

Before Mr. Justice Loch and Mr. Justice Ainslie.

THE QUEEN v. WAZIRA AND ANOTHER (APPELLANTS).*

1872
Jan'y. 6.

*Penal Code (Act XLV of 1860), s. 498—Presumption of Marriage—Burthen of Proof—
Procedure—Depositions before the Magistrate.*

In a charge under section 498 of the Penal Code, the proof that the woman and a man, other than the accused, were living together, is sufficient to throw the burthen of proof on the accused that they were not man and wife (1).

Evidence taken before the Magistrate, but not used at the trial, cannot be referred to on appeal.

THE prisoners in this case was charged by the Magistrate under section 365 of the Indian Penal Code. The Sessions Judge of Patna added another charge under section 498, on the ground that the prosecutor had, in his petition to the Magistrate, prosecuted the prisoners under that section. The Sessions Judge found the prisoners guilty under section 498 of the offence of having taken away Dawlati from the prosecutor, knowing or having reason to believe that she was his wife, with intent that she might have illicit intercourse, and sentenced the prisoners to undergo rigorous imprisonment for nine months.

The prisoners appealed to the High Court.

Mr. C. Gregory for the appellants contended that there was not sufficient evidence of the Marriage upon which to convict the prisoners; that the evidence given in the Sessions Court was not reliable, being contradictory to the statements made before the Police, and the evidence recorded by the Magistrate; that it has always been usual on appeal to refer to these statements and to the evidence recorded by the Magistrate, when they form a part of the record, although there is nothing in particular to show that these were referred to before the Sessions Court.

LOCH, J.—The prisoners in this case were committed for trial by the Magistrate under section 365 of the Indian Penal Code. The Sessions Judge added another charge under section 498 of that Code, being the charge which was originally made against the prisoners by the complainant Ghasita, and the Judge, agreeing with two out of seven of the assessors, convicted the prisoners on this charge, and sentenced them to nine months' rigorous imprisonment.

In appeal, the pleader for the appellant wished to read certain statements made by the witnesses before the Police Inspector; he also wished to read the

* Criminal Appeal, No. 681 of 1871, from an order of the Sessions Judge of Patna, dated the 25th September 1871.

(1) See Act I of 1872, s. 50.

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evidence that was taken before the Magistrate. But the Court refused to allow either the one or the other to be read. The statements made before the Police Inspector are not evidence, and could not be used as evidence in the trial; and unless the pleader could show that the evidence taken before the Magistrate had been used as evidence at the Sessions trial, and laid before the Judge and the assessors, and that they, after hearing that evidence, based their opinion upon it, we think that that evidence cannot now be laid before us, and made use of in support of the appeal.

An objection has been taken to the conviction in this case that there is no evidence of the Marriage of the parties Ghasita and Dawlati. But the law says :—Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man from that man, &c. Now in this case it is clear that Ghasita and Dawlati were living together. It appears that they had been living together in the house of Larmin, and had removed from that house to the house of Moracho, from which the woman Dawlati was taken away. The fact of their living together is sufficient to raise the presumption of their being man and wife; and it was for the prisoners to show that they were not married, and that Ghasita had no legal right to prevent her going away.

With regard to the facts of the case, it is urged that the evidence is untrustworthy, it being very contradictory. No doubt, the evidence of Ghasita and the evidence of his wife are contradictory on certain points, but both of them have deposed to one fact, *viz.*, that the woman was taken away; and accepting the deposition of Dawlati, which is most favourable to the prisoners in this case, as containing the true account of the occurrence, we think that the evidence of her being taken away from the person whom the prisoners had reason to believe to be her husband is proved, and that therefore this appeal must be dismissed.

AINSLIE, J.—With regard to the point as to whether there is evidence of the marriage, I wish to add that there is the evidence of Ghasita and the woman Dawlati, to the effect that she is his legally married wife, and that this evidence stands altogether un rebutted; and that no evidence is shown that the alleged marriage did not take place; it must, therefore, be taken that there was a marriage.

I concur with my learned colleague in dismissing this appeal.
