DESPATCH

EAST AFR. PROT.

No. 28605

C.O. 28605

Rec. 10 AUG 07

[illegible] 309

1907

20 July

(Subject.)

Nairobi Incident

[illegible] of judgments [illegible] by Judge Barth in appeals of Capt. Grogan & [illegible]

(Minutes.)

~~Mr [illegible]~~

Mr Cox

It appears that [illegible] ... mistake in [illegible] ... the [illegible] ... 5 of [illegible] ... being [illegible] ... [illegible] ... that. This [illegible] ... the Judge's decision [illegible] ... be [illegible] at all.

We have already approved

Yes H.J.R.

J.B.

Gov. 29644 395

of the appeal being lodged from this judgement, & it is therefore not any necessary to take any further step in it. This is not any [illegible]

RLL 13/8

[illegible]

14/8

Sir F. Hopwood

All these [illegible] bundled and [illegible] together to be stored at [illegible] a complete copy of the record of proceedings & [illegible] [illegible]ments of the [illegible] appeal.

[illegible]

14/8

[illegible] 14.8

[illegible]

E 14/8

Mr. Ellis

East African Dept

Remind Govr.

WM 21/1

[illegible] 14 Jan

21/1

amending 21/1

The Order has now come in 14 of 1907

Patley WM 22/1

C.O.
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...t Africa Protectorate

Governor's Office
Nairobi
July 20th 1907.

No 309.

My Lord,

With reference to my telegram of yesterday's date I have the honour to transmit to Your Lordship herewith copies of the judgments delivered by His Honour Judge Barth in the appeals of Captain Grogan and Captain Thord Gray.

These judgments have only been received just in time for the mail. I am therefore forwarding them without comment.

I have the honour to be
My Lord
Your Lordship's most obedient humble servant
[signature illegible]

His Majesty's Principal Secretary of State
for the Colonies
Colonial Office

by July ...

C.O.
28605
Rec^d [illegible] 1907

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In the District Registry of the High Court of the East Africa Protectorate at Nairobi.

APPELLANT SIDE.

Criminal Appeal No. 8 of 1907.

From original Judgment of H. O. Dolbey, Esq., in Criminal Case No. 63 of 1907 of the Town Magistrate's Court at Nairobi.

Captain Ewart Scott Grogan ----------- Appellant.

Versus

C R O W N ----------------------- Respondent.

JUDGMENT.

This is an appeal from a conviction under Section 143 of the Indian Penal Code by Mr. Dolbey, a first class Magistrate, under the same circumstances as those dealt with in the case of Gray Vs. R. & what I have said in that judgment applies equally here.

The appellant has however raised in his memorandum grounds of appeal which were not raised in the other appeal & I propose to deal shortly with such grounds.

The first point [illegible] in the interpretation of the word "charged" in the Criminal Procedure Ordinance 1906. Charge is used in a strict sense in the Criminal Procedure Code meaning the document which is framed by a Magistrate at the proceedings before him, setting forth the offence for which the accused is being tried and it is also used in another sense, i.e., the offence which is alleged by complaint or otherwise the accused has committed.

Mr. Allen for the appellant has urged that "charged" in Section 4 of the Criminal Procedure Ordinance 1906 can only bear the

the second meaning and with some force states that the Ordinance deals with cases charged which may be tried summarily and which the Magistrate elects to try summarily and that in a summary trial a formal charge in the first sense is not necessary. I am of the opinion that this contention is sound and that if an offence is charged in the second sense which is punishable with more than 6 months imprisonment or with a fine which may exceed Rs. 1,000 and if such offence is not triable summarily it must be committed for trial subject to S.S. 2 of the section.

In this appeal the further point has been raised that the Magistrate did not elect to try this case summarily and did not in fact so try it but rightly I think Mr. Allen does not press this point as the fact that a summary case has been tried either as a summons or warrant case does not in any way prejudice the accused.

I have nothing to add to this judgment further than that which I have already stated in the judgment Cray V. R. and I am of the opinion that the finding and sentence of the learned Magistrate must be reversed for the reasons stated in such judgment. In considering if the appellant should be committed for trial I have taken into consideration the facts recorded by the learned Magistrate, which put his conduct in a most unfavourable light and also the fact that he has undergone the term of imprisonment to which he was sentenced and with some hesitation having regard to the effect of such imprisonment on a person of the appellant's status I refrain from ordering his committment to Sessions and acquit him.

(Sd.) J. W. BARTH.

19th July 1907.

C.O.
28605
Regd. 10 AUG 07

In the District [illegible] of the High Court [illegible]

[illegible] at Nairobi.

[illegible]

Criminal Appeal No. [illegible]

From [illegible] of [illegible] Dolbey Esq. [illegible]

[illegible] Case No. [illegible] of 1907 of the Town

[illegible] Court at Nairobi.

Captain [illegible] Appellant

versus

Crown [illegible] Respondent.

[illegible]

The appellant [illegible] to [illegible] by [illegible] Magistrate [illegible] of [illegible] the [illegible] contained in the memorandum of appeal. [illegible]

The facts [illegible] in the evidence recorded by the learned Magistrate [illegible] do not purport to [illegible] [illegible]

[illegible] was convicted on a charge of having committed [illegible] sections [illegible] and with attempt of [illegible] section [illegible] Penal Code.

The charge ... 144 ... 147 Indian Penal Code ... and the learned Magistrate ... found that there was no evidence to support the charge under Section 144 Indian Penal Code ... that there was insufficient ... 147 ... Indian Penal Code ... committed the accused to Sessions ... accused together with four others was convicted under Section 147 Indian Penal Code.

It has been argued for the appellant that because he was summoned for offences under Sections 144, 147 and 3/109 ... Code the punishment for which exceeds 6 months ... for which the fine may exceed Rs.1,000, ... Section ... 1, of the Criminal ... should have been ... The ... amount of the fine which ... such sections of the Indian Penal Code ... therefore unlimited, vide Section ... may exceed Rs. ... may be imposed under Section 147 Indian Penal Code ... exceed ... 1,000. Section ... of the Criminal Procedure Ordinance ... gives the Magistrate power to discharge ... to be recorded if he considers the charge ... that there ... sufficient ground for ...

For ... the ... Magistrate came to the conclusion that there are not sufficient grounds for committing the accused ... 144, 147 of ... he discharged him on ... a summons case ... Section 147 ... It has been argued that ... because

The charge [illegible] 147 Indian Penal Code [illegible] the Court, and the learned Magistrate found that there was no evidence to support the charge under Section 144 Indian Penal Code, that there was insufficient [illegible] 147 [illegible] finding [illegible] Penal Code [illegible] committed to Sessions [illegible] accused together with four others was convicted under Section 147 Indian Penal Code.

It has been argued for the appellant that because he was summoned for offences under Sections 144, 147 and [illegible] [illegible] ces the punishment for which exceeds 6 months [illegible] for which the fine may exceed Rs.1,000, [illegible] 1, of the Criminal [illegible] should have been [illegible] of the fine which [illegible] Sections [illegible] Penal Code [illegible] unlimited, vide Section [illegible] may exceed Rs.1,000 [illegible] be imposed under Section 147 Indian Penal Code [illegible] exceed [illegible] 1,000. Section [illegible] of the Criminal Procedure Ordinance [illegible] the Magistrate power to discharge or acquit [illegible] to be recorded, if he considers the charge [illegible] sufficient ground for [illegible]

For [illegible] referring [illegible] the learned Magistrate came to the conclusion that there are not sufficient ground for committing the accused [illegible] 144, 147 or [illegible] him on [illegible] summons case [illegible] Section 147. It has been argued that [illegible] because [illegible]

... more than Rs.1,000 ... should have been committed ... that Section ... Penal ... giving power to try any case summarily and that it is beyond the power of the Court to read ... Code for Penal Code into ... of the Criminal Procedure ... to support ... arguments ... Lopez and Grove J.J. in ... (a Q.B. ...) a case which is squarely ... ordinary words ... that you cannot ... the other case cited was ... in a ... Section ... the Prescription ... to "easement".

... stands on a different footing ... is nonsense and the ... can be clearly gathered from the ... alteration ... so that which is obviously the intention of the legislator be ... that Criminal ... penal ... interpreting the ... for ... Criminal ... (... N.L.R. 363) ... on the fact ... the case was ... down ... the point ... conclusion there were ... commital and then that applicable ... Magistrate was empowered to discharge the ... the graver charge for which he was summoned if

in

in fact there were insufficient [illegible] trial and [illegible] reasons [illegible] given for convicting him for the offences [illegible] under Sections [illegible] are [illegible] not inclined to reverse his finding [illegible] on these grounds.

The common object of the assembly [illegible] not [illegible] stated on the summons or on the record but [illegible] there is a note on the record that the accused among others is [illegible] for being a member of an unlawful assembly, the common object of such assembly being the commission of an offence and there is a further note that the particulars of offence were stated and explained to the accused in accordance with section [illegible] of the Criminal Procedure Code. The judgment however shows offence which constituted in the [illegible] of the learned Magistrate the common object of the assembly [illegible] the beating by the accused and two others of [illegible]. Besides this offence there is some evidence of [illegible] other offence having been committed, i.e. [illegible] under Section [illegible] in relation to the removal of Smith from the crowd. The Magistrate should therefore have clearly stated what the actual offence constituting the common object was.

The learned Magistrate has [illegible] found that an [illegible] object being the [illegible] and [illegible] also rightly that the accused w[illegible] assembly. The fact that five [illegible] gan and his co-adjutors and [illegible] other [illegible] offence undoubtedly [illegible]. It is not open for a [illegible] in an assembly [illegible] that he was merely a [illegible]. The [illegible] should have been clearly stated

[illegible] to the [illegible]

There is evidence that some force was used by the assembly to Smith and that three members of the assembly including the accused used force and violence to the natives and is therefore according to the definitions of rioting [illegible] section [illegible] the accused [illegible] members of the assembly were guilty of rioting under Section [illegible]

In [illegible]

The [illegible] and [illegible] evidence on the record [illegible] shew that the accused committed the offence of hurt on one of the natives [illegible] actual nature of the act does not trans- [illegible] committed and if the [illegible] offence [illegible] simple hurt.

[illegible]

[illegible] offence had been committed [illegible] given yet that offence [illegible] not were to have been tried [illegible] it is not competent for a Magistrate to take over evidence and then withdraw case [illegible] tribunal. The accused [illegible] charge under Section 147 [illegible] not been set aside by the Magistrate [illegible] has had the privilege of being tried by [illegible] and [illegible] having [illegible]

In [illegible] transferred [illegible] with the [illegible] of the offences alleged and [illegible] evidence there- [illegible] finding and sentence [illegible] reverted [illegible] only point

[illegible] that [illegible] the [illegible] considered is whether the accused should be committed for trial or not. In view of the fact that the accused has already suffered the term of imprisonment to which he was sentenced I refrain from ordering a committal and acquit him.

Sd/- J. T. BARTH

Nairobi,

[illegible]

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E.A.P.
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DRAFT.

E.A.P. No 467

Gov.
Col. Sadler

MINUTE.

Mr. Ellis 22 Aug.
Mr. Read 22
Mr. Bates
Mr. Antrobus
Mr. Cox
Mr. Lucas
Sir F. Hopwood
Mr. Churchill
The Earl of Elgin

for concur

23 August 07

Sir

I have the honour to ack. the receipt of your desp. No. 309 of the 20th ult. transmitting copies of the judgments delivered by Mr. Barth in the appeals of Captain Grogan & Captain Bird & my

2 It has now been decided in accordance with your advice not to appeal against

...judgment ...

[illegible] the matter to
drop I need not
offer any further
remarks on the
questions involved, but

The mistakes, however,
to which Mr Bell
calls attention in
p. 111 of the
Criminal Procedure
Act, in which
[illegible] Code
have been written where
Code of Criminal Pro-
-cedure was intended,
should be corrected by
an erratum slip
as soon as possible