in which having regard to its trivial nature the learned police magistrate should have considered the provisions of s. 5[1] of the Summary Conviction Offences Ordinance and proceeded thereunder.

But if I am correct in my view of the law as above set out then the assault was justified and I so find, but even should I be wrong in my assumption and the appellant be guilty of the offence then I find that the assault was of such a trivial nature as not to warrant punishment and the information should have been dismissed accordingly.

In conclusion I would add that I have grave doubts as to whether this is an honest prosecution on the part of the respondent. It seems to me that, as has been done in many cases, if his grievance was real and honest he would in the first place have complained to the Inspector-General and would not have resorted to the Court until satisfied that in no other way could he obtain relief.

This appeal will be allowed and the conviction of appellant quashed.

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## INDIAN PRINTING AND PUBLISHING COMPANY *ats.* POLICE.

[Appellate Jurisdiction (Maxwell Anderson, C.J.) March 2, 1932.]

*Supreme Court Ordinance, 1875*[2]*—s. 37—application in Fiji of Imperial Statutes—Obscene Publications Act, 1857, 20 and 21 Vict. c. 83—right of appeal to Quarter Sessions—interpretation in Fiji.*

Proceedings were taken against the Indian Printing and Publishing Company Limited by way of a summons under the Obscene Publications Act, 1857, 20 and 21 Vict. c. 83 to show cause why certain copies of a publication entitled *Debate with the Arya Samaj in Fiji* should not be destroyed. An order was made by the Acting Chief Magistrate for destruction. The defendant entered an appeal to the Central Criminal Court and secondly an application for leave to appeal under 3 (2) (*d*) of the Appeals Ordinance, 1903.[3]

**HELD.**—An Act which deals or purports to deal with the protection of the public from a nuisance or crime committed by an individual member thereof is an Act of general application within the meaning of s. 31 of the Supreme Court Ordinance, 1875.[2]

(2) Semble. The Obscene Publications Act, 1857, 20 and 21 Vict. c. 83 is in force in Fiji.

[**EDITORIAL NOTE.**—Obscene publication are now dealt with under s. 191 of the Penal Code, Cap. 5.]

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1 *Repealed.*
2 *Revised Edition Cap. 2.*
3 *Rep.*

Cases referred to :—

(1) *Jex v. McKinney* [1889] 14 App. Cas. 77 ; 58 L.J.P.C. 67 ; 60 L.T. 287 ; 5 T.L.R. 258.

(2) *Richards v. Easto* [1846] 153 E.R. 840 ; 15 L.J. Ex. 163 ; 42 Dig. 602.

(3) *Reg v. London County Council* [1893] 2 Q.B. 454 ; 63 L.J.Q.B. 4 ; 69 L.T. 580 ; 58 J.P. 21 ; 9 T.L.R. 601 ; 42 Dig. 603.

MOTION for leave to appeal from Chief Magistrate's order made under the Obscene Publications Act, 1857, 20 and 21 Vict c. 83.

*G. F. Grahame* for the Appellant.

The Attorney-General, *C. G. Howell* (with him *Hollins Crompton*) for the respondent.

*G. F. Grahame.*—I wish first with leave of the Court to withdraw the appeal to the Central Criminal Court. (Leave granted). The Imperial Statute 20 and 21 Vict. c. 83 is not in force in Fiji. It is a police law and not a law of general application. It is local in character and effect. To be in force in Fiji it must be enacted by local legislation. Obscenity has a different standard in Fiji to that in England. See the Indian Code (Mayne).

*The Court.*—That may be so but the law of Fiji in criminal or quasi criminal matters is substantially the law of England.

*G. F. Grahame.*—I complained in the lower Court that the information was bad but I did not query the validity of the Statute. The Magistrate refused to permit certain religious books to be put in evidence to prove the origin of the material complained of.

*The Court.*—Has that any relevant bearing on the case ? I could take an extract from the Bible obscene *per se*. The question for the Magistrate was whether the pamphlet as a whole was obscene.

*G. F. Grahame.*—My last submission is that the matters in issue are of sufficient importance to justify an appeal. They affect a large portion of the Indian community and there is the primary question as to whether the Imperial Statute is in force. He quoted *Jex v. McKinney* 14 A.C. 77.

*The Court.*—That is not a criminal matter. Are you going into the whole question of Mortmain ? That will take us right back into the history of the middle ages and conflicts between the temporal and spiritual powers.

*G. F. Grahame.*—I say that the Statute is adjective and not substantive law and has no application in this Colony.

The Attorney-General, *C. G. Howell.*—The only real point now at issue is whether the Statute is in force in Fiji. All other objections should have been raised before the Magistrate and this Court cannot now entertain them. (Appeals Ordinance s. 23). The Statute is in force. It gives a power precedent to a common law offence. The Common Law of England prior to 1875 is the law generally of this Colony. The Statute goes with the law otherwise the common law cannot be enforced.

The issues raised in this motion disclose nothing of sufficient importance to justify an appeal. The premises to be searched were sufficiently and accurately described in the warant and so far as the Magistrate was concerned all subsequent proceedings were mere questions of fact.

MAXWELL ANDERSON, C.J.—In this motion the prospective appellant the Indian Printing and Publishing Company Limited seeks leave under the provisions of the Appeals Ordinance 1903 to appeal against an order of the Acting Chief Police Magistrate made on the 27th January 1932 under the provisions of the Imperial Statute 20 and 21 Vict c. 83. The order reads as follows :—

> " That no sufficient cause has been shown me that the book now " before the Court entitled *Debate with the Arya Samaj in Fiji* and " marked 'A' does not contain paragraphs of an obscene nature " and in fact does so contain such paragraphs and that the " publication and sale of the book aforesaid would be a mis- " demeanour and proper to be prosecuted as such it is therefore " ordered that the 254 copies of the book now held in Court " together with the loose leaves and proof of the same also in " Court be destroyed except such copies as may be required for the " purpose of further proceedings."

The Statute under which the order is made gives a right of appeal (in England) to Quarter Sessions and in virtue of such provision the appellant Company entered an appeal as of right to the Central Criminal Court of this Colony.

Subsequently a motion for leave to appeal under the provisions of local legislation was entered and at the hearing thereof Counsel for the appellant has withdrawn (by leave of the Court) the appeal based as of right as it is alleged to the Central Criminal Court.

The main ground of appeal is the question whether the Statute 20 and 21 Vict. c. 83 is in force in this Colony. Subsidiary points raised go to the rejection of certain evidence by the Acting Chief Magistrate and as to whether this case is one of " sufficient importance " within the meaning of s. 3 sub-s. 2 (*d*) of the Appeals Ordinance.

The first point to consider is whether the Imperial Statute 20 and 21 Vict. c. 83 is in force in Fiji. S. 31 of the Supreme Court Ordinance 1875 reads as follows :—

> " The Common Law the Rules of Equity and the Statutes of " general application which were in force in England at the date " when the Colony obtained a local Legislature that is to say on " the second day of January 1875 shall be in force within the " Colony subject to the provisions of section thirty-three of this " Ordinance."

The question therefore is whether the Statute 20 and 21 Vict. c. 83 is or is not a Statute of general application in force in England on January 2nd 1875.

Counsel for appellant argues that the Statute is really a police law and accordingly not of general application. He argues that being such it is purely local in character and effect and can have no application to this Colony unless re-enacted by the local legislature. I cannot find that the expression " Statute of general application " had ever been the subject of an express judicial interpretation although I note in passing the case of *Jex v. McKinney* 14 A.C. 77 a case cited by Counsel for appellant but which however does not seem of much assistance to this Court in this present instance. I am of opinion that the expression is used in the sense of denoting a Statute binding upon all His Majesty's

subjects in England at the relevant date. The expression is in my view used to distinguish between Public Statutes not necessarily binding upon all the population e.g. the Companies Act or the Friendly Societies Act on the one hand and the Public Statutes which on the other hand are binding upon everyone e.g., the Offences against the Person Act or similar legislation.

The division of Statutes under separate headings dates from May 1801 and having regard to the judgments of Parke B. in *Richards v. Easto* 1846 (153 E.R. 840) and of Bowen L.J. in *Rex v. London County Council* 1893 (2 Q.B. 454) I am of opinion that the Statute 20 and 31 Vict. c. 83 is a Statute of general application. Bowen L.J. says " Now a general act prima facie is that which applies to the whole community. In the natural meaning of the term it means an Act of Parliament which is unlimited both in its area and as regards the individual in its effect." And further speaking of Acts which deal with the administration of justice he states that all such Acts " differ *in toto* from the class of personal or local Acts. They are not limited in the true sense either as regards place or persons."

Even without such authority I am prepared to hold that an Act which deals or purports to deal with protection of the public from a nuisance or crime committed by an individual member thereof is an Act of general application and accordingly I hold that the Imperial Statute 20 and 21 Vict. c. 83 is in force in the Colony of Fiji and *per subsequens* that the Acting Chief Police Magistrate had jurisdiction to entertain the original complaint in these proceedings and to adjudicate thereon within the limits of the Act.

The next point to consider is whether there is any appeal from his decision. The Statute itself provides an appeal to Quarter Sessions a Court unknown in Fiji. S. 33 of the Supreme Court Ordinance enacts generally that as regards Imperial Legislation applied to the Colony for the purpose of facilitating the application of the same the Court may make such verbal alterations not affecting the substance of the Statute as may be necessary to render the Statute applicable to the matter before the Court but this permission is subject to any provision of the local legislature. In the absence of any provision of the local legislature I should not hesitate to make such verbal alteration in the Imperial Statute as would be necessary to give a right of appeal to the Supreme Court of the Colony since there is no Court intervening between a Court of Petty (*vide* s. 8 District Commissioners Ordinance 1876) and the Supreme Court. The local legislature has however provided full machinery for appeals from the decisions of District Commissioners (of whom the Acting Chief Police Magistrate is one) to the Supreme Court and accordingly appeals must in all cases be dealt with according to the provisions of the Appeals Ordinance 1903.

In s. 3 of that Ordinance the local legislature has provided for those cases in which appeal shall lie as of right and then in sub-s. 2 (*d*) it is provided that in any case not previously provided for there shall be an appeal by leave of the Court if in the opinion of the Court the question involved is of sufficient importance to justify an appeal. It is clear therefore that before granting leave to appeal this Court must be satisfied that there is in effect a question to sufficient importance to justify an appeal. Adopting the argument of the learned Attorney-General I

construe those words to mean not that the question raised is of sufficient importance to the individual for in a sense every case however trivial may be of importance to the individual concerned but is of importance to the community at large or to a considerable section thereof. It might be necessary to decide a question of law or whether any particular set of facts constituted a breach of a particular law.

I have already decided that the Statute 20 and 21 Vict. c. 83 is a part of the law of this Colony and in any event since it is admitted that the question was not raised in the lower Court I may point out in passing that s. 23 of the Appeals Ordinance debars the appellant from now raising that issue.

The remaining grounds of appeal are therefore refusal to entertain certain evidence and, in any event, is the question at issue of sufficient importance to justify an appeal to the Suprmee Court. In so saying I am not unmindful of the point raised by Counsel for the appellant as to the insufficiency of the original information. It is not necessary for this Court now to decide that point but I incline to the view that so long as the search warrant clearly indicated the premises to be searched (and as to this there is no dispute) any words as to the occupier thereof are redundant. No doubt at a later date it may become necessary to decide who the occupier of the premises may be although a mere agent in possession may suffice. In any event the question does not go to the root of the jurisdiction and attention may be directed to the proviso to s. 21 of the Appeals Ordinance. *A fortiori* the same proviso must be applied in an application for leave to appeal and I hold that if indeed there be any substance in this point any omission or misdescription in the original complaint and search warrant has not caused any miscarriage of justice substantial or otherwise.

The sole question before the Acting Chief Police Magistrate was whether the publication complained of was obscene proper to be destroyed and the selling thereof proper to be a subject of prosecution.

It suffices to say that in the view of this Court the Magistrate properly considered the case before his Court. He was right in not permitting his Court to be turned into an arena for religious discussion and the evidence rejected by him was properly rejected as irrelevant, the sole question which he had to decide being the obscenity or otherwise of the publication, the origin of the matter therein being immaterial to the issue before him.

Having satisfied myself that the case was properly before the Magistrate and that the procedure adopted or followed was correct is it of sufficient importance or even right that this Court should review the Magistrate's decision on a question of pure fact or opinion.

The present Acting Chief Police Magistrate is a man of wide and varied experience he has brought his mind to bear on the pamphlet as a whole and since it cannot be shown that he has in any way misdirected himself so as to cause a miscarriage of justice and further as Counsel for appellant has admitted that he would not invite this Court to review facts only I am of opinion that this is not a case in which an appeal should be allowed and leave is accordingly refused.

In view of certain criminal proceedings now pending I wish to make it clear that I do not now decide whether the publication complained of is or is not obscene. That is a matter to be decided in the course of the criminal proceedings and it may perhaps eventuate that after a full

hearing with the aid of assessors the criminal Court may be of an opposite opinion to that of the Magistrate. Accordingly all that I now decide is that no sufficient cause has been shown to this Court to entertain an appeal from the Magistrate's order but in view of any possibility that may arise I vary the order of the Acting Chief Police Magistrate to the extent that the copies of the publication which he has been ordered to be destroyed shall not be destroyed until 14 days after the termination of the next criminal sessions. This variation will give all parties opportunity to consider their position in the light of the criminal proceedings and the result thereof.

*The motion stands dismissed with costs.*

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## *IN RE* SUDAMMA.

[Civil Jurisdiction (Maxwell Anderson, C.J.) August 17, 1932.]

*Custody of infant—Rights of parents inter se—Marriage Ordinance, 1928*[1]*—Validity of Hindu marriage questioned.*

In this case the father of an infant aged about three years sought the custody of the child as against the mother who was living in adultery. The question was raised that the marriage was void under the laws of the Colony. Evidence was adduced that the marriage was celebrated by two Hindu priests registered as Marriage Officers under the Marriage Ordinance (No. 2 of 1918), as amended by Ordinance No. 27 of 1928. It was admitted that the marriage was valid under Hindu law.

**HELD.**—Despite the age of the child the Court will give the custody to the father if the mother is deemed not a fit and proper person to have such custody.

*Obiter dictum.*—Failure to obtain a certificate of marriage will not *ipso facto* render a marriage null and void.

[**EDITORIAL NOTE.**—*Vide* Marriage Ordinance Cap. 118 (Revised Edition Vol. II p. 1176). The relevant provisions of the Marriage Ordinance in force at the time of this decision were substantially as in the present Ordinance except for s. 42 (Revised Edition p. 1189) which was added by amendment in 1945 to replace the amendment of s. 41 effected by the Marriage (Amendment) Ordinance (1928) the amendment being otherwise spent.]

*Vide* also the cases of *R. v. Surajpal* [1934] 1 Fiji L.R., *R. v. Sarjudei* [1937] 1 Fiji L.R., *In re Dukhan* [1939] 1 Fiji L.R. and *R. v. Rama* [1946] 1 Fiji L.R.]

Cases referred to :—

(1) *R. v. Gyngall* [1893] 2 Q.B. 232 ; 9 T.L.R. 471 ; 62 L.J.Q.B. 559 ; 69 L.T. 481 ; 28 Dig. 142.

(2) *R. v. Inhabitants of Wroxton* [1833] 4 B. & Ad. 640 ; 27 Dig. 48 ; 110 E.R. 595.

(3) *Thorpe v. Taylor* [1926] Ch. 689.

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[1] *Vide Editorial Note.*