

APPELLATE CRIMINAL

Before Mr. Justice Benson and Mr. Justice Miller.

PONNAYEE

v.

PERIYA MOOPPAN.*

1908.
February 5.

Criminal Procedure, Act V of 1898. s. 488—Magistrate has a discretionary power in granting maintenance—Refusal to grant when woman guilty of adultery with one of lower caste not a wrong exercise of such discretion.

Under section 488 of the Code of Criminal Procedure, the Magistrate has a discretionary power to award maintenance, and such discretion is not wrongly exercised when a Magistrate refuses maintenance to a woman who, for adultery with one of a lower caste, is expelled from caste and has thus made it impossible for her husband to live with her.

THE facts are fully stated in the Letter of Reference which is as follows:—

“ I have the honour to submit herewith for the orders of the High Court the records in Miscellaneous Case No. 41 of 1907, on the file of my Head-quarters Deputy Magistrate.

The petitioner in the case applied for maintenance from her husband, the counter-petitioner. The relationship between the parties is not disputed, but the Magistrate found that the petitioner had been guilty of adultery on one occasion and he refused to award maintenance. Objection was taken that the petitioner's act did not amount to ‘living in adultery’ and that she was therefore entitled to maintenance. The Deputy Magistrate overruled this objection, remarking that the chances were that the immoral relations between the petitioner and her paramour had existed for some time and that even if only one act of adultery had been committed, the petitioner under the circumstances of the case had rendered it impossible for her husband to live with her. His reasoning is, I submit, faulty, and the refusal to award maintenance is, in my opinion, opposed to the ruling of the High Court in I.L.R., XXXV Mad., 332.

* Case referred No. 83 of 1907 (Criminal Revision Case No. 444 of 1907) for the orders of the High Court under section 488 of the Code of Criminal Procedure by J. H. Robertson, Esq., District Magistrate of Salem, in his letter No. Mis. C-41 of 1907, dated 1st November 1907.

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As the Deputy Magistrate's decision gives the grounds for his orders, I have not thought it necessary to call for further explanation."

T. Subrahmania Ayyar for petitioner.

T. Narasimha Ayyangar for counter.petitioner.

ORDER.—We are not prepared to say that the view taken by the Deputy Magistrate as to the construction of section 488, Criminal Procedure Code, is wrong. We think that the use of the word "may" in that section, as distinguished from "shall," shows that the Magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably, not capriciously. This was the view taken by Benson, J., in the case of *Gantapalli Appalamma v. Gantapalli Yellayya* (1). In the present case the Deputy Magistrate did not refuse to award maintenance, because the petitioner was "living in adultery," but because she had been guilty of adultery with a low caste man which led to her expulsion from caste, and thus, as we take it, rendered it, in effect, impossible for her husband to keep her with him without himself losing the society of his fellow caste-men. We are not prepared to say that in these circumstances the Deputy Magistrate was wrong in refusing to award her maintenance.

(1) I. L. R., 20 Mad., 470.