

SMITH, C.J.
&
MIDDLE-
TON, J.

[SMITH, C.J. AND MIDDLETON, J.]

REGINA

v.

1893,
March 11,

VASSILOU HADJI CHRISTODOULO
AND DJEMAL MEHMET

Defendants.

ADULTERY—HUSBAND'S POWER AS REGARDS PROSECUTION FOR—
DIVORCE—EFFECT OF CHANGE OF RELIGION BY CHRISTIAN
WIFE—OTTOMAN PENAL CODE, ADDITION TO ARTICLE 201—
SHERI LAW.

According to the law prevailing in the Ottoman Empire, the wife of a Christian who duly embraces the Moslem faith becomes ipso facto divorced from her husband, if he remains a Christian. Where after such a change of religion by a wife the husband instituted a prosecution against her paramour for adultery.

HELD: That he, being no longer her husband was incompetent to institute such proceedings.

APPEAL from the District Court of Nicosia.

The facts of the case were, that Dimitri Kyriako was the husband of Vassilou according to the rites of the Orthodox Greek Church. Vassilou appears to have left her husband, and gone to live with the defendant Djemal. Upon being discovered by her husband, it seems that she went with him on the 28th November, 1892, to the Mehkemé Sheri both intending to embrace the Moslem religion. Vassilou was duly received into the Moslem faith at the Mehkemé by the Cadi and the Mufti, but Dimitri Kyriako yielding eventually to the advice of friends, declined to change his religion. On the 29th November, 1892, Dimitri Kyriako made a sworn information against Vassilou and Djemal, charging them with adultery, and upon that, warrants were issued and they were arrested, brought before the Magistrates and duly committed for trial. The Queen's Advocate filed an information against the defendants for adultery under the addition to Article 201 of the Ottoman Penal Code. Upon the 23rd day of January, 1893, the defendants came before the District Court for trial, and thereupon Dimitri Kyriako stated that he wished to withdraw the charge against Vassilou, and take her back as

his wife. The District Court did not consider it had power to allow the charge to be withdrawn at that stage of the proceedings, but adjourned the case until the 7th March, 1893. On that day the case was tried, and after the evidence for the prosecution had been heard, the Cadi and Mufti of Cyprus were called as witnesses for the defence. They deposed that Vassilou had formally embraced the Moslem faith at the Mehkemé Sheri in their presence, and that the effect of her doing so, and her husband's refusing to do so, was that she became divorced from her husband, as under the law no Moslem woman could be the wife of a Christian.

SMITH, C.J.
&
MIDDLE-
TON, J.
--
REGINA
v.
VASSILOU
HJ. CHRIS-
TODOULO
AND DJEMAL
MEHMET.

The District Court found both defendants guilty, and sentenced Djemal to six months' imprisonment. After judgment, Dimitri Kyriako stated that he desired that the defendant Vassilou should be released, as he intended to take her back again as his wife. The District Court allowed this to be done, but refused to release Djemal who appealed to the Supreme Court.

Diran Augustin for the appellant.

This appeal is made on two grounds. (1) The husband is the only person who has control of proceedings on a prosecution for adultery. The husband withdrew his charge before trial, but the District Court refused to accept his withdrawal. When the husband did so, the District Court ought to have dismissed the case both against the wife and paramour. The Turkish Law on this point is founded on the French. According to French decisions, the husband at any stage before sentence, can withdraw his charge against the wife, and consequently against the adulterer. When sentence has been pronounced, the husband has only a right to release his wife. The husband in this case withdrew his charge, and, therefore, the judgment is null.

My second point is, that before the charge was brought against the defendants, Vassilou had formally embraced the Moslem faith. From the Mufti's evidence before the District Court, this change of religion on her part, acts as a divorce between her and Dimitri Kyriako, as no Moslem woman can be the wife of a Christian, consequently there was no husband to bring this charge according to the terms of the law.

SMITH, C.J. *Low, Q.A.*, in support of the conviction.

&
MIDDLE-
TON. J.
—
REGINA
v.
VASSILOU
HJ. CHRIS-
TODOULO
AND DJEMAL
MEHMET.

As regards divorce, the question is whether the husband had instituted proceedings before divorce. I cannot quote any law against the opinion of the Cadi and Mufti. Is it not, however, a question whether the woman was divorced according to the law of the Church to which she belongs ?

I do not gather from the authorities quoted by Mr. Diran Augustin, that the husband has any power to stay proceedings after they have begun. The object of giving the husband power as to taking proceedings is to avoid scandal. When proceedings have begun, the scandal has taken place. According to our Rules of Procedure when the Queen's Advocate has filed an information, it is the duty of the Court to try it to judgment, unless proceedings are stayed by the Queen's Advocate.

March 13. *Judgment* : We are both of opinion that this conviction must be quashed. It appears from the evidence, that on the 28th November the woman Vassilou was at the Mehkemé Sheri formally received into the Moslem faith, while at the same time her husband refused to change his religion. This according to the law of the Ottoman Empire, operates as a divorce between the parties, and the Ottoman authorities would recognise this as a divorce.

It is true that between persons of the same faith, the Ottoman Government would recognise their religious law, but different considerations arise when one of the parties is a Moslem. According to Ottoman Law, at the time when the man made his sworn information, he was no longer the husband of the woman. The Turkish text of addition to Article 201 of the Ottoman Penal Code, evidently means that proceedings must be instituted by the husband ; and the fact that the man may have complained to the Police authorities before the proceedings at the Mehkemé Sheri is not sufficient.

The first point relied upon by counsel for the appellant raises a much more difficult question, but one which it is not necessary for us to decide in this case. It is contended that the District Court should, when the husband declared his wish to withdraw from the prosecution, have stopped the case and acquitted the accused persons. This argument is based on the analogy of the French Law to the Turkish in such matters. The Turkish authorities in compiling

their law on the subject of proceedings for adultery, would appear to have adopted it from the French, and it is not unreasonable to assume that they would, therefore, adopt the views of French jurists on its construction. According to the cases quoted as having been decided in the French Courts, the husband is practically master of proceedings against his wife on the ground of adultery, and his consenting to take his wife back at any stage in the proceedings, may stay them, except that after judgment he cannot intervene to save the condemnation of the paramour.

SMITH, C.J.
&
MIDDLE-
TON, J.
REGINA
v.
VASSILOU
HJ. CHRIS-
TODOULO
AND DJEMAL
MEHMET.

The commentaries of the Turkish Law to which we have had access, show that Turkish lawyers take the same view of the law as has been adopted by the French Courts. According, however, to the Cyprus Courts of Justice Order, 1882, after the Queen's Advocate has filed an information against accused persons, the Court in which that information is filed, must proceed to the trial of those persons, and to judgment on the information, unless the Queen's Advocate shall enter a nolle prosequi, and stay the proceedings. It is possible that if the husband can stay the proceedings, he might apply to the Queen's Advocate to do so; but whether the Queen's Advocate would feel himself obliged to do so is another question. From the view we take of this case, however, this point is not material to our decision, and on the ground simply that at the time the proceedings were instituted there was no husband in existence competent to initiate them, we must hold that they are altogether a nullity and this conviction must be quashed.

Conviction quashed.