

Laila Jhina Mawji and another - - - - - *Appellants*

v.

The Queen - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

**REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE
4TH DECEMBER, 1956**

Present at the Hearing:

LORD OAKSEY
LORD TUCKER
LORD COHEN
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD SOMERVELL OF HARROW]

The appellants were charged with two offences; first conspiring to obstruct the course of justice contra section 110 (a) of the Penal Code; second retaining property feloniously stolen contra section 311 (1) of the Penal Code: this appeal is concerned with the conspiracy charge.

The first appellant is described in the charge as wife of the second appellant, and both as Ismaili Khojas. At the end of the evidence for the prosecution it was submitted for the defence that the accused being husband and wife could not be guilty of conspiracy. It was submitted that the rule of English law to this effect applied to the appellants. This raised two issues. First whether under provisions of the law of Tanganyika to be referred to later this rule of English criminal law was applicable in Tanganyika; second whether if it was applicable it applied to the appellants whose marriage was, it is now conceded, potentially polygamous.

The Magistrate decided that the rule of English law was applicable in Tanganyika but did not apply to a potentially polygamous marriage. Both appellants were convicted on both counts. The High Court and the Court of Appeal for Eastern Africa were of the same opinion as the Magistrate on the two points. The female appellant's conviction on the second count was quashed by the Court of Appeal. On 1st June, 1956, the appellants were given special leave to appeal limited to the count of Conspiracy.

The decision on the first point was of course in the appellants' favour.

The respondent submitted before the Board that the Courts below were wrong on this point and it is convenient to deal with it first. Section 110 (a) of the Tanganyika Penal Code is as follows:

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.

Section 4 of the Code is as follows:

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.

The question is whether the rule is incorporated into section 110 (a) by section 4.

The rule is stated in Archbold (33rd Ed. p. 22): "A husband and wife cannot alone be found guilty of conspiracy, for they are considered in law as one person, and are presumed to have but one will." The authority cited is Hawkins Pleas of the Crown 1 Hawk. c. 72, S. 8. Hawkins begins by quoting the Statute Ordinacio de Conspiratoribus (33 or 21 Ed. 1) "that conspirators be they that do confeder or bind themselves by oath, covenant etc." He goes on to consider the scope of the offence and its punishment. He deals with this matter in sub-section 8. "It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and wife only, because they are esteemed but one person in law and are presumed to have but one will." As in the present case Hawkins was considering inter alia whether the rule modified the generality of words used in a statute or ordinance.

Hawkins refers to Stanfords Pleas of the Crown p. 174 which refers to the rule as accepted in the 14th century. Citations from other authorities and text book writers can be found in *Kowbel v. The Queen* 1954 4 D.L.R. 337. It was not disputed that the rule is part of the English Criminal Law.

It was submitted for the respondent that in applying section 4 of the Penal Code substantive law must be distinguished from "interpretation" and "meaning". It may be difficult to define the limits of the effect of section 4. The contrast between substantive law and interpretation does not seem to assist. The most obvious form of interpretation will extend or restrict the application of words and thereby effect the substantive law. Their Lordships are of opinion that the rule is incorporated into the provisions of section 110 (a). The words "conspires" and "conspiracy" in English criminal law are not applicable to husband and wife alone: the words "other person" in section 110 (a) if English criminal law is applied to their "interpretation" or "meaning" cannot in this context include a spouse.

On this point their Lordships agree with the Courts below.

On the second point the Court of Appeal came to their conclusion "after much consideration" and their Lordships agree that the point is not an easy one.

Their Lordships accept the submission of the respondent that the rule is an example of the fiction that husband and wife are regarded for certain purposes, of which this is one, as in law one person. Some of the consequences of the fiction have been removed or modified by Statute. This has not. In the criminal law of Tanganyika the words husband and wife if unqualified are not restricted to monogamous unions. If it is desired to deal with monogamous as distinct from other marriages express words are used. For example, section 155 of the Criminal Procedure Code deals in sub-section (1) with the wife or husband of a person charged being a competent witness for the prosecution. Sub-section (2) restricts the competence in the case of a wife or husband of a monogamous marriage.

There are several sections not restricted to monogamous marriages which may be said to recognise the "unity" of husband and wife in relation to criminal responsibility. A wife who assists her husband

to escape punishment does not become an accessory after the fact (Cr. Penal Code 387). Section 264 is as follows: "A person, who, while a man and his wife are living together, procures either of them to deal with anything which is to his knowledge, the property of the other in a manner which would be theft if they were not married is deemed to have stolen the thing and may be charged with theft." This assumes the general common law principle that a wife could not steal from her husband. Section 161 (d) provides that neither husband nor wife can be made to disclose communications made by one to the other during marriage.

It is clear of course that the marriages primarily contemplated by the rule in England were monogamous marriages but the rule being now part of the criminal law of Tanganyika their Lordships are of opinion that it applies to any husband and wife of a marriage valid under Tanganyika law.

It was submitted for the respondent that the rule could not apply to the appellants unless it would apply to them if the alleged conspiracy had taken place in this country. Their Lordships do not accept this submission. Potentially polygamous marriages have been recognised for various purposes in this country (*Baindail v. Baindail* 1946 P. 122). It may be that such a marriage would be recognised for the purpose of this rule. Their Lordships express no opinion on that point. The rule plainly applies here at least to marriages recognised as fully valid and it should therefore apply in Tanganyika to marriages recognised as fully valid there. It was not suggested that the appellants' marriage was not in that category.

Their Lordships have therefore humbly advised Her Majesty that the appeal should be allowed and the convictions on the first count quashed and the sentences set aside.

In the Privy Council

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v.

THE QUEEN

DELIVERED BY
LORD SOMERVELL OF HARROW

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