REGINA v. NAN-E-QUIS-A-KA

(1889), 1 Terr.L.R. 211 (also reported: 1 (No. 2) N.W.T.R. 21)

Northwest Territories Supreme Court, Richardson, Macleod, Rouleau, Wetmore and McGuire JJ., 7 December 1889

Crown case reserved--N.W.T. Act--Indian marriage--Evidence of--Wife's evidence--Applicability of English Law.

The North-West Territories act, R.S.C. c. 50, s. 11, (1)Quoted in full in the judgment. This provision was consolidated from 49 Vic. (1886) c. 25, s. 3, which is in exactly the same terms, except that the words "subject to the provisions of this Act," and "are not hereafter repealed" are substituted for "subject to the provisions of the next proceeding section" and "may not hereafter be repealed" respectively. Section 2 of 49 Vic. c. 25, above referred to appears as sub-section 1 of section 112 of R.S. C. c. 50 with the insertion of the words "subject to the provisions of this Act." See also Ord. No. 26 of 1884 quoted p. XVII., *supra*, and Prefatory note. Ed. provides that, with some limitations, the laws of England, as the same existed on the 15th July, 1870, should be in force in the Territories in so far as the same are applicable to the Territories.

Held, that the laws of England relating to the forms and ceremonies of marriage are not applicable to the Territories--certainly *quoad* the Indian population and probably in any case.

On the trial of a prisoner, an Indian, on a criminal charge, the evidence of two Indian women M. and K. was tendered for the defence. M. stated "that she was the wife of the prisoner; that he had two wives, and that K. was his other wife; that she M., was his first wife; that she and the prisoner got married Indian fashion; that he promised to keep her all her life and she promised to stay with him, and that was the way the Indians got married; that he married the other woman last winter; that he and the other woman lived with each other and that he took her for a wife, that was all about it.

The trial Judge, WETMORE, J., rejected the evidence of M. and admitted that of K.

Held, affirming the decision of WETMORE, J., that the evidence quoted was sufficient evidence of a legally binding marriage between M. and the prisoner for the purpose of excluding the evidence of M. as being neither a competent (2) See now The Canada Evidence Act, 1893, 56 Vic. c. 31, s.4. nor a compellable witness against the prisoner on a criminal charge.

[Statement] [Court in banc, December 7th, 1889.

This was a Crown case reserved.

The prisoner, an Indian, was tried before WETMORE, J., on a charge of committing an assault upon one Vivian Maleterre and thereby occasioning actual bodily harm. The prisoner tendered the evidence of two Indian women, Maggie and Keewasens, both of whom he called his wives and both of whom were in fact called and sworn. The evidence of Maggie was confined to the question of the relationship between the prisoner and the two women. On this evidence--quoted in the head-note--the learned judge rejected the evidence of Maggie further than as above mentioned and admitted that of Keewasens. The prisoner was convicted and sentenced. The learned judge reserved for the opinion of the Court in banc the question whether or not he was right in rejecting the evidence of Maggie and respited the execution of the sentence of the Court meanwhile.
The question was argued on the 3rd December, 1889.

W. White appeared for the Crown; the prisoner was not represented.

[December 7th, 1889.]

The judgment of the Court (RICHARDSON, MACLEOD, ROULEAU, WETMORE, and McGUIRE, JJ.) was delivered by

WETMORE, J.--The question raised by this case is of considerable importance in regard to the administration of the criminal law as it affects the aboriginal inhabitants of these Territories.

The evidence of the witness Maggie was, as appears by the case, tendered by the prisoner as that of his wife, and she stated on examination that she was his first wife. It appeared therefore that by mutual consent the relation of husband and wife existed between these parties. The woman further stated that she and the prisoner got married Indian fashion; he promised to keep her all her life, and she promised to stay with him, and that that was the way Indians got married. If mere consent coupled with Indian custom is sufficient to establish a legal and binding marriage *quoad* the Indians in this Territory, it has been established [Judgment] by the facts I have recited. The first question which arises is, Would such a marriage if contracted before the laws of England were introduced into this Territory be recognized as a legal marriage? I am of opinion that it would. In the case of *Connolly v. Woolrich,* (1) (1867) 11 Lower Can. Jur. 197; 3 U. C. L. J. 14; 1 Lower Can. L. J. 253. Mr. Justice Monk in a very able and exhaustive judgment deals with the subject of a marriage according to Indian custom of a Christian white man with an Indian woman. The marriage in question in that case was contracted in the year 1803 in Athabasca which country for the purposes of the case Mr. Justice Monk assumed to be included within the Territories embraced by the charter of the Hudson's Bay Company. He says at page 214: "The charter did introduce the English law, but did not at the same time make it applicable generally or indiscriminately, it did not abrogate the Indian laws and usages. The Crown has not done so. Their laws of marriage existed and did exist." I adopt this view of the law in so far as the marriage customs and laws of the Indians are concerned as among themselves without, however, recognizing as valid any law or custom authorizing polygamy. I will quote some extracts from Mr. Justice Monks's judgment on page 243 where he makes some citations from Bishop on Marriage and other authorities.

"It is plain that among the savage tribes on this continent marriage is merely a natural contract and that neither law, custom nor religion has affixed to it any conditions or limitations or forms, other than what nature has itself prescribed." Bishop on Marriage, Vol. 1, s. 223.

"In a state of nature," says Lord Stowell, "the contract of present marriage alone, without form or ceremony superadded, constitutes of itself complete marriage." *Vide Lindo v. Belisario*.(2) 1 Hagg. Cons. Rep. 216, 220; 4 Eng. Ec. 367, 374. [*Vide*] Ruling.Cases, Vol. XVII., *tit*. Marriage, pp. 10 *et seq*. Bishop Vol. 1, s. 19.

"If practically a man and woman recognize each other as in substance husband and wife, though they attempt to restrict the operation of the law upon their relation, the law

[Judgment] should hold them--public policy requires this, the peace of the community requires it, the good order of society demands it--to be married persons, unless some statute has rendered the observance of some form of marriage necessary." Bishop Vol. 1, s. 227.

"Wherever marriage is governed by no statute consent constitutes marriage and that consent is shewn by their living together." Bishop Vol. 1, ss. 229 and 230.

"But whenever the matter is not governed by any doctrine then to be mentioned, no particular form for expressing the consent is necessary, nothing more is needed than that, in language which is mutually understood, or in any mode declaratory of intention, the parties accept of each other as husband and wife." Fraser Dom. Rel. 145. Bishop Vol. 1, s. 225.

The case of *Connolly v. Woolrich*(1) (1867) 11 Lower Can. Jur. 197; 3 U. C. L. J. 14; 1 Lower Can. L. J. 253. was decided in 1867 and Monk, J., held the marriage of the white man with the Indian woman so contracted according to Indian custom to be a good valid and legal marriage, although the husband and wife had removed to Lower Canada and the husband had afterwards there married a white woman according to the rites of the Roman Catholic Church. This case was carried to the Court of Appeal in Lower Canada and the judgment was affirmed. In my opinion that judgment was generally a sound exposition of the law, in so far as it affected the marriage there under consideration, in view of the circumstances under which it was contracted and the citations made in the judgment which I quoted. If a marriage between a white Christian man and an Indian woman, contracted under the circumstances under which the marriage considered in that case was contracted, was a valid marriage, then *a fortiori* a marriage contracted in these Territories by Indians by mutual consent and according to Indian custom before the 15th July, 1870, provided that neither of the parties had a husband or wife, as the case might be, living would be a valid

marriage. But it is provided by the North-West Territories Act, section 11 that "subject to the provisions of this Act the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July in the year of our Lord [Judgment.] one thousand eight hundred and seventy, shall be in force in the Territories *in so far as the same are applicable to the Territories* and in so far as the same have not been or are not hereafter repealed, altered, varied, modified or affected by any Act of the Parliament of the United Kingdom applicable to the territories, or of the Parliament of Canada or by any Ordinance of the Lieutenant-Governor in Council."

In the first place are the laws of England respecting the solemnization of marriage applicable to these Territories *quoad* the Indian population? I have great doubts if these laws are applicable to the Territories in any respect. According to these laws marriages can be solemnized only at certain times and in certain places or buildings. These times would be in many cases most inconvenient here and the buildings, if they exist at all, are often so remote from the contracting parties that they could not be reached without the greatest inconvenience. I am satisfied however that these laws are not applicable to the Territories *quoad* the Indians. The Indians are for the most part unchristianized, they yet adhere to their own peculiar marriage custom and usages. It would be monstrous to hold that the law of England respecting the solemnization of marriage is applicable to them. I know of no Act of the Parliament of the United Kingdom or of Canada, except as hereinafter stated, which affects in any way these customs or usages. The Ordinance respecting Marriage, chapter 29 Revised Ordinances (1888), does not in my opinion affect the question. The conclusion I have arrived at is that a marriage between Indians by mutual consent and according to Indian custom since 15th July, 1870, is a valid marriage, providing that neither of the parties had a husband or wife, as the case might be, living at the time; at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence.

The Indian Act, R.S.C. c. 43, and the amending Act 50-51 Vic. (1887) c. 33 recognize the relation of husband

[Judgment.] and wife among the Indians. Section 9 of the Indian Act refers to "any illegitimate child." Section 12 mentions "Any Indian woman who marries an Indian" and "her husband." Section 13 mentions "the widow of an Indian." Section 20 refers to the property of a deceased Indian in certain cases devolving on his "widow;" and the "widow" of an Indian is repeatedly mentioned in this section. Section 88 referring to an Indian uses the expression "a married man, his wife and minor unmarried children." References of a like description will be found in sections 90 and 93 sub. secs. 2, 3 and 4, and section 9 of the amending Act of 1887. In view of what the intention of Parliament was in passing these acts, whom they were intended to embrace and the general purview, I cannot conceive that these references were intended only to Indians married according to Christian rites. No doubt there are many such Indians, especially in the East, but I think these expressions were intended to apply to all Indians, Pagans and Christians alike. If so they amount to a statutory recognition of these marriages according to Indian custom in the Territories. I think therefore that the evidence of Maggie was properly rejected and that the judgment given on the trial of the prisoner should be affirmed. The reason of the doctrine which holds that, as a general rule, a wife is not competent or compellable to testify for or against her husband or a husband for or against his wife, when either is charged with an indictable offence, is obvious; and I do not desire to be construed as holding more than is necessary for the purpose for this case, and that is, that, such a binding and legal marriage has been established as to make this rule of law as to evidence applicable.

The order of the Court is that the judgment given on the trial be affirmed and that execution thereof be made and that a certificate as provided by R.S.C. c.174, s. 262, (1) See Crim. Code, s. 746, s.-s. 3. be prepared and forwarded to the Clerk of the Court for the Judicial District of Eastern Assiniboia.

Conviction affirmed.