A

ATTORNEY-GENERAL

v.

JONE NAEQE

[SUPREME COURT, 1965 (Mills-Owens C.J.), 17th September]

B

Appellate Jurisdiction

Criminal law—sentence—binding over—condition of marriage with girl against whom offence committed—condition void as contrary to public policy—Penal Code (Cap. 8) s.36.

Criminal law—public policy—condition intended to compel marriage—void.

C

Upon his conviction upon a charge of having carnal knowledge of a girl aged fifteen years and two months the appellant was bound over under section 36 of the Penal Code upon condition (*inter alia*) that he "marry the girl, if she consents, when she attains the age of 16 years".

D

Held: An order which in effect is intended to compel marriage as a condition of avoiding the infliction of punishment can have no place in the criminal law and the condition was void as being contrary to public policy.

Cases referred to: *Lowe v. Peers* (1768) 4 Burr. 2225; 98 E.R.160: *H.(orse.D) v. H.* [1953] 2 All E.R.1229; [1954] P.258.

E

Appeal by the Attorney-General against sentence and validity of condition of binding over order.

B. A. Palmer for the Crown.

R. A. Kearsley for the respondent.

F

MILLS-OWENS C.J. [17th September, 1965]—

The appellant was convicted on a charge of carnal knowledge of a girl aged 15 years and 2 months. He raised but a faint defence on the statutory ground of belief, based on reasonable cause, that the girl was of or over the age of consent. The defence was rejected and there is no appeal against conviction. In giving evidence at his trial

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he said that he was willing to marry the girl and that her mother was prepared to agree. He was thereupon bound over under section 36 of the Penal Code upon condition (inter alia) that he 'marry the girl, if she consents, when she attains the age of 16 years'.

The Attorney-General appeals against the order made, on the grounds (shortly) that (a) the condition as to marriage was void as

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contrary to public policy; (b) the Magistrate erred in failing to exercise the discretion vested in him by section 36 or in exercising it on wrong principles; and (c) that the order was manifestly lenient.

Both counsel agree, and there can be little doubt, that the condition is void as being contrary to public policy (see e.g. *Lowe v. Peers* (1768) 4 Burr. 2225; quoted in *Cheshire & Fifoot on Contract* (6th Edn.) p.322). It might also bring about the position that the marriage would be voidable on the ground of duress (see e.g. *H(orse D.) v. H.* (1953) 2 All E.R. 1229, particularly at p.1233 with reference to an Irish case very much like the present case). I am bound to hold that the order was unlawful. An order which in effect is intended to compel marriage as a condition of avoiding the infliction of punishment can have no place in the criminal law. Crown Counsel further questioned whether any condition other than those specifically mentioned in section 36 may be imposed thereunder, notwithstanding that the section refers to release "on probation". It is not necessary to decide the point.

As to ground (b) it is argued that the respondent's expressed intention to marry the girl was not a valid consideration under section 36; his intention, assumming it was genuine, was formed *ex post facto* and thus had no bearing on his motives at the time of the offence. It is not necessary to decide this point either.

As to the sentence properly to be imposed it is pointed out that the respondent is 25 years of age and a school teacher. The girl was not however one of his pupils and in fact had left school. She was, apparently, a willing party. According to the Probation Officer's report the respondent is highly regarded in the district and does useful work in the church. The Probation Officer advised against marriage. His report makes reference to temptation of the respondent by the girl. According to the girl's evidence she went to the respondent's house after attending a dance, but accompanied by a male companion; the respondent followed her and finding her alone brought her back to his house. The respondent made no challenge to or denial of this evidence; it does, however, as counsel for the respondent urges, admit of the possibility of an assignation. In his statement to the police the respondent said :— "As Naciri told me that he Naciri already had sexual intercourse with her, and that is why I try her and had sexual intercourse with her". This certainly does not support a case of sudden temptation, to say the least. In my view, having regard particularly to the respondent's position as a school teacher and to the need to protect young females no matter how promiscuously inclined they may be, authority would be failing in its duty if a prison sentence were not to be imposed. Accordingly the appeal against sentence is allowed and a sentence of 12 months' imprisonment is imposed.

Appeal allowed.