RATNA MUDALI v. KING-EMPEROR.

NAPIER, J.

without a warrant any person who has been concerned in a cognizable offence or against whom a reasonable complaint has been made or credible information received or a reasonable suspicion exists of his having been so concerned. The object of the Code is to give the widest powers to the police in cognizable cases and the only limitation is the necessary requirement of reasonability and credibility to prevent the misuse of the powers. The legislature could have confined the power to officers in charge of a police station as is done in section 55 where matters are dealt with which are not offences but has not thought fit to do so. The suggestion that a police officer who suspects a man of having committed a cognizable offence may arrest but that he may not arrest when a warrant has been issued, has nothing in the language of the section to support it and would enable a man wanted by the police on a charge of murder, for instance, to defy every police officer except the one who held the warrant. *In the matter of Charu Ch. Majumdar*(1) is a case where the accused was wanted by the police in Bombay and he was arrested in Bengal at their request, and there is no evidence that a warrant had been issued. There is, in my opinion, nothing in the learned Judge's observations which support the argument addressed to us. I agree with the order of my learned brother.

K.R.

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## APPELLATE CRIMINAL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield, and Mr. Justice Kumaraswami Sastriyar.*

1916, October, 31, November, 9 and 1917, April, 16 and 17.

*In re* KOLANDAIVELU AND ANOTHER (ACCUSED NOS. 1 AND 3).*

*Christian Marriage Act (XV of 1872), sec. 68—Hindu performing marriage in Hindu mode between persons one of whom is a Christian, whether guilty under.*

A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian, commits an offence under section 68 of the Christian Marriage Act (XV of 1872).

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(1) (1916) 20 C.W.N., 1233.

* Criminal Revision Case No. 544 of 1916.

*Madras High Court, Appellate Side, Proceedings, 21st March* 1871 (1871) 6 M.H.C.R., Appx. xx and *Queen-Empress* v. *Yohan* (1894) I.L.R., 17 Mad., 391, approved.

*In re* KOLANDAI-VELU.

Meaning of "solemnize" in section 4, explained.

TAKEN up case No. 21 of 1916 from the file of T. S. THIAGARAJA AYYAR, the acting Sessions Judge of North Arcot, in Sessions Case No. 59 of 1916.

The accused was not represented.

*M. D. Devadoss* for the complainant.

*E. R. Osborne, the Acting Public Prosecutor,* for the Crown.

This case came on for hearing in the first instance before SADASIVA AYYAR and NAPIER, JJ., who made the following ORDERS OF REFERENCE TO FULL BENCH.

NAPIER, J.—The records of this case have been called for by the High Court on its own motion owing to a doubt whether the case relied on by the Sessions Judge to convict the accused is good law. The facts are that a Hindu by religion, a *purohit* among the *Valluvas* (Hindu Pariahs), performed a marriage in the Hindu mode between a Hindu Valluva and a Christian girl, aged 11, belonging to the same community. The priest has been convicted under section 68 of the Christian Marriage Act XV of 1872, and the father of the girl has also been convicted under the above section 68 read with section 114 of the Indian Penal Code, and the Sessions Judge has very properly followed the decision of this Court in *Queen-Empress* v. *Yohan*(1) which follows another decision in *Madras High Court, Appellate Side Proceedings, 21st March* 1871(2). In my opinion, these decisions are wrong and should be reconsidered. NAPIER, J.

The Christian Marriage Act is a Code repealing and embodying the provisions of several prior Acts which were taken from the numerous English Marriage Acts. The preamble states:

"Whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion. . . ."

Section 4 provides that

"every marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void."

(1) (1894) I.L.R., 17 Mad., 391. (2) (1871) 6 M.H.C.R., App. xx.

*In re* KOLANDAI-VELU.

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AFIER, J.

Section 5 provides that

"marriages may be solemnized in India by any of the five different persons, (1) persons who have received ordination, (2) clergymen of the Church of Scotland, (3) Ministers of religion licensed under the Act, (4) Marriage Registrars appointed under the Act, and (5) persons licensed under this Act to grant certificates of marriage between Native Christians;"

and in addition it provides that marriages may be solemnized in the presence of a Marriage Registrar appointed under this Act. The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorized to attend Hindu marriages, and it is to be noted that no person can be appointed a Marriage Registrar other than a Christian (vide section 7). If, therefore, a Hindu does marry a Christian girl according to the customs of his caste, both he and the officiating priest render themselves liable to imprisonment or transportation for ten years. It seems to me that this cannot be the intention of the Act. The object of section 68 with its highly penal consequences is to punish persons for the serious offence of purporting to solemnize a marriage between two persons who honestly believed that they were being married, the consequences of such a void marriage being intensely serious. The English Acts never contemplated marriages in form other than those suitable for Christians and, in my opinion, the Indian Act intended to go no further. The use of the word "solemnized" is, in my view, indicative. It is true that the marriage provided for under the Act, need not in all cases be of a religious character just as in England persons can go through a civil ceremony before a Registrar; but the word "solemnized" is never used in this country with reference to a Hindu marriage ceremony. Section 10 provides that

"every marriage under this Act shall be solemnized between the hours of 6 in the morning and 7 in the evening."

Section 42 provides that where the marriage is solemnized in the presence of a Registrar, one of the parties must make oath that there is not any impediment of kindred or affinity or lawful hindrance to the said marriage. Section 51 provides that in some part of the ceremony each of the parties shall make a declaration of absence of lawful impediment and shall say to the other

"I call upon these persons here present to witness that I, A.B., do take C.D., to be my lawful wedded husband (or wife)."

Such sections are, on the face of them, inapplicable to Hindu marriages, and the forms in the schedule are all such as are applicable to Christian marriages. It seems to me that the whole Act has reference to nothing but marriages which purport to be solemnized in accordance with usage among Christians, and we would read section 4 as meaning

"every marriage purporting to be a Christian marriage shall be solemnized, etc."

If this section is not to be so read, it would follow that the legislature in 1872 has declared void all marriages acoording to caste custom between a Hindu and a Christian, with the necessary result that the children are illegitimate and cannot acquire rights of property. I very much doubt whether the legislature intended to interfere in this manner with Hindus among whom marriages are regulated by caste custom. There are, as already stated *Madras High Court, Appellate Side Proceedings, 21st March* 1871(1) and *Queen-Empress* v. *Yohan*(2) and in addition, there is a later case *Queen-Empress* v. *Paul*(3). The decision in *Madras High Court, Appellate Side Proceedings, 21st March* 1871(1) was on the language of section 56 of the Act V of 1865 and the Court decided the point on the strict language of the Act. The case was, however, not argued on either side. *Queen-Empress* v. *Yohan*(2) purported to follow the decision in *Madras High Court, Appellate Side Proceedings, 21st March* 1871(1). In *Queen-Empress* v. *Paul*(3) the only point taken was that the word "solemnized" could only have reference to a religious ceremony, and the Court, having pointed out that the civil marriage is also solemnized under the Act, thought that this point settled the matter. In my opinion, the question raised is of serious importance in view of the large number of Christians among the lower castes, and I therefore, think it right to refer to a Full Bench the question :—

"*Whether a Hindu by religion performing a marriage according to the Hindu mode between two persons either of whom is a Christian commits an offence under section* 68 *of the Christian Marriage Act, XV of* 1872".

(1) (1871) 6 M.H.C.R., Appx. xx. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1897) I.L.R., 20 Mad., 12.

*In re* KOLANDAI-VELU.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—I confess that I was at first not inclined to reopen the question which my learned brother's order, just now pronounced, refers to a Full Bench as that question had been considered in three cases *Madras High Court, Appellate Side Proceedings*, 21*st March* 1871(1), *Queen-Empress* v. *Yohan*(2) and *Queen-Empress* v. *Paul*(3) at sufficient intervals of time, and might, in a manner, be deemed to have been settled. But I have been much impressed by the arguments and considerations put forth from the Bench by my learned brother in the course of the hearing of these cases and as set out in his above order and I cannot say that the judgments in those cases deal so fully and exhaustively with all the aspects of the question as to preclude its authoritative reconsideration by a Full Bench.

For instance, as regards the meaning of the word "solemnize" in section 68, the decision in *Queen-Empress* v. *Paul*(3) says that it only means "conduct, celebrate or perform" and one of the reasons given is that in a marriage "solemnized" before a Marriage Registrar, "no ceremonies are necessary." But a Marriage Registrar cannot be the professor of any other religion than the Christian religion (see section 7 of the Christian Marriage Act) and two ceremonies or ceremonial declarations have to be made before him by each of the parties to the marriage under section 51 of the Act. Those declarations are:

"I do *solemnly declare* that I know not of any lawful impediment why I, A.B., may not be joined in matrimony to C.D."

"I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife (or husband),"

I do not see why these four indispensable solemn declarations (two by each party) required to be made only before a professing Christian recognized as such by the Government and authorized to record those solemn declarations should not be called "necessary ceremonies" required to validate the marriage. I am inclined to think that "solemnization" in section 68 indicates the performance of marriages "according to rules, rites, ceremonies and customs" of a Christian church or after complying with the ceremony of the four solemn declarations prescribed for celebrating marriages before the Christian Marriage Registrar. I think the making of those declarations before the Christian

(1) (1871) 6 M.H.C.R., Appx. xx. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1987) I.L.R., 20 Mad., 12.

Marriage Registrar means the observance of certain "particular forms and ceremonies" of solemnization and that that is one of the several definite modes of the "solemnization" of marriages contemplated by the Act. In Halsbury's Laws of England, volume 16, section 581 (page 302), the declarations above-mentioned are described in the margin as coming within "Forms and ceremonies." If the word "solemnize" as used in the Act merely means "celebration" (including celebration with Hindu or Mussalman rites), the Act cannot be said not to violate the principle of religious neutrality followed almost without exception by the Indian legislature, a violation which visits followers of religions other than the Christian with very severe criminal penalties for doing acts not prohibited by those other faiths. A construction which credits the legislature with such violation should, if possible, be avoided. A Sunni Mussalman male and a male of one of several of the Shiah sects can validly marry according to his law in the permanent form and with Muhammadan rites a "Kitabia" (that is a Jew or a Christian or the follower of any other religion revealed in a Kitab or sacred book provided she is not a fire-worshipper or idolatress). According to some other Shiah sects he can validly marry her in mute form (see Ameer Ali, volume II, page 320). If section 68 of the Christian Marriage Act be interpreted as widely as has been done in *Queen-Empress* v. *Yohan*(1) and *Queen-Empress* v. *Paul*(2) a Khazi who performs a marriage between a Mussalman male and a Christian female according to Mussalman rites is liable to the punishment of transportation for ten years. Whereas a Christian minister or Marriage Registrar who performs a marriage with Christian rites or the declaration ceremonies mentioned in section 51 between a Mussalman male and a Christian female is not subjected to any such penalty and performs a perfectly lawful and valid act. It may be said that when section 4 declares that a marriage "solemnized" otherwise than in accordance with section 5 between two persons though one of them alone is a Christian is void, the legislature does interfere with the Mussalman religion and the additional imposition of criminal penalties of a severe nature on such solemnization by the later section 68 does not, in principle, carry the interference further. But if the

(1) (1894) I.L.R., 17 Mad., 391. (2) (1897) I.L.R., 20 Mad., 12.

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meaning of the word "solemnize" is confined to (1) the celebration with the marriage rites and ceremonies of a Christian church and (2) the ceremonies of declaration prescribed to be followed before the Christian Marriage Registrar appointed by the Act, neither of the sections interferes with the tenets and marriage rules of other religions than the Christian. The Full Bench decision in *Queen-Empress* v. *Fischer*(1) does not deal directly with the interpretation of the word "solemnize."

However, as I said in the beginning, I have had some hesitation in the matter (especially as the first Christian Marriage Act of 1852 was based on the provisions of English Statutes, 14 & 15 Vict., cap. 10 and other Statutes which did not probably care for the principle of religious neutrality and treated religions other than the Christian with somewhat scant consideration). While therefore I do not think it necessary to express a final opinion on the matter, I do not think it undesirable to have the matter reconsidered by a Full Bench. I accordingly join in the reference proposed by my learned brother.

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On this Reference—

*E. R. Osborne, the Acting Public Prosecutor*, for the Crown, relied on *Queen-Empress* v. *Yohan*(2) and *Queen-Empress* v. *Paul*(3).

*M. D. Devadoss* for the complainant was not heard.

*T. R. Ramachandra Ayyar* (*amicus curiæ*) for the accused.—Act XV of 1872 applies only to marriages solemnized in the Christian form and has no application to a marriage in the Hindu form even where one of the parties is a Christian. The marriages that are dealt with in Act XV of 1872 are only Christian marriages as the short title of the Act itself indicates. The preamble also shows that it was an Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians. The previous Act which was repealed by Act XV of 1872 is Act V of 1865 whose title was the Indian Marriage Act. Hence in section 4, the word "marriage" must be taken as denoting only a Christian marriage. Whatever may be the view with reference to marriages of persons who are not

(1) (1891) I.L.R., 14 Mad., 342. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1897) I.L.R., 20 Mad., 12.

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Native Christians, the Act seems to take particular care when dealing with the marriages of Native Christians in describing the marriages as marriages between Native Christians: section 5, clause (5) and sections 9, 37, 59 and 60. Hence it seems to be clear that the marriages contemplated in the Act are confined to a Christian form of marriage and in the case of Native Christian, it must be between Native Christians. The expression "solemnize" is only applicable to marriages recognized by Christians. It was not the intention of the Legislature, nor does the language of the Act warrant the inference, that a marriage celebrated in the Hindu or Muhammadan form should be within the pale of the Act.

The Court delivered the following

WALLIS, C.J., OLDFIELD AND KUMARASWAMI SASTRIYAR, JJ.

OPINION.—We are of opinion that the decisions in *Madras High Court, Appellate Side Proceedings, 21st March* 1871(1) and *Queen-Empress* v. *Yohan*(2), which were accepted in *Queen-Empress* v. *Paul*(3) were rightly decided. In our opinion the Act was intended to apply to the marriages of all Christians in India, including marriages where only one of the parties is a Christian. Section 4 expressly says that

"any marriage between persons, one or both of whom is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section; and any such marriage solemnized otherwise than in accordance with such provisions shall be void";

and section 68 merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act. Offences under the section may vary very widely in gravity, and it has been considered necessary, as in England, to provide a very heavy maximum sentence which would be wholly inapplicable in such a case as the present, but that does not show that cases such as the present do not come within the section. Nor does the use of the word "solemnize" which is referred to in the Order of Reference of NAPIER, J., give rise in our opinion to such an inference. That word which is now invariably used in this connexion has a history which may usefully be referred to. The general law of the medieval Church, which regarded marriage as a sacrament as well a contract, did not regard the presence of

(1) (1871) 6 M.H.C.R., Appx. xx. (2) (1894) I.L.R., 17 Mad., 391.
(3) (1897) I.L.R., 20 Mad., 12.

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a priest in orders as essential to the validity of the marriage. The parties might themselves enter into the contract, and the issue born of the marriage would be legitimate, though such a marriage was regarded as clandestine and irregular as contrasted with a marriage *in facie ecclesiae*, and did not carry with it all the incidents of such a marriage. BRACTON in a passage cited in *Reg.* v. *Millis*(1), whilst upholding the validity of such clandestine marriages, says that they did not confer on the wife a right to dower. On the other hand he says that a wife married *in facie ecclesiae* was entitled to dower *propter solemnitatem* which we may translate 'because of the solemnization of the marriage' or 'the performance of the marriage in solemn form.' A solemnized marriage is thus a marriage effected in a solemn and regular manner, as opposed to an irregular and clandestine marriage. The question whether there was a stricter rule in England requiring the presence of a priest in orders arose in the great case of *Reg.* v. *Millis*(1) and was answered in the affirmative in accordance with the view of the Irish Court owing to the Lords being equally divided. To put an end so far as it could to clandestine marriages, the Council of Trent decreed that in future all marriages must be celebrated *coram parocho*, that is, in the presence of the parish priest, and also in the presence of witnesses. Its decrees were not received in England or Scotland, but Lord Hardwicke's Act, which was passed in 1754 with the same object, put an end to clandestine marriages in England by requiring all marriages to be celebrated in the Parish Church. This was considered a hardship by Roman Catholics and non-conformists, and in 1837 they were allowed to be married at their own places of worship if the marriage was attended by the Registrar, and provision was also made for the solemnization of marriages before the Registrar himself.

As regards Christian marriages in India it was held by Sir ERSKINE PERRY in *Maclean* v. *Cristall*(2) that the rule in *Reg.* v. *Millis*(1) as to the presence of a priest in orders, had never been applicable in India. The Legislature however considered it necessary to legislate in India on the same lines as in England against irregular and clandestine marriages among Christians and dealt with the subject in Acts XXV of 1864, V of 1865, and

(1) (1844) 10 Cl. & F., 534. (2) (1849) P.O.C., 175.

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XV of 1872 the Act now in force. Under that Act all marriages of Christians including marriages where only one of the parties is a Christian, must be performed, on pain of nullity, in one of the prescribed forms. The Act makes no distinction between Native Christians and other Christians, except that by section 9 it provides for the issue of licences to perform marriages between Native Christians to Christians who are not ministers of religion to meet the case of an insufficiency of ministers of religion, and that it directs that the registers of the marriages of Native Christians shall be kept separately from the registers of other Christian marriages, a provision dictated by administrative convenience. The provisions of section 9 have no bearing on the question now before us as they only apply where both the parties are Native Christians, as expressly declared by Act II of 1892; and therefore marriages of Christians with persons who are not Christians must be solemnized in one of the other manners provided in the Act. The general effect of the Act is as already stated to require that every marriage where one of the parties is a Christian, must as a condition of validity be solemnized in one of the prescribed forms, excluding the form prescribed by section 9 unless both the parties are Native Christians. The Act however is only concerned with the forms in which the marriage is to be solemnized, and does not deal with objections to the validity of the marriage. As pointed out in *Lopez* v. *Lopez*(1) where the history of this legislation is carefully examined, it requires one of the parties to the proposed marriage to make a declaration that there is no impediment of kindred or affinity or other lawful hindrance, and also requires that the Minister of religion or Registrar should be satisfied that there is no lawful impediment; but it provides in section 88 that

"nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

We answer the question in the affirmative.

N.R.

(1) (1885) I.L.R., 12 Calc., 607.