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*In re*  
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GHANDA-  
VARKAR

In my judgment, therefore, on the prosecution evidence, no offence has been committed by the applicant pleader and no useful purpose would be served by allowing these proceedings, which have already lasted thirteen months, to be recommenced, and I am, therefore, of opinion that the proceedings should be quashed and the petitioner discharged.

*Rule made absolute.*

R. R.

## CRIMINAL REVISION

*Before Mr. Justice Fawcett and Mr. Justice Mirza.*

*In re* FULCHAND MAGANLAL.\*

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November 14.

*Criminal Procedure Code (Act V of 1898), section 488—Maintenance—Wife “living in adultery”—Single lapse from virtue is not living in adultery.*

The expression “living in adultery” in section 488 of the Criminal Procedure Code, 1898, refers to a course of conduct and means something more than a single lapse from virtue.

*In re Shieram*,<sup>(1)</sup> distinguished.

*Kallu v. Kaunsilia*<sup>(2)</sup>; *Patala Atchamma v. Patala Mahalakshmi*<sup>(3)</sup>; and *Jatindra Mohan Banerjee v. Gouri Bala Debi*,<sup>(4)</sup> followed.

This was an application in revision against an order passed by M. P. Desai, Additional City Magistrate at Ahmedabad.

The applicant married the opponent in 1920. They lived together for some time, but separated afterwards. The opponent while living separate gave birth to a son, who, the applicant alleged, was illegitimate. It was held in a civil suit between the parties that they had no access to each other at the time the son was begotten.

The opponent applied under section 488 of the Criminal Procedure Code to recover maintenance. The applicant resisted the application on the ground of opponent's adultery.

\*Criminal Revision No. 228 of 1927.

<sup>(1)</sup> (1890) Ratanlal's Crim. Cas., p. 506. <sup>(3)</sup> (1907) 30 Mad. 332.

<sup>(2)</sup> (1904) 26 All. 326.

<sup>(4)</sup> (1924) 29 C. W. N. 647.

The trying Magistrate was of opinion that the opponent was guilty of only a single lapse from virtue which did not disentitle her to maintenance, and awarded to her maintenance at the rate of Rs. 20 per month.

The applicant applied to the High Court.

*K. N. Koyajee*, for the applicant:—The expression “living in adultery” in section 488 of the Criminal Procedure Code is wide enough to include a single lapse from virtue. The taint of adultery once contracted attaches until it is removed by forgiveness by the husband. See *In re Shivram*<sup>(1)</sup>; Halsbury’s Laws of England, Volume XVI, section 1003; Lush on Husband and Wife, p. 87; Bright’s Law of Husband and Wife, Volume I, p. 265. The cases of *Kallu v. Kaunsilia*<sup>(2)</sup>; *Patala Atchamma v. Patala Mahalakshmi*<sup>(3)</sup> and *Jatindra Mohan Banerjee v. Gouri Bala Debi*<sup>(4)</sup> are not correctly decided.

*P. B. Shingne*, Government Pleader, for the Crown:—The case of *In re Shivram*<sup>(1)</sup> was decided on its own particular facts. The cases of other High Courts correctly interpret section 488. Even under Hindu law, an adulterous wife cannot be abandoned by the husband: *Parami v. Mahadevi*.<sup>(5)</sup>

*B. D. Mehta*, for *P. A. Dhruva*, for the opponent.

FAWCETT, J.:—The petitioner, Fulchand Maganlal, has been ordered by the Additional City Magistrate, Ahmedabad, to pay his wife Bai Lili a sum of Rs. 20 a month as maintenance under section 488 of the Criminal Procedure Code. Bai Lili, according to the findings of the Magistrate, married Fulchand some seven years back, but for the last five years she has been living with a relative, her maternal uncle. According to Bai Lili she was obliged to leave the house—in fact she was driven out of it—owing to her husband’s maltreatment and misconduct. On the other hand, Fulchand has produced

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<sup>(1)</sup> 1890) Ratanlal’s Crim. Cas., p. 506.      <sup>(3)</sup> (1907) 30 Mad. 332.

<sup>(2)</sup> (1904) 26 All. 326.      <sup>(4)</sup> (1924) 29 C. W. N. 647.

<sup>(5)</sup> (1909) 34 Bom. 278.

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a judgment in a civil suit decided by the Joint First Class Subordinate Judge, where it has been held that Fulchand and Bai Lili had no access to each other at any time when a son who was born to Bai Lili could have been begotten ; and he relies upon this evidence of adultery and contends that the wife is not entitled to any maintenance from him. The Magistrate, however, rejected this contention, holding that the words of sub-section (4) of section 488, viz., that no wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, refer to a course of conduct or at least to something more than a single lapse from virtue, and therefore a single act of adultery does not necessarily amount to living in adultery, so as to disentitle the wife from applying for maintenance under this section. He held that, at the most, there had been only a single lapse from virtue on the part of Bai Lili and that many years ago, and that, as there was no evidence to show that Bai Lili was leading an unchaste life after the birth of her son five years ago, she was not disentitled to maintenance.

Mr. Koyajee for the petitioner relies upon a judgment of this Court in *In re Shivram*.<sup>(1)</sup> In that case the wife had run away from her husband twelve years before with her servant. A few months before the application for maintenance she became the mother of a child, whose father was not her husband. The Court held that in the circumstances she was not entitled to claim maintenance from her husband on the plea that she was not, at that moment, living in adultery. They go on to say (p. 507) :—

“ When, as in the present case, there has been a desertion of the husband for many years, coupled with adultery, and no attempt to seek the husband’s pardon for past misconduct, the wife is not entitled to an order for maintenance under section 488 of the Code, merely because, at the time when she makes her application, she may not be ‘ living in adultery.’ She does not come into Court with clean hands, and the Court may, in such a case, rightly remain passive.”

<sup>(1)</sup> (1890) Ratanlal’s Crim. Cas., p. 506.

The judgment refers in support of this last remark to I Bright's Law of Husband and Wife, page 265. On the other hand, they finally say (p. 507):—

“ We dispose of the present case with reference only to its own particular circumstances. We do not say that, in no circumstances, could a wife, who has been guilty of adultery, claim protection under the Code.”

It is clear, therefore, that that decision was based mainly upon the particular circumstances in that case and that it is not a decision which goes to the extent of saying that a wife, who has committed a single act of adultery, is debarred from obtaining maintenance from her husband under section 488 of the Criminal Procedure Code. The circumstances of that case are certainly much more unfavourable to the wife than the circumstances in the present case, so far as they appear in the evidence and the findings of the Magistrate; and since the Bombay ruling there has been a series of rulings by the Madras, Allahabad and Calcutta High Courts to the effect that a single act of adultery does not necessarily amount to “ living in adultery ” within the meaning of clause (4) of section 488 of the Criminal Procedure Code and will not justify a Magistrate in refusing maintenance, because the words “ living in adultery ” refer to a course of conduct and mean something more than a single lapse from virtue. See *Kallu v. Kaunsilia*<sup>(1)</sup>; *Patala Atchamma v. Patala Mahalakshmi*<sup>(2)</sup> and *Jatindra Mohan Banerjee v. Gouri Bala Debi*.<sup>(3)</sup> I see no sufficient reason to differ from this construction of the words, which, in my opinion, is the natural one to put upon the significant present tense in the words “ is living in adultery.” The fact that the wife in such a case does not come to the Court with absolutely clean hands cannot, in my opinion, affect the clear implication from the words of the Legislature that, unless she is actually living in adultery at or about the time of the application, she is not disentitled from obtaining maintenance. Nor is there any ground for saying that this view is opposed

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to Hindu law. It is sufficient in this connection to refer to the remarks made in *Parami v. Mahadevi*<sup>(1)</sup> as to the general rule to be gathered that a Hindu wife cannot be absolutely abandoned by her husband even if she is living an unchaste life. The reference in the judgment in *In re Shivram*<sup>(2)</sup> to the wife not making any "attempt to seek the husband's pardon for her past misconduct" is also not a test laid down under section 488 of the Code. It may, no doubt, be a circumstance to be taken into account in considering whether maintenance should or should not be awarded, but by itself it is no sufficient reason, in my opinion, for excluding a wife, who has committed a single act of adultery, from the benefit of section 488.

In view of the fact that the Bombay decision expressly says that it is only based on the particular circumstances of that case, we are not precluded from following the subsequent decisions of the Allahabad, Madras and Calcutta High Courts. In my opinion, therefore, there is no error of law in the view that the Magistrate has taken, nor does he seem to have exercised his judicial discretion in the matter improperly. I would, therefore, dismiss the application.

MIRZA, J. :—I am of the same opinion.

*Application dismissed.*

R. R.

## CRIMINAL REVISION

*Before Mr. Justice Fawcett and Mr. Justice Mirza.*

EMPEROR *v.* DAGA DEVJI PATIL.\*

*Criminal Procedure Code (Act V of 1898), section 476 B—Indian Limitation Act (IX of 1908), Article 154—Direction to prosecute—Appeal—Limitation.*

An appeal under section 476 B of the Criminal Procedure Code, 1898, should be filed within thirty days of the date when the finding under section 476 is completed by an actual complaint.

*Fitzhalmes v. The Crown*,<sup>(3)</sup> followed.

Per FAWCETT, J. :—"In my opinion, an appeal in such a case is, in fact, one against the order of the Court directing a complaint to be made, for the petitioner, in appeal,

\*Criminal Revision No. 327 of 1927.

<sup>(1)</sup> (1909) 34 Bom. 278 at p. 283. <sup>(2)</sup> (1890) Ratanlal's Crim. Cas., p. 506.

<sup>(3)</sup> (1925) 7 Lah. 77.

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