1949 *Present :* **Nagalingam J.**

AMEEN, Appellant, *and* EDWIN (Sanitary Inspector), Respondent

S. C. 1,476—M. M. C. Colombo, 39,073

Nuisance—Keeping premises in filthy condition—Fowl droppings in cages—Injury to health—Chapter 180—Section 2 (1).

The charge against the accused was that he kept in his garden a row of fowl cages which were filthy with fowl droppings, feathers and stagnant water in empty cigaretto tins. There was no evidence that the state of the premises was injurious to the health of any person.

Held, that the accused had not committed an offence under section 2 (1) of the Nuisance Ordinance.

APPEAL from a judgment of the Municipal Magistrate, Colombo.

E. B. Wikramanayake, K.C., with *F. W. Obeysekera*, for the accused appellant.

No appearance for complainant respondent.

Cur. adv. vult.

May 9, 1949. NAGALINGAM J.—

The accused in this case has been charged with and convicted of having committed an offence under section 2 (1) of the Nuisance Ordinance, Cap. 180, Legislative Enactments of Ceylon. The proceedings, however, reveal an exhilarating comedy. A medical man, an anaesthetist, complained to the Chief Medical Officer of Health of the City that his neighbour, the accused, was keeping *an aquarium* and that the obnoxious odours emanating therefrom defied description. A Sanitary Inspector inspected the premises of the accused and found *a row of foul* (sic) *cages* along the boundary separating the accused's premises from those of the man of medicine. The Municipal Magistrate at the invitation of the parties inspected the premises and found *an aviary*.

The evidence is so unsatisfactory that it is not possible to say with any degree of certainty whether the nuisance complained of is in respect of an aquarium, an aviary or a fowl run. The accused in the course of his evidence expressly stated that unpleasantness arose between himself and the medical man over the latter's servant pruning and thinning the hedge that stood along the boundary separating the two premises. The accused apparently claimed the hedge as his. He is the owner of the premises where he lives. The Doctor is a tenant of the premises occupied by him, but claimed the right to prune the hedge ; as a result, hot words were exchanged between the neighbours. The complaint by the Doctor to the Municipal authority was after this incident and the accused says that the complaint was not a bona fide one but that it had its origin in malice and spite and one that was totally unfounded.

On receipt of the complaint, the Municipality sent a notice to the accused alleging that the " premises are in such a state as to be a nuisance to or injurious to health owing to their being in a filthy and unwholesome

state", and prescribing the remedy thus: "Abate nuisance by screening off effectively the fowl cages placed near the boundary between above premises and No. 64, Ward Place." This notice purports to have been signed by some officer on behalf of the Chief Medical Officer of Health, and that speaks well for the Chief Medical Officer, for it is the height of ludicrousness for anyone, much less a highly paid Medical Officer, to suggest that premises in a filthy and unwholesome state could be rendered clean and wholesome by the simple expedient of screening off the offending fowl cages from the view of the neighbours.

The accused, who describes himself as a poultry and bird fancier and who has been Secretary of the Ceylon Poultry Club shows, paid little or no heed to this notice and the learned Municipal Magistrate in his judgment says that he cannot understand why the accused does not comply with the notice. On behalf of the accused it was said that as there were no fowl cages which could be screened off, it was impossible to comply with the notice. On the occasion the learned Magistrate inspected the premises of the accused the cages did in fact contain pigeons and not fowls. In his evidence-in-chief the Municipal Sanitary Inspector did not say that he found any fowls in those cages. He contented himself with describing the state of the cages as being filthy with "fowl droppings, feathers and stagnant water in empty cigarette tins". He says that on the expiry of the time allowed by the notice for abating the nuisance he inspected the premises again and found the cages in the same condition as earlier but it was only under cross-examination when he was pressed as to whether the cages he referred to did contain any birds at the dates of his visit that he took upon himself to say that he found fowls and not pigeons.

The doctor who was called as a witness does not refer to these cages as fowl runs but he refers to them as bird cages. It is true that in the book of Genesis we read of the fish of the sea and the fowls of the air and in the latter case birds of the air no doubt are referred to, but when we refer to the inhabitants of the barn yard we refer to them simply as fowls and their cages are called fowl runs and not bird cages; that the Doctor himself used the term very advisedly is clear, for he stated he could not say whether "there are fowls or pigeons in those cages," though according to the Doctor and confirmed by the Sanitary Inspector, these cages were no more than fifteen feet from the window of the Doctor's bed-room. The accused, on the other hand, is quite definite that there were never fowls in the cages complained of.

It is not unimportant to take into consideration the testimony of the accused that he has won several prizes for poultry and pigeons; for a person who breeds expensive strains of poultry and pigeons is not likely, apart from civic considerations but from pure self-interest to keep aviaries or fowl runs in a filthy or unhygienic condition. The evidence of the accused receives support from the evidence of the Municipal Inspector and of the Doctor. The Inspector nowhere says that any stench or odour emanated from the cages he referred to. He confined himself only to "fowl droppings, feathers and stagnant water in empty cigarette tins". He does not say, assuming that what he did see was "fowl droppings", that there was an accumulation of fowl droppings

over a period of days or months indicating that the cages had not been attended to. If in fact no attention had been paid to these cages the first thing that would have attracted one's attention would have been the offensive smell that would have emanated from them, but the Inspector says not one word about it. The presence of feathers, on the other hand, with no noxious smell about the cages tends to indicate that pigeons rather than fowls have had the shelter of the cages ; in regard to stagnant water in cigarette tins, it is impossible to believe that the Municipal Inspector used the term " stagnant water " in the sense in which the term is understood certainly in relation to nuisances. It would be idle to talk of water in a glass, replenished from time to time, as stagnant water, though etymologically it would be correct to say that it is water that does not flow. But stagnant water at the present day not only means water not flowing but from which offensive odour emanates. A clear pool of water with no offensive odours about it cannot be described as stagnant water. The Inspector does not even say that the water he saw in the cigarette tins had stood in them for a long time without having been renewed or replenished from time to time. The Municipal Inspector, therefore, made use of a stereotyped formula in giving evidence without committing himself too much to facts observed or seen. The Doctor's evidence, however, is that there was an offensive odour from those cages from the droppings of the birds. The Doctor further stated that on occasions there had been smell like that of dead rats, but this may be so, and the smell may have emanated from in fact dead rats. But there is no evidence whatsoever to connect the smell of dead rats with any smell emanating or that could possibly emanate from the cages that are complained of. It is therefore clear that on the point as to whether there is any offensive odour from these cages the evidence is that of one witness who is not corroborated by the only other witness called for the prosecution and is contradicted by the accused.

The Doctor, it seems to me, overreaches himself when he says that he could from his bed-room see the " dirt " in the two cages, and although he does not say so in so many words, it is obvious from his evidence that it was the pruning of the hedge by his servant that made it possible for him to have a view of the " dirt " in the cages. But this is a surprising phenomenon, for the Doctor is unable to identify from the very bedroom from where he says he was able to notice the dirt whether the much larger objects therein were pigeons or fowls. Is it to be supposed that a person of the eminence and erudition of a medical man is incapable of distinguishing a pigeon from a fowl ? Or is the inability rather not due to obstruction of vision ? If so, the only inference possible is that the Doctor could not see into the cages at all. If this inference is correct, is it possible to take him seriously when he says he saw " dirt " inside the cages which are much tinier objects ?

The Doctor's own solution to the problem of abating the nuisance is the same as that of the Health Department and consists in the two cages being screened on his side. The learned Magistrate has accepted this evidence, for in convicting the accused the learned Magistrate says that the nuisance is quite easily remedied at least appreciably by merely

screening off the unscreened parts of the two cages on the Doctor's side. I do not think that this is a satisfactory method of abating a nuisance caused by fowl droppings, feathers and stagnant water.

There is no evidence in this case that the state of the accused's premises are such that it is injurious to the health of any person. The only other question is whether it amounts to a nuisance. The term "nuisance" was defined by Knightbruce V.C., in *Walter v. Selfe* [1] as an "inconvenience materially interfering with the ordinary comfort physically of human existence not merely according to elegant or dainty modes and habits of living but according to plain and sober simple notions amongst English people". I think this definition may well be applied in Ceylon with the substitution of the word "Ceylonese" for "English". Judged by this test it cannot be said that the condition of the accused's premises is such as to amount to a nuisance.

It is a pity that the Municipal authorities should have permitted themselves to have been made tools of by one *irate* neighbour to pay off a grudge against another. Not the slightest attempt appears to have been made to find out before the plaint was filed whether the evidence available disclosed an offence or satisfied the provisions of the law under which it was proposed to prosecute the accused.

I think this is a fit case where the complainant should be condemned to pay the costs of the accused. I set aside the conviction appealed from and acquit the accused and order the complainant to pay to the accused the costs of appeal.

Accused acquitted.

[1] *4 G. D. & S. 322.*

1949 *Present:* **Canekeratne J.**

THAMBIAH *et al.*, Appellants, *and* TENNEKOON (Inspector of Police), Respondent

S. C. 365-366—M. C. Jaffna, 15,144

Charge—Several accused—Common intention—Section 32 of Penal Code—Need not be referred to in charge.

Where several accused acted with common intention it is not necessary to specify section 32 of the Penal Code in the charge framed against them.

APPEALS from a judgment of the Magistrate, Jaffna.

M. M. Kumarakulasingham, for 1st accused appellant.

H. W. Tambiah with *A. P. Thurairatnam* for 2nd accused appellant.

A. Mahendrarajah, Crown Counsel, for Attorney-General.

Cur. adv. vult.

May 31, 1949. CANEKERATNE J.—

At an election held about ten days before, the candidate whom the complainant zealously supported was successful; the one favoured by the two accused persons was not. So he became the object, as the Magistrate