

In the Privy Council.

UNIVERSITY OF LONDON
 21
 20 FEB 1957
 LEGAL STUDIES

ON APPEAL
 FROM HER MAJESTY'S COURT OF APPEAL
 FOR EASTERN AFRICA.

46089

BETWEEN

LAILA JHINA MAWJI (Wife of KASSAM ALI KARIM
 MAWANI, the second Appellant) and KASSAM
 ALI KARIM MAWANI *Appellants*

AND

10 HER MAJESTY THE QUEEN *Respondent.*

Case for the Appellants.

RECORD.

1. This is an appeal by Special Leave from the judgment and Order of the Court of Appeal for Eastern Africa delivered on the 1st day of August 1955, dismissing the Appellants' appeal against the judgment of the High Court of Tanganyika delivered on the 17th day of March 1955 dismissing the Appellants' appeal against their conviction by the Resident Magistrate at Dar-es-Salaam on the 3rd day of January 1955 on the charge of conspiring together to obstruct, prevent or defeat the course of justice by concealing a wall clock which they well knew was required for the purpose of an inquiry into a criminal offence : special leave to appeal to Her Majesty in Council was granted by Order in Council dated the 1st day of June 1956, the appeal being limited to questions arising on the conviction of the Appellants on the charge of conspiracy.

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pp. 89-95.
 pp. 57-84.
 p. 52, l. 5.
 pp. 95-97.
 p. 96, l. 40.

2. The Appellants who were lawfully married in accordance with the rules of the Khoja Sect (a sub-sect of the Shia Sect of Mohammedans) and were living together in a common matrimonial home under conditions in all respects similar to a monogamous union, were charged under Section 110 (A) of the Tanganyika Penal Code which reads as follows :—

p. 41, ll. 35-39.
 p. 1, ll. 8-9.

30 "Any person commits a Misdemeanour who conspires with any other person to accuse any person falsely of any crime, or to do anything to obstruct, prevent, pervert or defeat the Course of Justice."

p. 55, ll. 14-15.

3. On conviction by the Resident Magistrate the Appellants were sentenced to a term of two months imprisonment (hard labour) on the charge of conspiracy, which sentences were increased by the High Court at the request of the prosecution to one year's imprisonment, and the Court of Appeal ordered that such increased sentences should stand.

p. 84, ll. 19-20.

p. 1, ll. 10-11.

4. The Appellants were further charged with retaining the wall clock knowing or having reason to believe the same to have been feloniously stolen or obtained contrary to the provisions of Section 311 (1) of the Tanganyika Penal Code, and on conviction on this charge of retaining by the Resident Magistrate were sentenced to a term of four months imprisonment (hard labour) which sentences were increased by the High Court at the request of the prosecution to one year's imprisonment on the first-named Appellant and two years imprisonment on the second-named Appellant, the sentences on the two charges of conspiracy and retaining to run consecutively, and the Court of Appeal allowed the appeal of the first-named Appellant on the charge of retaining and quashed such conviction. The second-named Appellant was refused Special Leave by Her Majesty-in-Council to appeal against his conviction on the charge of retaining.

p. 55, ll. 20-21.

p. 84, ll. 20-22.

p. 93, ll. 13-40.

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5. The material facts of the case may be outlined as follows :—

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p. 3, l. 33, to
p. 4, l. 43.

On 17th November 1954 two police officers visited the Appellants' home in order to make inquiries about the wall clock, and when they arrived the first-named Appellant was present and the second-named Appellant was at his work as an accountant in the Headquarters of the Public Works Department at Dar-es-Salaam. The police officers went into the living room of the Appellants' home where they saw the clock and examined it closely, but as they were not satisfied that it was the clock for which they were searching it was returned to the first-named Appellant.

p. 37, ll. 12-20.

After the Police Officers had departed the first-named Appellant, without any opportunity of communicating with the second-named Appellant who was away at his work, threw the wall clock over the wall into the African quarter ; and when the Police Officers arrived at the second-named Appellant's place of work to question him about the clock he at once admitted that a wall clock of the description in question was at his house.

p. 5, ll. 3-19.

p. 42, l. 41 to
p. 43, l. 14.

The second-named Appellant returned home from his work at about 4.30 p.m. when, just before the further visit of the Police Officers to his home on that day, the first-named Appellant told him what she had done. Then the second-named Appellant at the request of the Police went to the Police Station and subsequently he made a statement in which he denied that the wall clock in question or indeed any wall clock had ever been at his home.

p. 97.

6. The issues in this appeal are :—

(A) Whether the doctrine of English Law that a Husband and Wife " are to be considered in Law as one person and are presumed

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to have but one will" (1 Hawkins' Pleas of the Crown C. 72 s. 8) which is imported into the construction of Section 110 (a) of the Tanganyika Penal Code by Section 4 of the Tanganyika Penal Code applies in the case where the Husband and Wife are lawfully married in accordance with the rules of the Khoja Sect.

(B) Whether the doctrine of English Law that a Husband and Wife are one person is applicable in the case of a Non-Christian or Polygamous Marriage or form of marital union based solely on contractual conception.

10 (c) Whether there was any evidence or overt act to support an agreement between the Appellants to conceal the wall clock as charged.

7. The Court of Appeal held that the doctrine of English Law was imported into Section 110 (a) of the Tanganyika Penal Code by Section 4 of the Tanganyika Penal Code, and further held (and it is submitted wrongly) that the doctrine could only apply to monogamous marriages, or to forms of marital union based on the sacrament of Christian marriage as distinct from forms of marital union based solely on a contractual conception, and therefore that the doctrine did not apply in the case of
20 the Appellants. p. 91, l. 6, to
p. 92, l. 33.

8. The Appellants respectfully submit that as the origins of the doctrine are to be found in the Old Testament (Genesis II 21 and III 16) which was written against the general background of polygamy which prevailed at that time, and that as one of the origins (Genesis II 21) is concerned with the making of Woman and the Institution of Marriage arising in connection with mythological theory as to the manner in which woman was first created from the body of Adam "bone of bone flesh of one flesh," and that as the other origin (Genesis III 16) arises in connection with the theory of subordination as a result of the use of the words "He
30 shall rule over thee," there is no warrant for limiting the application of the doctrine to monogamous marriages or to forms of marital union based on the sacrament of Christian marriage, and further that there is no warrant for excluding the application of the doctrine to forms of marital union based solely on a contractual conception regard being had to the following passage extracted from Blackstone's Commentaries on the Laws of England Volume 1 paragraph 433 :—

40 "Our Law considers marriage in no other light than as a civil contract, and until very recently the holiness of the matrimonial state was left entirely to the matrimonial Law: the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience . . ."

9. The Appellants respectfully submit that the theory of subordination (which is applicable whether the marriage is monogamous or polygamous) has been accepted as the origin and basis for the doctrine

in English Law, regard being had to the following passage extracted from Blackstone's Commentaries on the Laws of England Volume 1 paragraph 442 :—

“ By marriage, the husband and wife are for most purposes one person in Law: that is the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our Law French a femme-covert, feomina viro co-operta; is said to be covert baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely personal.” 10

10. The Appellants respectfully submit that as it is incumbent upon the Crown to establish the agreement which is the subject matter of a charge of conspiracy strictly as laid, and that as there was no evidence and no overt act to support the agreement alleged which was to conceal the wall clock (and not the fate or disappearance of the wall clock after the first-named Appellant had thrown it into the African quarter without the knowledge of the second-named Appellant): And that as the second-named Appellant's admission to the police officers as to the existence of such a wall clock at his house is inconsistent with the charge as laid :— 20

(A) The Resident Magistrate misdirected himself as follows :—

p. 51, l. 50, to
p. 52, l. 5.

“ The charge might have been better framed, but even if the clock had gone by the time the second accused (second-named Appellant) returned from work I am quite satisfied that he and the first accused (first-named Appellant) came to a definite agreement to conceal by agreed falsehoods the fate of the wall clock from the police with intent to obstruct the course of Justice.” 30

p. 70, l. 27.

(B) And that in upholding the conviction the High Court misdirected itself in applying *Rex v. Sharp* [1938] 1 A.E.R. 48 because the essence and reasoning of that decision pre-supposed that the agreement as charged had been established, and was solely concerned with whether a charge for conspiracy could lie if no proceedings were pending in respect of the crime which was the subject matter of the alleged conspiracy.

p. 94, ll. 11-13.

(C) And that the Court of Appeal having accepted that “ the evidence clearly established that when he ” (the second-named Appellant) “ had heard from his wife ” (the first-named Appellant) “ what she had done his subsequent conduct thereafter amounted to an adoption of her act as his own”, misdirected itself as follows :— 40

p. 92, l. 48, to
p. 93, l. 1.

“ We cannot say that he (the Resident Magistrate) was not justified in concluding that a definite agreement was reached by the two Appellants to conceal by agreed falsehoods the disappearance of the wall clock with intent to obstruct the course of Justice.”

11. The Appellants humbly submit that the fact that the second-named Appellant was held by his subsequent conduct to have adopted the act of the first-named Appellant in throwing away the clock is no evidence or indication of the fact that such adoption was by agreement with the first-named Appellant as it would be reasonable and natural for a husband to shield his wife in such circumstances after he had learnt of her folly, and the Appellants accordingly submit that it is not a permissible conclusion that there must have been a definite agreement to conceal the fate of the clock or that the falsehoods were agreed falsehoods. p. 94, ll. 11-13.

10 12. The Appellants humbly submit that their said conviction on the charge of conspiracy should be quashed and their said sentences set aside and that this appeal should be allowed for the following amongst other

REASONS

- 20 (1) BECAUSE having found that the doctrine of English Law that a husband and wife cannot conspire together is incorporated into Section 110 (a) of the Tanganyika Penal Code by Section 4 of the Tanganyika Penal Code, the Court of Appeal should have held that the doctrine applied to every husband and wife whom the Law of Tanganyika recognise as being lawfully married.
- (2) BECAUSE the doctrine of English Law that a husband and wife cannot conspire together which is imported into the construction of Section 110 (a) of the Tanganyika Penal Code by Section 4 of the Tanganyika Penal Code applies in the case where the husband and wife lawfully married in accordance with the rules of the Khoja Sect, where the husband is living with his only wife in a common matrimonial home in circumstances in all respects similar to a monogamous union.
- 30 (3) BECAUSE the doctrine of English Law that a husband and wife cannot conspire together is not limited to monogamous marriages or forms of marital union based on the sacrament of Christian marriage.
- (4) BECAUSE the doctrine of English Law that a husband and wife cannot conspire together applies in the case of a non-Christian or polygamous marriage, or to a form of marital union based solely on a contractual conception.
- 40 (5) BECAUSE there was no evidence or overt act to support an agreement between the Appellants to conceal the wall clock as charged.
- (6) BECAUSE the judgment and Order of the Court of Appeal as regards the charge of conspiracy was erroneous and ought to be reversed.

ALAN CAMPBELL.

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BETWEEN

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(Wife of Kassam Ali Karim
Mawani, the second
Appellant) and **KASSAM**

ALI KARIM MAWANI . Appellants

AND

HER MAJESTY THE QUEEN Respondent.

Case for the Appellants.

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