[IN THE PRIVY COUNCIL]

1964 *Present:* **Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Upjohn, and Lord Wilberforce**

THE ATTORNEY-GENERAL, Appellant, *and*
A. E. REID, Respondent

PRIVY COUNCIL APPEAL No. 18 OF 1964

S. C. 15/1962—D. C. (Crim.) Colombo, 2096/N

Bigamy—Christian monogamous marriage—Subsequent conversion of husband to Muslim faith—His right to contract a polygamous marriage—Marriage Registration Ordinance, ss. 18, 19 (1), 35 (2), 64—Muslim Marriage and Divorce Act—Penal Code, s. 362 B.

In a country such as Ceylon, where there are many races and creeds and a number of Marriage Ordinances and Acts, the inhabitants domiciled here have an inherent right to change their religion and personal law and so to contract a valid polygamous marriage. If such inherent right is to be abrogated it must be done by statute.

The respondent contracted a marriage on 18th September 1933 under the Marriage Registration Ordinance, according to Christian rites. On 13th June 1959 he and a divorced woman were converted to the Muslim faith. A month later they were duly married under the provisions of the Muslim Marriage and Divorce Act, notwithstanding that the earlier marriage was subsisting and had not been dissolved under section 19 of the Marriage Registration Ordinance. The respondent was at all material times domiciled and resident in Ceylon. Admittedly the conversion of the respondent to the Muslim faith was sincere and genuine.

Held, that the Muslim Marriage and Divorce Act makes full provision for a male Muslim inhabitant of Ceylon to contract more than one marriage. Accordingly, the respondent was not guilty of the offence of bigamy, because the second marriage was not void within the meaning of section 362 B of the Penal Code.

APPEAL, by special leave, from a judgment of the Supreme Court reported in (*1963*) *65 N. L. R. 97.*

Mark Littman, Q.C., with *M. P. Solomon*, for the appellant.

E. F. N. Gratiaen, Q.C., with *T. O. Kellock* and *M. I. Hamavi Haniffa*, for the accused-respondent.

Cur. adv. vult.

2——R 5183—1,855 (4/65)

December 15, 1964. [*Delivered by* LORD UPJOHN]—

This is an appeal by the Attorney-General of Ceylon, by special leave, from a judgment of the Supreme Court of the Island of Ceylon dated 11th July 1963 whereby the respondent's appeal against his conviction on the 23rd November 1961 by the District Court of Colombo of the offence of bigamy was allowed and the conviction was quashed.

The relevant facts are not in dispute. The respondent married Edna Margaret de Witt according to Christian rites at St. Mary's Church, Badulla, on 18th September 1933. Both were Christians at the time and they lived together as man and wife until 1957. There were eight children of the marriage. In May 1957 the wife left the respondent and obtained a Maintenance Order against him in the Magistrates Court of Colombo.

On the 13th June 1959 the respondent and a divorced lady of the name of Fatima Pansy were converted to the Muslim Faith. A month later on the 16th July 1959 they were duly married in the District of Colombo by the Registrar of Muslim Marriages under the provisions of the Muslim Marriage and Divorce Act, 1951, notwithstanding that the earlier marriage was subsisting.

On the 28th October 1961 the respondent was indicted at the instance of the appellant for the offence of bigamy under section 362 B of the Penal Code which so far as relevant is in these terms :—

> " Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. "

He was duly convicted by Buultjens A.D.J. and sentenced to three months rigorous imprisonment from which judgment, as already mentioned, he successfully appealed.

As the first Christian marriage was under the Marriage Registration Ordinance some reference to that Ordinance is necessary. It contains the following relevant sections :—

> " 18. No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.
>
> 19. (1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce *a vinculo matrimonii* pronounced in some competent court. . . . . .
>
> 35. . . . . .

(2) The registrar shall address the parties to the following effect :

" Be it known unto you, A. B. and C. D., that by the public reception of each other as man and wife in my presence, and the subsequent attestation thereof by signing your name to that effect in the registry book, you become legally married to each other, although no other rite of a civil or religious nature shall take place ; and know ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence."

.....

64. In this Ordinance, unless the context otherwise requires—

.....

" marriage " means any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam ; "

The Muslim Marriage and Divorce Act applies only to marriages and divorces and to ancillary matters of those inhabitants of Ceylon who are Muslims, but their Lordships do not think it necessary to set out in extenso any of its provisions. It is sufficient to say that it makes full provision for a male Muslim inhabitant of Ceylon to contract more than one marriage provided certain notices are given by the Muslim to the Quazi of the District and by the Quazi to the existing wife or wives.

It is important to state at the outset that this appeal has been argued before their Lordships upon the express admission of Counsel for the appellant on the footing that the conversion of the respondent to the Muslim faith on the 13th June 1959 was sincere and genuine notwithstanding doubts expressed in the Courts below on this point.

Before dealing with the arguments and examining the authorities it will be convenient to state the matters which are not in controversy between the parties.

1. The respondent was at all material times and is domiciled and resident in Ceylon.

2. The respondent's first marriage remains valid and subsisting notwithstanding the second marriage for there has been no divorce under Section 19 of the Marriage Registration Ordinance.

3. The first wife can if she so desires treat the second marriage as an adulterous association by her husband on which she can found a petition for divorce.

4. The second marriage ceremony was duly performed by a proper officer after all due notices had been given and was properly registered under the Muslim Marriage and Divorce Act.

5. Accordingly two of the three essential ingredients in the commission of an offence under section 362 B of the Penal Code are satisfied namely the respondent is a person "having a husband or wife living" who "marries".

The sole question therefore is whether the third ingredient, that is whether the second "marriage is void by reason of its taking place during the life of such husband or wife", is satisfied.

Mr. Littman in supporting the view accepted by the learned Acting District Judge does not rely on any statutory enactment which renders the second marriage void for he recognises that having regard to section 64, section 18 of the Marriage Registration Ordinance does not apply to the second Muslim marriage.

Section 18, he concedes, is dealing only with a monogamous marriage but he submits that it reinforces his main argument for it is some indication of the view of the Legislature that the parties to a monogamous marriage are incapable of re-marrying until it has been legally dissolved or declared void.

Mr. Littman's main argument was that a person who enters into a monogamous Christian marriage not only enters into a contract but acquires as a result a status, recognised throughout Christendom ; that it must be the voluntary union for life of one man and one woman to the exclusion of all others, and that status cannot be changed and no new marriage of any sort can be contracted by either spouse until the marriage is dissolved by a procedure recognised as applicable to monogamous marriages even if both parties change to the Muslim religion. He relied on such well known cases as *Hyde v. Hyde*[1]; *Sottomayer v. De Barros*[2] and *Niboyet v. Niboyet*[3]. Though a polygamous marriage may for some purposes be recognised as a marriage (see for example *Baindail v. Baindail*[4]) he argued with much force that there is no true analogy between a Christian monogamous marriage and a polygamous marriage (see *R. v. Hammersmith Registrar of Marriages*[5]). So he submitted that a marriage under the Marriage Registration Ordinance being admittedly monogamous precluded either party during its subsistence from validly entering into another marriage even on a change of faith of both. This argument is strengthened where the change of faith is unilateral on the part of the husband only.

Mr. Littman recognised that Ceylon is a country of many races who profess many creeds ; that there are three Acts dealing with marriage in the Island, the Marriages Registration Ordinance (whose long title is

[1] *L. R. 1 P. & D. 130.*
[2] *5 P. D. 94.*
[3] *4 P. D. 1.*
[4] *(1946) P. 122.*
[5] *(1917) 1 K. B. 634.*

the Marriage General Registration Ordinance), The Kandyan Marriage and Divorce Act and the Muslim Marriage and Divorce Act; each Act dealing with different forms, ceremonies and incidents of marriage. But he submitted that none of these Acts lays down any code, and general principles must be applied to see whether by the first marriage the parties acquired a status which rendered them incapable of validly marrying again until the first marriage should be validly dissolved. By the first marriage such a status, he submitted, was acquired which in the absence of dissolution of the first rendered the second marriage ceremony void.

Mr. Littman's argument may be summarised in the following passage of the judgment of the Acting District Judge :—

> "Monogamy is an unalterable part of the status of every person who marries under the Marriages (General) Registration Ordinance and a change of religion cannot affect that status. Conversion to the Muslim Faith, even if genuine, cannot enable one who has married under the General Marriages Ordinance to contract a polygamous marriage ; such a marriage is void in the lifetime of a former wife."

Mr. Gratiaen's argument for the respondent was that the status arising out of a contract of marriage is one to which each country is entitled to attach its own conditions both as to its creation and duration. *Sottomayer v. De Barros* supra at 101. He submitted that the question is: what status does the law confer upon parties to a marriage under the Marriage Registration Ordinance? That question, he argued, must be answered solely by reference to the relevant statute law. He submitted that if the marital rights of the first wife have been violated, as admittedly they have, then the Marriage Registration Ordinance provides a remedy in section 19, but there is nothing in any statute which renders the second marriage invalid and nothing in the general law of the country which precludes the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognises polygamy, notwithstanding an earlier subsisting monogamous marriage.

Before examining these arguments their Lordships propose to refer to the authorities on this important question. Curiously enough they are few.

In the Judicial Committee of the Privy Council the question seems only to have been answered once and then only in a most tentative way in the case of *Skinner v. Orde* [1], a case relating to the custody of an infant. The mother of the infant, then a widow, went through a marriage in Mahomedan form with a man already the husband in Christian marriage of a living Christian wife. James L.J. delivering the judgment of the Board said "The High Court expressed doubts of the legality of a subsequent Mahomedan marriage which their Lordships think they were well warranted in entertaining ".

[1] *14 Moo. Ind. App. 309.*

The subsequent case of *Skinner v. Skinner* [1] does not help.

Their Lordships have been informed that the question has never been considered in any reported case in Ceylon.

In India the question has been considered on a section substantially the same as in Ceylon. As long ago as 1866 in 3 M. H. C. R. VII a Hindu was converted to the Roman Catholic faith and married in accordance with that faith but subsequently reverted to Hinduism, which at that time recognised polygamy, and married again. It was held he was not guilty of bigamy. Holloway J. decided it on the short ground that as Hindu law recognised polygamy a second marriage according to Hindu rights would not be invalid, still less so by reason of the earlier marriage under the Roman Catholic faith which Hindu law would not have recognised.

Innes J. put it on a broader ground. He examined the only relevant statute (9 Geo. IV C. 74 Sec. 70) and pointed out that it only rendered void a second marriage between persons professing the Christian Religion at the time of the second marriage, which the accused did not, so that this statute did not operate. He continued :

> " If, in becoming a Christian, a man took upon himself the obligation of monogamy, i.e., if the Christian Religion restricted him, on his embracing it, to one wife, then I should say that if such a person married while still a Christian he could not afterwards throw off his obligations by a mere change of profession. But I do not think that a profession of Christianity *ipso facto* imposes any such obligation although doubtless the tendency of Christianity is adverse to polygamy. Polygamy as an offence exists only by statute ; and there is no statute applicable . . . . "

In *Emperor v. Lazar* [2] the Court relying on decisions where Hindu women had been found guilty of bigamy and on the English case of *Reg. v. Allen* [3] declined to follow 3. M. H. C. R. VII and found the accused guilty of bigamy. It is important to note that the case is distinguishable from that before their Lordships for after referring to the cases of bigamy by Hindu women the Court said " We think the same principles must be applied to the present case which is even stronger as here the accused is stated not to have renounced the Christian religion. According to the above decisions it would make no difference if he had. "

Three years later in *Emperor v. Antony* [4], where the prosecution conceded that the accused had renounced Christianity before the second allegedly bigamous marriage, Abdur Rahim J. followed 3 M. H. C. R. VII in preference to *Lazar's* case, and without giving reasons, directed the jury to acquit the accused of bigamy.

[1] *(1898) L. R. 25 Ind. App. 34.*
[2] *(1907) 30 I. L. R. (Mad.) 550.*
[3] *1 C. C. R. 367.*
[4] *33 I. L. R. (Mad.) 371.*

Apart from the fact that it is distinguishable their Lordships think that the reasoning of the Court in *Lazar's* case is open to some criticism. *Reg. v. Allen* is not in point for both marriages in that case were monogamous and to follow the cases where Hindu women had been found guilty of bigamy was erroneous for the simple reason that Hindu law and Muslim law have never recognised the validity of a plurality of husbands by women. Therefore Muslim women have been found guilty of bigamy in taking a second husband during the subsistence of a former marriage because by *the law of their faith* the second marriage was invalid (see *Re Ram Kumari* [1]). Such cases support the argument of the respondent and not that of the appellant.

It appears to their Lordships that as regards India the law is stated with complete accuracy in *Datta v. Sen* [2]. That was a succession case but the question for decision was whether an Indian Christian who became converted to Mahomedanism could take a second wife. Henderson J. said at p. 16:

> "In connection with marriage the personal law must be applied. In the case of *Advocate-General of Bombay v. Jimababai* [3], Beaman J. said this:—
>
> 'On conversion to Mahomedanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion and to have substituted for it the religion of Mahomed with so much of the personal law as necessarily flows from that religion.'
>
> After his conversion Dukhiram was governed by the Mahomedan law. There can be no question that under that law he was entitled to contract a valid marriage with Alfatanessa. It would, therefore, be a serious thing to say that such a union was a mere adulterous connection.
>
> In our view, as he was entitled to contract this marriage under the Mahomedan law, it must be held to be a valid marriage unless there is some statute which invalidates it. Mr. Sen was not able to put forward any such provision: nor can we find anything either in Act XV of 1872 or in the Indian Divorce Act which would expressly invalidate this marriage. The result is that, in our opinion, Dukhiram did contract a valid marriage with Alfatanessa."

Such authority is entitled to great weight particularly in questions of the validity of marriages celebrated in accordance with the laws of the country where it is celebrated, but does not bind their Lordships, who have to consider this matter for the first time as a matter of decision.

[1] *18 I. L. R. (Cal.) 264.* [2] *(1939) I. L. R. 2 (Cal.) 12.*
[3] *(1915) I. L. R. 41 (Bom.) 181, 196.*

Ceylon is a country of many races, many creeds and has a number of Marriage Ordinances and Acts. The position there, as it appears to their Lordships, is similar to that in the former territories of British India where as was pointed out by Chagla J. in *Khanum v. Irani* [1] " in matrimonial matters there is no one law which applies to persons domiciled in British India; they are governed by their personal laws which differ from community to community ".

Their Lordships also note with interest the recent observations of Sir Jocelyn Simon P. in *Cheni v. Cheni* [2] who said at p. 22 " After all there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses ", which recognises that the obligations assumed upon undertaking a Christian monogamous marriage may not in some circumstances be incapable of change.

Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. They agree with the observations of Innes J. almost 100 years ago. In their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none.

Their Lordships have not overlooked section 35 of the Marriage Registration Ordinance which tends to support Mr. Littman's argument, but the exhortation contained in the registrar's address is no more than a warning and though it may be apt to mislead the ordinary man or woman ignorant of the definition of marriage contained in section 64, it cannot successfully be prayed in aid when considering whether the offence of bigamy has been committed in terms of section 362 B of the Penal Code.

It follows that as the Attorney-General of Ceylon cannot establish that this second marriage was void by the law of Ceylon by reason of the earlier Christian monogamous marriage the appeal must fail.

For these reasons their Lordships have humbly advised Her Majesty to dismiss the appeal.

Appeal dismissed.

[1] *(1947) A. I. R. 272 at p. 273.*

[2] *(1963) 2 W. L. R. 17.*