APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Prinsep.

1878
July 19.

IN THE MATTER OF THE EMPRESS *v.* ABDOOL KURREEM.*

Abetment—Bigamy—Indian Penal Code, ss. 109 *&* 494.

A Mahomedan guardian of a married female infant, who, while her husband is living, causes a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, does not commit the offence of abetment under ss. 109 and 494 of the Penal Code.

The practice of instituting criminal proceedings with a view to determining disputes arising in cases of this class condemned.

HOORUNNISSA BEGUM, a Mahomedan female infant of six years of age, having at the time a mother and two paternal uncles, Abdool Kurreem and Abdool Sobhan, living, was first given away in marriage, to one Abdool Hosain, by her mother. This marriage being admittedly invalid, as the paternal uncles alone, and not the mother, could, according to Mahomedan law, dispose of the infant in marriage, a second marriage was shortly afterwards solemnized between the same parties; and at such second marriage, Abdool Sobhan, the younger of the infant's paternal uncles, was alleged to have been present and to have given away the bride. A few weeks later the same Hoorunnissa Begum was again married to one Dabeerooddin, having this time been given in marriage by both her guardians, Abdool Kurreem and Abdool Sobhan. Upon this the guardians, Abdool Kurreem and Abdool Sobhan, were charged with having been guilty of an offence punishable under ss. 494 and 109 of the Indian Penal Code.

The case of the prosecution was, that the marriage of the infant Hoorunnissa Begum, with the consent of her uncle Abdool Sobhan, was a legal one according to Mahomedan law; and that, therefore, the accused, by sanctioning and promoting the subsequent marriage with Dabeerooddin, had been guilty of

* Criminal Appeal, No. 379 of 1878, against the order of J. P. Grant, Esq., Sessions Judge of Zilla Hooghly, dated the 23rd of May 1878.

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the offence of abetting a marriage which was, and which they knew to be, void.

Abdool Sobhan pleaded that he had taken no part, and had not been present at either marriage. Abdool Kurreem admitted that he had sanctioned and been present at the marriage with Dabeerooddin, but denied that he had any knowledge of the alleged marriage to Abdool Hosain; and further disputed the validity of such a marriage, if it had in fact taken place, without his consent.

The result of the trial at the Sessions Court at Hooghly was, that the Court and assessors were of opinion that the infant Hoorunnissa Begum had in fact been married, as alleged, to Abdool Hosain in the presence and with the consent of the accused Abdool Sobhan, and that such a marriage was a valid one; but that the accused Abdool Sobhan had not taken any part in the subsequent marriage with Dabeerooddin. They therefore, acquitted Abdool Sobhan. As to the accused Abdool Kurreem, they found that, at the time when he sanctioned and took part in the marriage with Dabeerooddin, he must have been cognizant of the previous marriage with Abdool Hosain and of the validity of such previous marriage. Abdool Kurreem was, accordingly, convicted and sentenced to eighteen months' rigorous imprisonment.

Against this conviction and sentence Abdool Kurreem appealed to the High Court.

Mr. *E. P. Wood* and Moulvie *Siraj-ul-Islam*, who appeared for the appellant, contended that the finding of the Court below was erroneous upon the evidence before it, and further submitted that, taking the facts as found by the Court below, the appellant had been guilty of no offence, and that even if he knew, or had reason to know, that a pretended marriage ceremony had been solemnized between his ward and Abdool Hosain, he would have committed no offence in ignoring a pretended marriage, the validity of which he denied; and that he committed no offence in giving his sanction to a marriage of which he was willing to approve, leaving to the Civil Court to decide, if necessary, which of such marriages should be binding. The case for the appellant was further strengthened by the fact that the

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infant Hoorunnissa Begum was not personally present at her marriage with Dabeerooddin, and that what took place was more an assertion of his rights as guardian than anything else.

WHITE, J. (after stating the facts, proceeded as follows):—The prisoner before us has appealed against the finding of the Sessions Court on the facts and also against its conclusions in law. It appears to me unnecessary to enter into the merits of the appeal, for taking the facts as found by the Court to be true and the law applied by it to be correct, I am of opinion that this conviction cannot be sustained.

The prisoner is charged with the abetment of an offence under s. 494 of the Penal Code. To establish a charge of abetment under the Penal Code, the accused must be proved either to have instigated or aided some other person to commit the offence, or to have engaged with another in a conspiracy for the commission of the offence. The acquittal of Abdool Sobhan, who was jointly charged with the prisoner, puts an end to the case of conspiracy, for, except with Abdool Sobhan, there is no evidence to support a case of conspiracy. If, therefore, the conviction can be upheld, it must be in consequence of the prisoner having instigated or aided Hoorunnissa to contract a second marriage. The evidence shows that Hoorunnissa took no part in, nor was present at, the ceremony which the prisoner caused to be performed in her name, and there is not only no proof of instigation or aiding, but not even the slightest evidence that Hoorunnissa was consulted, or even communicated with, by the prisoner before the ceremony took place. In fact, the nature of the transaction almost precludes the notion of abetment as far as the infant girl is concerned. The prisoner purported to dispose of her in marriage not by virtue of any authority derived from her or from any consultation of her wishes, but by virtue of his legal position as elder paternal uncle. The girl was a mere cypher in the transaction. Her name was used, the ceremony was on her behalf, and the prisoner symbolically gave her in marriage to Dabeerooddin; but the girl was personally a stranger to the whole proceeding. Although the effect of the ceremony would have been, supposing the prisoner was acting within the authority given him by

law to bind the infant by the marriage so contracted, yet she was not the less personally a stranger to both the ceremony and the contract.

It appears to me, therefore, that, without determining any of the questions of fact or law raised by the prisoner's appeal, the conviction must be set aside on the ground that the prosecution has failed to show that the prisoner is guilty of the offence of abetment within the meaning of the Penal Code.

Assuming the facts and law to be as found and laid down by the Sessions Court, the prisoner has committed an illegal act in disposing of his infant ward in marriage after he knew that she had been previously lawfully disposed of in marriage by her younger paternal uncle; but in doing this act he was, according to the evidence, the sole actor, and the act, though illegal, is not, if done by one person alone, an offence provided for by the Penal Code.

In disposing of this case I would observe that it ought not to have been made the subject of a criminal prosecution. A dispute has evidently arisen between the relatives of this little girl, who appears to be entitled to some property, as to which of them should dispose of her in marriage. The several questions which the dispute has given rise to, *viz.*, what marriage ceremonies have been performed on the girl's behalf, and by whom, and what is their legal effect, are eminently questions to be submitted to a civil tribunal, if the parties disagree about the same; and it is much to be deprecated that one of the rival parties should endeavour to procure a decision on this point through the medium of a criminal trial.

The inconvenience and hardship to the accused of making such a dispute the subject of a criminal prosecution is well illustrated by the present case. The first marriage, which the mother solemnized is admitted by the prosecution to be wholly invalid. To show that the third marriage, solemnized by the prisoner was invalid, it is essential for the prosecution to establish that an intermediate ceremony took place in which Abdool Sobhan disposed of the girl in marriage, and that that intermediate ceremony constituted a valid marriage according to Mahomedan law. Although the evidence of Abdool Sobhan

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is of the utmost importance on this question, the prosecution has chosen to put him on his trial jointly with the prisoner, and so prevented him from being called as a witness. Abdool Sobhan denies that he did solemnize the second marriage, and this cardinal point has been determined by the Criminal Court without hearing his testimony.

Another objection to the course adopted in the present case is, that the criminal trial will not be a bar to the taking of civil proceedings at some future time in order to ascertain to which of the two boys the girl was legally married; and, should such proceedings take place, the conviction of the prisoner, in the criminal trial will be no evidence against him in the civil proceedings. The whole matter will have to be investigated upon such evidence as the parties may then adduce, and it is possible that the Civil Court may arrive at a conclusion different from that of the Criminal Court, and uphold the marriage, for contracting which the prisoner has been found guilty.

The conviction and sentence will be set aside and the prisoner released.

PRINSEP, J.—I altogether agree with my learned colleague, that in this case it is not necessary to come to any finding upon the facts, and that, accepting the facts as stated by the prosecution, the appellant cannot be convicted of the abetment of bigamy under ss. 109 and 494 of the Indian Penal Code.

The girl Hoorunnissa, who forms the subject of this case, is aged about six years, and apparently is possessed of considerable property, which fully accounts for the strife which is going on for her person and for procuring her marriage into one or other of the two families. She was married first to Abdool Hosain with the consent of her mother, but this was not a proper consent such as would render the marriage valid. She was afterwards, according to the prosecution, again married to the same boy Abdool Hosain with the consent of Sobhan, her younger paternal uncle,—that is, one of her two guardians. Then the prosecution goes on to say that she has been married for the third time (so as to cause bigamy) with the consent and at the instigation of the appellant Abdool Kurreem, the elder uncle,

to another boy. Now the first marriage is admittedly void, and if the facts are as stated by the prosecution, the third marriage would also be void as being a bigamous marriage. But however that may be, as has been forcibly pointed out, this matter should be decided, and can only be properly decided, in the Civil Court. Even if the appellant Abdool Kurreem did procure that marriage, he cannot, on the facts stated by the prosecution, be rightly convicted of abetment of bigamy. It does not appear, nor is it stated, that the girl was present or even cognizant that this marriage was to be contracted on her behalf. The offence of abetment and its definition is to be found in s. 127 of the Indian Penal Code, and that section is supplemented by a definition of the term "abettor" in s. 108; but both these sections contemplate either the instigation or the aiding of some person to commit a substantive offence, or the engaging in the conspiracy on the part of a person in the position of the appellant with one or more other persons. It has been pointed out by Mr. Justice White that there must be either a principal committing a particular act or instigating to commit that act, or there must be some other person engaged with the appellant in abetting this act to constitute an abetment under the Indian Penal Code. But nothing of the kind is alleged by the prosecution, and therefore, even if the appellant should have committed all the acts imputed to him, he would not be guilty of any criminal offence under the Indian Penal Code.

The conviction will be set aside and the prisoner released.

Conviction set aside.