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No. 9 of 1956.

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA.

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.*

20 FEB 1957

OFFICE OF THE ATTORNEY GENERAL
LONDON

46090

Case for the Respondent

RECORD.

1. This is an Appeal by Special Leave granted by Order in Council dated the 1st day of June 1956 against a Judgment of the Court of Appeal for Eastern Africa (Nihill, P., Worley, V.P., and Lowe, J.) delivered on the 1st day of August 1955 whereby the said Court of Appeal dismissed the Appellants' Appeals from a Judgment of the High Court of Tanganyika (Cox, C.J.) dated the 17th day of March 1955, by which Judgment the said High Court had dismissed the Appellants' Appeals from their convictions in the District Court of Dar es Salaam (J. A. Scollin, Magistrate) on two counts, the first charging them with conspiracy to obstruct, prevent, pervert or defeat the course of justice, contrary to Section 110 (a) of the Penal Code of Tanganyika (Cap. 16 of the Laws of Tanganyika) and the second charging them with retaining property feloniously stolen or obtained, contrary to Section 311 (1) of the said Penal Code. The present appeal was by the said Order in Council limited to the First Count, that of conspiracy. On the said Count the Appellants are each serving a sentence of one year's imprisonment; the above sentences having been imposed by the High Court of Tanganyika.

p. 95.
pp. 89-95.
pp. 57-84.
pp. 48-55.

Annexe hereto
p. 7.

2. The Appellants are Mohammedans and are husband and wife, being married according to the Mohammedan rites and the main point in this appeal is whether as husband and wife as aforesaid they could be charged with conspiracy under the said Section 110 (a) of the Penal Code of Tanganyika. In the Petition for Special Leave to Appeal the Appellants also submitted that there was no evidence of any agreement between them and that there had been misdirection by the Magistrate on the onus of proof and on the "requirements of proving the agreement alleged by the prosecution."

3. The case against the Appellants on the charge of conspiracy as disclosed by evidence is summarised in Paragraphs 4 to 7 below.

p. 8, l. 18.

4. Vrajlal Shivji Ramji (P.W.2) said that he was the owner of a German Wall Clock the maker's name of which was "Mouthe" and that this clock was stolen from his shop on the 13th April 1954. This witness said that in October 1954 he saw his clock hanging on the wall of a room in the Appellants' house and that he reported this to the Police. He gave a description of the clock in evidence.

p. 8, l. 25.

p. 9, l. 7.

p. 8, l. 32.

5. Derek Gwynne Cawley Eager (P.W.1) a Superintendent of Police and Franklin William Solanky (P.W.6) said in evidence that on the 17th November 1954 they called at the Appellants' house which included a shop as well as living rooms and saw the first Appellant, the wife of the second Appellant. One of the Police Officers told the first Appellant that it had been reported that a stolen wall clock had been seen in her house and asked if she would let him examine it. She refused. The Police Officer could see the clock and said that if she refused to let the Police examine the clock they would seize it. The first Appellant then called Juma, a servant, and told him to take the clock down from the wall. The servant did this and handed the clock to the Police who examined it. They noticed that it was in some particulars similar to the description of the stolen clock given in evidence by P.W.1. The first Appellant told the Police that she knew nothing about the clock and that her husband could tell them everything about it. The Police handed the clock back to the first Appellant. They asked her when her husband would be returning home and she said that he would be back at 4.30 p.m. It was then about 3 p.m. so the Police went to the second Appellant's office and told him of the report about the wall clock in his house and that his wife had told them to see him. The second Appellant said "There is a wall clock in my house which has green paint on the back. I painted it myself. It has a hole in it. I made the hole while repairing it." (The back of the wall clock seen by the Police was painted green and had a hole.) The Police told him that they were enquiring about a "Mouthe" clock and asked the second Appellant when he bought the clock. The second Appellant said that he bought it in early 1952 from Messrs. Haideri. The Police told the second Appellant that they would see him later and left. It was then about 3.50 p.m. At 4.10 p.m. Inspector Solanky went back to the Appellants' house to collect the clock. He found both the Appellants there and asked the second Appellant to go to the Police Station with the clock and his wife to see Superintendent Eager. The second Appellant went to the Police Station by himself and without taking the clock. When asked at the Police Station by Superintendent Eager for a statement about the clock the second Appellant began to tell the Superintendent about a table clock. The Superintendent, thinking there was some misunderstanding, said he would take the second Appellant back to his house to show him the clock which he (the Superintendent) was referring to. On arrival at the house the Superintendent found that the wall clock was no longer there. In the place where the wall clock had been there was a photograph of the first Appellant. Both Appellants denied that there had ever been a wall clock in the house. The Appellants were confronted by the Police with the servant, Juma, who admitted that he had taken down the wall clock that afternoon

p. 15, l. 18.

p. 15, l. 23.

p. 15, l. 24.

p. 15, l. 26.

p. 15, l. 29.

p. 15, ll. 36-45.

p. 16, l. 14.

p. 16, l. 1.

p. 16, l. 12.

p. 16, l. 16.

p. 15, l. 40.

p. 16, l. 19.

p. 16, l. 20.

p. 16, l. 28.

p. 5, l. 30.

p. 6, l. 5.

p. 6, l. 13.

and the Appellants were shown the servant's foot marks. To this the Appellants said nothing. The second Appellant repeated his denial of the existence of the wall clock in his statement taken down in writing by the Police. The first Appellant also in a written statement said that she had nothing to say and did not know anything about anything else. The Police searched the premises without success. On the next day a further search was made of the premises for the clock also without success.

Ex. A, p. 97.
Ex. E, p. 99.

6. Juma (P.W.3) was called to say that he had seen a wall clock on a wall of the Appellants' house and had taken it down when the Police came on the 17th November. Asmani Abdalla (P.W.4) another servant of the Appellants also said that he remembered the wall clock in the Appellants' house. Ambaram Vallabh Mistry (P.W.9) was called to say that in July 1954 he had repaired a wall clock for the second Appellant. Haiderali Dawoodbhai Sulemanji Alibhai (P.W.8) of Haideri Stores (where the second Appellant had at first told the Police that he had bought the wall clock) said in evidence that no such wall clock had been sold by his firm to the second Appellant.

p. 11.
p. 13.
p. 29.
p. 28.

7. Hamid Bin Saleh (P.W.7) an authority on Muslim Religion Law, said in evidence that the Koran laid down that a Muslim could have two, three or four wives.

p. 27.

8. Both the Appellants gave evidence. The first Appellant admitted with minor differences the substance of the Police evidence about the first interview on the 17th November, and further admitted that after the interview she had got rid of the wall clock. She said that she had thrown it over a wall at the back of her house. She said that she did not speak to her husband before she did this but that when he came home she told him about it. She said she did it because she wanted to avoid trouble. She said she had previously been in trouble about some article which was found in her house and that she was angry with the clock and Inspector Solanky. Inspector Solanky had been to her house on that very morning and they had had a quarrel and he had threatened to "show her what he could do." As a result she was frightened that he would cause some trouble about the clock. She also said that the clock was a gift from a man called Dayalji Sukhabhai Patel.

p. 36, ll. 11-23.
p. 37, l. 12.
p. 37, l. 24.
p. 37, l. 22.
p. 37, l. 7.
p. 37, l. 3.
p. 36, l. 4.
p. 37, l. 34.

9. The second Appellant said in evidence that the clock was a gift from Patel to his (the Appellant's) son on the occasion of the son's fifth birthday which was on the 12th October 1954. He said that he told the Police that he had bought the clock from Haideri Stores because Patel had told him that that was where he (Patel) had bought the clock but that later Patel had told him that he had bought it from a tailor named Rajey. The second Appellant said that when he came home on the 17th November his wife told him that she had thrown the clock away before he was asked to go to the Police Station. He admitted that he had pretended to the Police that he never had such a clock and said that he had done this to protect his wife. The second Appellant said that his marriage was governed by the Rules of H.H. Aga Khan Ismailia Council of Africa and that under these Rules he could marry only one wife.

p. 41, l. 18.
p. 40, l. 37.
p. 42, l. 20.
p. 42, l. 39.
p. 42, l. 44.
p. 43, l. 15.
p. 41, l. 39.

p. 47.

10. Among other witnesses Abdulla Hassam Kassam Tejpar (D.W.6) the Honorary Secretary of H.H. Aga Khan Ismailia Provincial Council, was called by the Defence. He said that under the rule governing the Ismailia Khoja community marriages were monogamous. He produced the Rules and said that under Rule 19 (a) and (b) of Chapter IX a man could in certain circumstances with the permission of the Council, take a second wife and that if a man did this he would have two wives but that the first wife could obtain a divorce.

p. 47, l. 28.

Annexe hereto,
p. 7.

p. 47, l. 30.

11. The Respondent submits that on the evidence it was open to the learned Magistrate to find (as he did find) that the Appellants had conspired together to obstruct the course of justice by concealing the wall clock. The Respondent further submits that neither the Judgment of the learned Magistrate nor on appeal of the High Court of Tanganyika nor of the Court of Appeal for Eastern Africa contained any misdirection on the onus of proof or on the requirement of proving the offence with which the Appellants were charged. 10

12. Turning to the main point of this Appeal, it was submitted on behalf of the Appellants at their trial both at the end of the Prosecution's case and also at the end of the hearing of all the evidence that it was not competent to charge the Appellants with conspiracy under Section 110 of the Penal Code as, since they were husband and wife, they were one person. 20

13. The learned Magistrate held contrary to the submission of the Prosecution, that the rule of English common law that a husband and wife cannot be charged with conspiracy with each other if no other person was joined in the said conspiracy (which rule is hereinafter referred to as "the English rule") applied to offences under Section 110 (a) of the Penal Code of Tanganyika. The ground for this ruling was that by Section 4 of the said Penal Code it was provided that "the Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England and the 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." However the learned Magistrate held that the English rule was based on the principle that husband and wife are deemed to have one will and that that principle applied only to the husband and wife of a monogamous marriage and did not extend to a polygamous or "potentially polygamous union." The learned Magistrate further held that a marriage contracted under the rules of the Ismailia Khoja sect of Mohammedans, as was the marriage of the Appellants, was not a monogamous marriage but a potentially polygamous marriage since under the said rules the husband was in certain circumstances permitted to take a second wife, while the first still remained his wife. The learned Magistrate therefore held that the English rule did not apply to the husband and wife of such a marriage. 30 40

14. On appeal both the High Court of Tanganyika and the Court of Appeal for Eastern Africa followed in substance the reasoning of the learned Magistrate and dismissed the Appellants' Appeals.

15. The Respondent first submits that the English rule does not apply at all to offences under Section 110 (a) of the Penal Code of Tanganyika. The said English rule is not a rule of interpretation as provided in Section 4 of the said Code. The only effect of Section 4 was that the word "conspire" in Section 110 (a) of the Code had the same meaning as in English law. The English rule that two persons of a particular relationship to one another could not alone conspire with one another was not a matter of the interpretation or meaning of the word "conspire" but was based on another principle of English law namely
10 the fiction that these two persons, namely a husband and wife, were in law one person. Section 4 of the Penal Code does not import that principle into the Code.

16. The Respondent will further refer to the provisions of the Tanganyika Order in Council 1920. By Section 17 (1) of this Order in Council the High Court of Tanganyika was set up to have full jurisdiction criminal and civil over all persons in Tanganyika. Section 17 (2) of the Order in Council provided that such criminal jurisdiction should so far as the circumstances admit be exercised in conformity with (inter alia)
20 the Criminal Procedure and Penal Codes of India and other laws which might thereafter be enacted. Further the said common law was expressly stated in the said Section to be in force in Tanganyika so far only as the circumstances of the territory and its inhabitants permit and subject to such qualification as local circumstances may render necessary. It is conceded that although this Section applies to the High Court its provisions should be extended to subordinate Courts set up in Tanganyika. It is, however, submitted that the above Section did not import the said English Rule into the law of Tanganyika. The common law only applied subject to the local laws of the Colony and so far as the said local laws did not extend or apply. The local laws did and do apply or extend to the
30 particular offence of conspiracy and they also extend or apply to the liability of a wife for crimes committed by her. For instance, Section 20 of the Penal Code of Tanganyika provided that a married woman should not be free from criminal responsibility for doing an act merely because the act took place in the presence of her husband. It is submitted that the above Section laid down the general rule in Tanganyika that a married woman was responsible for her criminal acts even if committed in the presence of her husband. There is no express provision either in the Penal Code of Tanganyika or in the Indian Penal Code which excludes the English exception to the wife's responsibility in the case of criminal
40 conspiracy. But if the general rule that a wife was liable for her crimes was laid down by the local law there was no room for the common law exception to apply and there was therefore no need for its express exclusion. Further the Indian Penal Code which was in force in 1920 created in Section 120A an offence of criminal conspiracy and, it is submitted, a husband and wife could be found guilty of the said offence of conspiracy even if no other person were a party to the said conspiracy. Therefore, as by Section 17 (2) of the Order in Council the common law was only to apply to Tanganyika subject to the Indian Penal Code and in so far as the said Code did not extend or apply, the said English Rule was excluded
50 by the Indian Penal Code from the common law imported into Tanganyika. Further, even if the English Rule was imported into Tanganyika by virtue

of the said Section 17 (2) it was in force only so far as the circumstances of the Territory and its inhabitants permitted and subject to such qualification as local circumstances rendered necessary. The said English Rule being based on a Christian view of marriage, that is, the taking by a man of a wife to the exclusion of all others, should not apply to a territory where the inhabitants practised and were permitted to practice polygamy, or should not apply to such inhabitants who practised or were permitted to practice polygamy. The Appellants' marriage was contracted according to the rites of a Sect of the Mohammedan religion which in certain circumstances permitted the male Appellant to take a second wife. If the Appellant had done so his second marriage would not have been bigamy under Section 164 of the Penal Code of Tanganyika as the second marriage could not have been void. The English Rule was based on the institution of, and only applied to, monogamous marriage. The Appellants' marriage was not a monogamous marriage. Prima facie the English Rule did not apply to such marriage and should not be extended so to apply. 10

Annexe hereto,
p. 7.

The Respondent humbly submits that the Appellants' Appeal should be dismissed for the following (among other)

REASONS

- (1) BECAUSE the rule of English Criminal Law which provides that a man and his wife cannot be convicted of criminal conspiracy unless there were another party to the said conspiracy, does not apply to offences under Section 110 (a) of the Penal Code of Tanganyika. 20
- (2) BECAUSE the said rule is not a rule of the law of Tanganyika.
- (3) BECAUSE the said rule does not apply in Tanganyika to the case of a husband and wife whose marriage is not a marriage to the exclusion of all others.
- (4) BECAUSE the said rule does not apply in Tanganyika to a Mohammedan marriage. 30
- (5) BECAUSE the said rule does not apply in Tanganyika to any marriage the parties to which are, according to the law and/or their religion, permitted to take a second spouse while remaining married to the first.
- (6) BECAUSE there was sufficient evidence against both the Appellants to justify the learned Magistrate's finding that they were guilty of the said offence.
- (7) BECAUSE there was no misdirection by the learned Trial Magistrate or by either of the Courts of Appeal. 40
- (8) FOR the reasons given by the learned Magistrate.
- (9) FOR the reasons given in the High Court of Tanganyika.
- (10) FOR the reasons given by the Court of Appeal for Eastern Africa.

D. A. GRANT.

ANNEXE.

PENAL CODE OF TANGANYIKA (CAP. 16 OF THE LAWS OF TANGANYIKA).

110. Any person commits a misdemeanour who—

- (a) 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 ;

* * * * *

311.—(1) Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe the same to have been feloniously stolen, taken, extorted, obtained or disposed of, is guilty of a felony, and is liable to imprisonment for seven years.

THE CONSTITUTION, RULES AND REGULATIONS OF HIS HIGHNESS THE
AGA KHAN ISMAILIA COUNCILS OF AFRICA.

CHAPTER IX.

Rules Relating to the Births, Marriages and Deaths.

19. (a) Any person desiring to marry a second wife, for reasons of serious illness, insanity, cruelty or non-bearing of children of his first wife, shall not apply to the Council for permission to marry another wife before three years of the marriage in cases of serious illness, insanity and cruelty and six years in cases of non-bearing of children. Such applicant shall produce a medical certificate certifying any of the above reasons. The first wife shall have the right to contest such an application.

(b) The applicant if permitted by the Council, shall deposit with the Council a minimum sum of Shs. 10,000/- or any greater sum as fixed by the Council. The deposited amount shall be invested by the Council on account and risk of the parties concerned, on sound securities, and its income shall be paid to the husband if the first wife is living with him.

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Case for the Respondent

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