1881.

NEW ZEALAND.

COMMUTATION OF SENTENCE OF DEATH PASSED UPON WIREMU WHAREPA,

(DESPATCH RELATING TO, TOGETHER WITH A LETTER AND MEMORANDUM BY MR. JUSTICE JOHNSTON ON THE PROCEEDINGS AT THE TRIAL.)

Presented to both Houses of the General Assembly by Command of His Excellency.

No. 1.

COPY of a DESPATCH from Governor the Hon. Sir ARTHUR GORDON to the Right Hon. the SECRETARY of STATE for the COLONIES.

MY LORD,— Government House, Wellington, 22nd August, 1881.

The 407th article of the Colonial Regulations provides that when a capital sentence is carried into execution in a colony, the fact is to be reported by the Governor to the Secretary of State. No such report is required in the event of a commutation of the sentence, and I did not therefore think it necessary to take up your Lordship's time by reporting that, on the 11th January last, agreeably to the advice of the Premier, Mr. Hall, but acting, as directed by the 11th paragraph of the Royal Instructions, "according to my own deliberate judgment," I commuted the sentence of death passed on a certain Te Wharepa for the murder of his wife, into one of penal servitude for life.

2. Mr. Hall, the Premier, like myself, considered that the sentence should be commuted; but the only two members of the Council (Messrs. Whitaker and Dick) who attended its meeting were, on the other hand, desirous that Te Wharepa should be executed. Two absent members of the Executive Council also telegraphed that they were in favour of carrying out the sentence of death. The opinions of these gentleman did not appear to me to possess all the weight which they would have had if delivered in Council after a consideration and discussion of the arguments adduced by me for a mitigation of the penalty, but they certainly show a preponderance of views unfavourable to the exercise of mercy in this instance among the members of the Council; and the case may thus be supposed to come within the scope of the 7th article of the Royal Instructions which directs the Governor to report the grounds and reasons of his action when, in the exercise of the powers granted by the Queen's Letters Patent, he acts in opposition to the advice of the Executive Council. I do not myself think that cases of this character are contemplated by that article, the exercise of the prerogative of mercy appearing to form a special subject of instruction exclusively dealt with by the 11th article, which itself points out the course to be followed by the Governor in the event of his commuting a capital sentence in opposition to the opinion of a majority of his Council; but any doubt on the subject is sufficient to justify me in troubling your Lordship with respect to a matter of otherwise no interest beyond the colony, and as my Ministers are desirous that I should make such a report with a view to its presentation to the local Legislature, I cannot have any reluctance in complying with their wishes.

The Right Hon. the Secretary of State for the Colonies, &c.

I have, &c.,
ARTHUR GORDON.

No. 2.

MINUTE of the GOVERNOR.

THE Governor has carefully considered the papers in the case of Te Wharepa, sentenced to death for the murder of his wife. He has also duly weighed the opinions of the two members of the Executive Council who attended the meeting of the Board this day, as well as those of other members communicated to him by telegraph.

The Governor has no doubt of the commission of the murder, or that the prisoner has legally, and His Excellency believes not unjustly, incurred the penalty of death; but before deciding that that penalty shall be inflicted, His Excellency feels bound to take into full account the following considerations:—

1. That the prisoner was undefended.

2. That the previous history of the murdered woman renders her adultery not improbable; that it was generally supposed to be notorious; that it was unquestionably believed by the prisoner, and apparently by the jury also, who would have recommended him to mercy on that account, had not the Judge forbidden them to do so.

The first consideration has very great weight with the Governor. His Excellency thinks that even the evidence given, adduced as it was wholly on behalf of the Crown, would have been sufficient to enable counsel to raise a possible presumption of manslaughter; it being alleged, and apparently admitted, that the woman had been banished from her husband's house, and was killed whilst endeavouring to force herself into it again, having just effected entrance by the window, after having been successfully repulsed in her attempts to force a passage by the door. It is quite impossible to say what might have been the verdict of the jury had this view of the case been put before them; or by what evidence it might have been supported, had a properly-conducted defence been insisted on.

Moreover, had the prisoner been defended, doubts may be entertained whether a successful resistance might not have been offered to the admission of the most important evidence against him; evidence which the Judge allowed to be given with manifest hesitation, first saying that he would admit it if the prisoner consented to its reception (a course not altogether in accordance with that prescribed by the best English authorities), and subsequently (the prisoner having refused to do this) admitting it at the request of the prosecutor who, in answer to a question from the Judge, "took the responsibility" of the step—a responsibility resting, as it cannot but appear to His Excellency, with the Court alone.

The second consideration has, of course, no legal value, nor does His Excellency attach to it all the weight which some might be inclined to do, but it is impossible to exclude it from all influence when considering whether the circumstances are such as to permit or preclude the exercise by the Crown of the prerogative of mercy.

It should not be forgotten that the jury desired to recommend the prisoner to mercy on the ground of his wife's misconduct, but were directed by the Judge not to do so, there being no evidence on that point before them; that is to say, there having been no defence, and no evidence given except what was called for the prosecution, which was, of course, not likely to adduce evidence exculpatory of the accused.

On the whole, therefore, His Excellency cannot say that he is thoroughly satisfied that the murder was not the result of the struggle caused by the woman's efforts to re-occupy her husband's house, or that the case is one the circumstances of which preclude the Crown from sparing the life of the criminal.

His Excellency, therefore, remits the penalty of death, as advised by the Hon. the Premier, commuting it to that of imprisonment for life, and directs the necessary papers to be made out accordingly.

Government House, Auckland, 11th January, 1881. A. H. G.

No. 3.

Mr. Justice JOHNSTON to the Hon. the MINISTER of JUSTICE.

SIR,— Judge's Chambers, Christchurch, 3rd September, 1881.

I have the honor of enclosing a memorandum respecting the trial of Wi Wharepa for murder, for the information of His Excellency the Governor; and I venture to express the hope that the same publicity will be given to it as has been given to His Excellency's minute on the commutation of the sentence.

I have, &c,

The Hon. the Minister of Justice. ALEXANDER J. JOHNSTON.

Enclosure in No. 3.

REGINA *v.* WI WHAREPA.

Memorandum of Mr. Justice Johnston for the information of His Excellency the Governor.

HAVING seen in the public newspapers a copy of a minute by His Excellency with respect to the commutation of the sentence of death passed by me at the January sittings of the Circuit Court of the Supreme Court, at Christchurch, upon Wi Wharepa, for the murder of his wife at the Chatham Islands, which seems to reflect upon the manner in which the trial was conducted, I feel it a duty to myself to make the following statement of facts, which may not have sufficiently appeared in the transcript of the notes of evidence forwarded by me to His Excellency immediately after the trial:—

2. It is alleged in the minute that the first consideration which His Excellency took into account, and which, he says, had very great weight with him, was that the prisoner was undefended.

Now it was publicly intimated to the prisoner in Court, before the commencement of the trial, that, if he desired it, counsel would be assigned to him, and a proper fee provided for the purpose by the Government; and I have been informed from trustworthy sources that, before the trial, he was urged to accept the services of counsel, but that he positively refused to do so then as well as in Court.

3. The prisoner showed by his manner and language that he fully comprehended the proceedings; and it was proved he understands English very well. The Rev. Mr. Stack, a clergyman of the Church of England, who has been for many years acquainted with the Maori people, acted, at the request of the Court and the prisoner, as interpreter on his behalf, and explained all the proceedings, and gave him all the assistance in his power.

4. In the second consideration mentioned in His Excellency's minute, it is stated that the jury *would have* recommended the prisoner to mercy, on the ground of adultery committed by his wife, had not the Judge *forbidden* them to do so. What actually occurred was this: That the foreman of the jury, on coming into Court about an hour after they retired, announced that the jury were unanimous in finding the prisoner guilty, but were not unanimous with regard to a recommendation to mercy. On that finding, a general verdict of "Guilty" would have been entered on the record; but I thought

it was desirable to ask the jury on what ground any of them wished to recommend the prisoner to mercy. The foreman intimated that it was on the ground of the adultery of the wife; whereupon I pointed out to the jury that there was no evidence before the Court of the wife's adultery, and reminded them that they were sworn to give their verdict according to the evidence.

After a brief consultation with his fellow-jurors, the foreman returned a verdict of "Guilty" without any recommendation.

5. The prisoner, on being called upon for his defence, made no statement with regard to his wife's adultery, nor did he do so in the long irrelevant address which he made on being called upon to say why judgment of death should not be passed upon him; and the only allusion made during the trial to the wife's misconduct was in the statement of the prisoner to Mr. Shand, at the lock-up.

6. With respect to the question of the admissibility in evidence of that statement, when tendered for the prosecution, I at first entertained a doubt whether it was admissable against him within the rule as to the exclusion of statements not made voluntarily, and I deferred my decision on that point. But inasmuch as the prisoner, or his counsel, if he had had any, might have desired to have that statement laid before the jury for the purpose of the defence, I asked the prisoner whether he desired that evidence to be given, and said that, if he did, I would admit it, its admission not being objected to by the prosecution. However, on its being explained to the prisoner that the evidence, if given, though tendered on his behalf, might be used against him, he intimated that he did not wish it to be given. At the same time I informed him that I should have to consider at a later period whether the evidence, if pressed by the prosecution, must not be admitted *against* him.

7. After hearing the other evidence to the end, Mr. Shand was recalled, and I asked him various questions as to facts which might affect the admissibility of the prisoner's statement to him at the lock-up, and I retired to consider the question, and to consult the authorities.

After my return into Court I asked Mr. Duncan, the counsel for the prosecution, whether he still pressed for the admission of the statement, and he informed me that he did so.

I think it is very probable, as stated in one of the newspaper reports (but not in the other, nor in my own notes), that I asked Mr. Duncan if he took the responsibility of pressing the evidence, which he must have understood to mean whether he considered that it would not be right for him to leave the case to go the jury upon the rest of the evidence, although that might be sufficient in law to justify a verdict for the prosecution, and whether he was prepared to run the risk of the conviction being quashed for improper reception of evidence if the case should be reserved.

8. The responsibility of tendering the evidence or not doing so rested entirely with the counsel for the prosecution; and the responsibility of admitting or rejecting it, when tendered, of course rested on and was accepted by the Judge. I held that the evidence was admissible; and, on still further consideration, I was quite satisfied, as I now am, that the circumstances under which the statement was made were such as would not bring it within the strictest application of the doctrine of exclusion. Having no longer any doubt, I did not think it right to reserve the point for the Court of Appeal.

9. I refrain, of course, from making any comments upon the opinion expressed by His Excellency on the case, or on the propriety of commuting the sentence.

Christchurch, 3rd September, 1881. ALEX. G. JOHNSTON.

No. 4.

MEMORANDUM of His EXCELLENCY upon Mr. Justice JOHNSTON's Memorandum of the 3rd September.

THE Governor has read Mr. Justice Johnston's memorandum of 3rd instant, written for his perusal.

Mr. Justice Johnston appears to consider that the Governor, in his minute in Council of the 11th January last, setting forth the reasons which induced him to commute the sentence of death passed upon Wi Wharepa into one of imprisonment for life, has in three particulars commented unfavourably on the conduct of the trial by the Judge.

Mr. Justice Johnston seems to think that some reflection upon himself is implied by the Governor in assigning the prisoner's want of counsel as one of the reasons for a mitigation of his sentence. Of the fact urged by Judge Johnston that the prisoner had declined to employ counsel, and had in Court said that "he had no experience of lawyers, and did not know what use lawyers would be to him," the Governor was fully aware; nor did he suppose, or imagine that any one else would suppose, that blame could on that account be imputed to the learned Judge who tried the case. But the absence of counsel was not therefore a less serious disadvantage to the prisoner.

Again, in directing the jury that their verdict must be according to the evidence only, and that no evidence of the adultery of the prisoner's wife had been adduced, Mr. Justice Johnston only gave a direction which in the circumstances it was his obvious duty to give; but it is no less the case that such a direction precluded the jury from making a recommendation to mercy if they concluded to do so, which they might without impropriety have made, had evidence been brought forward on the point in question—as, had the prisoner been defended by counsel, would probably have been the case. As to the wish of the jury, His Excellency may be in error, but he was certainly given to understand that, though not unanimous, the jury as a body desired to recommend the prisoner to mercy.

The only sentence of the Governor's minute which really raises any question as to the conduct of the trial is that which refers to the questions addressed by the Judge to the prisoner and the prosecutor.

In the Judge's notes of the trial, forwarded to His Excellency by Mr. Justice Johnston, the following words occur as addressed by the Judge to the prisoner:—"Mr. Shand is prepared to tell what you said when he asked you for what cause you were there. I have some doubt as to whether it is proper according to law to let him tell that, but if you wish that it should be told, I will allow him to repeat your statement." On this passage the then Minister of Justice, Mr. Rolleston, minuted a reference, which shows him to have read these words in the same sense in which they were interpreted by His Excellency.

In the report in the *Lyttelton Times*, also submitted to His Excellency as containing a fuller account of the proceedings, and initialled by Mr. Justice Johnston as "substantially correct," the question is given as follows: "His Honor (to prisoner): Mr. Shand is prepared to tell what you said when he asked you for what cause you were there. I have some doubt whether it is proper, according to law, for him to tell that, but if you wish it should be told, I will allow Mr. Shand to repeat your statements. You need not make any answer unless you please." In the same report the question subsequently addressed to the Crown Prosecutor is thus given: "His Honor (to Mr. Duncan): Do you wish the statement to be received? Mr. Duncan: Yes. His Honor: You take the responsibility? Mr. Duncan: Yes."

The Governor has read with satisfaction Mr. Justice Johnston's explanations of these questions.

From the Judge's notes of the trial, and the accompanying newspaper report initialled by the Judge, His Excellency had certainly not perceived the question put to the prisoner to be, as now explained, one asking him whether he wished to have put in as evidence for his defence evidence which the counsel for the Crown desired to adduce in support of the prosecution, but as to the admissibility of which, when so preferred, some doubts existed; or that the subsequent dialogue with the Crown Prosecutor was not to be understood as indicating that Mr. Duncan "took the responsibility" of the *reception* of the evidence—which is certainly the apparent meaning of the words—but merely that of tendering it.

Government House, Wellington, 8th September, 1881. ARTHUR GORDON.

By Authority: GEORGE DIDSBURY, Government Printer, Wellington.—1881.