1970 *Present:* H. N. G. Fernando, C.J.

M. A. PATTISON, Appellant, *and* KALUTARA SPECIAL CRIMINAL INVESTIGATION BUREAU, Respondent

S. C. 715/69—M. C. Kalutara, 33775

Penal Code—Section 362B—Charge of bigamy—Burden of proof—Evidence Ordinance, s. 103.

Where, in a prosecution for bigamy, the defence of the accused is based on the Exception to section 362B of the Penal Code, namely that the accused who contracted a second marriage did not know that his first wife had been alive at any time during the preceding seven years, the burden is on the prosecution to prove knowledge on the part of the accused that his first wife had been alive when he contracted his second marriage.

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

No appearance for the accused-appellant.

Kumar Amarasekera, Crown Counsel, for the Crown.

Cur. adv. vult.

September 4, 1970. H. N. G. FERNANDO, C.J.—

The appellant has been convicted on a charge of bigamy in respect of a marriage contracted by him in February 1960. His first wife, whom he had married in 1945, had in fact been alive in 1960, and she gave evidence at this trial. According to her, she had lived with the accused in her home at Dodangoda until 1952; at that stage, she left the accused and has since then lived with another man at Maharagama which is 35 miles away from her own village; the people of her village did not know where she resided, and letters addressed to her at her mother's house were not delivered to her; she herself had never seen the accused after the separation in 1952.

The second wife testified that the accused informed her before the second marriage in 1960 that he had previously been married. This information was conveyed to the Registrar, who suggested to the accused that he furnish an affidavit in terms of the Exception to s. 362 B of the Penal Code. The accused then furnished the affidavit D1, in which he averred the fact of the former marriage and separation ; and stated that he did not know whether his first wife was alive, and had been unable to trace her whereabouts.

The accused gave evidence at the trial to the effect that he had made inquiries for his first wife from her mother and others in her village. The mother had told him that she herself did not know the whereabouts of the first wife. This evidence as to the mother's statement stood uncontradicted. It is not hearsay, because the accused relied at the trial, not on the truth of the mother's statement, but on the fact that she made it.

In rejecting the defence based on the Exception to s. 362B, the learned Magistrate holds " Here is a person who accordingly to his own affidavit D1 had stated that his wife separated from him of her own will. Subsequently, he makes rather futile attempts to search for the wife. The defence has not placed before this Court any evidence that the wife of the accused was continually absent, for a space of seven years, and that she was not heard of as been alive within that time ".

The terms of the Exception to s. 362B require proof of two matters ;—

(1) that at the time of the subsequent marriage the first wife had been continually absent from the accused for the space of seven years ; and

(2) that the first wife had not been heard of by the accused as being alive during the seven years.

The first wife's evidence clearly established the first matter, namely the simple fact that she had been " absent from the accused " ever since 1952. If, as she and the accused both stated, the two had never been together or even seen each other between 1952 and 1960, then she had obviously been " absent from the accused " for the eight years. The learned Magistrate misdirected himself when he thought that there was no evidence of this simple fact of " absence " for seven years ; what had to be proved was "*absence from the accused*, and not absolute non-existence.

As to the second matter, the Magistrate's opinion is that the accused has " placed no evidence that the first wife was not heard of as being alive " after 1952. Involved in this opinion is a misdirection in law

for here also the matter to be established is only that she had not been heard of as being alive *by the accused*. The Exception does not require proof that the former wife had not been heard of as being alive even by other people.

It appears that the Exception in our s. 362B was based on the Proviso to s. 57 of the English Offences against the Person Act of 1861, which permits a similar exception to a charge of bigamy, namely that the accused who contracted a second marriage did not know that his first wife had been alive at any time during the preceding seven years. In the case of *R. v. Curgerwen* [1] the question whether the burden of proving this lack of knowledge lay on the accused was specially reserved, and was decided by a Bench of five Judges. Their decision was that "it is contrary to the general spirit of the English law that the prisoner should be called on to prove a negative". The acquittal of the prisoner was upheld because the prosecution had not proved knowledge on his part that his first wife had been alive when he contracted his second marriage. The harshness, and even the absurdity, of any other view is demonstrable. If, as in the instant case, it turns out that a man's first wife was in fact alive when he contracted a second marriage, proof that no one knew of that fact would be impossible unless the wife had led a hermit's existence.

Section 108 of the Evidence Ordinance provides that when a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to those who affirm that he is alive. In the instant case, the accused did make inquiries from the first wife's mother and persons in her village, and according to the available evidence those inquiries did not reveal that she had been heard of during the seven years preceding February 1960 by persons who would naturally have heard of her. Hence, if the question whether she was alive had arisen in a Court of law in February 1960, s. 108 would probably have operated to place the burden of proof on the party who affirmed that she was alive. The operation of s. 108 illustrates the reasonableness of the ruling in *R. v. Curgerwen*.

The accused in this case proved his good faith by disclosing the fact of his former marriage both to the intended second wife and to the Registrar. In fact the Registrar advised him to contract the second marriage. In these circumstances, it is pleasing to know that the law accords with St. Paul's advice that "it is better to marry than to burn".

The appeal is allowed, and the accused is acquitted.

Appeal allowed.

[1] *(1866) 1 O. C. R. 1.*