LIABILITY FOR BIGAMY OF CONVERT TO ISLAM

Attorney-General of Ceylon v. *Reid*

In *Attorney-General of Ceylon* v. *Reid*[1] the issue for determination was whether a man who, having contracted a marriage under the Marriage Registration Ordinance of Ceylon [which provided for monogamous marriages], was converted to Islam and then contracted a second marriage under the Muslim Marriage and Divorce Act of Ceylon [which allowed polygamous marriages] committed bigamy, if the first marriage was still subsisting. The respondent, who was domiciled and resident in Ceylon, while a Christian married a Christian woman according to Christian rites under the Marriage Registration Ordinance of Ceylon. She later left him and obtained a maintenance order against him. Subsequently, he and another woman were converted to the Muslim faith and were duly married by the Registrar of Muslim Marriages under the provisions of the Muslim Marriage and Divorce Act, notwithstanding that the earlier marriage was subsisting. He was convicted of bigamy in the District Court but his conviction was quashed by the Supreme Court of Ceylon. The Attorney-General of Ceylon appealed. It was expressly admitted by counsel for the appellant that the conversion of the respondent to the Muslim faith was sincere and genuine.

It was argued on behalf of the appellant that 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 Ordinance, to contract a polygamous marriage; such a marriage is void in the lifetime of a former wife. Counsel for the appellant did not rely on any statutory enactment which made the second marriage void as the Marriage Registration Ordinance did not apply to Muslim marriages and did not render the second Muslim marriage void.

On behalf of the respondent, it was argued that the status arising out of a contract of marriage is one to which each country is entitled to attach its own conditions both as to its creation and duration. The marital rights of the first wife

13. A sweepstake or lottery ticket is a *chose in action*: *Jones* v. *Carter* (1845) 8 Q.B. 134. A *chose in action* can be converted: *Plant* v. *Cotteril* (1860) 5 H. & N. 430 (deed); *M'Leod* v. *M'Ghie* (1841) 2 Man & G. 326 (guarantee) : *Watson* v. *McLean* (1858) El. Bl. & El. 75 (insurance policy).

14. (1775) 1 Cowp, 343.

15. (1964) 30 M.L.J. 458 at p. 463.

1. [1965] 2 W.L.R. 671.

had been violated but the Ordinance provided the remedy of divorce. There was nothing in any Statute which rendered the second marriage invalid and nothing in the general law of the country which precluded the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognises polygamy, notwithstanding an earlier subsisting marriage.

The Privy Council held that it had not been established that the marriage was void by the law of Ceylon by reason of the earlier Christian monogamous marriage. Lord Upjohn said:

> Whatever may be the situation in a purely Christian country (as to which their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. They agree with the observations of Innes J. almost 100 years ago. In their Lordship's view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none.

The Privy Council pointed out that there were a few authorities on this important question — none directly relevant among the decisions of the Privy Council and no reported case in Ceylon. As a result the Privy Council referred to some Indian cases and decided to follow the ruling laid down as long ago as 1866 by Holloway and Innes JJ. in the case reported in 3 M.H.R.C. VII[2] (which however dealt with the case of a convert to Hinduism) and the decision in *John Jibban Datta* v. *Abinash Chandra Sen*,[3] where it was held in a civil case that as the person who had been converted to Islam was entitled under the Mohammedan law to contract a marriage during the lifetime of his wife, such a marriage must be held to be valid.

While there appears to be no earlier direct authority in the Indian Sub-Continent or in Ceylon on the liability of a Muslim convert to a conviction for bigamy, if he marries while his previous marriage is still subsisting, there is authority in Malaysia which decides that he is so liable. In *Public Prosecutor* v. *White*[4] the facts were that the accused had married a Christian woman at Taiping, Perak, in 1918 according to the rites and ceremonies of the Church of England. In 1936, while his wife was still alive, the accused married another Christian woman according to Muslim law after they had been converted to the Muslim religion. It was held that the accused had committed the offence of bigamy. Home J. in his judgment said:

> I am therefore bound to hold and so to direct that as monogamous and polygamous marriages are recognised by the civil law, a man who enters into a marriage relationship with a woman according to monogamous rites takes upon himself all the obligations springing from a monogamous relationship and acquires by law the status of "husband" in a monogamous marriage. He cannot therefore whatever his religion may be, during the subsistence of that monogamous marriage marry or go through a legally recognised form of marriage with another woman.

He relied on the *dictum,* of Lord Reading C.J. in *R.* v. *Hammersmith Superintendent Registrar of Marriages*: [5]

> Once the marriage has been celebrated according to the law of the place where it is celebrated the status of marriage with all its incidents is conferred by law upon the parties.

In effect he held that the prohibition against taking a second wife is derived from the status conferred upon the man by the law of marriage.

This *ratio decidendi* can, it is submitted, no longer stand in view of the decision of the Privy Council in *Attorney-General of Ceylon* v. *Reid, (supra),* where the Privy

2. (1866) 3 Mad. H. C. Rulings VII.
3. 1939 I.L.R. 2 Cal. 12.
4. (1940) 9 M.L.J. 214.
5. [1917] 1 K.B. 641.

Council stated in effect that it could not agree that in a country like Ceylon a Christian monogamous marriage prohibited for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. Lord Upjohn in that case, referred to the case of *Cheni* v. *Cheni* [6] where Sir Joselyn Simon P. said that "after all there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouse." [7]

In *Public Prosecutor* v. *White, (supra),* Horne J. said: "A conversion to another faith of either spouse has no legal effect on the status of that spouse." He relied for this proposition of law on the judgment of Bucknill C.J. in *Rex* v. *Davendra.*[8] That, however, was an entirely different case, as in that case a Hindu had married monogamously under the law of Ceylon and upon conversion to Christianity married another woman in Singapore, and was convicted of bigamy. Indeed, Bucknill C.J. in that case said:

> I have no doubt that if a Hindu man marries according to Hindu rites a Hindu woman such a marriage though recognised by our law as binding would not prevent that Hindu man from contracting a second valid marriage to another Hindu woman under Hindu rites as I do not think this proposition can be disputed for though if a Hindu went through a second Hindu ceremony of marriage with a second Hindu woman, (the first wife also married by Hindu rites being alive) he could not be prosecuted for bigamy, a different consideration arises when Christian converts are concerned.

In the case of *R.* v. *Davendra, (supra),* and in the cases relating to Muslim and Hindu women converts, decided in India[9] and referred to by Horne J., the second marriage was invalid under the personal law applicable to them after the conversion and therefore they were held guilty of bigamy. However, where a person is converted to Islam and marries again, his second marriage appears to be valid under the Muslim law and therefore he cannot be convicted of bigamy.

In the case of *Advocate-General of Bombay* v. *Jimbabai*,[10] Beaman J. said:

> On conversion to Mohammedanism, converts no matter what their previous religion may have been must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion and to have substituted for it the religion of Mohammed with so much of the personal law as necessarily flows from that religion.

This *dictum* was approved in the case of *John Jibban Datta* v. *Abinash Chandra Sen, (supra),* where it was held that an Indian Christian who had been converted to Islam, was governed by the Muslim law after his conversion and therefore if he married a second wife, such marriage must be held to be a valid one. This decision has been followed in Pakistan in the case of *Farooq Leivers* v. *Adelaide Bridget*[11] where Changez J. said:

> It cannot be disputed that as soon as a person embraces Islam he at once becomes subject to the Muslim personal and religious law and is completely cut off from his past. He accepts a new mode of life and enters a new domain where his deeds, words and actions are governed by the laws of his new religion. So far as his individual personality is concerned, there cannot

6. [1963] 2 W.L.R. 17.

7. It is interesting to note that in *Re Loh Toh Met, deceased* (1961) 26 M.L.J. 234 it was held by the Court of Appeal that even if a Chinese is a Christian he can still chose to contract polygamous marriages under the Chinese custom and such marriages will be valid. If however such a person is married under the Civil Marriage Ordinance, 1952 of the Federation, he will become incapable of contracting a valid marriage with any third person (s. 4). In Singapore, persons other than Muslims, are not allowed to contract valid polygamous marriages, after the coming into operation of the Women's Charter, 1961.

8. 1 Malayan Cases 51.

9. See *Nandi* v. *Crown* 1919 1 Lah. 140 and *Robaba Khanum* v. *Khodadad Bomanji Irani* 1946 48 Bom.L.R. 864.

10. 1915 I.L.R. 41 Bom. 181 at p. 196.

11. P.L.D. 1958 (W.P.) Lahore 431.

> be any doubt about it that his future in all respects of his life becomes amenable to Muslim law, from the moment of his conversion to Islam.

He went on to say:

> Another right which the husband seems to acquire on conversion to Islam is that he can take another wife, although it may be strictly prohibited in accordance with the personal law which was applicable before his conversion.

In the case of *Attorney-General of Ceylon* v. *Reid, (supra),* the Privy Council stated that as regards India the law was stated with complete accuracy in the case of *John Jibban Datta* v. *Abinash Chandra Sen, (supra).* This rule was applied in the Ceylon case and, it is submitted, would be equally applicable in Malaysia.

Home J. in *P.P.* v. *White, (supra),* also made a valiant attempt to show that the second marriage in that case was void according to the Muslim law. His reasoning was that Muslim law recognises in certain circumstances a non-Muslim marriage and that although it permits polygamy it does not make it obligatory. Further, Muslim law requires the husband to treat his wives with justice and equity. He said:

> A system of law which demands justice to all would not permit a person subject to it first to contract a monogamous marriage with one woman and then later to contract a polygamous marriage to another. Under Mohammedan law men and women are on a footing of perfect equality in the exercise of all legal powers and functions. If the first marriage is legally valid in Mohammedan law then the application of the principle of equity demands there shall be no further marriage.

Attractive though the reasoning of the learned Judge may be, it would appear to be contrary to the view generally accepted which would hold that the marriage in such a case is valid according to the Muslim law.

Both in *Attorney-General of Ceylon* v. *Reid* and in *Public Prosecutor* v. *White* it was assumed that the first marriage was still subsisting. This is the position under Muslim law where the first wife is a Christian or a woman who can be classed as a *kitabiyya,* but the rule would be different if the couple belongs to a non-scriptural faith. In such a case under Muslim law the Muslim husband could not lawfully retain a non- *kitabiyya* wife and therefore Islam has to be offered to her and on her refusal a decree for dissolution of marriage has to be passed against her. This rule of Muslim law has not been applied in India or Pakistan [12] and, it is submitted, would not be applicable in Malaysia. In any event, the validity of any marriage which the man enters into after his conversion under Muslim law will not be effected.

It would seem, therefore, that the decision in *Public Prosecutor* v. *White, (supra),* can no longer be relied on as an authority and that the correct position is that laid down in *Attorney-General of Ceylon* v. *Reid, (supra), i.e.* that a man who is converted to Islam may contract a valid marriage under Muslim law, despite the fact that he is already married to another woman, and that he is therefore not guilty of bigamy in so marrying. The position would appear to be hard on the first wife, but she has her remedy in divorce, and it would be open to the Court, in granting her the divorce, to award adequate maintenance and compensation for her. It is also respectfully suggested that those responsible for the administration of Muslim law in the States of Malaysia should seriously consider whether they will allow Muslim law to be abused and so to cause injury to others. A stricter administration of Muslim law relating to polygamy [13] will ensure that permission to marry again will not be granted unless the husband is able to justify his application and can show that he will deal equitably and justly with his wives.

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12 *Sayeda Khatoon* v. *Obadiah* 1949 49 Col.W.N. 745; *Robaba Khartum* v. *Irani* 1946 Bom. L.E. 864 and *Farooq Leivers* v. *Adelaide Bridget* P.L.D. 1958 (W.P.) Lahore 431.

13. See M. Siraj, "The Control of Polygamy", (1964) 6 Malaya L.E. 387.