

EAST AFR. PROT.

C. O.
19219

REC'D
Rfc 7 JUN 13

19219

mer
old 349

1913

Key

at previous Paper.

19177

MURDER OF NATIVE BY AN ITALIAN

The report by Judge Barth on the case of the Italian Natale Penoglio. Thinks that the jury were right in finding the prisoner not guilty of murder but that they were misled by the fact that the Judge did not lay sufficient emphasis of finding a verdict on minor counts stated.

Mr. Jennings
Dr. G. Fieldes

This is unfortunate & gives an opportunity for hostile criticism which need not have occurred. The man is certainly have been convicted on one of the minor counts & the Judge seems to have acted very stupidly in the matter.

Well & say that Mr. H. considers it very regrettable that the Judge did not lay sufficient emphasis on the necessity of finding a verdict on the minor counts, but that he is glad to see from the Judge's report that there was nothing to lead him to suppose that the jury acted for any

subsequent Paper

T. O.

sentiment of above is because the direct
evidence was that of retires
with regard to W. E. Harvey (see etc)

Q: A: H. J. R.
15.11.13 I think that
probably the best plan is to let him
copy of this despatch & of our reply

H. J. R.
9/11/13

As to the governor's comments
I don't think there would
have been any chance of securing
a conviction for culpable homicide
under s. 304 for the jury would
have had to be convinced that
the prisoner acted with knowledge
that his act was likely to cause
death. The judge did direct
the jury to consider whether
the prisoner had been
guilty of causing hurt, but he
felt a diff. as to whether
whether they had come to any con-
-clusion on these points as there
was no specific charge. I don't
know what the practice under
the Indian Code is, but it would
certainly have looked like giving
the jury a lead. The mistake was
not framing specific charges in
a this importance.

CB. 9/11/13

This is evidently a case of being arranged
or to avoid being
Dykes was not to be jury, but to
the remission of the prosecution and of the
judge.

I cannot understand why it should be
left to the judge to frame charges. Mr. Thompson
has looked the point up and he tells me that
under the Indian Code, applicable to the case,
the magistrate frames charges; if not
he, then the judge.

We could refer to the public
papers (which is unnecessary) or to show the
corruption of W. Harvey. - The reply of the
Gov. should be carefully considered.

In addition to that which has been
said I would add that the facts disclosed
suggest that the existing procedure under
the I.P.C. stands in need of revision,
and ask the Gov. to draw the matter before
early favorable attention.

U. 10. 6. 13 10/6/13

11. 6. 13.

As proposed - and send privately to
W. E. Harvey 11. 6. 13

C. O.
19219
7 JUN 13

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EAST AFRICA PROTECTORATE.

No. 249.

GOVERNMENT HOUSE
NAIROBI
BRITISH EAST AFRICA.

May 10th, 1913.

Sir,

*Book 2
2148
Report*

In reply to your despatch No. 244 of March 31st I have the honour to transmit herewith a copy of a report by His Honour Judge Barth on the case of the Italian Natale Ponoglio, who was tried by him on the 5th of February last.

2. The report embodies the information asked for in your despatch and you will observe that the accused made no confession or statement which would implicate him.

3. In my opinion the prisoner should have been convicted of culpable homicide not amounting to murder, and, though it was not essential that he should have been charged alternatively on a series of minor counts, I think that the judge should have directed the jury that in the event of their finding the prisoner not guilty on the major charge it was their duty to consider

whether

THE RIGHT HONOURABLE

LEWIS HARCOURT, P.C., M.P.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET,

LONDON, S.W.

whether or not he was guilty of

(i) Culpable homicide not amounting to murder.

(ii) Voluntarily causing grievous hurt.

(iii) Voluntarily causing hurt,

and on receipt of the verdict of not guilty of murder, he should have required and obtained their verdict upon the above minor counts successively.

4. I think that the jury were misled by the fact that the learned Judge did not lay sufficient emphasis on the necessity of finding a verdict on these minor counts, that they were right in finding the prisoner not guilty of murder and that they offered no further verdict, because they were not clearly directed to do so.

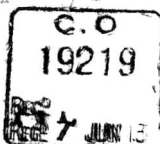
I have the honour to be,

Sir,

Your humble, obedient servant,

H. Lawry, Bejised

GOVERNOR.

HONOURABLE THE CHIEF SECRETARY.

The Italian, Natale Fenoglio, was tried by me on the 5th February 1913 for the murder of a native on the Magadi Railway line on 22nd December 1912. The Accused was committed for trial on a charge of culpable homicide not amounting to murder under Section 304 I.P.C. by the Magistrate having jurisdiction over the Magadi railway. No formal charge was however drawn by the Magistrate. There being nothing in the facts which would in my opinion bring the homicide within any of the exceptions to Section 300 I.P.C. I framed a charge of murder under Section 302 I.P.C. on the Accused being brought up for trial. Realising that the jury were competent to convict of hurt in the event of the facts not constituting the offence of murder (vide Section 357 Criminal Procedure Code) no further charges were framed by me.

The facts proved shew that on Sunday the 22nd December the Accused had sent gangs of his men out to work in the morning. In the afternoon the Accused again sent boys to work and went to the hut in which the deceased, Kingariki, and eight others were sitting. I believe the Accused was at this time somewhat angry because the boys had not gone out to work and it is in evidence the deceased said "what work have we to do at 5 p.m."

The floor of the hut was so low that the only method of egress was crawling on all fours. On Fenoglio's appearance at the hut one native got out and ran away. Kingariki was sleeping when the Accused kicked him in the

(2)

stomach as he was rising up after crawling through the door. The kick has been described as "hard" Kingariki cried out "The European has killed me" vomited and fell down. He died about an hour later.

The Medical evidence shows that death was due to shock caused by injuries to the stomach. The injuries revealed by a post mortem examination were laceration and contusion of the posterior wall of the stomach and ruptured blood vessels on the inner gastric wall and blood and food stuff was spilt into the peritoneal cavity. The Medical Officer, Dr. Fieberne, was of the opinion that a severe kick might have caused the injuries.

Remains of undigested food were found in the stomach and a quantity of food and blood had been vomited. Dr. Fieberne was of the opinion that the fact that the deceased had just had a meal and had a distended stomach increased the chance of rupture.

There were two native eye witnesses of the Accused's act and two native witnesses who were inside the hut but could not see the actual occurrence but saw the deceased immediately after he was kicked and heard him crying out.

Of the other native witnesses before the Committing Magistrate one was ill, one was dead and one was offered for cross examination by the Prosecution.

The Accused at no time made any confession or a statement inculcating himself and pleaded not guilty at the trial. He did not elect to give evidence himself and called no witnesses but made a long rambling statement which amounted to a denial of the material facts alleged by the Prosecution.

In my charge to the jury after dealing with the evidence I dealt with the law relating to murder under the

(3)

Indian Penal Code and directed the jury that, if they found that the Accused did kick the deceased and caused the injuries which resulted in his death, to convict under Section 302 I.P.C. they must find that the Accused had either the intention to cause death or the intention of causing such bodily injury as the Accused knew would be likely to cause death or the intention of causing such bodily injury as would be sufficient in the ordinary course of nature to cause death or lastly that the Accused knew his act was so dangerous that it would in all probability cause death. I then went on to direct the jury in the event of their finding that the requisite intention nor knowledge to convict under Section 302 I.P.C. to consider the offences firstly of voluntarily causing grievous hurt which was explained with reference to I.P. . Section 320, 8th example and Sections 322 and 325 and if the necessary intention or knowledge was in the opinion of the jury absent from the mind of the Accused then to consider secondly the offence of voluntarily causing hurt Sections 319 and 323 I.P.C.

The jury, in my opinion quite rightly, found the Accused not guilty of murder and the foreman, Mr. Banks, when asked by me if he had anything further to say said "No".

As no formal charge under Section 325 or Section 323 I.P.C. had been framed I was of the opinion that it would not have been proper to put definite questions to the jury if they found the accused guilty of either of these offences although they were competent to convict on either of them if they so wished. It may be that, the Accused having been put in peril on the capital charge, the jury formed the opinion that having acquitted him on that charge they should not take into consideration minor charges but that

(4)

that the accused should be released. It is possible that the foreman expected further examination by me.

I have no doubt from the evidence that the accused did kick the deceased as alleged. There is nothing, however, to lead me to suppose that the jury acted from any sentiment of colour or because the direct evidence was that of natives.

The original High Court record and a copy of the Proceedings before the Magistrate are enclosed.



Gov./19219/E.A.P.

13

DRAFT.

AFRICA PROTECTORATE.

462

Downing Street,

18 June, 1913.

13
35278

FROM
C. Belfield, Esq., C.M.G.
Sec., Sec., Sec.
MINUTE.

Sir,

Mr. Downie 12.6.13.
Mr. Bottemley 13.6.13.
Mr. Tennissen 13.6.13.
Mr. Read
Mr G. Fiddes *16*

Sir H. Just.

Sir J. Anderson *16*

Lord Emmott.

Mr. Harcourt.

I have the honour to acknowledge the receipt of your despatch No. 349 of the 10th of May, forwarding a report by His Honour Judge Barth on the trial of the Italian Natale Fanoglio, which took place on the 5th of February last.

2. I consider it ~~very~~ regrettable

that the Judge did not frame specific charges of causing hurt against the prisoner, but I am glad to note from the Judge's report that there was nothing to lead him to suppose that the jury acted

from

2 drafts.

Copy to Mr. Atwell, 18 June

from any sentiment of colour or because
the direct evidence was that of natives.

3. The facts of this case suggest
that the practice of relying on the pro-
visions of Article 237 of the Criminal
Procedure Code in framing charges is
liable to be abused especially under a
system which leaves the framing of the
charges to the Judge, and, unless the sub-
ject has already been satisfactorily dealt
with in the Criminal Procedure Bill which
I understand will be submitted to me at an
early date, you should give your early and
careful consideration to the question whether
some revision of the existing practice is not
desirable to prevent the occurrence of
similar miscarriages of justice in the
future.

I have, etc.

(Signed) L. HARCOURT

C. D.
217 JUN
17

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Gov. /19219/E.A.P.

Private.

On quarto

for Mr. Harcourt's signature.

DRAFT.

R. HARVEY, ESQ., M.P.

Downing Street,

18 June, 1913.

MINUTE.

Mr. Downie 12.6.13.
Mr. Bottomley 13.6.13.
Mr. Reed.

Sir G. Fiddes.

Sir H. Just.

Sir J. Anderson.

Lord Emmott.

Mr. Harcourt.

No. 349 10 Nov (19219)

Gov. No. 463-13 June (19219)
(dit. herewith)

Dear Mr. Harvey,

I have received a despatch
from the Governor of the East Africa
Protectorate containing a report on the
case of the Italian, Natale Fenoglio,
whose trial took place on the 5th of
February last. This is the case re-
ferred to in your questions in the House
on the 26th of March, the 29th of
April and the 27th of May. I think
I shall provide you with the fullest

information

unofficially

information by sending you the enclosed
copies of the despatch and report and of
my despatch in reply to the Governor.

Yours very truly

(signed) L. HARGOURT

Mr. Boscawen 25/6/17

Sir Anderson
 N. G. Fittes

Mr. Ross

I send you the annexed letter from Mr.

Edmund Harney, M.P. to Mr Harcourt which

has P.S. has sent on to the S. & Dept.

The letter deals with

(1) Cattle disease among the herds, concerning

which a copy was sent to the Harney

on Ev. /1929/13/ESD.

(2) The case of the Italian Travellers, concerning

which Mr Harney received a copy on Ev. /1929/13/ESD.

Mr Harney only seems to require further

information as to the latter case and asks

whether, with a view to greater publicity

being given to what has been done in the

case Mr Harcourt objects to his asking

a further question in the House

before him that until Mr Harcourt

receives a reply from the Government of S. & D.

it is de facto on the question of a to

Ev. /1929/13/ESD

...the ...

in the new Criminal Procedure Bill for the

revision of the existing practice in both

branches of charge, he fears that any

further question would be premature, but

that he will communicate with her.

Having then to be absent the

provisional report,

20.6.13

I don't gather that Mr. Harvey wants
back about the point of procedure
which was all in fact to the fact &
in the article I think his question
would come as well now as later

W.S. 2/1/13

Dr. G. Fowler

Mr. Harvey might put his question

with regard to the mass, see 1st case: 2
for the death of 9th May amount - para: 2-6.
I sh. be inclined to tell him that for all
reports so far obtained the bones are believed
to have been very little or (as in para: 2)
- that report from death by underpart
with which Mr. H. has dealt in his
letter, the stock it is true suffered in
two instances & then find the substance
para: 4, winding up with the substance

para; 5th - but it must be remembered that
large losses occur anywhere, for instance one of
the folk. Vet. Officer recently saw a Massai
in Laikipia containing number of dead sheep
which might have succumbed in a heavy
rain storm. However 1912 was an exceptionally
bad year for sheep throughout the country
- the largest sheep losses among the Europeans
having had help in flock by the
inclement weather.

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H. J. L.

21/6/13

21.6.13

21.6.13

He does want to ask about the
Italian ^{case} and not about the
Massai - as I read his letter.
I suppose there is no further answer
can be given yet about the
criminal proceedings.

H. 21.6.13

Yours
J. L.

Dewing Street,

24 June, 1913.

Dear Mr. Harvey

I am much obliged to you for your letter of the 20th June with regard to the case of the Italian Venezis in East Africa. I have, as you know, written to the Governor of the Protectorate on the question whether it will be necessary to make provision in the new Criminal Procedure Bill for the revision of the existing practice as to the framing of charges. I fear that any further question on this subject would be premature until I have had the Governor's reply but I shall not fail to communicate with you further when I have received it.

Yours sincerely
Spencer Harcourt

HARVEY, ESQ., M.P.

10th 1843

Dear Mr. Harcourt

I am much obliged
for your two kind
letters and the enclosed
copies of reports as to
cattle disease amongst
the Maori and as to
the case of the Tahiti
Ferry.

I am very glad that you
are dealing with the
difficulties raised by the
latter case, and I think
it would be helpful if
some public information
could be given as to it.
I do not wish to trouble
you with needless questions.
Yours truly,
Wm. Lloyd Garrison

111 South Street 1. 287

But perhaps all that has
been done is the best
action ever being taken
in the matter.

Perhaps something may be

done to prevent a man of

that type from continuing

in a position of such

discredit to the blacks under

No doubt he has
learned a lesson, but hardly
adequate one.

The information as to the
removal of cattle disease
seems satisfactory as far
it goes but does not ac-
count for the great losses appar-
ently mentioned by the Board
during and after the
Transfer.

I am much obliged for your
kindness in reading and
returning these papers.

Sincerely yours
1. Edmund N.

The Registrar
L. Hancock M.P.