Sept. 20, 1911

[FULL BENCH.]

Present : Lascelles C.J., Middleton J., and Grenier J.

THE KING *v.* PERUMAL.

[Crown Case reserved.]

Second Midland Circuit, Kandy, Case No. 8.

Indian Tamil settled at Kandy not governed by Tesawalamai—*Polygamous marriage in Ceylon of Indian Hindu void—Burden of proof—Penal Code, s. 362.*

A Hindu (Tamil) who was a native of Tinnevelly in South India, who had settled in the Central Province of Ceylon, was held not to be governed by the *Tesawalamai*.

A polygamous marriage between persons who are not Muhammadans is void in Ceylon, even though it is valid by the law of the country in which the husband has his domicile.

Where an accused, a Hindu, was charged under section 362 of the Penal Code, the prosecution led no affirmative evidence to prove the *kurai* ceremony at the time of the celebration of the first marriage ; but a witness for the prosecution deposed that all that was necessary to constitute the marriage was done ; he also said that the *kurai* ceremony was an important portion of the ceremony.

Held, that even if the *kurai* ceremony was an essential part of the marriage ceremony, that it was proved.

LASCELLES C.J.—The fact of a marriage ceremony having been proved, it was incumbent on the accused, if he relied upon the omission of any essential detail in the ceremony, to make good his point and to show that the omission had in fact taken place.

THE facts are stated by Wood Renton J. thus :—

1. E. A. S. Awatta Perumal was tried before me and a Tamil-speaking jury on August 23, 24, and 25, 1911, on the following charges :—

(1) That on or about September 12, 1908, at Kandy, he being then lawfully married to one Kadirai, went through a form of marriage with one Catherine Gallway, "which second marriage was void by reason of its taking place during the life of the said Kadirai," and that he thereby committed an offence punishable under section 362 (*b*) of the Ceylon Penal Code ; and

(2) That at the time and place aforesaid he concealed from the said Catherine Gallway his former marriage with the said Kadirai, and that he thereby committed an offence punishable under section 362 (*c*) of the Ceylon Penal Code.

2. Owing, as I was given to understand, to the illness of Catherine Gallway, she was not examined as a witness at the trial, and accordingly Crown Counsel withdrew the second count in the indictment.

3 The material facts as to the first count are these. Perumal is a Tamil resident in the District of Kandy, where he owns an estate. He is a Hindu by religion. On April 20, 1906, he contracted a valid marriage according to Hindu customary law with Kadirai, daughter of Arumugam Kalimuttu, kanakapulle on Choisy estate, which is about thirty miles away from Kandy. This marriage was not registered. After a few months Kadirai returned to her father's house, the suggestion being that Perumal had illtreated her. Perumal petitioned the Supreme Court for a *habeas corpus* to get his wife back. Both in his petition and in the affidavit supporting it he stated that she was his lawful wife, and had lived with him as such. The Supreme Court referred the parties to their civil remedy. Eventually Kadirai returned to her husband on a written undertaking by him to pay to her father a sum of Rs. 2,500, for which he granted a promissory note, by way of fine and maintenance money if she had occasion, through any fault of his to leave him again. After a time Kadirai once more left Perumal. Her father claimed the sum above mentioned, but it was not paid.

4. There is evidence that Catherine Gallway is a Burgher. The certificate of her marriage with Perumal, which was put in evidence at the trial, shows that she is a resident in Colombo. The marriage was, on September 12, 1908 celebrated under the provisions of Ordinance No. 19 of 1907. Perumal is described in the certificate as a bachelor. In answer to a question which I put to them, the jury found—a fact which is otherwise clear on the evidence, and which Perumal's counsel did not contest—that it was a marriage celebrated, not in accordance with Hindu rites, but under the municipal law of the Colony.

5. As the case presented various points of legal difficulty, I proposed to counsel on both sides to put, and did in fact put with their consent, to the jury the following questions :—

(1) Did accused contract a lawful marriage with Kadirai on April 20, 1906 ?

(2) Did he go through a ceremony of marriage with Catherine Gallway on September 12, 1908 ?

(3) Was Kadirai then alive, and was her marriage, if any, with the accused still undissolved ?

(4) Was accused at the date of the second marriage domiciled in India or in Ceylon ?

(5) Was the second marriage in accordance with Hindu rites or not ?

This last question was added for the purpose of enabling the effect of the prohibition of polygamy in section 19 of Ordinance No. 19 of 1907 to be considered, in view of the position of Catherine Gallway, whether the accused was domiciled in India or in Ceylon.

6. The jury answered the first question by a majority of 6 to 1 in the affirmative, and the second and third unanimously in the affirmative. As regards the fourth question, they held by a majority of 6 to 1 that the domicil of the accused at the date of the second marriage was in India and not in Ceylon. Their answer to the fifth was a unanimous

Sept. 20, 1911

The King v. Perumal

finding that the marriage with Catherine Gallway was celebrated, not in accordance with Hindu rites, but under the municipal law of the Colony.

7. In my view the finding of the jury in favour of an Indian domicil is against the weight of the evidence. But I have accepted it as correct for the purposes of the present case. On the findings above stated, Perumal's counsel raised three points of law :—

(i.) That as there had been no affirmative proof on the part of the prosecution that the *kurai* ceremony, or presentation of the sacred cloth to the bride, had been performed at the marriage of Perumal and Kadirai, I ought to have ruled as a matter of law that there was no evidence on which the jury could find that a valid marriage had been entered into.

(ii.) That under section I., clauses 17 and 18, of the *Tesawalamai*, polygamy among Tamils is recognized, and that Perumal, as a Tamil, although not resident in the Northern Province, was entitled to the benefit of these provisions.

(iii.) That as a Hindu domiciled in India Perumal was entitled to contract a polygamous marriage under the municipal law of Ceylon, even with a person subject to that municipal law.

On the grounds to which I will refer immediately, I over-ruled all these contentions. The jury, on my direction, entered a unanimous verdict of guilty against Perumal, and I sentenced him to twelve months' simple imprisonment, imposing a lenient sentence in view of the finding, erroneous as I considered it, in favour of an Indian domicil.

8. In support of his argument on the first of the three points of law above mentioned, Perumal's counsel referred to a note in *Katiresu's Tesawalamai 19* of a ruling by Sir Joseph Hutchinson C.J. in the case of *Rex v. Palani*,[1] to the effect that the *kurai* ceremony is essential to a valid Hindu marriage. The facts of the case are not stated, and there is nothing to show that Sir Joseph Hutchinson held that a valid Hindu marriage could not be proved, unless the witnesses stated positively that the *kurai* ceremony had been performed. In Perumal's case the witnesses stated that all the necessary ceremonies had been observed, and, as I have already pointed out, Perumal himself, in his application to the Supreme Court for a *habeas corpus*, and in his subsequent agreement with Kadirai's father, himself treated the marriage as a lawful one. I dealt with this matter at length in my charge to the jury, a certified copy of which accompanies this case, and need not repeat what is there said. I should point out, however, that the witnesses to the marriage, who had stated that all necessary ceremonies were performed, were not asked in cross-examination as to whether the *kurai* had been omitted. See further on this matter *Mayne's Criminal Law of India, sections 63 and 636.*

9. It was not necessary to consider whether section I., clauses 17 and 18, do in fact sanction polygamy among the Tamils to whom the *Tesawalamai* applies, and I expressed no opinion on that point. But I told the jury that the *Tesawalamai* had no application to a Tamil in the position of Perumal.

10. In support of his argument on the third point stated in paragraph 7 above, Perumal's counsel contended (*a*) that under Hindu law and the law of British India a Hindu domiciled in India may legally marry

[1] *S. C. C. Min., Feb., 1907.*

any number of wives that he pleases, and (*b*) that in accordance with the rule of private international law that domicil is the test of contractual capacity he may exercise the same right under the municipal law of Ceylon, which prohibits polygamy, even although the persons with whom such marriages are contracted are domiciled in Ceylon, and, therefore, subject to its municipal law. In reply to a question that I put to him on the point, he said that he was prepared to contend that a person, the law of whose domicil recognized incestuous or polygamous marriages, could under the statute law of this Colony marry his sister or contract any number of marriages that he thought proper in the Registrar-General's Office at the same time.

11. I assumed for the purposes of this case that the Hindu law in force in British India is as stated in the last paragraph. I held, however, that as both the common law and the statute law (see Ordinance No. 19 of 1907, section 19) of the Colony prohibit polygamy, save in cases where special provision has been made in favour of a particular community such as the Moors, and as there is no such provision to the benefit of which Perumal was entitled, he could not contract under the municipal law a marriage which the municipal law expressly prohibited, particularly with a person subject by domicil to that law. The cases to which Perumal's counsel referred, and of which *Brook v. Brook*[1] and *Sottomayer v. De Barros*[2] may be taken as instances, appeared to me not to apply. They merely decide that a contractual incapacity imposed upon a man by the law of his domicil is still binding on him, although no such incapacity is recognized by the *lex loci celebrationis*. It does not follow—and there are, I think, authorities to the contrary as regards both polygamous marriages and immoral contracts—that a man can, by virtue of a capacity existing under the law of his domicil, take advantage of the provisions of the municipal law of the country where he is residing to contract a marriage or enter into a contract which that law has expressly made illegal. I referred, during the course of the argument, to the case of *In re Bozzelli's Settlement*, decided in England in 1902, as marking the furthest point to which, so far as I am aware, the English Courts have gone in support of the contention that I am now dealing with. I could not obtain access to that decision in Kandy. But so far as I recollect, the point decided was that a marriage with a deceased wife's sister validly entered into by the law of the domicil of the contracting parties in the country of their domicil might be recognized in England, in spite of the then existing prohibition of such marriages there. I think that the Court in *In re Bozzelli's Settlement* indicated that the decision would have been different, if the prohibition of the marriage had been of such a character as that with which we have here to deal. In any case *In re Bozzelli's Settlement* appeared to me to constitute no authority for the proposition that a man enabled by the law of his domicil to contract polygamous marriages could, under the provisions of a municipal law which, as is the case with Ordinance No. 19 of 1907, not only contemplates monogamous marriage alone but expressly prohibits polygamy, enter into a valid polygamous marriage with a person on whom that law is binding.

12. The questions for the Court are these :—

(1) Was I right in holding that, in spite of the absence of affirmative proof by the prosecution of the *kurai* ceremony at the time

[1] *(1861) 9 H. L. C. 193 at pp. 207 and 266.* [2] *(1877) 3 P. & D. I.*

Sept. 20, 1911

The King v. Perumal

of the celebration of the marriage between the accused and Kadirai, there was evidence on which the jury could find that a valid marriage between these parties had taken place ?

(2) Was I right in holding that, even assuming that the provisions of section I., clauses 17 and 18, of the *Tesawalamai* contain a statutory recognition of polygamy, the accused was not a Tamil to whom the *Tesawalamai* applied, and was, therefore, not entitled to the benefit of these provisions ?

(3) Was I right in holding that the accused, whom the jury found to have been and to be a Hindu domiciled in India, although resident in Ceylon, committed the offence of bigamy under section 362 (*b*) of the Penal Code by his marriage with Catherine Gallway under the circumstances set out in this case reserved ?

H. A. Jayewardene (with him *A. St. V. Jayewardene* and *Canakeratne*), for the accused.—The Judge should not have left to the jury the decision of the question whether the first marriage of the accused with Kadirai was valid. The evidence adduced failed to establish the fact that the *kurai* ceremony was performed at the first marriage. *Kurai* ceremony is an essential portion of the marriage ceremony. (*Rex v. Palani*,[1] *Katiresu's Tesawalamai* 19.) None of the witnesses for the prosecution say that the *kurai* ceremony was performed. [Lascelles C.J.—You rely on an omission, to prove the invalidity of the marriage. The fact that there was a marriage ceremony according to Hindu rites is proved. You should have proved the omission.] The first marriage was not a registered marriage ; it was therefore incumbent on the prosecution to prove all the essentials of a Hindu marriage ceremony.

Capacity to contract a marriage is governed by the law of domicil. All Hindus of India can marry more than one wife. The jury have found that the domicil of the accused is India. The accused has therefore committed no offence by his marrying a second time, even if the marriage with Kadirai was a valid one. The second marriage of the accused is not void " by reason of the first."

Counsel cited *Dicey on the Conflict of Laws* 543 ; *Burge, vol. III., p.* 240 ; *Brook v. Brook* ;[2] *Le Mesurier v. Le Mesurier* ;[3] *In re Bozzelli's Settlement* ;[4] *In re Cooke's Trusts* ;[5] *Viditz v. O'Lagan* ;[6] *Cooper v. Cooper.*[7]

It is true that in England a person cannot contract a polygamous marriage, even though the law of the domicil of such person allows it : but that is because England is a Christian country. In India and Ceylon the same rule will not apply. Counsel cited *Gour's Penal Code* 1194, *Mayne's Hindu Law* 111, 3 *Mad. H. C. App.* 7, *In re Chamia*,[8] *Jukni v. Queen Empress.*[9]

[1] *S. C. C. Min., Feb., 1907.*
[2] *(1861) 9 H. L. C. 193 at pp. 207 and 266.*
[3] *(1895) A. C. 517; 1 N. L. R. 160.*
[4] *(1902) 1 Ch. D. 751.*
[5] *(1887) 56 L. J. Chan. 637.*
[6] *(1900) 2 Ch. 87.*
[7] *13 A. C. 88.*
[8] *7 Cal. 354.*
[9] *19 Cal. 627.*

Clauses 17 and 18 of the *Tesawalamai* show that polygamy is lawful under the *Tesawalamai*. The accused is governed by the *Tesawalamai*.

Walter Pereira, K.C., S.-G., for the Crown.—The very same witness who says that the *kurai* ceremony was an essential part of the Hindu marriage ceremony says that all the necessary ceremonies were performed. The fact that he did not specially mention the *kurai* ceremony when he enumerated the various rites performed at the wedding is a pure oversight. The accused should have asked the witness about the *kurai* ceremony if he wished to prove that ceremony was not performed.

Section 2 of the Penal Code makes the Penal Code applicable to all persons in the Colony (see *Ratanlal's Law of Crimes, commentary on section* 2).

An act which is not an offence in the domicil of a person may become an offence if committed in England (*Rex v. Esop*[1]).

Section 3 of the Marriage Ordinance (No. 19 of 1907) defines marriage as any marriage, except the marriages of Kandyans and Muhammadans. Section 19 enacts : " 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." The second marriage of the accused is void by reason of the first, within the meaning of section 362 (*b*) of the Penal Code.

The rule as to domicil quoted by the other side would apply (if at all) only if both parties were domiciled in India, and not if the accused only was domiciled there.

Counsel cited *Halsbury's Laws of England, vol. VI., p.* 254.

Jayewardene, in reply.

Cur. adv. vult.

September 20, 1911. LASCELLES C.J.—

This is a case stated by my brother Wood Renton under section 355 (1) of the Criminal Procedure Code on the conviction of one Perumal. The count of the indictment under which Perumal was convicted was in the following terms :—

That on or about September 12, 1908, at Kandy, you, having your wife living, to wit, one Kadirai, did marry one Catherine Gallway, which second marriage was void by reason of its taking place during the life of the said Kadirai, and that you thereby committed an offence punishable under section 362 (*b*) of the Ceylon Penal Code."

The questions of law reserved for decision are the following :—

" (1) Was I right in holding that, in spite of the absence of affirmative proof by the prosecution of the *kurai* ceremony at the time of the celebration of the marriage

[1] *7 Car. and Payne 456.*

between the accused and Kadirai, there was evidence on which the jury could find that a valid marriage between these parties had taken place ?

"(2) Was I right in holding that, even assuming that the provisions of section I., clauses 17 and 18, of the *Tesawalamai* contain a statutory recognition of poligamy, the accused was not a Tamil to whom the *Tesawalamai* applied, and was, therefore, not entitled to the benefit of these provisions ?

"(3) Was I right in holding that the accused, whom the jury found to have been and to be a Hindu domiciled in India, although resident in Ceylon, committed the offence of bigamy under section 362 (*b*) of the Penal Code by his marriage with Catherine Gallway under the circumstances set out in this case reserved ?"

With reference to the first question, it is necessary to examine the evidence of the witnesses by whom the marriage between the accused and Kadirai was sought to be established.

Arumugam Kalimuttu, the father of Kadirai, describes the marriage ceremony. A holiday was given to the labourers on the estate in honour of the occasion, and the Assistant Superintendent attended the ceremony.

A Brahmin officiated, and broke a coconut and placed rice in front of the bride and bridegroom. Fruit, betel, arecanuts, and money presented by the parents of the bride to the Brahmin were placed in front of the bride and bridegroom. The Brahmin sprinkled water over the gifts and placed incense in fire before the parties. Then the *thali* was placed in a plate in the presence of the bride and bridegroom ; incense was burnt ; the *thali* was given to the bridegroom, who tied it on the neck of the bride, in token that they were man and wife. Various ceremonies followed, which it is unnecessary to particularize.

Kalimuttu, in his evidence, makes no mention of the *kurai* ceremony, or presentation of the sacred cloth to the bride. In cross-examination he was merely asked whether any other ceremonies than those which he had detailed were performed, and he answered the question in the negative. But the question whether the *kurai ceremony was performed was never* specifically put to him.

Velupillai Ramasamy, a kanakapulle, states that he was acquainted with the rites of a Hindu wedding, and all that is necessary was done at the marriage between the accused and Kadirai. In cross-examination the witness stated : "It is usual to give the wife the *kurai*, or sacred cloth ; that is as important as the *thali*." But here, again, the question whether the *kurai* was given was not definitely put to the witness. The inference which I should draw from the evidence is that the *kurai* was given on this occasion. The witness stated that the presentation of the *kurai* was as important

as the *thali*, which is equivalent to stating that it is an essential element in the ceremony, and at the same time stated that all that was necessary was done at the marriage in question. He would hardly have made the latter statement if what he regarded as an essential or at any rate an important, portion of the ritual had been omitted.

The position taken up by the learned counsel for the defendant is, in my opinion, untenable. There is abundant evidence that a marriage according to Hindu rites was celebrated with much ceremony between the accused and Kadirai. The evidence of the bride's father and that of Velupillai Ramasamy was corroborated by Mr. Marcel, the estate superintendent, who was present during a part of the ceremony, which he believed at the time to be a valid Hindu marriage.

The case is thus widely different from *Reg. v. Kallu*[1] and other Indian cases noticed by Mayne in section 635 of his *Criminal Law of India*, where the evidence of marriage consisted only of statements by interested parties that the parties were husband and wife.

The fact of a marriage ceremony having been proved, it was, in my opinion, incumbent on the learned counsel for the accused, if he relied upon the omission of any essential detail in the ceremony, to make good his point, and to show that the omission had in fact taken place. Instead of doing this, he cautiously refrained from asking the witnesses whether the ceremony was defective by reason of the omission of the presentation of the *kurai*, and now asks us to assume the existence of the flaw on which he relies.

Taking into consideration the evidence which I have noticed, coupled with accused's subsequent statement in the *habeas corpus* proceedings that Kadirai was his lawful wife, I am of opinion, on the first question, that the learned Judge was right in holding that there was evidence on which the jury could find that a valid marriage between the parties had taken place.

The second question may be disposed of shortly. The accused is a Hindu, a native of Tinnevelly, who has settled in the Central Province of Ceylon. The collection of customary law known as the *Tesawalamai* has no application whatever to such a person.

The *Tesawalamai* is described by Regulation No. 18 of 1806 as " the customs of the Malabar inhabitants of the Province of Jaffna, as collected by order of the Governor Simons in 1706." The application of the *Tesawalamai* has been rigorously kept within these limits. It is well settled that the Tamil inhabitants of the Districts of Trincomalee and Batticaloa, which were never included in the Province of Jaffna, are not subject to the *Tesawalamai*. (*Wellapulle v. Sitambalam.*[2]) Even with regard to the District of Mannar, now a portion of the Northern Province, it was at one time doubtful whether the *Tesawalamai* was in force, until the question was set at rest by a decision of this Court.

[1] *I. L. R. 5 All. 233.*

[2] *Ram. 72-76, 114.*

Sept. 20, 1911

LASCELLES C.J.

The King v. Perumal

Holding as I do that the *Tesawalamai* has no application to the accused, it is not necessary to discuss the effect of clauses 17 and 18 of that document.

With reference to the suggestion that the Hindu inhabitants of Jaffna are permitted by these sections to contract polygamous marriages, I only desire to avoid saying anything which may be taken to lend countenance to the suggestion that polygamy is lawful to that section of the community under the *Tesawalamai* or otherwise.

The third question raises an interesting point of private international law. Stated briefly, the position is as follows. The accused is a Hindu, and as such polygamy is permitted to him by the law of British India. His domicil has been found by the jury, rightly or wrongly, to be Indian ; and it is conceded that, if the accused had gone through the form of marriage with Catherine Gallway in India, he could not have been convicted by a Court in British India under section 494 of the Indian Penal Code, which corresponds and is identical with section 362 (*b*) of the Ceylon Penal Code. The question is whether he can be convicted in Ceylon under section 362 (*b*) of the Penal Code, the form of marriage having taken place in Ceylon.

Section 362 (*b*) is in the following terms : " 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 a fine." The accused cannot be convicted under this section unless the second marriage took place " in any case in which such marriage is void by reason of its taking place during the life " of Kadirai. The crucial question for determination, then, is whether the marriage with Catherine Gallway is valid.

The statute law of the Colony appears at first to offer a ready answer to this question. Section 19 of " The Marriage Registration Ordinance, 1907," enacts 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."

Under the interpretation section (3) the word " marriage " means all marriages, except marriages under the Kandyan Marriage Ordinance and marriages between persons professing the Muhammadan faith, so that the application of section 19 to Hindus, apart from any question of domicil, cannot be doubted. But Mr. Jayewardene relies on the rule of private international law, under which the capacity to marry depends upon the domicil of the parties. The accused, he argues, is a Hindu domiciled in British India ; as such it is not unlawful for him to marry during the lifetime of a former wife, and such marriage is therefore not an offence under section 362 (*b*) of the Penal Code. The rule of private international law on which

Mr. Jayewardene relies is, of course, indisputable, but it is subject to certain well-recognized exceptions, one of which is thus stated as a proviso to rule 169 of *Dicey's Conflict of Laws* : " By the term 'marriage' is meant in these rules marriage as understood in Christendom," *i.e.*, " the voluntary union for life of one man and one woman to the exclusion of all others." " Hence," the learned author continues, "rule 169 has no application to connections which though called marriages, either are not intended to be for life, or are made with a view to polygamy."

It was objected by Mr. Jayewardene that the exception to which I have referred is founded upon the teaching of Christianity, upon the prohibition which Christianity is understood to have placed upon polygamy, and that there is no room for this exception in a country like Ceylon, where Christianity is neither the State religion nor the faith of the majority of the population.

The position taken up is a curious one, and I do not see how the accused could in any case claim the benefit of the rule of private international law, and at the same time claim to be exempt from the limitations attached to that rule.

It is true that in the leading cases on which the rule is founded (*Brook v. Brook*,[1] *Hyde v. Hyde*,[2] *Sottomayer v. De Barros*,[3] *In re Bozzelli's Settlement*[4] such expressions as " the general consent of all Christendom," " the law of God," and " the law of Christendom" are used to denote the principle on which polygamous and incestuous marriages are excluded from the application of the general rule that the domicil of the parties governs the essentials of the contract of marriage. But the use of these expressions does not imply that it is only in countries where Christianity is the prevailing religion that polygamous and incestuous marriages are beyond the pale of private international law. If a non-Christian country has followed the rule of Christendom as to polygamy, and by its municipal law has prohibited such marriages, it surely stands on the same footing as Christendom as regards the non-recognition of polygamous marriages. The only distinction is that in the former case the prohibition rests on grounds of public policy, whilst in the latter case it is associated with the teaching of Christianity.

The polygamy has been prohibited and has been an offence under the municipal law of Ceylon for more than half a century, except in the case of Muhammadans, is beyond all question.

Section 28 of Ordinance No. 6 of 1847 declares that no marriage shall be valid (except amongst Muhammadans) if either of the parties has contracted a prior marriage which has not been legally dissolved or declared invalid, and the same section provides for the punishment of the offence of bigamy. This prohibition has been continued in force under various Ordinances up to the present time.

[1] *(1861) 9 H. L. C. 193.*
[2] *(1866) L. R. P. M. 130.*
[3] *(1879) 5 P. & D. 94.*
[4] *(1902) 1 Ch. 751.*

Sept. 20, 1911

LASCELLES C.J.

The King v. Perumal

It is thus clear that, except in the case of Muhammadans, polygamy is as obnoxious to the public policy of Ceylon as to that of European States.

The principle involved is fully stated in the following passage in the new edition of *Burge, vol. III., p.* 257 :—

> VI. *Impediments by Lex Fori.*—Polygamy, when the validity of a marriage celebrated in one country is brought before the Courts of another it is necessary to consider the effect of the law of the tribunal as well as the personal law and law of the place of contract, and the Court is entitled to apply the *impedimenta dirimentia* of its own law to the question whether a valid marriage has been created. It can refuse to give effect to the law under which the marriage was contracted if that sanctions a violation of the precepts of the Christian religion or of public morals or of its own policy.
>
> A marriage founded on polygamy, or which is incestuous, will not be recognized in any Christian country, although it may be warranted by the municipal law of the country in which it was contracted or by the personal law of the parties. English Courts have thus declined to exercise jurisdiction over marriages which do not fulfil the essential condition of being " an union for life of one man and one woman to the exclusion of all others," but will take cognizance of those having this characteristic, whether Christian or not ; they have accordingly refused to dissolve a polygamous marriage, such as that of Mormons, or an African native marriage, but have recognized a marriage according to Japanese rites.

In view of the circumstance that polygamy is expressly prohibited by the municipal law of the Colony (except in the case of Muhammadans), I am clearly of opinion that a polygamous marriage between persons who are not Muhammadans is void in Ceylon, even though it is valid by the law of the country in which the husband has his domicil. I therefore hold that my brother Wood Renton was right in holding that accused, by going through the form of marriage with Catherine Gallway in the circumstances of the case reserved, committed the offence of bigamy under section 362 (*b*) of the Penal Code. I would therefore affirm the conviction and sentence ; the sentence to run from the date when it was pronounced.

MIDDLETON J.—

The accused was found guilty of contracting a bigamous marriage with one Catherine Gallway under section 362 (*b*) of the Penal Code while his first wife Kadirai was alive, and sentenced to twelve months' simple imprisonment.

The three questions propounded to us by the learned Judge who reserved the case for our consideration were :—

> " (1) Was I right in holding that, in spite of the absence of affirmative proof by the prosecution of the *kurai* ceremony at the time of the celebration of the marriage

between the accused and Kadirai, there was evidence on which the jury could find that a valid marriage between these parties had taken place ?

" (2) Was I right in holding that, even assuming that the provisions of section I., clauses 17 and 18, of the *Tesawalamai* contain a statutory recognition of polygamy, the accused was not a Tamil to whom the *Tesawalamai* applied, and was, therefore, not entitled to the benefit of these provisions ?

" (3) Was I right in holding that the accused, whom the jury found to have been and to be a Hindu domiciled in India although resident in Ceylon, committed the offence of bigamy under section 362 (*b*) of the Penal Code by his marriage with Catherine Gallway under the circumstances set out in this case reserved ? "

The only questions raised on the argument before us were (1) whether the ceremony gone through by the convict with Kadirai constituted a valid Hindu marriage ; (2) even if the marriage were valid according to the Hindu custom, did it render the second marriage with Katherine Gallway void by reason of its taking place during the lifetime of Kadirai ?

Upon the first question, the proof adduced by the prosecution consisted of the evidence of Kadirai's father and a kanakapulle called Velupillai Ramasamy, and the petition and affidavit of the accused to the Supreme Court acknowledging Kadirai as his lawful wife. In this connection I would refer to the case of *Brinda bun Chandra Kurmokar v. Chundra Kurmokar, &c.*,[1] when in a suit for restitution of conjugal rights it was held that when the fact of the celebration of the marriage is established it will be presumed, in the absence of evidence to the contrary, that all the necessary ceremonies have been complied with. This I think effectually disposes of the objection as regards the alleged failure to prove the performance of the *kurai* ceremony.

I answer my brother Wood Renton's first question in the affirmative.

Upon the second question raised in argument before us, I think the reasoning of the learned Solicitor-General must be adopted. It is not contended that an alien is not amenable to the criminal law of the Island, and even if it were, section 2 of the Penal Code is conclusive on the point.

The marriage of the convict with Kadirai being a valid one, section 19 of the Marriage Ordinance, No. 19 of 1907, which applies to all persons in Ceylon other than Kandyans and Muhammadans, enacts 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."

[1] *(1885) 12 Cal. 140.*

Sept. 20, 1911

MIDDLETON J.

The King v. Perumal

The valid marriage with Kadirai has not been legally dissolved or declared void, and therefore the form of marriage with Katherine Gallway was invalid and void by reason of its taking place during the lifetime of Kadirai, or, in other words, before the valid marriage with Kadirai had been legally dissolved by her death.

Section 19 of Ordinance No. 19 of 1907 in its effect forbids polygamy in Ceylon by all persons subject to that Ordinance, and is merely a re-enactment of section 19 (1) of Ordinance No. 2 of 1895. If, therefore, a Hindu native of India validly married in Ceylon, or even in India, assumed to contract a second marriage in Ceylon, the first marriage still subsisting, his action in doing so would be repugnant to section 19 of Ordinance No. 19 of 1907, and would, I think, render him amenable to the criminal law under section 362 (*b*) of the Penal Code. He cannot, under the circumstances, contract a valid marriage in Ceylon ; and if he goes through the form of marriage with another person during his valid marriage, he has acted in contravention of section 362 (*b*).

In my opinion section 19 of Ordinance No. 19 of 1907, inferentially repeals any statutory recognition of polygamy to be derived from the *Tesawalamai* in favour of so-called Pagans, and I therefore consider this conclusion dispenses with the necessity for an answer to the second question from this Court ; and I answer the third question in the affirmative, and think that the conviction should stand.

GRENIER J.—

The three questions reserved by the learned Judge who tried this case present, to my mind, no difficulties either as regards the law or the facts, and I would unhesitatingly answer them in the affirmative. On the first question, I would say that there was evidence of a positive and distinct nature that a valid marriage had taken place between the accused and the woman Kadirai. Although there was no specific affirmative proof that the *kurai* ceremony was observed, the whole body of evidence adduced by the prosecution contained sufficient materials on which the jury could base their finding that a valid marriage had taken place. I have do doubt that had the witnesses been asked whether the *kurai* ceremony was observed, they would have placed the matter beyond dispute. The marriage between the accused and Kadirai took place in 1906 according to Hindu customary law, and I think it unreasonable to expect persons who were present to describe or detail with scrupulous accuracy everything that took place on the occasion, unless they were unusually observant. They would know that the intention of the parties was to contract a marriage, and that certain ceremonies in accordance with Hindu customs, appropriate to the event, would necessarily be performed ; and unless their attention was subsequently drawn to the ceremonies in detail, all they would be able to

say would be that they were present at the marriage, and that it took place with a due observance of the prescribed ritual. The learned Judge was right in allowing the case to go to the jury on the question of the first marriage, and in refusing to rule as a matter of law that there was no evidence on which the jury could find that a valid marriage had not been entered into.

On the second question, I fail to see how a native of Southern India, whose domicil has been found to be outside Ceylon, can claim to be governed by the *Tesawalamai*. Even if the *Tesawalamai* applied to him, this is the first time I hear that polygamous marriages are allowed under that system of law. Personally, I have never heard or known of such marriages amongst the Tamils of the North, who have always, as far as I know, practised monogamy.

On the third question, I think that the accused, although he may be entitled in his own country, according to the law of his domicil, to practice polygamy freely, our marriage laws present an insuperable bar to his contracting a second marriage during the lifetime of his first wife, the first marriage not having been legally dissolved or declared void. There is special legislation in the case of Muhammadans, but there is absolutely none which applies to the class or community to which the accused belongs, and which entitles him to contract such a marriage as he has contracted under our municipal law with Catherine Gallway. The provisions of section 19 of Ordinance No. 19 of 1907 are too clear to permit of any doubt as to the accused's second marriage being a bigamous one. The conviction must therefore stand.

Conviction affirmed.