

Present : Mr. Justice Wood Renton.

1909.
July 6.

CAREY v. KALAI *et al.*

P. C., Kandy, 18,987.

Marital compulsion—Defence to a criminal prosecution—Applicability to Ceylon—Statutory offence—Ceylon Penal Code, s. 87.

The applicability of the doctrine of marital compulsion, as a defence to a criminal prosecution under the Ceylon Penal Code, discussed.

APPEAL by the accused from a conviction under section 2 of Ordinance No. 16 of 1905 by the Police Magistrate (T. B. Russell, Esq.). The facts material to the report sufficiently appear in the judgment.

H. A. Jayewardene, for the appellants.

Cur. adv. vult.

July 6, 1909. WOOD RENTON J.—

In this case the appellants, who are husband and wife, have been convicted under section 2 of Ordinance No. 16 of 1905 of having deserted from Vedahela estate from the employment of the complainant without leave or reasonable cause. It is clear on the evidence, so far as the first accused, the husband, is concerned, that he has committed the offence charged against him, and practically the only point which Mr. Jayewardene has argued before me in support of the appeal is that the second accused, being the wife of the first accused, should be presumed to have left under the compulsion of her husband, and, in the absence of any evidence showing that she took an independent part in the desertion, should be acquitted on the present charge. There is nothing in the evidence to show that, in fact, the husband and wife actually deserted together, for I cannot regard what the head kangany said on that point as a statement of anything he had himself seen, still less that the wife acted in any way under marital compulsion, and I was asked by Mr. Jayewardene to infer, from the mere fact of the existence between these parties of the relationship of husband and wife, that the second accused acted under her husband's compulsion.

It appears to me to be a grave question whether this doctrine of marital compulsion is in force in Ceylon at all, in view of the fact that section 87 of the Penal Code expressly defines the circumstances under which the defence of compulsion is entitled to legal recognition for the purposes of that enactment, and is significantly silent as to the doctrine of the coercion by a husband of his wife. In this connection I should, perhaps, mention that Mayne, in his treatise on

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The Criminal Law of India (section 131), states that the English doctrine of marital compulsion finds no place in the Penal Code of India ; and also that this very question seems to have come before Browne J. in the case of *Justinahamy v. Bastian*,¹ to which Mr. Tambyah, as *amicus curiæ*, has kindly called my attention, and to have been decided, under section 87 of our Penal Code, in the very sense which Mayne had adopted in construing the Penal Code of India. The only authority on the other side is the case of *Romel v. Segadu*,² in which Lawrie J. said that, as a general rule, it is inexpedient to punish a woman for the acts committed by her in presence of and on the instigation of her husband. If I were compelled to choose between these conflicting authorities, I should certainly prefer the opinion of Mr. Mayne and Justice Browne. But even if the doctrine of marital compulsion does apply in Ceylon, it is a doctrine which, according to the decision of the Privy Council in the case of *Brown v. Attorney-General for New Zealand*,³ can find no application where the only evidence before the Court is the existence of the relationship of husband and wife between the accused. This case, which is binding upon me independently as a decision of the Privy Council, has been followed in England in *Queen v. Baines et al.*⁴

If the English cases bearing on the doctrine of marital compulsion are referred to, it will appear that great diversity of opinion has prevailed among Judges from early times as to the class of offences to which it applies, and the circumstances under which it could be invoked. There are decisions in which even the presence of the husband has been held not to excuse the wife ; but there is no case in which the doctrine has been introduced on the mere strength of evidence showing that the two accused persons are so related. In an old case (see *Regina v. Cruse*⁵) Justice Burrough told the jury that when the wife was in company with the husband, the law always presumed her to be under his control, although the jury, as married men, knew that the contrary was often the fact. So far as I am aware, the doctrine of marital compulsion has never been put higher than this. It would open a wide vista of immunity to servants under the Labour Ordinance if I were to hold that that doctrine applied to cases like the present, in which the charge is one of statutory contravention by each of the accused parties of an independent contract.

The appeal is dismissed.

Appeal dismissed.

¹ (1898) 6 *Tambyah's Reports* 105.

² (1898) *Appeal Cases* 234.

³ (1897) 6 *Tambyah's Reports* 105.

⁴ (1900) 69 *L. J. Q. B.* 681.

⁵ (1838) 8 *C. & P.* 555.