1958 *Present :* **Pulle, J., and H. N. G. Fernando, J.**

THE QUEEN *v.* ALWIS *et al.*

S. C. 313—Application for Revision in D. C. (Crim.) Balapitiya, 13238/349

Forgery—Evidence—Registration of marriage—Forgery of signature of the " wife "—Competency of the " wife " as witness for prosecution.

Where the signature of a woman was alleged to have been forged by a man in a marriage register (in collusion with the Registrar of Marriages) so as to make out that she was lawfully married to him—

Held, that the woman was a competent witness against the man in a prosecution for forgery. In such a case, it is not necessary that the marriage should first be declared null and void in a civil action instituted by the woman.

APPLICATION to revise an order of the District Court, Balapitiya.

Ananda Pereira, Crown Counsel, for the Attorney-General.

C. S. Barr Kumarakulasinghe, with *V. Arulambalam*, for the 3rd respondent.

Cur. adv. vult.

October 31, 1958. PULLE, J.—

This is an application made on behalf of the Attorney-General to revise an order made by the District Judge, Balapitiya, on 26th June, 1958, postponing the trial of three accused persons pending the decision of a civil case. At the hearing of the application only the 3rd accused was represented and learned counsel on his behalf stated that he could not support the order. As there was no argument at the hearing we have taken time to consider more closely the reasons given by the learned Judge for the order under review.

The 2nd accused is a Registrar of Marriages who is alleged to have been present at and registered a marriage between the 1st accused and a woman named K. P. Gurunanselage Leelawathie on the 8th January, 1955. The 3rd accused was one of the witnesses. The case for the prosecution is that the person truly answering to the name of K. P. Gurunanselage Leelawathie was not even present at the ceremony and that she did not sign the register. The signature on the register purporting to be hers is, therefore, alleged by the prosecution to be a forgery and six out of the seven counts in the indictment impute to each of the accused complicity in the forgery.

On the date of trial, namely, the 26th June, 1958, the three accused persons were present. They were not, in terms of section 204 of the Criminal Procedure Code, asked to plead to the indictment. A submission was made on behalf of the 1st accused that as according to the marriage certificate one K. P. G. Leelawathie was his wife, the witness

Leelawathie could not be called against him until a court of competent jurisdiction enters, to use the words of counsel, " a valid decree to the effect that the marriage is null and void." A certified copy of a plaint dated 13th November, 1957, filed by Leelawathie against the 1st accused was produced. She has stated in the plaint that the signature on the register purporting to be hers had been forged and asked for various declarations on the footing that she was not a party to any marriage whatsoever.

The learned Judge accepted the submission on behalf of the 1st accused principally for the reason that the entry in the register which was attacked as a fabrication and forgery was the best evidence of the marriage of the 1st accused and the witness Leelawathie and that until such marriage was declared null and void it was not open to the prosecution to call her as a witness. A second reason which influenced the Judge was that the 1st accused would be denied " the facilities to place evidence before court in regard to the marriage certificate as evidence in the entry in the marriage register. The 1st accused must have the opportunity of having the marriage register produced and calling witnesses in regard to the registration of the marriage and his witnesses would necessarily be the Registrar and the attesting witness. But I am told the Registrar and the attesting witness are the co-accused in this indictment. Therefore, the 1st accused cannot compel these two other co-accused to give evidence for him."

The very substance of the case for the prosecution is that the witness Leelawathie whom it wanted to call was not and could not be the wife of the 1st accused. This is not a case in which the prosecution is putting forward a witness who did go through a form of marriage with the 1st accused but which marriage was void *ab initio* or voidable. In such a case, unless the decision of a court of competent jurisdiction declaring the marriage to be a nullity is given, there would not be any difficulty in holding the witness to be not competent. But this is not such a case, for the prosecution is putting forward a witness as a *femme sole* to establish that a transaction to which the three accused were parties was a fabrication and fraudulent from the beginning to the end. To say in these circumstances that the entry impugned as a forgery is the best evidence of the marriage is not far from pre-judging the very facts in issue arising on each of the seven counts of the indictment. The prosecution is entitled to shew that what has been called " the best evidence " is worthless for the purpose of proving a marriage between the 1st accused and the witness Leelawathie. If Leelawathie has chosen after consulting legal advice to seek relief in a court of civil jurisdiction that does not alter the stand taken by the prosecution that she did not go through any of the formalities of a marriage with the 1st accused and that no objection could be taken to the admissibility of her evidence.

The second reason given by the Judge for postponing the trial is also untenable. It is plain that at a trial of two or more persons a witness is entitled to depose to a fact even though one of the accused cannot

compel his co-accused to give evidence contradicting that fact. The reason given by the Judge that the 1st accused would be handicapped in his defence is of no consequence, because a prior decision of the civil case in favour of Leelawathie would make no difference. The prohibition against one accused compelling another to give evidence will still remain. Obviously the Judge could not have postponed the case on the ground that either the 2nd accused who was the Registrar who officiated at the marriage or the 3rd accused who was one of the two witnesses required by law to attest a marriage could not compel the 1st accused to give evidence. They were at an equal disadvantage with the 1st accused.

I would, therefore, set aside the order of the District Judge dated the 26th June, 1958, and remit the case for trial in due course.

H. N. G. FERNANDO, J.—I agree.

Order set aside.