JOSEPH *ats.* APPANA.

[Appellate Jurisdiction (Young, C.J.) October 6, 1925.]

Marriage Ordinance 1918—*s.* 45—*" harbouring "—whether influence by defendant is an ingredient—onus of proof as to " just cause."*

The wife of Joseph, an Indian immigrant, left her home to live with one Appanna who refused to send her back to her husband.

HELD.—(1) To sustain a charge of unlawful harbouring there must be evidence that the defendant used some influence against the wife returning to her husband.

(2) The onus of proof that his wife left him " without just cause " is on the plaintiff (husband) but slight evidence will suffice to shift the onus to the defendant.

Cases referred to :—

(1) *Sanderson v. Hudson* [1923] 2 K.B. 520.

(2) *Reg. v. Jackson* [1891] 1 Q.B. 671.

APPEAL against conviction. The facts and arguments are set out in the judgment.

R. Crompton, K.C., for the appellant.

J. N. Leleu for the defendant.

YOUNG, C.J.—This is an appeal from the conviction of the appellant Appanna by the District Commissioner of Suva—the information upon which the conviction was obtained is laid under s. 45 of the Marriage Ordinance 1918 and reads as follows " did unlawfully harbour Mary alias Tayari the wife of the complainant without just cause." That the respondent Joseph was duly married to the girl Mary alias Tayari on the 19th May, 1925, is not denied. Mr. Crompton, K.C., of counsel for the appellant cites the case of *Sanderson v. Hudson* reported in the *Times* of the 27th January, 1923, in which a claim for damages was made against the mother of the plaintiff's wife of unlawfully enticing, procuring and inciting his wife to leave him, and for harbouring and detaining her—In that case Mr. Justice Darling held that anything which the defendant did must not only have been against the will of the plaintiff, but that she must have induced the wife to do that which she would not have done voluntarily—it must be proved that her will was overborne. The learned judge went on to say that in 1745, if a wife merely left her husband and someone else received her that would found an action—But that since then the law had been modified and a wife might elect to live apart from her husband, and, therefore for the plaintiff to succeed now he must show that his wife did not elect to leave him, but was overborne by a stronger will. It is submitted that this is the law, and that there is nothing in the Marriage Ordinance to render this enunciation of the law inapplicable. In the case of the *Queen v. Jackson*—1 Q.B. 1891, p. 671, the question was considered as to the right of the wife to refuse to live with her husband, and whether in so doing she was acting of her own free will, and not induced by anyone to adopt such a course—Mr. Justice Darling after referring to the case continued " The court in *Jackson's* case expressly denied the exist-

ence of the rights over a wife there suggested (i.e. the right of the husband to deprive his wife of her liberty). The old authorities on harbouring were no longer law, and it was necessary to show whether the defendant did actually entice the wife away from her husband ".

Mr. Leleu of counsel for the respondent in reply points out that the charge is not one of " enticing " but of " harbouring " and that the fact of legal marriage is sufficient to sustain the offence.

It must not be overlooked however that the case cited was " for unlawfully enticing and for harbouring." Mr. Leleu further submits that if the principle established by the case of *Sanderson v. Hudson* is applicable there is sufficient evidence to justify the inference that the girl was " overborne by a stronger will " namely that of the appellant. The point raised by appellant's counsel is not so difficult to decide as it appears at first sight—namely do the provisions of s. 45 of the Marriage Ordinance derogate from the established principle governing the relations between husband and wife—the important words of the section so far as this question is concerned are " unlawfully harbours the wife of an immigrant who has left her husband without just cause."

The word " harbours " is qualified by the word " unlawful " it follows therefore that harbouring may be lawful in certain circumstances : what are those circumstances—the first which would readily occur to one would be " with the consent of the husband " if without his consent is that sufficient to render the harbouring " unlawful." The ordinary meaning of the word unlawful is " contrary to law "—The Courts have declared that a husband cannot deprive his wife of her liberty and that if a wife elects to live apart from the husband the Court had no power to compel her to return to him. It is necessary says Mr. Justice Darling that the husband must show that his wife did not elect to leave him, but was overborne by a stronger will so as to enable him to succeed in action for harbouring—such being the existing state of the law merely to harbour a wife would not be contrary to law —therefore not unlawful ; I cannot draw any distinction between the Civil Law and s. 45—a wife is free to live where she pleases, the husband cannot keep her in custody and thus deprive her of her liberty. To constitute the offence of " unlawfully harbouring " it results therefore that the husband must prove that the defendant used some influence against the wife returning to her husband : did he use such influence—Mr. Leleu submits the evidence supports such an inference and refers to the evidence of the respondent Joseph in reply to the District Commissioner, where he says " I went and took another house and returned to her and told her, but she would not speak to me as defendant told her not to. He first told me to get another house and when I got one he refused to send her. He gave no reason ".

The learned counsel also refers to the witness Kuchippan when he says " Defendant refused to send her. Defendant refused to let her go and told plaintiff he had better lay his information " another witness Kandasami swears " we told defendant to send plaintiff's wife to plaintiff's house and defendant did not agree ". On the other hand the appellant denies that there was any Panchayat and that he was told to hand the girl over. From this evidence I am of opinion that so far as this question goes there is evidence upon which the District Commissioner could reasonably come to the conclusion that the girl Mary was

influenced by the appellant in not returning to her husband, although according to the appellant's evidence on the day of the marriage he sent her to the respondent's house.

A further point raised by Mr. Crompton on which he seeks to have the conviction set aside is that it is for the plaintiff (now respondent) to show that his wife left him " without just cause " and that since he has not done so the conviction is bad—In a charge of cohabiting, s. 45 expressly throws the onus on the defendant of satisfying the Court that the wife was deserted by the husband or compelled by him to leave the house—The proviso to that section reads as follows :—

> " No person shall be convicted under the section for cohabiting " with the wife of an immigrant if he establishes to the satisfaction " of the Court before whom such person is tried that the wife was " deserted by her husband or that the husband compelled her to " leave the house or that such cohabitation was with the knowledge " and consent of the husband ".

No such provision however is made in the case of harbouring, and I can find nothing to take the matter out of the ordinary rule, namely that the *onus probandi* lies on him who asserts, but I do think this, that very slight evidence on a plaintiff's part would be sufficient to shift the burden of proof—even a mere denial that any cause existed for the wife leaving the husband would be sufficient. Incidentally there is evidence on the part of the plaintiff tending to prove that his wife left him " without just cause " when in reply to the court he says " I asked her to come she refused objecting to the house I live in, I said nothing to this I went and took another house and returned to her and told her but she would not speak to me as defendant told her not to ".

The plaintiff here states the reason given by wife for refusing to live with him : he says he remedied this by taking another house—I do not see that he should be called upon to go further.

I have now dealt with the legal aspects of the case raised in argument and come now to the simple issue : is there evidence upon which the court below—could reasonably come to the conclusion that the appellant was harbouring—in the sense of affording shelter to—the girl ? The respondent says " Since our marriage my wife has always lived at Appana's house " and further " I have seen my wife in the room since, saw her there last Tuesday at 2 p.m. Defendant was absent, her sister was there ".

Kuchiappan swears that the wife was present at a meeting held on verandah very close to defendant's room and he is corroborated in this respect by another witness—but I can find no corroboration of respondent's bare statement that since the marriage his wife had always lived at Appana's house.

On the other hand the appellant denies that the girl has ever lived in his house but states that since the marriage the girl lived with her mother and he further denies that she was there on the 5th July last.

An unsatisfactory feature of this case to my mind is that neither the mother nor the girl have been called to give evidence, nor is any explanation given as to why they have not been.

S. 21 of the Appeals Ordinance 1903 gives the Supreme Court power, *inter alia*, to make any such order as may just. In exercise of this

power I order before I finally decide the Appeal, that the girl Mary and her mother, appear before this Court and be examined on oath touching the matter in question.

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After hearing, on the 14th October, 1925, the additional evidence referred to the court held : That although the additional evidence was open to criticism it must have raised a reasonable doubt in the District Commissioner's mind if he had had the opportunity of hearing it—no doubt the case was a suspicious one, but suspicion was not sufficient to convict upon and the defendant was entitled to the benefit of any doubt which existed. The evidence adduced by the prosecution to my mind is unsatisfactory and does not warrant a conviction.

The conviction is therefore quashed and appeal upheld.

As regards the point raised by Mr. Crompton I am not prepared without further consideration to give any definite ruling, but will express the opinion, by way of *obiter dicta*, that in similar circumstances I should hesitate to convict, and if owing to the state of the law I felt compelled to do so, should only pass a nominal sentence. I take this view on the ground that a husband described as " too old " cohabiting with a mere child, is repugnant to our ideas of what is morally right.

In the circumstances of the case I make no order as to costs, leaving each party to pay his own. I arrive at this conclusion on the ground that the appellant was at fault in neglecting to call the additional evidence in the court below.

PARSOTAM *ats.* POLICE.

[Appellate Jurisdiction (Young, C.J.) May 6, 1926.]

Liquor Ordinance 1911—*s.* 43[1]—*sale of " Hop Beer " containing* 5.7 *per cent proof spirit—vendor licensed to sell " Hop Beer "—whether an offence to sell a liquid within the definition of " liquor "—evidence of sale.*

Defendant held a licence to keep a " Hop Beer " Saloon under the Liquor Ordinance. Samples of his wares were analysed and found to contain 5.7 per cent proof spirit.

HELD.—A person who is licensed to keep a Hop Beer Saloon is not thereby licensed to sell a liquor within the meaning of the Liquor Ordinance, 1911.

APPEAL against conviction. The facts appear from the judgment.

R. Crompton, K.C., for the appellant.

The Attorney-General, *K. J. M. Mackenzie*, for the respondent.

YOUNG, C.J.—This is an appeal against the conviction of the apellant by the Chief Police Magistrate sitting at Suva on the 19th March, 1926, for selling liquor without a licence, contrary to the provisions of s. 43 of the Liquor Ordinance No. 6 of 1911, the liquor in question being described as " Hop Beer ".

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[1] *Rep. Now Liquor Ordinance*, 1946, *s.* 46.