

R. v. JIWACHAND RAMRAKHA.

[Criminal Jurisdiction (Corrie, C.J.) December 15, 1941.]

Perjury charge in respect of evidence given on affirmation—Oaths Ordinance—s. 2¹—no inquiry by Court as to ground of objection to being sworn.

Jiwachand Ramrakha, called as a witness for the defence in a police prosecution, indicated by shaking his head that he would not take the oath on the Ramayan and, by raising his hand, that he wished to affirm. He was permitted to give evidence on affirmation without any further inquiry.

[HELD.—(1) An affirmation is not to be regarded as an oath within the meaning of the Perjury Ordinance, 1913,² s. 13

(2) Evidence given on affirmation without the Court having satisfied itself that the witness was a member of one of the three classes of persons to whom the Oaths Ordinance, 1897, s. 2³ applies is not within the scope of the Perjury Ordinance, 1913,² s. 3—(1).

Cases referred to:—

(1) *R. v. Moore* [1892] 61 L.J.M.C. 80 ; 66 L.T. 125 ; 56 J.P. 345 ; 8 T.L.R. 287 ; 17 Cox, C.C. 458 ; 22 Dig. 455.

(2) *Nash v. Ali Khan* [1892] 8 T.L.R. 444 ; 22 Dig. 455.

(3) *R. v. White* [1786] 1 Leach 430 ; 186 E.R. 317.

PROSECUTION FOR PERJURY. The argument fully appears from the judgment.

A. G. Forbes for the Crown.

P. Rice for the accused.

CORRIE, C.J.—The accused is charged with perjury contrary to s. 3 (1) of the Perjury Ordinance 1913.¹

For the defence it is submitted that, on the evidence which has been given, the accused on the occasion to which the charge relates was never lawfully sworn within the meaning of the sub-section.; and hence that he cannot be convicted thereunder.

The accused was called as a witness for the defence in the case of the *Police v. Ramkirpal*. The evidence of the Clerk of the Court is that when the accused went into the box the Clerk, thinking that he was a Hindu, tendered him the Ramayan. The accused shook his head and raised his right hand and indicated that he wished to affirm. No inquiry was made of the accused either by the Clerk or by the Magistrate as to his reasons for refusing to be sworn. The accused having made a solemn affirmation, gave evidence; and it is in respect of a passage in the evidence which he then gave that he now stands charged.

¹ Cap. 7 (Revised Edition Vol. I page 367).

² Repealed. Vide Penal Code Cap. 5 ss. 102, 113 (Revised Edition Vol. I p. 253).

³ Cap. 7 (Revised Edition Vol. I p. 367).

S. 2 of the Oaths Ordinance 1897¹ reads:—

“Every person upon objection to being sworn and stating as the
 “ground of such objection either that he has no religious belief or
 “that the taking of an oath is contrary to his religious belief and
 “every person who by reason of any defect of religious knowledge or
 “belief is incapable of comprehending the nature of an oath shall
 “be permitted to make his solemn affirmation instead of taking an
 “oath in all places and for all purposes where an oath is or shall be
 “required by law which affirmation shall be of the same force and
 “effect as if he had taken the oath and if any person making such
 “affirmation shall wilfully falsely and corruptly affirm any matter
 “or thing which if deposed on oath would have amounted to wilful
 “and corrupt perjury he shall be liable to prosecution indictment
 “sentence and punishment in all respects as if he had committed
 “wilful and corrupt perjury. Provided that nothing in this Ordi-
 “nance shall prevent any person from being sworn according to the
 “ceremonies of his own religion or in such manner as such person
 “may deem binding on his conscience”.

It is argued for the defence that under this section there are only three classes of persons who are entitled to give evidence upon affirmation, namely (1) a person who states that he has no religious belief; (2) a person who states that the taking of an oath is contrary to his religious belief; and (3) a person who “by reason of any defect of any religious knowledge or belief is incapable of comprehending the nature of an oath”; that until it was ascertained that the accused was a member of one of these three classes, it was incompetent for him to give evidence except upon oath, and that it was for the Court to ascertain the ground of his refusal to be sworn. The defence rely upon the judgment in *R. v. Moore* 61 L.J.M.C. page 80; and *Nash v. Ali Khan* 8 T.L.R., page 444.

The reply of the prosecution is two-fold. In the first place it is pointed out that s. 2 of the Oaths Ordinance differs in one important respect from the English Statute upon which the cases cited were decided in that English law does not recognise as being entitled to affirm, persons who by reason of any defect of religious knowledge or belief are incapable of comprehending the nature of an oath. It is argued that the rule laid down in Moore’s case is not to be held to apply to this class of persons, and that in view of the well established practice among Indian witnesses of giving evidence upon affirmation, the Court was entitled to assume, when the accused refused to take an oath, that he was a member of that class and entitled to give evidence upon affirmation.

I am unable to accept this reasoning. So far as regards the application of the rule in Moore’s case, I see no ground for making a distinction between a person who is incapable of comprehending the nature of an oath and one who belongs to either of the other two classes to which s. 2 of the Oaths Ordinance applies.

No evidence has been submitted to the Court to show that incapacity to comprehend the nature of an oath by reason of defect of religious knowledge or belief is wide-spread among the Indian community in this Colony; and of the many Indian witnesses who have appeared to give evidence before me in this Court, none has ever refused to be sworn.

The second point taken by the prosecution is that the rule in *Moore’s* case is over-ruled by s. 13 of the Perjury Ordinance 1913¹.

¹ Repealed. Vide Penal Code Cap. 5, s. 113 (Revised Edition Vol. I page 256).

The section reads as follows:—

“For the purposes of this Ordinance the forms and ceremonies used in administering an oath are immaterial if the Court or person before whom the oath is taken has power to administer an oath for the purpose of verifying the statement in question and if the oath has been administered in a form and with ceremonies which the person taking the oath has accepted without objection or has declared to be binding upon him”.

This section is identical in terms with s. 15 (1) of the Perjury Act 1911²; and the view put forward by the prosecution has the support of a passage in *Archbold's Criminal Pleading, Evidence and Practice*, 30th Edition page 1220, in which it is stated that “An oath in this subsection includes affirmation and it appears to over-ride *R. v. Moore*”.

No other authority for this view has been cited to the Court: and there does not appear to have been any decision upon the point.

If, however, the prosecution's contention is correct, an affirmation must be regarded as a form of oath for the purposes of the section, and I can see no ground for so regarding it. As it was said in *R. v. White*, Leach 430 “An Oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth”. That is not the position of a person who gives evidence upon affirmation: he invokes no penalty other than that which may be inflicted upon him by a Court.

I hold, therefore that an affirmation is not to be regarded as a form of oath within the meaning of s. 13 of the Perjury Ordinance³.

As the evidence in respect of which the accused now stands charged was given upon affirmation, without the Court having satisfied itself that he was a member of one of the three classes of persons to whom s. 2 of the Oaths Ordinance applies, it follows that he was not within the scope of s. 3 (1) of the Perjury Ordinance⁴.

re DUKHAN.

[Civil Jurisdiction (Corrie, C.J.) February 17, 1942.]

Marriage Ordinance, 1918—s. 12— Notice of Marriage—intended bridegroom already married according to Hindu law—refusal of Registrar-General to issue marriage certificate—whether prior marriage valid—whether the Court is bound to follow a judgment given in its Criminal Jurisdiction.

In October 1939 Dukhan an Indian female filed with the Registrar General a Notice of Marriage and Declaration in accordance with s.12 of the Marriage Ordinance. The form stated that the applicant was “Married according to Hindu law about 14 years ago to one Sautu F/N Samjhawan, but no longer living with him for the last three or four

² 1 and 2 Geo. 5 c. 6.

³ *Rep. Vide Penal Code Cap. 5 s. 113 (Revised Edition Vol. I page 156).*

⁴ *Rep. Vide Penal Code Cap. 5 s. 102 (Revised Edition Vol. I page 153).*