

1947

Present : Howard C. J. and Windham J.

THE KING *v.* PETER NONISS. C. 126—D. C. *Crim. Avissawella, 38,092.*

*Marriage Registration Ordinance (Cap. 95), s. 38 (1)—Entry in register—Charge of bigamy—Entry not produced—Best evidence—Admissibility of oral evidence—Penal Code, s. 362 C.*

The appellant was charged with bigamy. The prosecution produced no entry in the marriage register book in proof of the first marriage but called in evidence the first wife and the officiating priest. This evidence was uncontradicted.

*Held*, that the first marriage was properly proved. The expression "best evidence" in section 38 of the Marriage Registration Ordinance merely signifies that the entry in the register shall prevail over any other evidence as to marriage in case of conflict as to whether the marriage was celebrated at all or as to its character or any particulars regarding it.

**A**PPPEAL from a judgment of the District Judge, Avissawella.

*H. Wanigatunga*, for the accused, appellant.

*Boyd Jayasuriya, C. C.*, for the Attorney-General.

*Cur. adv. vult.*

November 10, 1947. WINDHAM J.—

The appellant was convicted of bigamy, contrary to section 362c of the Penal Code. The sole point arising on appeal is whether his first marriage was properly proved, having in view section 38 (1) of the Marriage Registration Ordinance (Cap. 95). Section 38 (1) provides as follows:—

"38. (1) The entry made by the registrar in his marriage register book under sections 32, 33 and 37 shall constitute the registration of the marriage, and shall be the best evidence thereof before all Courts and in all proceedings in which it may be necessary to give evidence of the marriage".

The prosecution produced no such entry in the marriage register book in proof of the appellant's first marriage, nor even any copy of it, but they proved the marriage *aliunde*, calling in evidence the first wife herself and the officiating Catholic priest, both of whom testified to the marriage and both of whom the Court believed. The appellant neither gave nor called evidence in contradiction, or at all.

It is argued for the appellant that this first-hand oral evidence of the marriage was inadmissible, because section 38 (1) states that the entry in the marriage register book shall "constitute the registration of the marriage and shall be the best evidence thereof". At this point I would state that, from the context of the section, I consider that the word "thereof" means "of the marriage" and not "of the registration of the marriage". It is contended for the appellant that the phrase "best evidence" of the marriage means the only admissible evidence of it. If this contention means that no marriage which, if registered, would be registered under the Marriage Registration Ordinance (Cap. 95). can be

proved except by production of the registration entry, then it cannot be acceded to. For there would then be no means of proving such a marriage at all if it had not been registered, although such a marriage is none the less valid if not so registered. That it is valid though not registered was laid down in *Nicholas de Silva v. Sheik Ali*<sup>1</sup>; it will also be noted that the Marriage Registration Ordinance (Cap. 95) lacks any provision similar to section 8 of the Kandyan Marriage Ordinance (Cap. 96) which renders Kandyan marriages void if not registered under the latter Ordinance.

What, then, does "best evidence" in section 38 mean? The same expression appears in the same context in section 36 of the Kandyan Marriage Ordinance, which provides that—"The entry as aforesaid in the register of marriages and in the register of divorces shall be the best evidence of the marriage contracted or dissolved by the parties and of the other facts stated therein . . ." With regard to its meaning in the latter section two cases are in point, namely, *Mampitiya v. Wegodapola* (unreported), followed in *Seneviratne v. Halangoda*<sup>2</sup>. In both of these cases the question at issue, so far as concerns the meaning of "best evidence" in section 36, was whether the character of a Kandyan marriage could be proved by oral evidence to be other than that stated in the register. And the decision in both cases was that it could not. In so deciding, the learned Judges said in the earlier case—and their dictum was approved in the later one—that the expression "best evidence" in the section was "used in the English law sense, and excludes all evidence of an inferior character". But it seems to me clear, bearing in mind the point decided in those cases, that what the learned Judges meant by the somewhat ambiguous phrase "excludes all evidence of an inferior character" was not that the register entry is the only evidence which may be adduced to prove a marriage, but rather that it prevails over any other conflicting evidence as to the marriage. Section 8 of the Kandyan Marriage Ordinance, rendering void unregistered Kandyan marriages, should not be allowed to confuse the issue. It is a provision of the substantive law, whereas section 36 is concerned with evidence only. The above meaning of "best evidence" is precisely the meaning which I would give to it in the similar context of section 38 of the Marriage Registration Ordinance (Cap. 95).

In any case what is the meaning of "best evidence" in the English law sense? It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits. If one were to apply that meaning of the phrase to the present case, it might be held that the entry in the register ought to have been produced, since it would appear from the evidence of the first wife herself that the marriage was registered. But the "best evidence" rule in England has been subjected to a whittling-down process for over a century, and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. It should be noted at this point that the "best evidence"

<sup>1</sup> (1895) 1 N. L. R. 228.

<sup>2</sup> (1921) 22 N. L. R. 472.

rule is not to be confused (as it often is) with the rules as to "primary evidence" in connection with documents, and as to the exclusion of oral by documentary evidence, to which special considerations apply which in this country are embodied in the Evidence Ordinance (Cap. 11)

It is true that the old rule of best evidence does to some extent survive in England in certain cases; and one of these is the very one now under consideration, namely, the proof of marriage in charges of bigamy. But in such cases it only survives to this extent, that *strict* proof of the marriage is required. Strict proof, however, is not confined to production of the registration entry, but covers the evidence of an eye-witness to the marriage, which indeed is more direct evidence than a register entry—vide *Rex v. Allison*<sup>1</sup>.

I would therefore construe the expression "best evidence" in section 38 of the Marriage Registration Ordinance as follows:—The registrar's entry of the marriage in the register shall prevail over any other evidence as to the marriage in case of conflict, *i.e.*, conflict as to whether the marriage was celebrated at all or as to its character or any particulars regarding it. It would thus prevail as a matter of law over the evidence of an accused in a bigamy charge who denied the marriage. But if the registrar's entry is not produced, whether or not the marriage was in fact registered and whether or not (if registered) the non-production of the entry is satisfactorily accounted for, then the marriage may be proved by any other evidence affording strict proof, and this would include (as in the present case) the evidence of an eye-witness. The learned District Judge was accordingly right in admitting and accepting the oral evidence of the first wife and of the officiating priest (which be it noted was not contradicted) in proof of the first marriage.

For these reasons this appeal must be dismissed, and the conviction and sentence confirmed.

HOWARD C.J.—I agree.

*Appeal dismissed.*

