the suggested alteration of the law a necessary measure. If the Chief Justice thinks that the difficulties I have suggested are magnified or can be overcome then I agree that the proposed Amendment is desirable.

Sd/- J. W. BARTH.

ATTORNEY GENERAL .
B.

.512/15

November 30th, 1915.

The Hon: Chief Secretary,

Reference No.S.13111/06 of the 26th instant.

re Criminal Case No.69 of 1915

Re: v/s Nakutu Kuteri.

In response to your above minute I agree with the Chief Justice in thinking that he has gone beyond the letter of the Ordinance. The suggested amendment of the Ordinance, however, would I fear be somewhat hard to administer on account of the difficulty in native cases of fixing time, complicated by the fact that no native knows the date of his birth.

2. I venture to disagree with the Chief Justice's last sentence. The Ordinance as drafted does not appear to be at all ambiguous. A "young person" is defined as any person "who in the opinion of the Court is under the age of sixteen" (vide the Penal Code Amendment Ordinance, 1910, Section 2). That is to say the accused must be when before the Court in its opinion under sixteen years of age to receive the benefit of the Penal Code Ordinance, 1909.

3. There is much to recommend the Chief Justice's proposal based on the facts of the case before him but it is asking rather much of a Judge to estimate the

Looked at from this point of view the case does not appear to be one that calls for a long period of detention in prison and I submit that it is open to Your Excellency under the Ordinance to direct that he should reside at a particular place under the control of a District Officer where his energies might be guided into a useful channel.

5. In construing the terms of the Penal Code Ordinance as I have done it is possible that I have gone beyond the strict letter of the Ordinance, which says that "no sentence of death shall be passed on a person who in the opinion of the Court is under 16 years of age".

Read in the Ordinary sense this would mean under 16 years of age at the time of passing sentence, but I have read it as though it applied to a person under 16 years of age at the time of the commission of the Offence. Otherwise, as in the present instance, owing to a delayed trial a boy might be hanged at 17 for an Offence committed at 15 whereas he could not have been sentenced to death had the trial followed more closely on the offence. I would therefore suggest the desirability of amending the Ordinance to make it free from doubt in this respect.

I have, etc,

Your Excellency's,

etc., etc., etc.,

Sd/- R.W. HAMILTON

Chief Justice.

To
His Excellency the Governor
East Africa Protectorate.

6-7

RECEIVED
NOV 15 1915

EAST AFRICA PROTECTORATE
No 13

GOVERNMENT HOUSE,
NAIROBI,
BRITISH EAST AFRICA

Sir,

I have the honour to acknowledge the receipt of your letter of the 11th inst. in relation to the proposed purchase of land in the neighbourhood of the Government House, Nairobi, and in reply to inform you that the same has been referred to the Secretary of the Government, Nairobi, for consideration.

From Chief Justice.
From Attorney General.
30-11-1915.
From Chief Justice.
14-12-1915.
From Attorney General.
20-12-1915.

I have the honour to be,

Your obedient servant,

A. G. Gower

OFFICE OF THE SECRETARY OF THE GOVERNMENT,

THE RIGHT HONOURABLE

ANDREW BONAR LAW, P. C., F. R. S.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET, LONDON, S. W.

Code as constituting the present Law of the East Africa Protectorate with regard to the age at which offences can be committed. ^{if necessary for parents to commit}

Say that we apprehend that under Section 103 of the Children Act 1908 the age contemplated is the age at the time of the sentence and ask for their observations on the proposal now put forward by the East Africa Protectorate.

SSA
23/2/16

C.H.
23 Feb 16

Wine

Ch 94 2/16

[Faint handwritten notes]

law is to prevent the scandal of expiating
as young persons the more severe ~~penal~~ provisions
provided by law, & that the age at the time of
the crime is therefore the governing factor.

According to him the law takes no account of the
age at the time of the crime - the view (held by
the C.J.) that a young person is not mentally
as responsible as a person of more mature
age being an advance on the existing law.

Apparently therefore, if a "young person" might
commit a crime at the age of twelve, escape
for five years, be assisted & tried & sentenced
to death.

It seems that if the A.G. is right as to the
law in question there are presumably
other English laws, which cover the point
in question & do take account of the age
at the time of the crime.

19/2/16. T.C.H.

Harris,

The provisions of English Criminal Law as to
age of a person at the time he commits an offence
(1) that no act whatever done by a person under 7
years of age is a crime and (2) that no act done by a
person over 7 and under 14 is a crime unless it is
proved that he had sufficient capacity to know that the
act was wrong.

The corresponding provisions of the Indian
Penal Code which would be applied by the Courts of the
East Africa Protectorate are:-

or ? six
No. Not under 7
known to be
capax doli
substantive
to the

Section 82. "Nothing is an offence which is done
by a child under 7 years of age."

Section 83. "Nothing is an offence which is done
by a child above 7 years of age and under 12, who has
not attained sufficient maturity of understanding to
judge of the nature ^{and} of the consequences of his conduct
on that occasion."

These provisions are a sufficient protection
for persons in the East Africa Protectorate under 12.

The present question therefore is whether in
the E.A.P. the benefit of the Penal Code Amendment
Ordinances 1909 and 1910 ^{should be extended} extends to a person between 7
and 12 who is capax doli and to a person between 12 and
16 according to his age (in the opinion of the Court)
at the time of the commission of the crime ^{instead of} at the
time of the sentence.

I think there is no doubt that under Section
105 of the Children Act 1908 on which the East Africa
Protectorate Legislation is founded the age contemplated
is the age at the time of the sentence.

It is the exception in this Country for there
to be a very long delay between the commission of the
crime and the trial, and the point raised by Mr. Hamilton
has very probably never been raised here.

I think, however, we might usefully consult the
Home Office generally on the subject.

? Send Home Office copies of despatch and
enclosures and of the Circular of 17th February, 1909
calling attention to paragraph 4 and explaining that the
discretion given by the East Africa Protectorate Ordinances
of 1909 and 1910 (sending copies) to the Court to fix
the age of the accused has been adopted in Tropical
Colonies and Protectorates owing to the difficulty of
proving the age of native youths.

Refer to Sections 82 and 83 of the Indian Penal