

of the Magistrate to consider the case with reference to the above observations, and after trying the issues of fact as to divorce, &c., to enforce the order, or stay the operation thereof, as the case may be.

In view of these observations, I see no reason to interfere in the order to which this reference relates.

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IN THE MAT-  
TER OF THE  
PETITION OF  
DIN MUHAM-  
MAD.

## APPELLATE CRIMINAL.

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December 8.

Before Mr. Justice Straight.

EMPRESS OF INDIA v. KALLU.

*Adultery—Act XLV of 1860 (Penal Code), s. 497—Evidence of marriage—Act I of 1872 (Evidence Act), s. 50—Prosecution for adultery—Act X of 1872 (Criminal Procedure Code), s. 478.*

*K* was accused by *D* and *P*, alleged to be *D*'s wife, of raping *P*, and was committed for trial charged in the alternative with rape or adultery. The evidence of marriage between *D* and *P* consisted of their statements that they were married to each other, and of a statement by *K* that *P* was *D*'s wife. *K* was convicted on the charge of adultery.

Held that such evidence, having regard not only to s. 50 of the Evidence Act 1872, but to the principle that strict proof should be required in all criminal cases, was not sufficient to establish the vital incident to the charge of adultery, namely, the marital relation of *D* and *P*. *Empress v. Pitambur Singh* (1) concurred in.

Also that, as no complaint had ever been actually instituted by *D* against *K* for the offence of adultery, as contemplated by s. 478 of Act X of 1872 (Criminal Procedure Code), (the circumstance of *D*'s appearing as a witness for the prosecution for the offence of rape not amounting to the institution of a complaint within the meaning of that section), *K*'s conviction for adultery must be quashed.

APPEAL from a judgment of conviction of Mr. J. C. Leupolt, Officiating Sessions Judge of Allahabad, dated the 26th October, 1882. The facts of the case are stated in the judgment of the Court.

Mr. Howard, for the appellant.

The Junior Government Pleader (Babu Dwarka Nath Banarji), for the Crown.

STRAIGHT, J.—This is an appeal from a decision of the officiating Sessions Judge of Allahabad, dated the 26th of October last, convicting the appellant of adultery with the wife of one Dubri, *kachi*,

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and sentencing him to one year's rigorous imprisonment. The charge originally preferred was one of rape, but the Magistrate made an alternative committal, and the Judge tried the case in the shape it was sent up to him. It is unnecessary to discuss the facts of the case, as they are not referred to in the petition of appeal; and for the purpose of deciding the legal points involved, I may take it that the fact of the appellant's having had connection with the woman Parbattia is established.

The two questions raised by the learned counsel for the appellant are:—(i). That there is no sufficient evidence on the record to prove the marriage of Dubri and Parbattia; (ii) that no complaint for an offence under s. 497 of the Penal Code was ever instituted by Dubri within the meaning of s. 478 of the Criminal Procedure Code.

As to the former of these, it may be convenient to state what the evidence really is. Parbattia herself says: "I am the lawful wife of Dubri, *kachi*: don't know when I was married: I live with my husband the last three or four years." Dubri says: "Parbattia is my wife: I was married to her eight years ago: she was never married before: she lives with me for the last four years: no children yet." In addition to these statements the Junior Government Pleader, in meeting the objection, pointed out that the appellant before the committing Magistrate said: "Parbattia is the wife of Dubri." Such is the whole evidence of the marriage upon the record. I am very clearly of opinion that it is altogether insufficient, and that not only having regard to the distinct provisions of s. 50 of the Evidence Act, but to the principle that strict proof should be required in all criminal cases, it fails to establish the vital incident to the charge, namely the marital relation of Dubri and Parbattia. The admission of the appellant in no way strengthens the position, because if, as a matter of fact, there had been no marriage, no conviction could stand against him under s. 497. The Judge should have required some satisfactory proof, independent of the very vague assertions of Dubri and Parbattia, to show that the ceremony of marriage, as recognised among *kuchis*, had taken place between them, and his remark that "the evidence clearly establishes that Parbattia is the lawful wife of Dubri, *kachi*," was

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obviously made without sufficient care or reflection. I entirely concur in the Full Bench ruling of the Calcutta High Court in *Empress v. Pitambar Singh*, (1) and the Judge would have done well to accept it as an authority when it was quoted to him. Holding the view I do upon this first question, I should have thought it right to send the case back to the present Judge of Allahabad, for him to take further evidence as to the marriage of Dubri and Parbattia; but entertaining the opinion I do with regard to the second point, it would be superfluous to do so. As a matter of fact, no complaint ever was instituted by Dubri against Kallu for an offence under s. 497 of the Penal Code, as contemplated by s. 478 of the Code of Criminal Procedure; on the contrary, the case put forward by Parbattia and himself was one of rape, pure and simple. I do not think that the circumstance of his appearing as a witness in the prosecution for that offence, can be regarded as amounting to the institution of a complaint for adultery in the sense of s. 478. The expression "complaint" is a perfectly well-understood one, and s. 142 of the Criminal Procedure Code in terms prohibits Magistrates from taking cognizance of a case *without complaint* when it falls under Chapter XX. of the Penal Code, within which is included s. 497. It by no means follows as a necessary consequence, that because a husband may wish to punish a person who has committed a rape upon his wife, that is, who has had connection with her against her consent, he will desire to continue proceedings when it turns out she has been a willing and consenting party to the act. At any rate, if a criminal charge of adultery is to be preferred, a formal complaint of that offence must be instituted in the manner provided by law, and if it is not, s. 478 will not have been satisfied. I may mention here that s. 238 of the new Criminal Procedure Code leaves no doubt as to the course the Courts should adopt in cases of the kind now before me. In reference to the opinion I have expressed the appeal must be allowed, and the conviction of Kallu will be quashed. I further order that he at once be released.

(1) I. L. B., 5 Calc. 566.