
(1919) 09 MAD CK 0021
In the Madras High Court

P. Kandaswamy Mudaliar

APPELLANT

Vs

King-Emperor

RESPONDENT

Date of Decision : 26-09-1919

Acts Referred:

Penal Code, 1860 (IPC) — Section 269

Citation : (1920) ILR (Mad) 344

Hon'ble Judges : Seshagiri Ayyar, J

Bench : Single Bench

Judgement

1. The facts of the case are these. The accused was asked by the Health Officer of the City of Madras to remove his son to the Isolation Hospital

at Krishnampet, as the child was then suffering from small-pox. The child was being treated by Dr. V. Rama Kamath, a certified medical

practitioner. This gentleman advised the accused to remove the patient to an isolated house, which was done. Thereupon this prosecution was

launched u/s 269 of the Indian Penal Code. The Magistrate was apparently of opinion that as the Health Officer was the sole judge of the justness

of the order to remove the infected child to a hospital, he had no option but to convict the accused of the offence. There is an affidavit that the

Magistrate did not permit evidence being given as to the precautions taken by the accused to avoid infection. The question for consideration is

whether this conviction is right.

2. u/s 366 of the Madras City Municipal Act (Act III of 1904), under which the order for removal was made, it must "appear to the Health Officer

that a person is suffering from a dangerous disease," has no proper lodging or accommodation, or lodges in a place occupied by more than one

family. Then he can order the person to be removed to the isolation hospital. So the Health Officer has to be satisfied not only that a person is

suffering from infectious disease, but also that the infected person has no proper lodging, or is lodged in a place which is occupied by more than

one family. In this case, no doubt at the time the order was made the son of the accused was being lodged in a place which was occupied by more

than one family. Therefore, the order in its inception was right, although it is defective in that it gave no option to the accused to lodge his son in a

proper place. The further question is whether the action of the accused in providing a separate lodging was such a violation of the order as brought

him u/s 269 of the Indian Penal Code. The 3rd clause of Section 366 says:

Whoever having charge of a person in respect of whom an order is made under Sub-section (1) disobeys the said order shall be deemed to have

committed an offence punishable u/s 269 of the Indian Penal Code.

3. The learned Crown Prosecutor suggested that this notional imputation of crime deprived the Magistrate of power to inquire into the elements

which constitute the offence u/s 269. It would be dangerous to hold that the prosecution is not bound to prove the offence because the local

legislature has enacted that a violation of the order of an executive officer is punishable under a particular section of the Code. The Penal Code is

an All-India Statute, and anybody charged under it has the right to expect of the prosecution proof that he has committed the offence as defined in

the section.

4. Turning to the Indian Penal Code, I find that to bring the offender within it, he should have unlawfully or negligently done an act which he knew

or had reason to believe to be likely to spread the infection of any disease dangerous to life. The accused in this case is not charged with

disobeying the order of a public servant lawfully promulgated. He is charged with having knowingly spread the infection of disease. Therefore, the

question is not whether the order of the Health Officer in its inception was right, but whether the conduct of the accused in choosing the alternative

of sending his son to an isolated house was an offence u/s 269.

5. Before I refer to cases, I must draw attention to the language of the section. It uses the words "unlawfully or negligently" and not illegally. As

was pointed out by Lord Ellenborough, in *Rex v. Vantandillo* (1815) 4 M. & S. 73,

any indictment which charges a person to have done an act

unlawfully or injuriously must assume or prove that there was no lawful excuse. Le Blanc, J., said this:

Neither did they pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner

and the patient was kept from the society of others so as not to endanger a communication of the disease.

6. In such a case the law did not pronounce it to be an offence. SO the gist of the unlawful act is that there must be danger of the infection

spreading. If care is taken to avoid such an infection, the act cannot be said to be unlawful or negligent. In fact, the City Municipal Act

contemplates that the action will not amount to an offence if a proper lodging or accommodation is found for the infected person. When we

remember that Section 269 does not use the word "illegal", which has been defined by Section 43 as being applicable to everything which is an

offence or which is prohibited by law, but uses the word "unlawful", it is clear that the prosecution must make out not only that there has been

disobedience to the order of the Health Officer, but also that the disobedience was unlawful and negligent and had also the effect of spreading

infectious disease.

7. The case nearest in point is *Cahoon v. Mathews* ILR (1897) Cal 494. In that case a mother was directed to remove her daughter to an isolation

hospital. She refused to comply with the order unless she was herself allowed to accompany her child. Thereupon she was charged u/s 269 of the

Indian Penal Code. The learned Judges held, that as in her own house there were no lodgers, as the order to remove was passed upon a

misapprehension as to the existence of lodgers, and as sufficient accommodation was provided for the infected child, the mother did not act

unlawfully or negligently. The learned Judges say, and I entirely agree with that observation of theirs: "'An act, however, may be lawful though it

may be illegal.'" Therefore, although in the present case the refusal to comply with the direction of the Health Officer might have been illegal as

defined in Section 43, I am not prepared to hold that it was unlawful, when it is found that proper precautions were taken to prevent infection and

to provide suitable lodging for the person infected, I may refer in this connection

to the weighty observations of Lord Blackburn and Lord Watson

in *Metropolitan Asylum District v. Hill* (1881) 6 App.Cas. 193. Lord Blackburn said:

On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication.

8. Lord Watson in the same case said:

Where the terms of a statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights.

9. The Health Officer would have been well within his rights, if he had told the accused that he should either provide a proper lodging for the son or

he should remove the child to the hospital, That would have been in the language of Lord Watson, an exercise of discretion compatible with private

rights. The mere failure to carry out an order, which could otherwise have been bond fide, obeyed by the avoidance of the danger of infection

cannot be regarded as an offence u/s 269 of the Indian Penal Code. I must, therefore, quash the conviction. The learned Crown Prosecutor

informed me that in case I come to the conclusion that the Magistrate was not justified in shutting out evidence he was not prepared to press for the

case being sent down for further inquiry. All that is necessary in a case of this description is to state the principle which should guide the Magistrate

under similar contingencies, The fine, if paid, must be refunded.