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PRAG
v.
KING-
EMPEROR.*Raza and
Nanavutti,*
JJ.

cient to justify the charge of murder of Nanhu Singh by Musammat Bishna. Even the presence of Nanhu Singh at the house of Prag, though it may raise grave suspicions against Prag as to his complicity in the murder, would not, in the absence of any other evidence, direct or circumstantial, connecting him or his wife with the murder of Nanhu Singh, justify this Court in finding either of them guilty of murder.

For the reasons given above we are constrained to allow these appeals. We accordingly set aside the convictions and sentences passed upon the appellants Prag and Musammat Bishna, acquit them of the offence charged and order their immediate release.

Appeal allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice A. G. P. Pullan.

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August, 26.

NADIR MIRZA (OPPOSITE PARTY-APPELLANT) v.
MUNNI BEGAM (APPLICANT-RESPONDENT).*

Guardian and Wards Act (VIII of 1870), section 17—Appointment of guardian—Male child born and brought up in father's faith—Conversion of mother to another faith—Mother, whether entitled to guardianship of her male son after conversion—Shia mother's title to guardianship of her male child.

The Shia law gives a Shia mother after the father the first claim to the guardianship of her son under the age of seven years. Her subsequent conversion to Christianity, although it acts as a dissolution of her marriage under the Shia law, does not operate so as to forfeit the right which she had under the Shia law to the guardianship of her child as is clear from the Removal of Caste Disabilities Act, XXI of 1850.

Under the Guardian and Wards Act a court in appointing or declaring a guardian of the minor is guided first by the provisions of section 17 of the Act, and secondly by what appears to be for the welfare of the minor consistently with the law to which the minor is subject. By placing the provisions of the section above the law to which the minor is subject the

*Miscellaneous Appeal No. 38 of 1930, against the order of L. S. White, District Judge of Lucknow, dated the 23rd of July, 1930.

Act makes it open to the court to consider other matters as well as the personal law even if they are opposed to that law. Thus the court may consider the opinion of the minor, whatever it may be, if he is old enough to form an intelligent preference, and in considering what is for the welfare of the minor the court must have regard to his age, sex and religion and any existing or previous relations of the proposed guardian with the minor or his property. Where, therefore, a male child has been born and brought up in the faith of his father, he should not be handed over to his mother who has left that faith, and has thereby stepped outside the family in which she was married, with the certainty that the boy will be induced to leave the religion of his father for the new religion of the mother.

Mr. *Al-i-Raza*, for the appellant.

Mr. *R. I. Wahid*, for the respondent.

PULLAN, J. :—This is an appeal under section 47 of the Guardians and Wards Act against an order of the District Judge of Lucknow. The facts are as follows. Musammat Munni Begam *alias* Rahil was the wife of Mohammad Mirza deceased. They were Shia by religion and two children were born to them while they were both professing that faith. Before the death of Mohammad Mirza, which occurred recently, his wife became a Christian and it appears that two years before the death of Mohammad Mirza she was living apart from him. She had with her her infant son who is now 2 years of age and her elder son, who is now about 6 years of age, remained with his father. On the death of Mohammad Mirza Munni Begam brought an application in the court of the District Judge for the guardianship of the person and property of her elder son whose name is Mirza Asghar Husain. I am not concerned with the counter application brought by Nadir Mirza, who is the father of Mohammad Mirza and the grandfather of the child, for the guardianship of the younger son of Musammat Munni Begam. That application has been dismissed by the learned Judge and no appeal has been filed. Nadir Mirza however appeals against the learned

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Judge's decision giving Musammat Munni Begam the guardianship of her elder son. By her marriage and by the birth of her children in the Shia faith Musammat Munni Begam became entitled to the rights of a Shia mother in respect of the guardianship of her sons. Her subsequent conversion to Christianity, although it acted as a dissolution of her marriage under the Shia law, did not operate so as to forfeit the right which she had under the Shia law to the guardianship of her child as is clear from the Removal of Caste Disabilities Act, XXI of 1850. Consequently her claim is supported by the Shia law which gives the mother after the father the first claim to the guardianship of her son under the age of 7 years. Under the Guardians and Wards Act a court in appointing or declaring a guardian of the minor is guided first by the provisions of section 17 of the Act, and secondly by what appears to be for the welfare of the minor consistently with the law to which the minor is subject. If the court had only got to consider the law, the mother, even although she is no longer a Muhammadan, would be able to take this child away from his father's house and act as his guardian, but the Act allows a court much wider discretion than this. By placing the provisions of the section above the law to which the minor is subject the Act makes it open to the court to consider other matters as well as the personal law even if they are opposed to that law. Thus the court may consider the opinion of the minor, whatever it may be, if he is old enough to form an intelligent preference, and in considering what is for the welfare of the minor the court must have regard to his age, sex and religion and any existing or previous relations of the proposed guardian with the minor or his property. In the present case the child was born a Shia Muhammadan and had been brought up by his father in that faith until the father's death. He has not lived with his mother for two years and it is a matter for serious consideration whether a mother, who has rejected the

religion of her husband, should be able to come forward on the latter's death and take away the son whom she had herself left with his father from the religion and the surroundings in which he has been so far brought up. The mother's feelings are doubtless worthy of consideration but she has one child already with her. She is not living in Lucknow and has been separated for some time from the boy and presumably the ties of affection between them are less strong. She has stated that one of the reasons why she did not look after her elder son was her poverty and the address which she now gives is a charitable home in Allahabad. The learned Judge has certainly expressed an opinion that there is not much difference in the status of the parties, but I consider that in this case it is not in the minor's interest that he should be taken away by his mother. Generally speaking a court of justice is loath to take sides in a case between rival religions, and where a male child has been born and brought up in the faith of his father, I do not consider that he should be handed over to his mother who has left that faith, and has thereby stepped outside the family in which she was married, with the certainty that the boy will be induced to leave the religion of his father for the new religion of the mother. In my opinion therefore the child should be left with his grandfather and I accordingly allow this appeal, set aside the order of the learned District Judge and appoint Nadir Mirza to be the guardian of the person and property of the minor Asghar Husain. The learned Judge had two cases before him in both of which the respondent received his costs. It is not necessary to pass any order as to costs in this court but in this court the parties will bear their own costs. The child was made over by me in accordance with the District Judge's order to his mother on the 24th of July, 1930. Musammatt Munni Begam is directed to return the child to his grandfather the appellants within seven days.

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*Pullan, J.**Appeal allowed.*