SOUTH AUSTRALIA

FORTY-FIFTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE COMPETENCE OF SPOUSES AS WITNESSES IN CRIMINAL PROSECUTIONS FOR INJURIES CAUSING DEATH OR SERIOUS BODILY INJURY TO CHILDREN

1978

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*

THE HONOURABLE MR. JUSTICE KING, *Deputy Chairman.*

B. R. COX, Q.C., S.-G., *Deputy Chairman.*

THE HONOURABLE MR. JUSTICE WHITE.

D. W. BOLLEN, Q.C.

J. F. KEELER.

K. T. GRIFFIN.

The secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide, South Australia.

FORTY-FIFTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE COMPETENCE OF SPOUSES AS WITNESSES IN CRIMINAL PROSECUTIONS FOR INJURIES CAUSING DEATH OR SERIOUS BODILY INJURY TO CHILDREN

To:

The Honourable Peter Duncan, M.P.,
Attorney-General for South Australia.

Sir,

You have referred to us the problem which arises in criminal prosecutions for what is colloquially called "baby bashing" because spouses who are often the only eye witnesses of the affair are neither competent nor compellable witnesses in prosecutions laid under the Criminal Law Consolidation Act and we advise as follows:—

At the beginning of the seventeenth century that great authority of the common law Sir Edward Coke wrote:—

> "Note, it hath been resolved, that a wife cannot be produced either for or against her husband, quia sunt duae animae in carne una, and it might be a cause of implacable discord and dissention between them, and a means of great inconvenience."

Exceptions however were very shortly thereafter engrafted on the common law rule. In *Lord Audley's case (1631) 3 State Trials 401* the Judges held that a wife was a competent witness against her husband on an indictment for rape because she was the party wronged and might otherwise be abused. In *Bentley v. Cooke (1784) 3 Doug. 422 at 423* it was said by Lord Mansfield C.J.:—

> "There never has been an instance, either in a civil or criminal case, where a husband or wife has been permitted to be a witness for or against the other except in case of necessity, and that necessity is not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would otherwise be exposed without remedy to personal injury."

The common law position is well summed up in *Bacon's Abridgement* (Bac. Ab. Evidence A.1.). Husband and wife "are considered as one and the same person in law, and to have the same affections and interests; from whence it has been established as a general rule that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissention which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case".

As far as the law of evidence is concerned, the prohibition was connected with the common law rule that the plaintiff and the defendant in civil proceedings in the common law courts with very minor exceptions could not give evidence on their own behalf. Accordingly as husband and wife were one flesh both in scripture (St. Matthew XIX: 5) and in law, if one of the spouses was interested in the result of an action so was the other.

In criminal cases an accused person could not give evidence in his own defence, though by a merciful bending of the rules the practice gradually

grew up that the accused could make an unsworn statement from the dock as he still can. The general prohibition on a wife giving evidence for her husband or vice versa applied to criminal as well as to civil proceedings.

The law commenced to be altered in England in civil cases in 1851 by the Evidence Act of that year 14 & 15 Vict. c.99 s.1 which permitted parties to civil actions to give evidence on their own behalf. As a result of that amendment a further amendment was made two years later by the Evidence Act Amendment Act 1853 16 & 17 Vict. c.83 s.1 making husbands and wives competent and compellable witnesses for either party in civil cases.

Criminal causes were however expressly excepted from the amending Acts of 1851 and 1853 so that the spouses were neither competent nor compellable in criminal cases except to the limited extent referred to above. There were a number of minor exceptions made in English statutes of the latter part of the nineteenth century and the matter was dealt with generally in England in the Criminal Evidence Act 1898: 61 & 62 Vict. c.36 ss. 4 and 6(1). The position in South Australia is governed in relation to criminal causes by the Evidence Act 1929-1974 s.18 which reads as follows:—

> "18. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person: Provided as follows:—
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> I. A person so charged shall not be called as a witness in pursuance of this Act except upon his own application:
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> II. The failure of any person charged with an offence, or of the wife or husband as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution:
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> III. The wife or husband of the person charged shall not, save as herein mentioned, be called as a witness in pursuance of this Act, except upon the application of the person so charged:
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> IV. Nothing herein contained shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage:
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> V. A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:
>
> VI. A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(c) he has given evidence against any other person charged with the same offence:

VII. Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness box or other place, from which the other witnesses give their evidence:

VIII. Nothing herein contained shall affect the provisions of section 110 of the Justices Act, 1921, or any right of the person charged to make a statement without being sworn."

The matter is further dealt with in Section 21 of the Evidence Act:—

"(1) The wife or husband or a person charged with an offence under any enactment mentioned in the third schedule hereto may be called as a witness either for the prosecution or defence, and without the consent of the person charged and shall only as regards the age or relationship of any child of the husband or wife be compellable.

(2) Nothing herein contained shall affect the operation of any Statute or rule of law in a case where—

(a) the person charged with an offence is compellable to give evidence by virtue of the provisions of any enactment specially applicable to the case; or

(b) the wife or husband of a person charged with an offence may, either under any enactment specially applicable to the case, or at common law, be called as a witness without the consent of that person."

Regrettably all the enactments mentioned in the third schedule to the Evidence Act are repealed Acts and the third schedule needs to be brought up to date to recite the present legislation in force and not a series of Acts which are no longer in force in South Australia.

It was thought until this year that a wife was a competent and also a compellable witness where the husband was charged with personal violence against her. The leading case was *R. v. Lapworth [1931] 1 K.B. 117*, a case in which a husband had been convicted of the attempted murder of his wife by strangling. The Court of Criminal Appeal held

that the wife was both competent and compellable in such cases and said that that was also the rule at common law. That case was overruled by the House of Lords in *Metropolitan Police Commissioner v. Hoskyn "The Times" April 7, 1978: [1978] 2 W.L.R. 695.*

The common law which we have outlined above was held to be in force in Australia by the High Court of Australia in the case of *Riddle v. The King (1911) 12 C.L.R. 622.* A very careful description of the historical basis and development of the law on the subject is contained in the judgment of Angas Parsons J. in *R. v. Phillips 1922 S.A.S.R. 276.*

As a result of the first report of this Committee, the Children's Protection Act 1936 was amended by the Children's Protection Act Amendment Act No. 49 of 1969 to provide for compulsory reporting of baby bashing cases and providing for immunity both criminal and civil to attach to such reports. By Section 10 of the Children's Protection Act Amendment Act 1969 a new Section 20a was added to the Act reading as follows:—

> "In any proceedings for an offence against section 5 or section 11 of this Act or for an offence under any Act relating to the inflicting of bodily harm on a child where it is alleged that the person charged had the care, custody, control or charge of the child in relation to whom the offence was committed the wife or husband of that person may be called as a witness for the prosecution or the defence without the consent of that person and that wife or husband shall be competent and compellable to give evidence generally in the proceedings."

As a consolidation measure the sections in the Children's Protection Act were placed in the Community Welfare Act in 1972 and became Sections 72 and 73 of the Community Welfare Act. No analogue to Section 20a of the Children's Protection Act was placed in the Community Welfare Act because there was already a section in the Community Welfare Act, Section 245, providing that the wife or husband of any person should be competent and compellable to give evidence for or against that person in any proceedings under that Act. The draftsman apparently therefore did not think it necessary to insert the analogue of Section 20a of the Children's Protection Act. Section 20a of course was in different terms from Section 245 as it dealt not only with prosecutions arising under the Children's Protection Act, but purported to deal with offences under *any* Act relating to the inflicting of bodily harm on a child, in certain circumstances which are not here material.

By a further consolidation Sections 72 and 73 of the 1972 Community Welfare Act are now found in Section 82e of the Community Welfare Act 1976 No. 111 of 1976. Section 82e reads as follows:—

> "(1) Any person having the care, custody, control or charge of a child, who maltreats or neglects the child, or causes the child to be maltreated or neglected, in a manner likely to subject the child to unnecessary injury or danger shall be guilty of an offence and liable to a penalty not exceeding five hundred dollars or imprisonment for a period not exceeding twelve months.
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> (2) Proceedings for an offence against this section shall not be commenced except upon the authorisation of a regional panel.
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> (3) An apparently genuine document purporting to be under the hand of a member of a regional panel, and to certify that the

commencement of specified proceedings has been authorised by the panel, shall be accepted in any legal proceedings, in the absence of proof to the contrary, as proof of the matter so certified."

It will be seen that proceedings under Section 82e are dependant upon authorisation by a regional panel. It is, we think, a fair inference that the 1976 provisions are the result of the report of a Committee headed by the now Justice Murray of the Family Court.

You referred this matter to us because of a communication from the State Coroner, Mr. K. B. Ahern, stating that he was unable to commit a man for prosecution for manslaughter in a baby bashing case because his spouse who was the only other eye witness refused to give evidence and her refusal had to be upheld. In a communication to us Mr. Ahern says that there are other cases which have arisen during his period as Coroner where a committal for prosecution was not possible because of the operation of the rule.

The result of the present law, therefore, is that if the parties are married, a spouse can indulge in baby bashing with little fear of prosecution for an offence otherwise than under Section 82e of the Community Welfare Act if the other spouse is the only witness because of the spousal immunity. If on the other hand the parties are living together in a de facto relationship, either party to that relationship is both competent and compellable as a witness in a "baby bashing" prosecution.

We have been assisted by communications from Dr. B. J. Fotheringham, the Chairman of the Northern Metropolitan Regional Panel for the Prevention of Child Abuse, and from Chief Superintendent Lockwood of the Police Department. It is obvious from Dr. Fotheringham's report that he and his panel place emphasis upon psychological and medical treatment. We would think that there is a fair inference from the communication that it is unlikely that that panel, given its point of view, would authorise proceedings for an offence under Section 82e of the Community Welfare Act. Chief Superintendent Lockwood in his report indicates that there is in the opinion of the police, a place for the intervention of the law in the case of death and grievous bodily harm caused to a child. He also points out that by an amendment in Victoria by their Act No. 7546 of 1967, the husband or wife of a person charged is compellable to give evidence in a wide range of personal violence offences against any victim at all, not only against children of the household.

Dr. Fotheringham's point of view is borne out by the report of the Royal Commission on Human Relationships Part 4. However, it must be said that that Royal Commission does not seem to have considered the questions of public interest and public importance which must be considered by any Attorney-General in deciding whether or not an indictment should be filed.

Accordingly as the law now stands, in the case of a prosecution under Section 82e of the Community Welfare Act, the panel must give their approval before a complaint can be laid but if consent is given and the complaint comes on for hearing the spouse witness is both competent and compellable. If an indictment is filed charging an offence under the provisions of the Criminal Law Consolidation Act, no approval is required but the spouse witness is not compellable nor in some cases (depending on the charge laid) even competent.

The anomaly may be met in one of three ways:—

(1) by requiring that approval be given by the panel before a charge for an offence can be laid in any Court

(2) to remove the requirement for approval by the panel before the laying of a complaint under Section 82e of the Community Welfare Act

(3) to provide that the panel review all cases of child injuries of this kind and make recommendations for or against prosecution in all cases but that if the recommendation is against prosecution, the Attorney-General be enabled, notwithstanding the recommendation, to direct the laying of a prosecution, where the public interest in his opinion requires it, in the case of death or serious bodily harm caused to a child.

The majority of the committee feel that they lack the necessary expertise to choose between these alternatives. They draw attention to the problem discussed above and the possible solution to it but make no positive recommendation.

We should also point out that the Mitchell Committee in their Third Report recommend that spouses should be compellable as well as competent witnesses in all cases of assault on a child under sixteen: see the Third Report of that Committee pages 178-179. Accordingly a majority of this Committee recommends as follows:—

1. That the recommendation of the Mitchell Committee referred to above become law and that spouses be competent and compellable witnesses in all such cases.
2. That we respectfully draw your attention to the anomalous position referred to above of the third schedule to the Evidence Act in which all the references in the third schedule following on the provisions of Section 21 are references to obsolete and repealed Acts, so that at the least their present day successors may be substituted in a new third schedule.
3. We draw your attention to the difficulty about prior approval of prosecutions discussed on the preceding page.

We have the honour to be

L. J. King

B. R. Cox

J. M. White

D. W. Bollen

J. F. Keeler

Law Reform Committee of South Australia

8th September, 1978.

DISSENT OF THE CHAIRMAN REGARDING THE THIRD RESOLUTION OF THE COMMITTEE

I do not agree that we lack the necessary ability, or the expertise either, to make a recommendation to the Attorney-General on resolution 3 at the end of this report. In my opinion it is totally impracticable to insert a power, even if the majority of the Committee had gone so far as to recommend it, that the Attorney of the day be enabled to overrule the recommendation of his advisers in serious cases of baby bashing by ordering a prosecution to be laid where his advisers have recommended against that course.

That would simply provide counsel for the accused with a splendid argument to the jury that the poor hardly-done-by thug whom he represents ought never to have been brought before a jury at all. All that was required was to entrust him to those wonderful psychiatrists who need only wave their wand, "unthug" the thug, and restore him to his friends and his relations, ready for the next round of bashing a helpless child.

This report ought to have made a recommendation that will distinguish betwen serious cases falling within the purview of the criminal law, and minor cases which can be dealt with by treatment or at most by a court of summary jurisdiction. That is the position of the law at present. Accordingly in my view the recommendations 1 and 2 of the Committee contained in this report should be translated into law and nothing further needs to be done or recommended.

The anomaly referred to in the report is not a true anomaly; it accurately reflects the different approach which ought to be made in serious cases of baby bashing as against the one to be used in minor cases.

HOWARD ZELLING

8th September, 1978.

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