

**The Public Prosecutor Vs. Munian Alias Payya Kutti and ors.**

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**Court :** Chennai

**Decided On :** Jul-15-1943

**Reported in :** AIR1944Mad207; (1943)2MLJ675

**Appellant :** The Public Prosecutor

**Respondent :** Munian Alias Payya Kutti and ors.

**Judgement :**

**Kuppuswami Ayyar, J.**

1. This is an appeal by the Crown against the order of the Sub-Divisional Magistrate of Tiruvannamalai acquitting the four accused in C.C. No. 170 of 1942 on his file. All these four accused were charged for an offence under Section 429, Indian Penal Code, and tried by the Second Class Magistrate of Polur. The case against them was that they killed a bull which was stolen by the accused 1 and 2. The case of theft was tried separately. All these four accused were tried by the Second Class Magistrate of Polur, who after taking evidence, was of opinion that all of them were guilty under Section 429, but thought that as the first accused was a first offender and as the report of the District Probation Officer recommended his release on probation of good conduct he should send the papers to the Sub-Divisional Magistrate under Section 5 of Madras Act III of 1937. But instead of sending the records with the first accused alone, he directed all the accused to be produced before the Sub-Divisional Magistrate for being dealt with, and in the

order he stated that the proceedings were submitted under Section 349(I-A), Criminal Procedure Code. The learned Sub-Divisional Magistrate was of opinion that the accused could not be found guilty on the evidence on record and acquitted all of them. Hence this appeal.

2. If the Second Class Magistrate in a case like this was entitled to act under Section 349, the order of the Sub-Divisional Magistrate will have to be sustained, because he had jurisdiction to go into the question as to the guilt of the accused when the papers are sent to him under Section 349. That is not disputed. But what is urged is that this is not a case in which the record could be sent under Section 349, especially when there is a separate provision for dealing with such cases, namely, Section 5 of Madras Act III of 1937. The wording of that section is similar to that of Section 380 of the Code of Criminal Procedure. The Court which sends the records has to find the accused guilty before sending the papers to the Sub-Divisional Magistrate or First Class Magistrate for dealing with any accused under the provisions of Act III of 1937. Evidently the Magistrate did not know that he will have to find him guilty before taking action under that Act and thought instead that it would be enough if he expressed an opinion as required by Section 349. In this he was certainly wrong. As pointed out in *Public Prosecutor v. Gurappa Naidu* : AIR1933 Mad728 in a case where a Magistrate has to find an accused guilty before he sends the papers to a higher class Magistrate for the purpose of passing a sentence, it is not open to the latter to go into the question of the guilt or otherwise of the accused. In this case the language of Section 380 is similar to that of Section 5 of Act III of 1937. The Second Class Magistrate of Polur therefore ought to have found the accused guilty and sent the papers to the Sub-Divisional Magistrate for taking action. With regard to the first accused alone under the provisions of Act III of 1937. The order of the Sub-Divisional Magistrate acquitting the accused is set aside and he is ordered to return the papers so far as accused 2 to 4 are concerned to the

3. Second Class Magistrate of Polur for taking action with regard to those accused himself and he will ask the Second Class Magistrate to pass an order convicting the first accused and then send him the records for passing orders against him under -Act III of 1937.

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