# CRIMINAL REVISION.

*Before Mr. Justice Ghose and Mr. Justice Gordon.*

1897 *March* 3.

S. CAHOON (PETITIONER) *v.* A. MATHEWS (OPPOSITE-PARTY.)*

*Penal Code (Act XIV of 1860), section 269—Negligent act—Refusal to allow person suffering from infectious disease to be removed to a hospital—Penal Code, sections 268, 270.*

Where a mother refused to allow her daughter suffering from small-pox to be removed to a hospital in accordance with an order made by the District Magistrate, unless she accompanied her, and was convicted of an offence under section 269 of the Penal Code by the District Magistrate:—

*Held*, that no unlawful or negligent act had been committed within the meaning of section 269 of the Penal Code.

THE petitioner, Mrs. Cahoon, resided in a certain house in Howrah with her daughter and another person, Mr. Webber, who lived as a friend of the family without payment, and occupied a room adjoining that occupied by the daughter.

The daughter was attacked with small-pox, and accordingly the Magistrate of the District issued an order for her removal to the hospital. Mrs. Cahoon resisted the execution of this order, and stated that, if her daughter was removed to the hospital, she must be removed also. Thereupon the petitioner Mrs. Cahoon was prosecuted summarily under section 269 of the Penal Code and sentenced by the Magistrate to four days' simple imprisonment.

On application to this Court Mrs. Cahoon obtained a rule calling on the Magistrate to shew cause why the conviction and sentence under section 269 of the Penal Code should not be set aside.

Mr. *Jackson* (Dr. *Ashutosh Mukerjee*, Babu *Promothonath Sen* and Babu *Mahendranath Roy* with him) for the petitioner.—Under section 269 of the Penal Code doing an act is not the same as omitting to do an act. Wherever the Penal Code deals with the question of omission, it expressly say so. The petitioner did not try to get small-pox. What offence has she committed? Does any law

* Criminal Revision No. 42 of 1897 made against the order passed by H. F. T. Maguire, District Magistrate of Howrah, dated the 14th of January 1897.

contemplate that a mother should under circumstances like these be separated from her daughter? The case of *Queen-Empress* v. *Krishnappa* (1) where a person entered a train suffering from cholera was different. Here it is suggested that the petitioner had a lodger. If she had, there is nothing to prevent him from leaving. But there is no evidence that there was a lodger. He was only a friend, who lives in one of the rooms without payment. Section 269 cannot apply to this case, because the petitioner has done nothing. Section 270 has less bearing still. Also section 268. How is a nuisance public which takes place in a private house? How can the petitioner be guilty of any offence for refusing to allow her daughter to be taken away, unless she (the petitioner) went with her?

No one appeared to shew cause.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows:—

The facts of this case are very short and simple. The petitioner, Mrs. Cahoon, has been residing in a certain house in Howrah with her daughter; and a certain person (Mr. Webber), who is a friend of the family, lived with them without payment of any hire or anything else, occupying the room next to that occupied by the girl. The latter was attacked with a mild form of small-pox, and the Magistrate of the District issued an order that she should be removed to the Campbell Hospital. When this order was attempted to be carried out, Mrs. Cahoon objected, and said that, if her daughter be removed, "she must also be removed." Thereupon, a prosecution was instituted against her under section 269 of the Penal Code, the result being that she was convicted and sentenced to four days' simple imprisonment.

The case was tried summarily; and the Magistrate, after giving a brief analysis of the evidence, stated as follows:—

"It appears that the accused keeps lodgers in her house and that the witness lives in the next room to the girl who has small-pox, and there is every probability of the small-pox being still further disseminated over the town on account of her action. It seems therefore necessary that she, especially as she has been a nurse, and ought to know better, should be dealt with somewhat

(1) I. L. R., 7 Mad., 276.

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severely." And in this view of the matter he convicted the petitioner as already mentioned.

Section 269 of the Penal Code occurs in chapter XLV, which is headed "of offences affecting the public health, safety, convenience, decency, and morals."

The first section, section 268, in that chapter lays down how a person may be guilty of a public nuisance; and the next section 269 provides:

"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine or with both."

The Magistrate seems to have been of opinion (as we understand him) that because the accused kept lodgers in her house, there was every likelihood of such lodgers catching the disease (small-pox), and that, through them, the contagion might be spread over the town of Howrah. The Magistrate in his explanation, since submitted to this Court, repeats the same view, and states that the act of Mrs. Cahoon was illegal, the word "unlawful" as occurring in section 269 having at least the same import as the word "illegal" as defined in the Penal Code; and that therefore the conduct of Mrs. Cahoon comes under the head of "public nuisance."

Now, it appears to us that the initial mistake which the Magistrate fell into was that he considered that Mrs. Cahoon kept "boarders" or "lodgers" in her house. Of this, there is no evidence; the only person residing with the family at the time being a friend who lived not as a boarder or lodger and who was welcome to go away at any moment he pleased. Mrs. Cahoon was not responsible, if he chose to stay there, and by his own intervention incurred the risk of catching the contagion.

The word "illegal" is defined in the Penal Code, but the word "unlawful" is not; and there are various sections in the Code, where the two words are rather indiscriminately used. An act however may be lawful, though it may be illegal; and an act may be unlawful, though not illegal. But accepting the view of the Magistrate as correct, the question arises whe

ther the act of Mrs. Cahoon amounted to a "public nuisance," and caused danger to "public health." She was living with her daughter in a house of which she was the owner or occupier; it was not a public house, she kept no lodgers or boarders, she kept her daughter in a room, and never took her out of the house, or to any public place. And we fail to see how by keeping the girl in the house, or opposing her removal to a hospital, she caused any "common injury or annoyance to the public or to the people in general, *who dwell or occupy property in the vicinity*" within the meaning of section 268, which defines what a public nuisance is.

What is really a public nuisance may be gathered from Chapter X of the Code of Criminal Procedure headed "Public Nuisance," and the procedure laid down therein for the abatement of such nuisance.

Turning then to section 269 itself, can it be said that the act of Mrs. Cahoon in keeping her child, though attacked with small-pox, was an unlawful or negligent act, and can it be said that, when she did so, or when she opposed the removal of the girl to a hospital, she knew or had reason to believe that it was likely to spread the infection of small-pox? We are unable to answer these questions in the affirmative. It was no doubt her duty, if she had the means, to isolate her child in such a way as not to spread infection to others; and apparently she did what she was bound to do; and we do not think that she committed any unlawful act by objecting to the removal of the girl to a hospital; and indeed it may well be said, that the carrying of the patient through a public street would be more risky to the public than keeping her in a private house.

We might in this connection refer to some of the observations of Lord Blackburn in the case of the *Metropolitan Asylum District* v. *Hill* (1) where the question to be decided was whether a small-pox hospital was a public nuisance, and where the duty not to spread infectious disease was considered. Lord Blackburn in the course of his judgment observed as follows: "Where those who have the custody of the person sick of an infectious disorder have not the means of isolating him from the other inmates which is

(1) L. R., 6 App. Cas., 193 (205).

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very commonly the case with the poor, and consequently those other inmates and the neighbours are exposed to the risk of infection, I think that the inability to isolate him would form a sufficient excuse to be a defence to any indictment; and I think also, though I am not aware of any authority on the subject, that the neighbours could not maintain any action for the damage which they would in such a case sustain from the proximity of the infected person, it being a necessary incident to the use of property for habitations in town that contagious sickness may befall their neighbours. If those who have the charge of the infected person have the means of isolating him on the spot, they certainly do well to use them, and, if it cannot be done on the spot, and they can, either by their own means, or by the aid of charitable persons who have erected an hospital, find a place where he can be isolated so as to avoid the risk of infection, they will do well to use these means. I do not mean to express any opinion as to whether, at common law, they would or would not be responsible for not doing so; but there is no authority, and I think no principle, for saying that they are justified in removing him to a place where the neighbours would be exposed to contagion, though it may be that those neighbours would be fewer in number than the neighbours of the spot where the infection broke out, nor for saying that, if that was done, and the contagion was such as to amount to a real nuisance, those neighbours might not maintain an action and obtain an injunction to protect themselves against the importation of foreign infection. For though, as I have already said, I think it an incident to the use of a habitation in a town that the occupier must bear the necessary risks of the inmates of a neighbouring habitation falling ill of a contagious disease, I do not think it an incident that he is to submit to his neighbours wilfully, though for very laudable motives, and not maliciously, bringing in contagion, where it did not previously exist, if the effect is not merely to alarm him, but to injure him. This, I think, is borne out by the decisions on the subject of inoculation." These observations are instructive in the present case.

We are not aware under what authority the Magistrate issued an order for the compulsory removal of the girl from the private residence of her mother. In the city of Bombay, we understand, the authorities have power to remove persons suffering from infec-

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tious diseases to hospitals; but no such power seems to have been conferred in this Presidency.

Upon the whole, we think, that the conviction in this case cannot be supported, and we accordingly direct that the rule be made absolute.

C. E. G. *Rule absolute.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Ghose and Mr. Justice Gordon.*

QUEEN-EMPRESS *v.* FATTAH CHAND (PETITIONER).*

1897 *February* 23.

*Magistrate, Jurisdiction of—Disqualification of Magistrate to try case—Witness—Omission to record statement of accused under Code of Criminal Procedure (Act X of 1882), section 364—Order as to disposal of property as to which no offence has been committed—Criminal Procedure Code, section 517—Property found by Police in possession of accused.*

Where a Magistrate before whom an accused person is brought omits to record (as provided by section 364 of the Criminal Procedure Code) statements made by the accused, he does not thereby make himself a witness, and so become disqualified from trying the case.

The accused was convicted of criminal breach of trust in respect of certain money belonging to the complainant, and on his conviction the Magistrate made an order under section 517 of the Code of Criminal Procedure, directing that an amount equal to the monies embezzled should be repaid to the complainant out of certain sums of money found by the police on the person of the accused.

*Held*, that the Magistrate had no power to make the order under section 517 of the Criminal Procedure Code, there being nothing to show that any offence had been committed with regard to the property, or that it had been used for the commission of any offence.

THE accused, who was a cashier in the employ of the complainant, a dealer in kerosine oil, was convicted by the Presidency Magistrate of Calcutta, Syud Ameer Hossein, under section 408 of the Indian Penal Code of criminal breach of trust in respect of certain monies belonging to the complainant. Upon the complaint being lodged the Magistrate issued a warrant for the arrest of the accused, who was brought up before the Magistrate under

* Criminal Appeal No. 918 of 1896 against the order passed by Nawab Amir Hossein, Presidency Magistrate of Calcutta, dated the 26th of October 1896.