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Judgment
58/1964

IN THE PRIVY COUNCIL

No. 18 of 1964

ON APPEAL FROM THE SUPREME COURT
OF CEYLON

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
23 JUN 1965
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :-

THE ATTORNEY-GENERAL OF CEYLON

Appellant

- and -

78729

ALLEN ELLINGTON REID
alias IBRAHIM REID

Respondent

CASE FOR THE APPELLANT

Record

10 1. This is an appeal by Special Leave from a Judgment of the Supreme Court of the Island of Ceylon, dated the 11th day of July 1963, whereby the said Court allowed the Respondent's appeal against his conviction on the 23rd day of November, 1961 by the District Court of Colombo of the offence of bigamy. p.25 p.13

20 2. The main question raised by this appeal is whether a man who contracts a monogamous marriage in Ceylon under the Marriage Registration Ordinance, which marriage is still subsisting, can thereafter, during the subsistence of that marriage, lawfully contract a second polygamous marriage.

3. On the 28th day of October, 1961 the Respondent was indicted in the District Court of Colombo at the instance of the Attorney General upon the following charge :- p.1

30 "That on or about the 16th day of July, 1959 at Slave Island in the division of Colombo, within the jurisdiction of this Court, you having a lawful wife living, to wit: Edna Margaret Fredrica De Witt, did marry Fathima Pansy in which case such marriage is void by reason of its having taken place during the life of the said Edna Margaret Fredrica De Witt and that you have thereby committed an offence punishable under Section 362B of the Penal Code."

It would appear that at the preliminary inquiry the Magistrate had discharged the Respondent under p.17 11. 23-5

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p.17, 11.28-32

Section 162 of the Criminal Procedure Code, but that the Attorney General had directed the committal of the Respondent under Section 391 of the Code.

4. Section 362B of the Penal Code provides as follows :-

"Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. 10

Exception - This section does not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time : 20

Provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, as far as the same are within his or her knowledge." 30

Section 391 of the Criminal Procedure Code provides as follows :-

"Whenever a Magistrate's Court shall have discharged an accused under the provisions of section 162 and the Attorney-General shall be of opinion that such accused should not have been discharged the Attorney General may direct it to commit such accused to the court nominated by the Attorney-General or order a Magistrate of such court to re-open the inquiry and may give such instructions with regard thereto as to him shall appear requisite; and thereupon it shall be the duty of such Magistrate to carry into effect such 40

instructions."

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5. The following statutory provisions are relevant to this appeal.

Marriage Registration Ordinance

"18. No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.

10 19. (1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce a vinculo matrimonii pronounced in some competent court

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(2) The registrar shall address the parties to the following effect :

20 "Be it known unto you, A. B. and C. D., that by the public reception of each other as man and wife in my presence, and the subsequent attestation thereof by signing your name to that effect in the registry book, you become legally married to each other, although no other rite of a civil or religious nature shall take place; and know ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence."
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64. In this Ordinance, unless the context otherwise requires -

40 "marriage" means any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam;"

RecordMuslim Marriage and Divorce Act

"2. This Act shall apply only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims."

"24. (1) Where a married male Muslim living with or maintaining one or more wives intends to contract another marriage, he shall, at least thirty days before contracting such other marriage, give notice of his intention to the Quazi for the area in which he resides, and to the Quazi or Quazis for the area in which his wife or each of his wives resides, and to the Quazi for the area in which the person whom he intends to marry resides. 10

(2) Every notice required by subsection (1) shall be in the prescribed form and shall contain the full names and addresses of the person giving the notice and of his wife or each of his wives and of the person with whom he intends to contract a marriage. 20

(4) Notwithstanding anything in section 17, no marriage contracted by any male Muslim of the description set out in subsection (1) without giving the notices required by that subsection shall be registered under this Act."

"98. (1) For the avoidance of doubt, it is hereby declared that the repeal of sections 64 to 101 and of the first paragraph of section 102 of the Mohammedan Code of 1806, by the Muslim Marriage and Divorce Registration Ordinance, 1929, or the repeal of that Ordinance by Act No. 13 of 1951, does not affect the Muslim law of marriage and divorce, and the rights of muslims thereunder." 30

6. At the trial the prosecution proved that the Respondent married Edna Margaret Fredrica Reid nee De Witt according to Christian rites at St. Mary's Church, Badulla on the 18th September 1933 and at the time of such marriage both parties were Christians. They lived together until the 25th of May 1957 and had eight children, of whom six died. In May 1957 the said Edna Margaret Fredrica Reid 40

p.2,1.17
p.8,1.24
pp.30-32
p.4,11.1-4
p.2,1.25
-p.3, 1.9

left the Respondent and thereafter sued him for maintenance. An order for maintenance against the Respondent was made, but he fell into arrears in his payments.

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7. The evidence for the prosecution was further that on the 16th **July** 1959 the Respondent went through a ceremony of marriage with Fathima Pansy formerly Mary Pansy Clare De Kauwe, the divorced wife of Vincent De Kauwe, at the Muslim Registrar's Office at No. 21-26 Saunders Court, Colombo. The quazi for Colombo South, M. A. Thassin, testified that the Respondent had come to him in 1959, bringing a letter from a priest that he was a converted muslim and that the name "Ibrahim" had been given to him, and had given notice on the 14th June 1959 purportedly as a Muslim married man under Section 24(1) of the Muslim Marriage and Divorce Ordinance, of his desire to marry again. The said quazi had sent a copy of this notice to the said Edna Margaret Fredrica Reid, who had protested to him against the proposed marriage by letter and also in person. In spite of such protests, the quazi had issued his certificate that the Respondent had given notice of intention to marry, and this certificate enabled the Respondent to have a marriage ceremony performed by the muslim registrar.
8. The said Fathima Pansy was called as a witness by the prosecution and testified that she was a Christian until the 13th of June 1959 i.e. one month before the ceremony of marriage alleged by the prosecution to be bigamous. The Registrar of Muslim Marriages at Slave Island, a priest named M. T. T. Amir, testified that he registered the marriage between the Respondent and the said Fathima Pansy on the 16th of July 1959. His evidence was that the Respondent and Fathima Pansy had come to him on the 13th of June 1959 and that he "instructed converted and did everything on 13.6.59." In the course of his evidence he said:-
- "At the time the accused came to marry I knew that he had been married earlier. At the time the accused was being converted I did not know that he was married before.

ReXD:

I did not know that the accused was married

p.6,1.21
p.7,1.17
pp.39-40

p.4,1.31
-p.5,1.24

pp.32-3

p.5,1.7

pp.34-5;
pp.35-6;
pp.37-8.
p.38

pp.6-7

p.6,11.30-33

p.7,11.17-20

p.7,11.27-9

p.7, 1.37-
p.8,1.11.

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under the General Marriages Ordinance. Islam is a vast subject. These parties understood the principles of Islam. Within not even one hour the accused and Pansy Reid understood the principles of Islam."

pp.9-10

9. The Respondent gave evidence on his own behalf. He said that he was a Christian when he married first, that he married in church, that his wife was a Christian and that the marriage was under the Marriage Registration Ordinance. He testified that he became a muslim on the 13th of June 1959 and gave notice of his intention to marry another wife according to the Muslim Faith one day after he became a muslim. He said that his second wife became a muslim on the same day that he was converted.

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p.10,1.20
-p.12,1.12

10. It was contended on behalf of the prosecution that a man who had contracted a monogamous marriage under the Marriage Registration Ordinance could not thereafter evade the consequences of such a marriage by becoming a muslim and that under the General Marriages Ordinance no man can marry more than one wife unless the marriage is dissolved by death or divorce. It was submitted that the first marriage, i.e. the marriage with the said Edna Margaret Fredrica De Witt on the 18th December 1933, had certain attendant consequences affecting both parties to it and that it was not possible to change the character of that marriage by one party becoming a Muslim. It was further contended for the prosecution that the words "no marriage" in Section 18 of the General Marriage Ordinance mean "any marriage" including marriage according to the Muslim faith.

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p.12,1.13
-p.13,1.20

11. It was contended on behalf of the Respondent that the prosecution had not proved a second marriage within the meaning of the General Marriage Ordinance, and that this Ordinance has no application to Muslims. It was further contended that a Muslim converted from Christianity acquires all the rights and obligations of a Muslim, that on conversion a new personal law attaches to the convert and that the marriage of a Muslim converted can in no case be declared void. It was urged that in order for the Respondents to be liable in a case of this sort, he must have purported to contract a second marriage under the Marriage Registration

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Ordinance.

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12. On the 23rd November 1961 the District Court of Colombo (A. E. Bultjens A.D.J.) gave judgment finding the Respondent guilty of the charge against him and sentencing him to serve a term of three months rigorous imprisonment.

pp.13-21.

13. The learned Judge summarised the submissions for the Respondent as follows :-

10 "The defence attacked the case for the prosecution upon the following grounds:- p.16,11.
32-42

(a) Firstly that proof was lacking that accused had contracted a second marriage;

(b) Secondly that the committal of the accused after his discharge by the Magistrate was not warranted by law;

(c) Thirdly that assuming that there was a valid marriage under Muslim Law, the accused, a converted Muslim, was entitled to contract a polygamous marriage."

20 As to the first submission the learned judge considered the evidence and concluded :-

"It is patent that the accused contracted a second marriage on 16.7.59 under the Muslim Marriage & Divorce Act. The argument raised by the accused on this ground is without merit."

p.17,11
16-19

30 As to the second submission the learned Judge held that it was within the power of the Attorney General to direct an committal of an accused where he is of opinion that an accused should not have been discharged under Section 391 of the Criminal Procedure Code and that this the Attorney General did by his Order dated the 24th July 1961. p.17,11
27-32

40 14. Dealing with the third submission, the learned Judge expressed the view that the Respondent's alleged conversion to Islam was only a device to enable him to marry again but in any event rejected his contention that on assuming the Muslim faith he was entitled to contract a subsequent marriage under the Muslim Marriage and Divorce Act even though his first marriage was still subsisting. He said in the

p.20, 1.46
- p.21, 1.4

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course of his Judgment :-

p.18, l.15 -
p.19, l.3.

"The Marriages (General) Registration Ordinance provides for only monogamous marriages and it is not permissible for one to contract a marriage under this Ordinance and thereafter evade its consequences by becoming a muslim. The learned Deputy Solicitor General drew my attention to the form of address by the registrar under Section 35 to the contracting parties cautioning them that if another marriage is legally dissolved, it shall be bigamous. Clearly, when the accused went through the form of marriage with Pansy de Kauwe, there was a valid marriage subsisting between him and Edna de Witt which had not been dissolved or declared void. The apostacy of the accused and the profession by him of the Muslim Faith clearly does not dissolve the earlier marriage or declares it void so as to enable him to contract a polygamous marriage under the Muslim Law. The accused was a Christian and married as such and he could re-marry legally only if he complied with Section 19(1) of the Marriages (General) Registration Ordinance No. 19 of 1907. The accused cannot, by renouncing Christianity and embracing Islam, cast off the obligations which he contracted at the time of his Christian marriage. Section 362(b) of the Penal Code applies only to classes of persons to whom polygamy is prohibited and in such case the second marriage would be void owing to the continuance of the first.

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Monogamy is an unalterable part of the status of every person who marries under the Marriages (General) Registration Ordinance and a change of religion cannot affect that status. Conversion to the Muslim Faith, even if genuine, cannot enable one who has married under the General Marriages Ordinance to contract a polygamous marriage; such a marriage is void in the lifetime of a former wife."

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15. The Respondent appealed to the Supreme Court of the Island of Ceylon by Petition of Appeal, dated the 23rd November 1961, and Amended Petition

p.21
p.23

of Appeal, dated the 28th November 1961, upon the following grounds inter alia,

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"(a) that the Honourable the Attorney General has no power to commit the Accused - Appellant to face his Trial in the District Court of Colombo when the learned Magistrate has discharged the Accused-Appellant;

p.24,11.
14-36

(b) The said Judgment is contrary to law in that, inter alia -

10 (i) The General (Marriages) Ordinance has exempted the Kandyan and Muslims from this Ordinance,

(ii) the Muslims are governed by a special Ordinance viz: The Muslim Marriage and Divorce Act Ordinance 13 of 1951 and the Muslims acquire all the personal laws of the Muslims under that Act,

20 (iii) the Marriage under the Muslim Law does not become invalid by reason of the Joint Marriage under the General (Marriages) Ordinance and as such, the Accused-Appellant is not guilty of the offence."

16. On the 11th day of July 1963 the Supreme Court of Ceylon (Basnayake C.J., Abeysondera J., and G. P. A. Silva J.) allowed the Respondent's appeal against his conviction. Basnayake, C.J., who delivered the principal judgment, founded his judgment wholly upon the terms of section 18 of the Marriage Registration Ordinance, holding that by reason of the definition of "marriage" in section 64, section 18 did not apply to invalidate a marriage "contracted between persons professing Islam". The Respondent's second marriage was registered under the Muslim Marriage and Divorce Act, under which Act persons professing Islam are to marry, and marriages under that Act are not marriages within the definition of the expression "marriage" in the Marriage Registration Ordinance.

pp.25-7

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p.26, 1.
35 - p.27
1.17.

40 17. The Appellant was granted Special Leave to appeal against the said Judgment of the Supreme Court of Ceylon by Order in Council dated the 20th December, 1963.

pp.29-30

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18. There would seem to be no reported decision in Ceylon on the point raised in this Appeal.

The Indian cases on the point are conflicting. The case of Emperor v. Lazar (1907) I.L.R. Madras Series Volume 30 p. 550, was a case in which it was held that a Christian, who, having a Christian wife living, married a Hindu woman according to Hindu rites [Hindu religion at that time allowing polygamy] and did not renounce his religion, was guilty of bigamy. However the view was expressed that he would have been equally guilty even if he had renounced the Christian religion. This decision was disapproved in Emperor v. Antony (1910) I.L.R; Madras Series Volume 33 p. 371 in which it was held that a Hindu convert to Christianity married to a Christian woman according to the rites of the Roman Catholic religion but who subsequently, and during the lifetime of his Christian wife, reverted to Hinduism and married a Hindu woman in accordance with the rites of the class to which the parties belonged, had not committed bigamy.

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Datta v. Sen I.L.R. (1939) 2 Calcutta 12 was a case in which it was decided that an Indian Christian who became converted to Mohammedanism could lawfully take a second wife.

In the case of Rakeye Bibi v. Anil Kuman Mukherji I.L.R. (1948) 2 Calcutta 119, the effect of the conversion of a Hindu wife to Islam upon the validity of her Hindu marriage was considered. It was held that a Hindu marriage is not automatically dissolved in India in these circumstances. It was pointed out that there was a conflict between the personal laws of the parties at the date of the institution of the suit and that since there was no expressed provision that one personal law rather than the other should prevail there was no reason for excluding the law under which the marriage was celebrated.

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The Privy Council has never expressly decided the point raised in this appeal, but in Skinner v. Orde (1871) M.O.O.I.A. Volume 14 p. 309, which was a decision on a question of the custody of a child, the legality of the marriage in Mohammedan form of a man who was already a husband in a Christian marriage of a living Christian wife, was doubted,

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even upon the assumed basis that the Mohammedan marriage was contracted in proper form. In another Privy Council case, Skinner v. Skinner (1898) L.R. Vol. 25, I.A. p.34, where a question arose as to the entitlement of a wife to succeed to the share of a Mohammedan widow, (although excluded by a Will), she and her late husband having been married as Christians but having subsequently been converted to Mohammedanism and re-married according to Mohammedan law, the Privy Council expressed itself as follows:-

"Whether a change of religion made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, has the effect of altering rights incidental to the marriage such as that of divorce, is a question of importance and, it may be, of nicety."

19. The Appellant submits that the Christian monogamous marriage to which the Respondent was a party on the 18th September 1933 was not only a religious and civil contract implying and creating mutual rights and obligations but also an institution affecting and defining the status of both parties. It is respectfully submitted that the Respondent could not unilaterally or by purportedly embracing Islam alter the nature of this still subsisting monogamous marriage or the status conferred by it upon both parties. Accordingly on the 16th July 1959 the said Edna Margaret Fredrica Reid was (and still remains) the sole lawful spouse of the Respondent with the rights and obligations thereby implied. So long as she is alive and her marriage to the Respondent remains undissolved any subsequent purported marriage by the Respondent will be void by reason of his marriage to her. In other words on the 16th July 1959 the Respondent was not free to marry and his purported marriage was void by reason of the subsisting monogamous marriage.

20. It is respectfully submitted that the Supreme Court of Ceylon in deciding that the second purported marriage was not void by reason of the existing monogamous marriage did not have regard to the existing status of the Respondent (and the status of the said Edna Margaret Fredrica Reid) and the rights and obligations resulting from such status. By relying solely upon Sections 18 and 64 of the Marriage Registration Ordinance, the Supreme

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Court did not consider whether or not the status conferred upon a party to a monogamous marriage could itself have the effect of rendering void any subsequent marriage ceremony. The Appellant accordingly submits that the Supreme Court was wrong in coming to the decision it did and that the said purported second marriage was void by reason of its taking place during the life of the said Edna Margaret Fredrica De Witt.

21. The Appellant respectfully submits that this appeal should be allowed for the following among other 10

R E A S O N S

1. BECAUSE the Christian monogamous marriage of the 18th September 1933 to which the Respondent was a party is still subsisting.

2. BECAUSE the status of the Respondent is determined and defined by the said marriage of the 18th September 1933.

3. BECAUSE by virtue of the said subsisting monogamous marriage the Respondent acquired in law the status of a monogamously married person and thereby deprived himself of capacity of validly contracting a further marriage so long as the said monogamous marriage was still subsisting. 20

4. BECAUSE the Respondent could not by unilaterally embracing Islam alter the nature of the still subsisting monogamous marriage of the 18th September 1933 or the status conferred by it upon both parties today. 30

5. BECAUSE the said marriage of the 18th September 1933 could only be terminated and the status conferred by it upon either party could only be altered by death or divorce.

6. BECAUSE if any change in the personal law of the spouses in a monogamous marriage resulting from a change in religion is capable of permitting a subsequent polygamous marriage, it would have to be by consent of both spouses and in the present case the wife had not changed her religion and had not consented. 40

7. BECAUSE, quite apart from the provisions of the Marriage Registration Ordinance, the status of the Respondent conferred upon him by the said marriage of the 18th September 1933 itself rendered void the subsequent marriage ceremony of the 16th July 1959.

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8. BECAUSE, there being a conflict between the present personal law of the Respondent and that of the wife whom he married by the said marriage of the 18th September 1933, the law under which the said marriage was celebrated should be applied.

9. BECAUSE the Attorney-General was fully entitled to direct the committal of the Respondent for trial by the District Court of Colombo.

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10. BECAUSE the Judgment of the District Court of Colombo dated the 23rd November 1963 was right for the reasons therein stated and the Supreme Court of Ceylon was wrong in reversing it.

MARK LITTMAN

MONTAGUE SOLOMON

No. 18 of 1964

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