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REVISIONAL CRIMINAL.

Before Mr. Justice Ryves.

EMPEROR v. NAZIR KHAN*

Act No. XLV of 1860 (Indian Penal Code), section 498—Enticing away a married woman—Quantum of evidence necessary to prove the marriage.

1913
September, 24.

The fact and the legality of the marriage are material elements in a case of enticing or taking away or detaining with criminal intent a married woman and must be proved as strictly as any other material facts, but it is not necessary that they should be proved in any particular way.

Queen Empress v. Subbarayan (1), Empress v. Pitambur Singh (2), Empress of India v. Kallu (3), Queen Empress v. Santok Singh (4) and Queen Empress v. Dal Singh (5) referred to.

In this case one Nazir Khan was convicted of an offence under section 498 of the Indian Penal Code and sentenced to four months' rigorous imprisonment. He appealed to the Sessions Judge, by whom the appeal was dismissed and the conviction and sentence maintained. He then applied in revision to the High Court, where the principal question raised was that the evidence tendered by the prosecution with that object was not sufficient to prove the marriage of the complainant with his alleged wife Musammat Sirtajan.

Mr. *S. M. Ahmad Karim*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

RYVES, J.—Nazir Khan was convicted of an offence under section 498 of the Indian Penal Code and sentenced to four months' rigorous imprisonment. On appeal the conviction was

* Criminal Revision No. 656 of 1913 from an order of E. O. Allen, Sessions Judge of Mainpuri, dated the 14th of June, 1913.

(1) (1885) I. L. R., 9 Mad., 9.

(3) (1882) I. L. R., 5 All., 233.

(2) (1879) I. L. R., 5 Cal., 566. (4) Weekly Notes, 1898, p. 186.

(5) (1897) I. L. R., 20 All., 166.

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maintained. The application in revision to this Court is grounded on three main contentions.

(1) Because, the actual marriage of the complainant and the woman Sirtajan not being attempted to be strictly proved by evidence, the conviction under section 498 is illegal.

(2) Because under the present section the marriage cannot be presumed from the mere fact of cohabitation.

(3) Because in any case, the woman having clearly stated that she had been divorced by Haidar Khan, unless the contrary has been proved, no conviction under the section can stand.

My attention has been called to the following rulings in support of the first ground. *Empress v. Pitambur Singh* (1). In that case Garth, C. J., delivering the judgement of the Full Bench, said that "the fact of the marriage must be strictly proved in the regular way". That ruling was followed by this Court in *Empress of India v. Kallu* (2), in which the evidence to prove the marriage was set out and was held to be insufficient. The next case referred to was *Queen Empress v. Santok Singh* (3). In that case also the whole of the evidence with reference to the marriage is set out, and there too it was held to be insufficient. The next case cited was *Queen Empress v. Dal Singh* (4). There a Division Bench of this Court held that, "the court should require some better evidence of the marriage than the mere statement of the complainant and the woman."

What I think was meant in all these cases is that, as the fact and the legality of the marriage are material elements in a case under section, 498, they must be proved as strictly as any other material facts, as for instance the enticing away of a woman with the intention mentioned in the section. I do not think these rulings lay down that the fact of the marriage can be proved only in some particular way. This case is much more like the case of *Queen Empress v. Subbarayan* (5), and I entirely agree with the observations of the Judges who decided that case. As pointed out in that case, "even a marriage in England may be proved by any person who was actually present and saw the ceremony performed;

(1) (1879) I. L. R., 5 Cal., 566.

(3) Weekly Notes, 1898, p. 186.

(2) (1882) I. L. R., 5 All., 293.

(4) (1897) I. L. R., 20 All., 166.

(5) (1885) I. L. R., 9 Mad., 9.

it is not necessary to prove its registration or the licence or publication of the banns."

In the present case I find on going through the record that the complainant was not asked one word throughout a lengthy cross-examination about his marriage with the woman Sirtajan.

In the opening words of the judgement of the Magistrate it is stated:—"It is common ground that Musammat Siratajan was the duly married wife of Haidar Khan." Musammat Sirtajan was called, she deposed to her marriage to the complainant, and no question was asked her in cross-examination. It is true that she stated in a subsequent cross-examination "when my husband turned me out, he told me—I divorce you, go out." In re-examination she said:—"He told me this inside the house." Karim Bakhsh, the father of Musammat Sirtajan, was called, and he also proved the marriage, giving details. The whole object of calling him was to prove the marriage, and no other question was put to him in examination in chief and he was not cross-examined on the point. Similarly, Abdul Karim, the father of the complainant, was called, and he also proved the marriage: no question was put to him in cross-examination on the point. Under these circumstances, I fail to see how the first ground can be supported. There is un rebutted evidence in this case of the woman, the husband and their parents describing the marriage in detail. I think, therefore, in this case the fact and legality of the marriage have been satisfactorily proved.

The second ground taken does not arise.

The third ground I think really comes within the rule of the cases quoted by me, and the vague statement of the woman that she had been divorced, unsupported by any evidence, is quite insufficient to establish the fact that she had been divorced. No such suggestion was made during the cross-examination of the prosecution witnesses: it was only after the charge was framed and Musammat Sirtajan was called for further cross-examination that she made this statement. I may point out that these points were not taken in the court below. In any event it seems to me that it has been abundantly and satisfactorily proved that Musammat Sirtajan was the wife of the complainant. The result is that I reject this application.

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It is not clear from these papers whether the applicant has served the four months' rigorous imprisonment to which he was sentenced. If he has not, he must surrender to his bail and serve out the unexpired portion of his sentence.

Application dismissed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Ryves.

EMPEROR v. SAILANI.*

1913
October, 22.

Criminal Procedure Code, sections 403, 423, 439—Previous acquittal on charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under section 304 of the Indian Penal Code—Revision.

S. and R. were charged with causing simple hurt to K. The case was compounded and both the accused were acquitted. K, later on, died of the injury caused by S. and R. The Magistrate, thereupon, sent up R. for trial before the Sessions under section 304, but discharged S, as he found that the injury caused by him did not in any way contribute to K.'s death. The Sessions Judge directed the Magistrate to commit S. also, and he was committed accordingly. *Held* that there was no legal bar to the trial of S. under section 304 of the Indian Penal Code, and to his conviction under that section if the evidence enabled the court to apply either section 34 or 114 of the Indian Penal Code to the case. A commitment can only be set aside on a point of law and as no such point arose in this case High Court did not interfere.

Two persons, Sailani and Ram Ghulam, were put on their trial for causing simple hurt to one Kesri. That case was compounded, and both the accused were acquitted. Subsequently Kesri died, and on a post mortem examination it was discovered that his death was due to an injury which he received in the course of the assault referred to above. Thereupon both persons were *challenged* under section 304 of the Indian Penal Code for causing the death of Kesri. The Magistrate committed Ram Ghulam to take his trial under section 304, but held that the injury caused by Sailani to the back of the head of Kesri did not in any way contribute to his death and that he could only be considered guilty of causing simple hurt—of which he had already been acquitted. The Sessions Judge, however, directed that Sailani should also be committed to his court under section 304. Against this commitment Sailani applied in revision to the High Court.

Babu *Satya Chandra Mukerji*, for the applicant, submitted that inasmuch as the accused had been acquitted on certain facts of a charge of simple hurt an order for commitment for culpable

* Criminal Revision No. 894 of 1913 from an order of F. S. Tabor, Sessions Judge of Shahjahanpur, dated the 1st of September, 1913.