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SPOUSAL TESTIMONY ON MARITAL COMMUNICATION AS INCRIMINATING EVIDENCE

Lim Lye Hock v *PP*[1]

THE primary aim of a trial is to search for relevant facts. In that search, we must not forget our humanity. No court of law worth the name could sanction the use of physical torture, however effective it might be in extracting the truth from the witness. Supposedly belonging to the same order of thought, but less dramatic, is the desire to protect the sanctity of the marital relationship: is it in accordance with our humanity to force a person to testify against his or her spouse? More specifically, must or can a witness reveal communication made in the intimacy of marriage? Whether or not one spouse may be forced or allowed to "betray" another affects not just the particular relationship into which we are seeking to intrude; it affects the institution of marriage. The fear is that the possibility of intrusion may cause uneasiness and undermine the confidence in any marital relationship. When, if ever, is our respect for the trust between spouses and our expectation of such trust to give way to our desire to get (and to attain the good that flows from getting) the facts right?

There is no easy answer. We shall return to this later. Assuming, for the moment, that the price is worth paying, there are at least three ways in which the law of evidence could shelter the marriage from strain. Two of these have been abandoned. The first is to disqualify a person from standing as witness in proceedings to which his or her spouse is a party. This was the position at common law: the spouse of a party or of the accused was generally an incompetent witness.[2] This common law disqualification has been removed under the Evidence Act.[3] It is explicit in sections 122(1)

1 [1995] 1 SLR 238.

2 Coke so stated the rationale: "[A] wife cannot be produced either against or for her husband, *quia sunt duae animae in carne una*; and it might be a cause of implacable discord and dissention between the husband and the wife..." (*Commentaries Upon Littleton* (19th ed, 1832), at 6b. The latin tag refers to the union of legal personalities of spouses, a myth long discredited.) The likelihood that the spouse would be biased is sometimes given as an additional reason.

3 Cap 97, 1990 Rev Ed.

and (2) respectively that the spouse is competent to testify in both civil and criminal proceedings.[4] It is implicit in those provisions that the spouse can also be compelled to testify, even by the prosecution.[5] The second possible way of protecting marital relationship is to make inadmissible evidence of marital communication. This was supported by a slender line of old cases.[6] However, it appears to be settled, in the light of modern authorities, that proof may be given of marital communication, both at common law[7] and under the Evidence Act.[8] Thirdly, while we are not prepared to disqualify the spouse altogether from giving evidence, we could, and indeed we do under section 124 of the Evidence Act, excuse a spouse from disclosing marital communication.

Is the third rule, the marital privilege, justifiable? Consider the rise and fall of the privilege in England: Marital privilege probably never existed at common law.[9] It was statutorily created in the later half of the nineteenth century.[10] The view which carried the day was that "much of the happiness of human life...rest(s) on the inviolability of domestic confidence"; that great alarm and unhappiness would be occasioned to society by invading the sanctity of a marriage and compelling disclosure of confidential communication between spouses.[11] When values change, the law has to follow. Marital privilege was repealed not so long ago.[12] Those who had recom-

4 See also s 134(1) Women's Charter, Cap 353, 1985 Rev Ed. Note that no witness, whether a spouse or not, can give evidence unless the person satisfies the general test in s 120 of the Evidence Act: he or she must be able to understand questions put to him or her and must be able to give rational answers thereto.

5 *Ghouse bin Haji Kader Mustan* v *R* [1946] MLJ 36; *Gimbu bin Sangkaling* v *R* [1958] SCR 114. Both decisions were held to be correct by the Court of Appeal in *Lim Lye Hock* v *PP*, *supra*, note 1, at 247. See also *PP* v *Abdul Majib a/d Md Haniff* [1994] 4 CLJ 172. The present position is the result of the amendment by Ordinance no 12 of 1895, which amendment may well have been prompted by the decision in *R* v *Osman* (1895) 3 SSLR 46.

6 Or so Holdsworth argued in (1940) 55 LQR 137.

7 *Rumping* v *DPP* (1964) AC 814.

8 The Indian Supreme Court so held in *Verghese* v *Ponnan* AIR 1970 SC 1876. The Indian Evidence Act is *in pari materia* with our Evidence Act.

9 For this proposition, *Shenton* v *Tyler* [1939] Ch 620 is commonly cited as authority but, as McNicol says, this is not free from doubt. S McNicol, *Law of Privilege* (1992), at 295.

10 S 3, Evidence (Amendment) Act 1853, *viz,* civil cases and s 1(d), Criminal Evidence Act 1898, *viz,* criminal cases.

11 See the passage from the *Second Report of the Commissioners for Inquiring into the Process, Practice and System of Pleading in the Superior Courts of the Common Law* (1852) quoted in *Rumping* v *DPP*, *supra*, note 7, at 841. This report led to the passing of the Evidence (Amendment) Act 1853, *supra*, note 10.

12 S 3, Evidence (Amendment) Act 1853 was repealed by 16(3), Civil Evidence Act 1968 while s 1(d), Criminal Evidence Act 1898 was repealed by s 80(9), Police and Criminal Evidence Act 1984.

mended its abolition expressed views antipodal to sentiments aired the century before: it is now said that the privilege has limited effect upon marital relations; that it is unrealistic to suppose that candour of communication between spouses is influenced by the privilege or that marital confidence would be enhanced by it.[13]

Unlike in England, marital privilege has stood firm in Singapore. It weathered a recent attempt to move it in the English direction. In *PP* v *Lim Lye Hock*,[14] Lai Kew Chai J valiantly sought to restrict the scope of marital privilege in criminal proceedings. There was no doubt that a ghastly murder had been committed. To link Mr Lim to it, the prosecution sought to call his wife to testify. There was other circumstantial evidence apart from Mrs Lim's testimony. On that evidence alone, Lai J was prepared to convict.[15] The wife was willing to testify because, we are told, she "had recently embraced Christianity and she felt compelled to tell the truth."[16] That being so, there was no issue about *compelling* her to take the witness stand and to answer questions about what her husband told her; she was prepared to do all of these. The defence objected to her taking the stand on the ground of marital privilege. This is conceptually untidy. It confuses competency with privilege. Even if the accused can claim marital privilege, that does not disqualify his wife from taking the witness stand; it is not a reason for stopping her from testifying to matters not concerning marital communication.[17]

If we overlook this point, we may take Lai J's judgment as addressing this issue: does the accused have a right to prevent his spouse, when she takes the stand, from disclosing marital communication? Section 124, which contains the marital privilege, has two limbs.[18] Under the first, a

[13] These views were expressed in the civil context in the *Law Reform Committee Sixteenth Report (Privilege in Civil Proceedings)* (Cmnd 3472, 1967), at para 43. The Criminal Law Revision Committee thought that the position ought to be the same in criminal cases: see the Committee's *Eleventh Report, Evidence (General)* (Cmnd 4991, 1972), at para 173.

[14] Criminal Case No 25 of 1992. The High Court decision is not officially reported. References hereafter will be to the transcript of the judgment ("the transcript"). It is commented upon by Tan Yock Lin in the postscript to "Reforming Competence and Compellability" (1994) 15 Sing LR 133 at 168-170.

[15] See p 36 of the transcript. This fact was stressed by the Court of Appeal: *supra*, note 1, at 243.

[16] See p 19 of the transcript.

[17] The Court of Appeal has now recognised as much: *supra*, note 1, at 248. This very point was clearly made in the earlier Court of Appeal decision of *Peter Chi Man Kwong & Anor* v *Ronald Lee Kum Seng* [1985] 1 MLJ 21 (on legal professional privilege). See also the last paragraph of the judgment in *PP* v *Abdul Majib a/d Md Haniff* [1994] 4 CLJ 172, at 175.

[18] In addition to these two limbs, there is an exception clause which applies to two cases: suits between married persons and proceedings in which one spouse is prosecuted for a

person shall not be *compelled* to disclose marital communication. There was, as said, no question of compulsion on the facts. It was the second limb that was in issue; it provides that a person shall not be *permitted* to disclose marital communication *unless* consent is given by the spouse who made the communication (or his representative in interest). Mr Lim did not consent to the disclosure and hence, it was argued, Mrs Lim should not be allowed to testify on marital communication.

This argument was rejected by Lai J. His Honour ruled that the accused's right to prevent his spouse from testifying on marital communication was taken away by the introduction in 1976 of section 134(5)(a) of the Evidence Act.[19] The reasoning seemed to have run as follows:[20]

(i) the accused could not prevent his wife from giving evidence that incriminates him because a witness' privilege against incriminating his or her spouse has been removed under section 134(5)(a);

(ii) therefore a witness has to answer a question even though the answer to it might incriminate the spouse;

(iii) however, under section 124, a person generally has the right to prevent his spouse from answering a question if it would involve a disclosure of marital communication;

(iv) if the disclosure of the marital communication by the witness-spouse would incriminate the accused, a conflict between proposition (ii) (which says that the witness has to answer) and proposition (iii) (which prevents the witness from answering without the accused-spouse's consent) would arise;

(v) the conflict cannot be reconciled but should be resolved by subjecting the older provision (s 124) to the newer (s 134(5)(a)), as probably intended by Parliament.

crime committed against the other. It is unclear whether these two cases are brought out of the operation of the second limb only or of both limbs. McElwaine CJ suggested in *Ghouse bin Haji Kader Mustan* v *R* [1946] MLJ 36, at 37 that the exception clause applies to the first limb as well (in other words, the spouse may be compelled to disclose marital communications in the two cases.) In *Lim Lye Hock*, *supra*, note 1, the Court of Appeal, in a dictum, said that this was wrong (at 246); it appeared to be of the view that the exception clause applies only to the second limb (at 248).

19 *Vide* s 7, Evidence (Amendment) Act No 11 of 1976. The possible conflict between the two provisions was noted and discussed by Leong Wai Kum in "Spouses as Witnesses: Some Aspects" (1976) 18 Mal LR 225.

20 See pp 15-17 of the transcript.

Mrs Lim was therefore allowed to give evidence and she testified to not just non-communicative facts (for example, that on the night in question, she noticed that her husband appeared frightened and behaved oddly; that the toes on one of his feet were stained with blood) but also to what her husband said (for example, his confession of the crime).

It is submitted that there is no conflict between the two provisions – one takes away while the other gives an excuse. Section 134(5)(a) does *not* impose any obligation on the spouse to answer a question. It merely takes away an excuse for refusing to answer: a witness cannot refuse on the ground that the answer would incriminate his or her spouse.[21] Section 134(5)(a) has nothing to say about the availability of *other* excuses for not answering. Section 124 gives one such excuse. The witness has two strings to her bow. She may refuse to answer by trying to claim either the privilege against spousal incrimination or marital privilege. The effect of section 134(5)(a) is merely to take away the former (but note, only if the question does not go solely or mainly to credibility). That, however, is no reason why she cannot fall back on the latter.[22] It is not a matter of whether one section should prevail over the other. It is simply a question of whether either of the two applies in the circumstances.

The two excuses are distinct: (a) section 124 applies to both civil and criminal cases while section 134(5)(a) applies only to criminal cases; (b) the protection under section 124 is restricted to 'communication'[23] while section 134(5)(a) is not so restricted; (c) more particularly, section 124 applies only to communication made *to* the witness and not to communication made *by* the witness; (d) provided the marital communication was made during the marriage, section 124 applies even after the marital relationship has come to an end[24] while section 134(5), it would seem from its wording, applies only so long as the witness remains a spouse. These differences, according to Professor Stone, are secondary to a divergence in the rationales

[21] Unless the question is relevant solely or mainly to credibility. S 134(4)(b)(ii) and s 134(5)(a) apparently presuppose that we have in the background a privilege against spousal incrimination; otherwise, there is nothing to take away.

[22] Of the same (or perhaps similar) view is Chin Tet Yung, *Evidence* (1988), at 188. See also J Pinsler, *Evidence, Advocacy and the Litigation Process* (1992), at 187.

[23] It does not apply to non-communication, that is to say, non-communicative facts or acts. Hence a spouse called by the prosecution may testify that she saw her husband holding the firearm of which he is being charged with illegal possession. She may not however testify to what her husband told her: *Palldas Arumugam* v *PP* [1988] 1 CLJ 661, 665 but see text associated with *infra*, note 31.

[24] S 124 refers to a person 'who is or has been married'. See *Ibrahim bin Awang Mat* v *Ibrahim bin Dollah* [1987] 2 MLJ 471, at 472.

of the two privileges: while both marital privilege and privilege against spousal incrimination "are designed to protect family life,...their starting points are different. The former aims to reassure the spouses during marriage, the latter merely to palliate the tragic situation at the moment of the trial during marriage."[25]

The case went on appeal and while it did not succeed because the other evidence supported the conviction, the ruling on marital privilege was reversed. According to the Court of Appeal, the judgment of which was delivered by Thean JA, "the wife's evidence of what the appellant told her was not admissible in evidence."[26] This ruling is imprecise: as mentioned before, evidence of marital communication is not inadmissible as such. It would have been better had the Court of Appeal ruled instead that an error of law was committed in allowing the witness to disclose marital communication, that the wrong was committed against the accused because the privilege was his – he had been deprived of his right to prevent his wife's disclosure of marital communication.

The Court of Appeal was not persuaded by the argument that in enacting section 134(5), Parliament intended to do away with marital privilege in criminal cases. It pointed out that section 134(5) was enacted following the recommendation contained in clause 15 of the Eleventh Report of the Criminal Law Revision Committee.[27] The Report recommended in clause 16 the abolition of marital privilege in England. That we left section 124 unamended shows that we did not accept the recommendation to do away with marital privilege in Singapore.[28] It was held that section 134(5) may be reconciled with section 124 in this manner:[29]

> "[W]hen the spouse of an accused is called as a witness,... under section 134(5) he or she is 'compellable' to give evidence of any fact and produce any document which would or might incriminate the accused in respect of the offence the latter is charged, save and except that under section 124 he or she is not compellable to disclose any marital communication ... made by the accused, and further if he or she is prepared to disclose it, he or she is not permitted to do so without the consent of the accused."

[25] *Evidence – Its History and Policies, An Original Manuscript by Julius Stone*, revised by WAN Wells (1991), at 610.

[26] *Supra*, note 1, at 254.

[27] *Supra*, note 13.

[28] *Supra*, note 1, at 252-4. The effect of abolishing marital privilege in England is ameliorated by the non-compellability of the accused's spouse in most cases. On the significance of this, see Tan, *supra*, note 14.

[29] *Supra*, note 1, at 249-250.

The wife therefore may be compelled to give relevant evidence of what she saw her husband do or how he appeared but may not be permitted, without her husband's consent, to give evidence of what her husband told her.[30] In practice, this line is not always easy to draw. As Hussain J observed in *Palldas Arumugam* v *PP*,[31] communication and acts may sometimes be so inextricably interwoven that to separate the acts from the words spoken would be extremely difficult, if not impossible.

Taking the law as it stands, the conclusion of the Court of Appeal must be correct. However, the soundness of the rule in section 124, as interpreted, is debatable. That a wife should not be *forced* to disclose incriminating marital communication against her husband may be defensible.[32] However, ought the husband to have a right to prevent his wife from discharging what she perceives to be her higher moral duty, to voluntarily reveal in a court of justice her husband's confession of an odious deed?

Some may be inclined to agree with Lai J that the husband deserves no such right.[33] (Indeed, he would not have that right under the marital privilege formerly applicable in England.)[34] In support of the High Court judgment, some may use this argument of Burger CJ in *Trammel* v *US*:[35]

> "When one spouse is willing to testify against the other in a criminal proceeding... their relationship is almost certainly in disrepair; there

[30] *Supra*, note 1, at 248.

[31] [1988] 1 CLJ 661, at 665.

[32] There is no universal answer as to how to resolve this conflict between loyalty to State and to spouse. It is not unknown for the communal consciousness in communist societies to run so strong as to extol informing on one's relatives. No one in the free world can accept this; we would not demand that persons "be faithless...in order to prove that they are good citizens, and worthy members of society." (See: *In re Agosto* (1983) 553 F Supp 1298, at 1331.) On the other hand, an individual, by virtue of some commitment expected of him or her to the State, should not be allowed *always* to keep inviolate his or her private relationships. (See: S Levinson in "Testimonial Privileges and the Preferences of Friendship" [1984] Duke LJ 631.) That England has abolished marital privilege shows that even a liberal society can live with some lesser forms of "coerced betrayal". It is of interest to note that in a survey commissioned by the Law Reform Commisssion of Hong Kong in 1986, it was found that, of the persons surveyed, 38% were in favour of retaining marital privilege while 27% were not. (The rest did not give their opinion.) However, of the institutions surveyed, 73% were in favour while 22% were not. See: *Report of Competence and Compellability of Spouses in Criminal Proceedings* (1987), at 126.

[33] His Honour commended the wife's conduct: "[She] at last came through and cast aside her blind loyalty to her husband." (See p 38 of the transcript).

[34] See the provisions cited in *supra*, note 10. Under those provisions, the spouse to whom the communication was made alone has the power to waive the privilege; consent by the other spouse is not required.

[35] (1979) 445 US 40 at 52.

> is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace."

This argument was made in relation to the privilege against adverse spousal testimony. It cannot be convincingly applied to marital privilege which is intended to protect not so much the marriage of the accused as the institution of marriage. The justification of the privilege lies in its supposed encouragement of openness in marital relationships in general. And, as Wigmore argued, if we accept that the privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate, it must follow that it should belong to the communicating spouse.[36] There is also the legitimate fear that to permit the wife to give evidence over her husband's objection might "give the government an incentive to turn spouses against each other – to break up marriages in the cause of justice."[37]

In principle, therefore, it is possible to defend the right to prevent one's spouse from volunteering evidence of marital communication. However, practical problems may arise if the right is left as it is formulated in section 124. It has been pointed out by George Rankin, who was a Chief Justice of Bengal, that where the spouses are jointly tried for a crime, it might be important to the wife's defence that she should give in evidence some communication made to her by her husband but it might not be in the husband's interest to consent.[38] An exception should perhaps be added to section 124 so that in this kind of situation, one spouse would not have the power to hamper the other's defence. Another difficulty with making the privilege a joint one was noted by the English Law Reform Committee in 1967: "One of the spouses may not be present or readily available when the claim for privilege arises. In such a case the evidence would be shut

[36] 8 Wigmore, *Evidence*, para 2340 (McNaughton rev 1961). Similarly, see McNicol, *supra*, note 9. According to the *Law Reform Committee Sixteenth Report*, *supra*, note 13, at para 42, if marital privilege is to be retained, "it should clearly be that of the communicator and waivable by the communicator alone." See also: *Rumping* v *DPP*, *supra*, note 7, at 833-834 (*per* Lord Reid).

[37] Richard O Lempert "A Right to Every Woman's Evidence" (1981) 66 Iowa LR 725, at 737 (a critique of *Trammel*, *supra*, note 35). In *Lim Lye Hock*, it was said, at p 19 of the transcript, that the wife was "frightened when questioned by the CID".

[38] *Background To Indian Law* (1946), at 132 (comment made in relation to the equivalent provision under the Indian Evidence Act). This scenario falls outside the exception clause in the last limb of s 124.

out even although the absent spouse, if asked, would have had no objection to the disclosure."[39] Section 124 ought perhaps to be modified along the line that consent is unnecessary where, in the circumstances, the communicating spouse would not be prejudiced by the disclosure and it is impractical to seek his or her consent.

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[39] *Supra*, note 13, at para 42. The statements were made with reference to s 122 of the Indian Evidence Act, which is *in pari materia* with our s 124.

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