Council, from the Presidency of Madras to that of Bombay (16th April 1862).

No question appears to arise with respect to the effect of Sec. 47 of the Indian Councils' Act, as the Code of Criminal Procedure is not a law or regulation of the character therein described.

The district of North Cánará (with the exception of the táluká of Candápúr) having, therefore, been severed from the Presidency of Madras, and annexed to the Presidency of Bombay, before the trial of the case under consideration, and having passed from the one Presidency to the other with the Code of Criminal Procedure in uninterrupted operation within its limits, the provision of law contained in that Code to the effect that "any person convicted on a trial held by a Court of Session may appeal to the Ṣadr Court" cannot, with respect to cases tried by a Session Court in the transferred district subsequently to the date of the transfer, be held to give an appeal to the High Court at Madras, but must, in my opinion, be interpreted as making the decision in such cases appealable to the High Court at Bombay.

I consider, therefore, that we should admit the appeal of the convict.

Appeal admitted.

April 22.

REG. v. KARSAN GOJA'. REG. v. BA'I RUPA'.

Adultery—Nátrá—Dissolution of Marriage—Custom of Caste—Hindú Law—Ind. Pen. Code, Secs. 52, 79, 494, *and* 497.

Held that a custom of the Talapda Kolí caste, that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage (nátrá) with another man during the lifetime of her first husband and without his consent, was invalid, as being entirely opposed to the spirit of the Hindú law; and that such marriage was "void by reason of its taking place during the life of such husband," and therefore punishable, as regards the woman, under Sec. 494 of the Indian Penal Code; and that the man with whom the woman so married, having had sexual intercourse with her, and it being found that he did not honestly believe that she had become his wife, was guilty of adultery, under Sec. 497.

THE prisoners, Karsan Gojá, aged about twenty-two, and Bái Rupá, aged about fifteen, Hindús of the Talapda Kolí caste, and inhabitants of the Urpár Parganá, in the

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Súrat Zilla, were charged before the Court of Session : the first (Karsan), under Sec. 497 of the Penal Code, with adultery, in having had sexual intercourse with a person (Bái Rupá) who was, and whom he knew or had reason to believe to be, the wife of another man (Jayarám Keshav), without the consent or connivance of that man ; and the second (Bái Rupá), under Sec. 494, of having, while her husband Jayarám Keshav was still living, contracted a marriage void by reason of its taking place during the lifetime of her husband.

The prisoners were, on the 12th of October 1863, severally found guilty of the offences with which they were respectively charged ; and sentenced, the first to suffer rigorous imprisonment for six months, and to pay a fine of Rs. 100, commutable to four months' rigorous imprisonment ; and the second to suffer rigorous imprisonment for fifteen months.

The facts of the case, as well as the grounds of the convictions, appear in the judgments recorded by R. H. Pinhey, Acting Session Judge of Súrat.

The judgment in the case of *Karsan Gojá* was as follows :—

"The accused is charged with adultery, and pleads not guilty.

"It is proved for the prosecution, and admitted for the defence, that the woman Rupá was originally married to the witness Jayarám Keshav ; and that about three months ago she contracted nátrá with the accused Karsan Gojá, and that ever since the nátrá marriage Rupá has lived with the accused in his house. It, therefore, appears to me necessary to consider at length only the issues raised for the defence. First it is contended that although the accused and Rupá contracted nátrá, and lived together in the same house for three months, they did not have sexual intercourse with each other. Secondly it is contended that, even if Rupá and the accused did have sexual intercourse after they contracted nátrá, still the latter cannot have committed adultery, as Rupá was his legal wife.

"First, then, I must consider, Is there sufficient legal evi-

dence to establish that accused had sexual intercourse with Rupá. I consider that there is. The accused contracted nátrá with Rupá, then took her home to his house, calls her his wife before all the world, and has lived with her ever since. What inference alone can be drawn from these facts, and what more can the prosecution prove to convince the Court that the accused did have sexual intercourse with Rupá? Rupá was not a virgin when she went to live with the accused. Therefore, medical testimony could not prove whether the accused had sexual intercourse with her or not. Impotency on the part of the accused, or physical incapacity for sexual intercourse on the part of Rupá, are not even pleaded, much less proved. On the contrary, it is proved by the evidence of her husband Jayarám Keshav that no such physical incapacity on the part of Rupá exists. Again, in all religious systems one of the objects of marriage is sexual intercourse; and this is especially the case in the Hindú system, as regards nátrá marriages. If the accused did not intend to have sexual intercourse with Rupá, but, entertaining for her only a platonic affection, wished to have her live with him as a companion or servant, why did he contract nátrá with her? If they contracted nátrá, and still the accused did not wish to have sexual intercourse with her, why did he take her home to his house? It appears to me that the burden of proving the negative in this case rests on the accused. The prosecution has proved all that could be proved by legal evidence.* The law would protect a husband who resisted any attempt on the part of a witness to enter a married man's house at night, to see whether he had sexual intercours with his wife or not. It would, therefore, be unreasonable to require the prosecution to produce such a witness. The only inference that appears to me deducible from the facts proved—an inference equal, as it appears to me, to a legal presumption—is that the accused did have sexual intercourse with Rupá.

"The other point that I have to determine is, whether when the accused had sexual intercourse with Rupá she was

* NOTE.—As to the evidence necessary to establish sexual intercourse see Mayne's Commentary on the Penal Code, Sec. 197, 4th Edn.—ED.

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his wife, or the wife of the witness Jayarám Keshav. She cannot be the wife of both of them. Nearly every religious system in the world abhors polyandry; and it is peculiarly abhorrent to the principles of Hindú law, notwithstanding that the Náiars of the Malabar coast, the only people in the world that I know of amongst whom polyandry prevails, are Hindús. It is, however, unnecessary for me to consider whether Rupá could legally be at the same time the wife of both Jayarám Keshav and the accused; for it is not pleaded that polyandry exists or is legal in the Kolí caste, to which Jayarám and Karsan and Rupá belong. Perhaps the best form in which this issue can be determined is by framing it in these words:—Has the marriage of Rupá with Jayarám Keshav been dissolved. Because, if that marriage contract still subsists, the nátrá contracted with Rupá by the accused is no marriage at all. I am of opinion that Rupá's marriage with Jayarám Keshav has not been dissolved. It is clear that Jayarám Keshav never divorced Rupá; and it also appears to me clear, from the evidence in this case, that the general rule of Hindú law, as given by Sir Thomas Strange in his work on Hindú Law (3rd ed., 1859, p. 52), applies to the Kolí caste; and that the right of divorce amongst the Kolí caste is marital only, and not competent to a wife without the consent of her husband. An extract from the caste rules of the Kolís has been filed for the defence; but it fails, in my opinion, to dispose of the issue under consideration. All that appears from the extract (whatever its value may be) is that a nátrá marriage should not be set aside; but the only meaning I can attach to this maxim is that a nátrá marriage, regularly and legally contracted, should not be set aside; and the maxim so interpreted does not affect the point under consideration. It follows, then, that if the general rule of Hindú law, that the right of divorce is marital only, applies to the Kolí caste, the marriage of Jayarám Keshav with Rupá is still undissolved: for Jayarám Keshav has never consented to its dissolution, and, therefore, the intercourse of the accused with Rupá is adulterous. If, however, it be allowed for argument's sake that the rule of Hindú law

is in practice relaxed by the Kolís; that the Kolís have so often, and for so long a time, allowed to their women the right of divorce, without the consent of their husbands, that it has become a caste custom; still it it must presumed that this right can be exercised by a wife only under certain circumstances and in a particular manner. If a wife could leave her husband whenever she pleased, and without any forms whatever, the marriage tie would have no force at all; and the intercourse of the sexes, in a caste in which such a state of society was allowed, would reduce its members to the level of the beasts of the field. In dealing with a case such as this, in which the right of divorce is claimed for a wife without the consent of her husband, I think a Court of Justice is bound, in the interests of morality, and for the sake of society, for whose protection courts exist, to inquire strictly as to whether the circumstances under which the right was exercised were such as justified its exercise, and as to whether the forms necessary to render a divorce effectual had been duly observed. Now in this case it is not proved what are the circumstances under which a wife can insist on being divorced from her husband against his wishes; and it is not proved that any circumstances whatever existed which would have justified Rupá in insisting on being divorced from her first husband, Jayarám Keshav. From the evidence I also gather that even if Rupá was justified in trying to get divorced from Jayarám Keshav, she was bound to give back to him her dowry before the divorce could be effectual, and this she has not done. I have, therefore, no hesitation in arriving at the conclusion that Rupá is not the wife of the accused, but of Jayarám Keshav, at the present moment; and that the intercourse of the accused with her is, therefore, adulterous.

The judgment in the case of *Bái Rupá* was as follows:—

"The accused is charged with marrying Karsan Gojá during the lifetime of her first husband, Jayarám Keshav. The marriages of the accused, first with Jayarám Keshav and then with Karsan Gojá, are admitted. No evidence whatever is adduced in this case to show that her marriage with

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Jayarám Keshav was ever dissolved. The vakíl of the accused trusts to the Court declaring Rupá legally married to Karsan Gojá, in the case in which Karsan Gojá is charged with adultery; as, if in the case of Karsan Gojá, Rupá be declared his wife, the charge will necessarily fail in this case. I have, however, convicted Karsan Gojá of adultery; and in the judgment recorded by me in his case I have recorded at length my reasons for considering his marriage with Rupá void, by reason of its taking place during the lifetime of her first husband, Jayarám Keshav. The line of defence taken in this case renders it unnecessary for me to repeat here in detail what I have written in the case of Karsan Gojá, as the two judgments will be read out to Karsan Gojá and Rupá consecutively as soon as they are translated."

Both prisoners having appealed to the High Court, the records and proceedings were sent for, and the cases came on for hearing, on the 11th of January 1864, before FORBES and COUCH, JJ.

Dhirajlál Mathurádás for the prisoners:—Karsan Gojá (*a*) contracted nátrá with Bái Rupá (*b*) according to the custom

(*a*) The following are extracts from the petition of Karsan Gojá:—

"I have been charged with having committed adultery with one Rupá, the daughter of Lahá Bhaván. But the said charge, of which I have been convicted by the Session Judge, is not applicable to me, since I have contracted a nátrá with her according to the custom of my caste; and the testimony of her former husband, Jáyarám Keshav, and other witnesses has proved this fact. And as I have contracted a nátrá with her, the sexual intercourse I may have had with her was under the belief that she was my wife. Hence the sentence passed against me is not just. * * * In our caste of Kolí no one acts up to the Shástras, and it is customary for a woman to contract nátrá with another man during the lifetime of her husband and without his consent."

(*b*) The following are extracts from the petition of Bái Rupá:—

"I have married Karsan Gojá by the nátrá ceremony, during the lifetime of my former husband, Jayarám Keshav, but it is not all proved that the nátrá marriage with the said Karsan can be dissolved. On the other hand, it is clearly proved, from the extract produced by me in this case taken from the paper, containing the usages of my caste, submitted in the time of Mr. Borradaile, that this nátrá marriage cannot be dissolved. * * * My caste, that of Kolí, is one in which nátrá marriages are allowed. It is customary in my caste to marry a second husband, if one disagrees with one's husband. Such being the case, the punishment inflicted upon me is unjust."

of the caste, which was the law of the parties; and there was, therefore, no offence committed by either.

PER CURIAM :—It is ordered that the Session Judge make further inquiry, and, if necessary, take further evidence, as to whether the said Karsan Gojá honestly believed that, notwithstanding the want of the consent of Rupá's first husband, she had become his (the accused Karsan Gojá's) wife. Also to certify to the High Court the opinion of the Assessors on these points along with his own.

The cases were, accordingly, sent back to the Court of Session, where further evidence was taken, and returned by R. H. Pinhey, Acting Session Judge, on the 8th of February, with the following finding :—

"The finding of the Assessors on the issue raised is in the negative, and with the Assessors the Session Judge concurs.

"It appears to me from the evidence that a woman of the Kolí caste cannot properly contract nátrá in the lifetime of her first husband without his consent—that if she does so, the caste exercise such power as it can by inflicting a heavy fine upon her—and that Rupá and Karsan Gojá, therefore, knew perfectly well that they were living in a state of (what more civilised communities call) sin."

The cases came on for further hearing on the 15th of March, before the same Judges.

PER CURIAM :—It is ordered that the Session Judge put the following questions to the heads of the Talapda Kolí caste, and other persons well acquainted with the custom of the caste in Súrat and its neighbourhood, and obtain answers thereto; and certify to the High Court the result thereof, together with his own finding on the said questions.

1. Is it permitted to a woman in the Talapda Kolí caste, for any and what reasons, to leave the husband to whom she has been first married, and to contract a second marriage (nátrá) with another man in his lifetime and without his consent?

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2. Is the permission of the caste necessary as a preliminary to such a contract of second marriage (nátrá), or is such permission ever given subsequently to the contract; and if so, what is the mode in which it is given, and what is the effect which, when given, it is considered in the caste to have?

3. Quote any instances which may have occurred in the caste, within your own experience, in which a woman has contracted a second marriage in the lifetime of her first husband and without his consent; and mention the position which such a woman has occupied in the caste since such second marriage.

The following finding was returned, on the 5th of April by E. T. Down, then Acting Session Judge :—

1. "My finding on the first question is that it is proved by the depositions of the witnesses recorded that it is permitted to a woman in the Talapda Kolí caste to leave the husband to whom she has been first married, and to contract a second marriage (nátrá) with another man in his lifetime and without his consent.

2. "My finding onthe second question is that the permission of the caste is not necessary as a preliminary to such a contract of second marriage (nátrá); that permission is sometimes given or withheld subsequently to the contract, *i.e.*, on the complaint of the first husband; if she restore to him any property she may have acquired by her first marriage, she does not lose her position in the caste.

3. "My finding on the third question is that the instances quoted support the view contained in the two preceding questions."

The appeals came on for further hearing on the 22nd of April before the same Judges.

PER CURIAM :—Karsan Gojá has been convicted of committing adultery with Rupá, the wife of Jayarám; and Rupá has been convicted of contracting a marriage with Karsan, which is void by reason of its having taken place during the lifetime of Jayarám. The defence in the case of each prisoner is the

same—namely, that a nátrá marriage has been solemnised between Karsan and Rupá, and that it is the custom of the Talapda Kolí caste that a woman may without the consent of her husband leave him, and contract a valid marriage with another man. We are of opinion that such a caste custom as that set up, even if it be proved to exist, is invalid, as being entirely opposed to the spirit of the Hindú law; and we hold that a marriage entered into in accordance with such a custom is void. The convictions must be upheld, but, as the Judge has found the custom set up by the prisoner to be proved, we reduce the punishment awarded to Karsan Gojá and Bái Rupá to three months', and one month's, rigorous imprisonment, respectively.

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Sentence altered.

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April 6.

Examination of Prisoner—Evidence of Character—Crim. Proc. Code, Secs. 205, 366, 380, *and* 399.

The examination of the accused by the Magistrate, not having been recorded in accordance with the provisions of Sec. 205 of the Code of Criminal Procedure, was not admissible in evidence at the trial before the Court of Session under Sec. 366; and the evidence, being, in the opinion of the High Court, insufficient to support the conviction, the prisoner was acquitted under Sec. 399.

It is improper to allow witnesses for the prosecution to state that the accused is not of good character.

THE prisoner was convicted of murder by F. Lloyd, Session Judge of Dhárwár; and sentenced to death, subject to the confirmation of the High Court, under Sec. 380 of the Code of Criminal Procedure.

The case came on for hearing this day before COUCH and TUCKER, JJ.

PER CURIAM:—The Court hold that the examination of the accused before the Magistrate put in evidence before the Court of Session, not having been recorded according to the provisions of Sec. 205 of the Code of Criminal Procedure, was not admissible as evidence in the case; and con-