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TRIAL OF PERSONS ACCUSED OF MURDER.

MINUTE BY HIS EXCELLENCY THE GOVERNOR.

1. In connection with the trial last year of two Europeans accused of murder, when the Court assigned both Counsel and Attorney for the defence and ample time was given to the Solicitors to prepare the case, the Chief Justice, Sir JOHN SMALE, addressed the following letter to the Acting Colonial Secretary:—

“ THE SUPREME COURT, HONGKONG,

“ September 12th, 1877.

“ SIR,— I have the honour to acknowledge the receipt of your Letter No. 660, of the 6th instant, in which you refer to a resolution of the Executive Council of the 30th November, 1872, authorising a fee of \$25 for the defence of pauper prisoners in certain cases, and by direction of His Excellency the Governor, you ask my opinion as to the advisability of allowing a refresher where a case lasts for more than one day, and my views on the subject.

“ The question raises various, and as I think, serious considerations.

“ In the semi-barbarous ages of our Criminal Law, no accused man was allowed Counsel, whilst prosecutions were conducted with the utmost ingenuity and learning. The State trials, too often most disgraceful, are specimens of what was universal at every Assizes when even sheep stealing and forgery were capital offences, down even to within my memory.

“ But by statute, persons charged as felons were allowed to be defended by Counsel, a boon to the rich who could pay a fee, a mockery to the poor man who could not.

“ Then the Judge, actuated by mercy or love of ease, asked Counsel to defend pauper prisoners, and as no fund was provided, it was done willingly without fee.

“ According to the assertion of Lord ERSKINE, assented to by Lord ELDON, it is a universal truth that the elucidation of innocence is as much the obligation on Courts of Justice as the conviction of guilt. It seems to me to be equally an obligation on the State. This axiom, for such I hold it, raises a question as to every accused man (whose position, the Law holds, until verdict, to be his misfortune not his crime), whether in every case as much care should or should not be taken of the defence as of the prosecution,—a question you do not put. The question in your letter is confined to cases where murder is charged.

“ In 1865-1866 the dangers of miscarriage of Justice on trials for murder, with instances of miscarriage, and the execution of innocent persons, were brought before the Royal Commission on Capital Punishments by several witnesses, of whom Sir FITZROY KELLY, now Chief Baron Exchequer, was among the most earnest.

"The twelve Commissioners made their Report in 1866, agreeing to forbear to enter into the question; but 5 of the 12 resolved that capital punishment might, safely, and with advantage to the community, be at once abolished.

"I refer to this, the result of public opinion, not to advocate the abolition of capital punishment here, which would be highly improper, but as a foundation for urging that the State here should, on such awful occasions, use the like effort for the elucidation of innocence, as it puts forth, through the leading Counsel and Attorney in the Colony, to prove guilt; for the Judge to attempt to do so on the trial greatly endangers his equal balance of impartiality. The elucidation of innocence can be effectually attained only by the assigning Counsel and Solicitor for the prisoner, with ample discretion to them. Fortunately, these trials are rare, but when any occasion arises, it is unseemly for the Judge to put himself under obligation to Counsel and Attorney, whilst, it seems to me to be the duty of the State to secure an efficient defence, and it should pay for it by a proper fee, and, in protracted cases, not by way of "refresher," but upon a due taxation by the Registrar, of work actually done, subject, as that always is, to the final decision of the Judges, who alone can, even approximately, know what work has been done in each case, and who act on a serious responsibility.

"Merely to hand the depositions to Counsel, and for him to defend a prisoner at a fixed fee, with them only as his instructions, is a mere delusion. All grounds of defence require to be ferreted out. They are often unknown or unthought of even by the accused. All this is painfully impressed on my memory by the fact that four absolutely innocent men were once convicted of murder through conspiracy to obtain an advertised reward. They would have been executed, but that an accident postponed the day of execution. Their innocence was afterwards absolutely proved, and they were discharged, but after weeks of agony, and the conspirators were convicted. On looking into that case, I came to the conclusion, with the light I then had, that if a witness, not called for the Crown, had been called for the prisoners, the conspiracy would have become patent at once; but Counsel, not having had time or opportunity to ascertain the facts, the witness was, probably in the exercise of a wise discretion under the special circumstances, not called.

"A defence, not to be a delusion, must be thoroughly got up."

"I have the

"Sir,

"Your most obedient Se

"JOHN SMALE,
"Chief Justice."

2. In addition to recording his opinion that a trial for murder where Counsel and Solicitors are not both assigned for the prisoner is a delusion, His Honour conveyed to me subsequently on two occasions his convictions that in this Colony especially, no exception whatever from this rule should be allowed, inasmuch as the majority of those that may be tried on a capital charge would probably be individuals unacquainted with the practice and procedure of our Courts and of whose language neither the Judge nor the Jury had any knowledge.

3. The Chief Justice's opinion, in which I entirely concurred, was not, however, acted upon in the recent case of CHEUNG ASHIN, who was convicted of murder and sentenced to death.

4. Inform the Acting Chief Justice and the Attorney General, that in all future cases where a man is tried on a capital charge, I think SIR JOHN SMALE's opinion and practice should be adhered to.

J. POPE HENNESSY.

2nd July, 1878.

ourable

TING COLONIAL SECRETARY.