

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 admissible 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.