1971 *Present :* Alles, J.

S. E. DE ZOYSA, Appellant, *and* INSPECTOR OF POLICE (S. C. I. B.), Respondent

S. C. 220/70, with Application in Revision 322/71—M. C. Panadura, 18701

Criminal law—Mistake of law—Relevancy in regard to liability and the sentence that should be passed—Charge of bigamy—Accused's misconception of facts and law—Sentence.

An accused person's misconception of the facts, though it relates to a provision of law, is relevant and effective to negative a particular state of mind imputed to the accused. Although ignorance or mistake of law is no defence, the effect of the misconception as to the law can be taken into consideration in determining the sentence that should be imposed by Court.

The accused-petitioner was charged with bigamy. The evidence established that he honestly and in good faith believed that his first marriage on 8th October 1947 came to an end by reason of the repudiation of the marriage by his first wife who had deserted him and was living with another man. He therefore honestly believed that he was legally entitled to contract his second marriage on 14th February 1953. No deceit was practised on his second wife.

Held, that, on the question of sentence, the Court should be guided by what the accused in good faith and honestly believed to exist and not the actual facts proved by the prosecution—only such a view could give full scope to the doctrine of Mistake.

APPEAL, with application in revision, from a judgment of the Magistrate's Court, Panadura.

F. N. D. Jayasuriya, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

July 24, 1971. ALLES, J.—

There is no right of appeal in this case as the appellant pleaded guilty to the charge. The appeal is therefore rejected. However, with the appeal the petitioner-appellant has filed papers in revision and made an application to revise the sentence of nine months rigorous imprisonment imposed on him for the offence of bigamy.

The petitioner, who is presently employed at the Port Cargo Corporation as a clerk, married one Koronchige Ipin Silva on 8th October 1947. He had one child by the marriage. Soon afterwards in August 1948 the petitioner lost his job and was unable to maintain his wife as he was not possessed of any means whatsoever. Thereafter, as a result of differences with his wife, he left the matrimonial home. In January 1949, Ipin Silva went to live with her parents at Negombo and became the mistress of one Edmund Fernando. She thereafter severed all connections with the petitioner and continued to live as the mistress of Edmund Fernando. By this union she had ten children. She instituted proceedings for divorce against the petitioner for malicious desertion and on 12th May 1969 obtained a decree for divorce and married Edmund Fernando on 14th October 1969.

According to the petitioner in June 1950, after securing employment, he visited Ipin Silva at her parental home at Andiambalama close to Negombo and learnt that she was being kept as the mistress of Edmund

Fernando and was informed by Ipin Silva that she had ceased to recognise him as her husband. Thereafter, believing honestly and in good faith, that his marriage with Ipin Silva had come to an end he contracted a second marriage with Yantrasaduge Daisy Elsida Fernando on 14th February 1953. By this union he has nine children, the eldest of whom is 17 years of age and the youngest 6 years. Plaint against the petitioner was filed on 10th August 1969, sixteen years after the date of the commission of the alleged offence and after his first wife had obtained a decree for divorce. In his affidavit the petitioner states that, as a result of his conviction, he would be dismissed from his employment and consequently his present mistress and their nine children would be deprived of their only source of sustenance and livelihood.

The reason for the institution of criminal proceedings by the Police, after such a long lapse, remains a mystery. The petitioner's conviction and incarceration for a period of nine months can only result in disastrous consequences for himself and his dependants.

Learned Counsel for the petitioner strongly urges that it would be grossly unjust to sentence the petitioner to any term of imprisonment in the circumstances of this case. In support, he has submitted an interesting argument on the aspect of punishment and sentence. Counsel submits that the petitioner has stated in his affidavit that he, honestly and in good faith, believed that his first marriage came to an end by reason of the repudiation of the marriage by his first wife. Having entertained the misconception that his first marriage had come to an end, he honestly believed that he was legally entitled to contract the second marriage. He thereafter looked upon Elsida Fernando as his lawful wife and the issue from this union as lawful children and had them baptised in church. Indeed, now that his first wife has obtained a decree for divorce, there is no lawful impediment to his regularising his marriage with Elsida Fernando and legitimising his children.

The petitioner's misconception of the facts, though it relates to a provision of law, is relevant and effective to negative a particular state of mind imputed to an accused person. Undoubtedly it is no defence, because ignorance or mistake of law is no defence, but the effect of this misconception as to the law can be taken into consideration in determining the sentence that should be imposed by Court. In *Regina v. Tolson*[1] (1889) 60 Law Times 899 Mrs. Tolson married on 11th September 1880 and her husband deserted her on 13th December 1881. She and her father made inquiries about him and learnt from his elder brother, and from general report, that he had been lost on a vessel bound for America, which went down with all hands on board. On 10th June 1887, within seven years of the alleged disappearance of her husband, supposing herself to be a widow she went through the ceremony of marriage with another man and was subsequently indicted before the Assizes for bigamy. The question of law was reserved by the Assize Judge and was argued

[1] *(1889) 60 Law Times 899.*

before a bench of 14 judges who by a majority of nine to five held that it was a good defence to the indictment that Mrs. Tolson bona fide believed and had reasonable grounds for believing that her husband was dead. Stephen J., who was one of the majority, considered how mistake in general, is relevant to liability and sentence, and stated at p. 907 :—

> " I think it may be observed as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence. I am unable to suggest any real exception to this rule, nor has one ever been suggested to me. "

For the same reason Stephen J. holds that a bona fide claim of right (i.e. a mistake of law) negatives larceny and many of the offences against the Malicious Mischief Act—offences where the theftuous or wrongful intention is material.

Professor Kenny in his Outlines of Criminal Law (16th Ed. p. 278) states as follows :—

> " If property is taken by a true legal right, obviously no criminal wrong is committed by taking it. But immunity is carried further, because the common law has always admitted that a man's honest, though erroneous or unreasonable, belief that he had a legal right to take the thing should negative criminal guilt. This clearly covers a mistake of law and it is incorrect to state that a belief in a right which has no existence in law will not suffice. "

In Ratanlal and Thakore—Law of Crimes (1961) 20th Ed. pp. 962, 963 the same principle is recognised. Decisions of our Supreme Court have also adopted this same principle. In *Ponnu v. Sinnatambi*[1] 24 N. L. R. 248 the accused who were renters of a grazing field, removed some goats belonging to the complainant, from whom money was due for animals tied on the pasture lands, in the mistaken belief that they had the right to do so to enforce payment (clearly a mistake of law). Schneider J. held that, although a mistake of law is no defence, the facts asserted and proved by the defence negatived a dishonest intent on their part and acquitted them. In *Broome v. Carolis*[2] 19 N.L.R. 276 the accused plucked coconuts from a land, believing that the land was property of a notary, on whose instructions he acted and who asserted title to the land on deeds. The conviction on the charge of theft was set aside on the ground that, in view of the misconception entertained by the accused, an intention to cause wrongful gain or wrongful loss could not be imputed to the accused.

In the present case, the misconception of law entertained by the petitioner establishes an intention on his part to contract a lawful marriage, and at the same time negatives an intention to deceive Elsida Fernando and an intention to contract a bigamous marriage,

[1] *(1922) 24 N. L. R. 248.*

[2] *(1916) 19 N. L. R. 276.*

notwithstanding the fact that mistake of law by itself is no defence. On the question of sentence, the Court has to be guided by what the accused in good faith and honestly believed to exist and not the actual facts proved by the prosecution—only such a view can give full scope to the doctrine of Mistake.

Learned Counsel for the petitioner also draws my attention to the modern trend in England, which seems to take the view that the punishment meted out for the offence of bigamy is considered excessive by jurists and draws my attention to an article by Glanville Williams on Language and the Law (Law Quarterly Review Vol. 61 at p. 71). Dealing with common errors in the law, Glanville Williams criticises the severe punishment that can be imposed for this offence in England. At one time the offence was punishable with death but is now punishable with seven years rigorous imprisonment (Section 57 of the Offences against Persons Act, 1861). According to Professor Kenny (17th Ed. p. 201) the punishment was based on the broad ground of its " involving an outrage upon public decency by the profanation of a solemn ceremony ". Glanville Williams gives an apt illustration of the absurdity of such a view when he states :—

> " If A deserts his wife and lives with a mistress he commits no crime, either in deserting his wife or in committing adultery. But if he tries to make the position more regular by going through a form of marriage with his mistress, then, even though the marriage is totally null and void (as it necessarily is), so that the whole ceremony is a mere empty form of words, and even though he never thereafter cohabits with the woman, he commits a felony. And this simply because he is 'profaning a solemn ceremony'. The ceremony may have taken place in a Registrar's office, but that makes no difference to its solemnity in the eye of the law. "

There may be some justification to refer to " the profanation of a solemn ceremony " in a Christian country like England but can such a serious view be taken in a country like Ceylon where the majority of marriages usually take place with the signing of the register in the Registrar's office ? Nevertheless our law seeks to impose an even higher punishment for the offence than England has chosen to do. My observations must not be construed to mean that one can practice a deceit on a wronged spouse with impunity and thereby go through a mock ceremony of marriage. Such conduct must necessarily be condemned and disapproved by Courts of law. Where however, both parties to the bigamous marriage have a guilty intent, their object is generally to hold themselves out to the world as man and wife. As Glanville Williams remarks " this is no doubt to deceive the world at large but is anyone necessarily the worse for that ? ".

Glanville Williams also poses the question as to what are the harmful social consequences of bigamy. He states that very often the male offender has told the woman before the ceremony that he is already

married. "A ceremony" he says "performed in such circumstances is no more than a pathetic attempt to give a veneer of respectability to what is in law an adulterous association". Elsida Fernando was aware at the time she got married to the petitioner that he was married to another woman. In effect therefore the petitioner in this case has misused a legal ceremonial for the purpose of giving a decent appearance to intercourse which he knew to be illicit and by going through a marriage ceremony in church, he did no more than give a "veneer of respectability" to his adulterous association, knowing full well that his first marriage was a complete failure. No deceit has been practised on his second wife which is likely to shock the social conscience of any right thinking person.

I therefore think this is an appropriate case for the Court to invoke the provisions of Section 325 (1) of the Criminal Procedure Code. Acting in revision, I quash the sentence of nine months rigorous imprisonment imposed on the petitioner by the Magistrate and without proceeding to conviction, I discharge the petitioner conditionally on a personal bond in a sum of Rs. 1,000 to be of good behaviour for a period of one year.

Accused discharged conditionally.