1961 *Present* : **Basnayake, C.J., Gunasekara, J., and T. S. Fernando, J.**

KATCHI MOHAMED, Appellant, *and* A. F. C. BENEDICT (Inspector of Police), Respondent

S. C. 1169—M. C. Colombo, 42574/B

Marriage—Muslim marriage—Second marriage by husband to a Roman Catholic—Bigamy—Marriage Registration Ordinance (Cap. 112), ss. 18, 64—Penal Code, s. 362B.

A married man who belongs to the Muslim faith at the time of his marriage and who subsequently marries a second time, under the Marriage Registration Ordinance, a person not professing Islam, while his previous marriage is subsisting commits thereby the offence of bigamy within the meaning of section 362B of the Penal Code.

APPEAL from a judgment of the Magistrate's Court, Colombo.

Nimal Senanayake, for Accused-Appellant as *amicus curiae*.

D. St. C. B. Jansze, Q.C., Attorney-General, with *V. S. A. Pullenayegum*, Crown Counsel, and *M. Hussein*, Crown Counsel, for Complainant-Respondent.

Cur. adv. vult.

December 20, 1961. BASNAYAKE, C.J.—

The question that arises for decision on this appeal is whether a married person who belonged to the Muslim faith at the time of his marriage and who became a Roman Catholic and married a second time while his previous marriage was subsisting has thereby committed the offence of bigamy.

Briefly the facts are as follows :—The appellant who was a Muslim by the name of Katchi Mohamed married Asiya Umma on 3rd March 1947 at Mannar according to Muslim rites. They lived together till 1954. In that year he left Asiya Umma and on 18th November married Felicia Therese Benedict at St. Lucia's Cathedral, Kotahena. He went through the ceremony of conversion to Catholicism at St. John's Church, Mutwal, about two months before his marriage. At and after that ceremony he assumed the name of James Merrial Gunaratnam under which name he went through the second marriage ceremony. He described himself as a bachelor and Ceylon Tamil.

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The accused admits that he assumed the name of Gunaratnam because he was told that the priest would not perform the ceremony of marriage unless he changed his name. He also admits that he went to two churches, one at Kotahena and the other at Mutwal, and that he first went to the church at the latter place and that he was named Gunaratnam after he went to the church at Mutwal. He stated that he was a Muslim even at the time of the trial, the change of name and marriage in church notwithstanding.

It was submitted that under our law it is legal for a Muslim to have more than one wife and that the appellant being a Muslim his second marriage did not constitute the offence of bigamy. There is no evidence nor was it contended that a Muslim cannot change his religion and become a Roman Catholic. When a Muslim becomes a Roman Catholic he is no more a follower of the Prophet and does not thereafter enjoy the rights and privileges of a Muslim. The moment the appellant became a Roman Catholic he ceased to be a person who was in law entitled to have more that one wife and when he married a second time as a Roman Catholic he committed the offence of bigamy. The section under which the appellant is charged (s. 362 B of the Penal Code) reads—

> " 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.
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> *Exception* :—This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time :
>
> Provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge. "

Now the marriage of a person other than one who belongs to Islam is void by operation of section 17 of the Marriage Registration Ordinance under which law the appellant's second marriage was solemnised, and which became applicable to him the moment he became a Roman Catholic. The appellant's oral evidence that he divorced his first wife in 1953 has not been accepted and rightly too.

The appeal is dismissed.

GUNASEKARA, J.—

I agree that the appeal must be dismissed.

Mr. Senanayake advanced in support of the appeal an argument based on the definition of " marriage " in the Marriage Registration Ordinance[1]. In terms of this definition, 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 word " marriage " occurs twice in what was section 17 and is now section 18 of the Marriage Registration Ordinance. The section reads—

> 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.

It was contended by Mr. Senanayake that in each of the expressions " no marriage " and " a prior marriage " the term " marriage " must be understood to exclude marriages contracted between persons professing Islam, and that therefore the second marriage was not rendered invalid by reason of the fact that it was contracted while the first was subsisting.

The Marriage Registration Ordinance is, according to its long title,

> An Ordinance to consolidate and amend the law relating to marriages other than the marriages of Muslims and to provide for the better registration thereof.

It was necessary, therefore, that marriages of Muslims should be excluded from the operation of those provisions of the Ordinance that relate to the validity of marriages. Such provisions could relate only to marriages contracted under the Ordinance, and the legislature excluded Muslim marriages from their operation by the terms of the definition of "marriage". It is manifest that when the Ordinance provides that " no marriage shall be valid " where it is contracted in certain circumstances the term " marriage " must be understood to exclude Muslim marriages. The reference to " a prior marriage ", however, does not occur in a provision relating to the requisites of such prior marriage or its registration and cannot be understood to contemplate only marriages contracted under this Ordinance. In my opinion the context requires that in this expression the term " marriage " must be understood to mean any marriage and not any marriage except a Kandyan or Muslim marriage. I am therefore unable to accept Mr. Senanayake's contention.

We were invited by the Attorney-General to consider the effect of a view that under the relevant Muslim Law a marriage is automatically dissolved by apostasy. In my opinion the appellant's own evidence and the position taken by him both at the trial and in his petition of appeal

[1] Cap. 95 of the 1938 edition of the Legislative Enactments, section 59 ; Cap. 112 of the 1956 edition, section 64.

render it unnecessary to discuss the question whether at the material time his "prior marriage" had been dissolved by apostasy. Apart from some inadmissible hearsay, the only evidence adduced by the prosecution on the question of apostasy was that of Felicia Benedict's father, who said that the appellant "was baptized about two or three weeks before the marriage" and that "the baptism took place at St. James' Church at Mutwal". According to the appellant the effect of that ceremony as he understood it was merely to change his name, and he did not at any time abandon the Muslim faith. The defence set up by him at the trial and in his petition of appeal has been that he divorced his first wife in accordance with Muslim Law, and that being a Muslim he was in any event entitled to marry a second time while his first marriage was subsisting. There appears to be no reason why his evidence that he never abandoned the Muslim faith should not be accepted.

T. S. FERNANDO, J.—

I agree with the judgment of my Lord, the Chief Justice, dismissing this appeal for the reason that when the appellant married Felicia Benedict on 18th November 1954 under the Marriage Registration Ordinance, No. 19 of 1907, his previous marriage on 3rd March 1947 to Asiya Umma who was alive on 18th November 1954 (and who is still alive) had not been legally dissolved. I desire only to add some observations in reference to an argument addressed to us by Mr. Senanayake who appeared as *amicus curiae* in the absence of any counsel for the appellant.

Both the appellant and his wife Asiya Umma were persons professing Islam at the time of their marriage on 3rd March 1947, and their marriage was registered under the provisions of the Muslim Marriage and Divorce Ordinance, No. 27 of 1929, an ordinance which applied only to subjects of the Sovereign professing Islam. In view of the definition of "marriage" in section 64 of the Marriage Registration Ordinance, the appellant and Asiya Umma could not have had their marriage solemnized under the provisions of that Ordinance. Although there is no legal impediment to a person professing Islam registering under the provisions of the Marriage Registration Ordinance his or her marriage to a person not professing Islam, the question here is whether the marriage of the appellant to Felicia Benedict was valid. Section 18 of the Marriage Registration Ordinance enacted that "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".

Mr. Senanayake, basing his argument on the definition of "marriage" in section 64 of the Marriage Registration Ordinance set out hereunder, viz.,

> "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;

contended that the appellant had not contracted a " prior marriage " with Asiya Umma within the meaning of section 18 of the Marriage Registration Ordinance. It seems to me, however, that the expression " marriage " which occurs twice in section 18 does not bear the same meaning in each instance. What is, in section 18, declared not to be valid is a " marriage " as defined in section 64; but a marriage in the expression "a prior marriage" in the same section 18 is, in my opinion, not limited to a marriage as defined in section 64, and the context requires that it be given its ordinary and natural meaning and interpreted as denoting any legally recognised marriage. Otherwise, an acceptance of Mr. Senanayake's argument would mean that whereas section 6 of the Kandyan Marriage and Divorce Act, No. 44 of 1952, renders invalid a marriage between two persons subject to the Kandyan law where one of the parties has contracted a prior marriage which has not been lawfully dissolved or declared void, this consequence of the invalidity of the second marriage may be avoided by a Kandyan who has married another Kandyan under the Kandyan Marriage Ordinance or the Kandyan Marriage and Divorce Act by the simple expedient of resorting to a registration of his or her second marriage under the Marriage Registration Ordinance.

Appeal dismissed.