FULL BENCH

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice MacDonell.

1879
Dec. 8.

THE EMPRESS v. PITAMBUR SINGH.*

Adultery—Evidence of Marriage—Evidence Act (I of 1872), s. 50.

The provisions of s. 50 of the Evidence Act show, that where marriage is an ingredient in an offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved.

The Queen v. *Wazira* overruled (1).

THIS was a case referred for the opinion of a Full Bench by Mr. Justice Wilson and Mr. Justice Tottenham. The order of reference was as follows:—

"In this case the prisoner has been convicted of adultery under s. 497 of the Indian Penal Code. The only evidence of the marriage of the woman is the statement of the prosecutor, 'she is my wife by marriage,' and the statement of the woman 'I am married to Somea' (the prosecutor).

"We desire to submit, for the opinion of a Full Bench, the question whether a conviction for adultery can be sustained upon such evidence of the marriage.

"Two decisions of this Court appear to be in conflict. In *The Queen* v. *Smith* (2), a conviction of adultery was set aside on the ground (amongst others), that there was no sufficient proof of the marriage, and it was laid down 'that, in proceedings founded on a charge of adultery, strict proof of the marriage is always required.'

"To the same effect is letter No. 1144 of 15th December 1865, issued by the Court (3). In *The Queen* v. *Wazira* (1), evidence of the same nature as that in the present case seems to have been held sufficient.

* Full Bench Reference in Criminal Appeal, No. 549 of 1879, referred by order of Mr. Justice Wilson and Mr. Justice Tottenham, against the order of Colonel H. Boddam, Officiating Judicial Commissioner of Chota Nagpore, date the 27th June 1879.

(1) 8 B. L. R., Appx., 63. (2) 4 W. R., Cr. Rul., 31.

(3) See Vol. IV, Weekly Reporter, Criminal Letters, 10.

"It appears to us that, upon principle, such evidence must be held insufficient. The marriage of the woman is as essential an element of the crime charged as the illicit intercourse. And it ought, we think, to be proved like any other essential fact in the case, by the direct evidence of witnesses speaking to the facts said to constitute a marriage (Evidence Act, s. 60), so that the Court may determine whether what they state to have taken place, did take place in fact; and if so, whether it constitute a marriage in the point in law.

"The sections of the Evidence Act, which, in certain cases and for certain purposes, allow less strict proof of marriage, appear to be s. 32, which has no application here; and s. 50, which expressly excludes from its operation criminal charges of bigamy, adultery, and enticing of married women. This express exclusion seems to us strong to show that, in such cases, the Legislature intended the marriage to be proved by direct evidence.

"The Indian Divorce Act (IV of 1869), which governs civil proceedings based upon adultery, confirms this view. It gives the form of a petition for divorce in which the marriage is alleged as a fact with time and place. If this is to be alleged, it is presumably because it ought to be proved, and it can hardly be supposed that greater strictness of proof is to be required in a civil proceeding than in a criminal proceeding founded upon the same facts.

"It appears to us that the framers of the Evidence Act have endeavoured, in dealing with this subject, exactly to follow the English law. And in England, there has never been any doubt that, in an indictment for bigamy, the first marriage, or in proceedings founded upon adultery, the marriage, must be proved with the same strictness as any other material fact.

"We cannot see that any inconvenience is likely to follow from adopting the stricter rule. Amongst the large majority of the people of this country, marriage is accompanied with so much of ceremonial and publicity, that there can rarely be any difficulty in proving it. If there be any class of the community with whom it is otherwise, whose marriage notions and practices are so lax as to render many marriages of doubtful validity,

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this seems to us additional reason for requiring the actual facts to be brought properly before the Court, so that it may determine the validity or invalidity of the marriage in each case that comes before it."

No one appeared to argue the case.

The judgment of the Full Bench was delivered by

GARTH, C. J.—We think it clear that, in this case, the evidence of the marriage is not sufficient to justify a conviction for adultery.

The marriage of the woman, as observed by the learned Judges who referred the case, is as essential an element of the crime charged as the fact of the illicit intercourse, and the provisions of the Evidence Act (s. 50) seem to point out very plainly, that where the marriage is an ingredient in the offence, as in bigamy, adultery, and the enticing of married women, the fact of the marriage must be strictly proved in the regular way.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1879
Aug. 8.

IN THE MATTER OF A COLLISION BETWEEN THE "AVA" AND THE "BRENHILDA."

Board of Trade Certificate—Public Documents—Merchant Shipping Act of 1854, s. 138—Investigation of Charges of Misconduct—Condition precedent—Act IV of 1875, ss. 5, 13, 14—Evidence Act (I of 1872), ss. 65, 74—Secondary Evidence.

An investigation under Act IV of 1875, s. 5, into charges of incompetency or misconduct cannot proceed, unless the person whose competency or conduct is to be enquired into has been proved to be the holder of a certificate granted by the Board of Trade.

Such a certificate is not a 'public document' within the meaning of s. 74 of the Evidence Act.

In a case falling under cl. (*f*), s. 65 of the Evidence Act, and also under cl. (*a*) or (*c*) of the same section, any secondary evidence is admissible.

THE facts of this case have been already reported, *ante*, p. 453, on the question of the jurisdiction of the Court to proceed with the charges against Whittard, the mate of the *Ava*, and