SPOUSES AS WITNESSES: SOME ASPECTS

The position regarding the competency of spouses as witnesses for or against each other has not been the subject of clear exposition by the courts. The purpose here is to discuss some aspects of this portion of the law of evidence. It was prompted by certain statements made by the former Chief Justice McElwaine in the decision of *Ghouse bin Haji Mustan* v. *Rex*[1] which are respectfully disputed, and also by the changes introduced by the Evidence (Amendment) Act 1976 which came into force on 1 January 1977.[2]

The appellant Ghouse had been convicted on a charge of kidnapping a girl from the lawful guardianship of her father, the only material witness being the girl herself. She had, before the trial, married the appellant and one of the grounds of appeal was based on section 121(2) of the then Evidence Ordinance,[3] corresponding to section 120(2) of the present Act. It was contended that the section prohibited the court from compelling her to give evidence if she did not choose to do so voluntarily. It was held that she could in fact be so compelled. The more interesting part of the learned Chief Justice's decision was the statement regarding section 123 of the Ordinance, corresponding to section 122 of the present Act. The learned Chief Justice stated that "a spouse [under section 122] may be compelled to disclose a communication made during marriage if it [is] relevant in a prosecution for any crime committed against the other."[4] It is submitted that this dictum does not represent the correct position, and that under section 122 a spouse cannot be compelled to disclose a marital communication in any circumstance.

In order to understand the sections more easily, one needs to bear in mind the twin concepts of competency and compellability of a witness. In short, a competent witness is one who is allowed to give evidence; a compellable witness is one who not only is allowed to give evidence, but can be obliged to do so.

At common law, the rule was strict that a spouse is an incompetent witness for or against the other. This was the inevitable result of the projection of the doctrine of the unity of the spouses, buttressed by the desire to preserve marital harmony. The only clear exception was the situation where one spouse was charged for a crime of grave personal violence against the other.[5] No separation of the two concepts was thus necessary at common law, and it is sometimes said that the common law knew no such distinction. Statutory inroads

1 (1946) 12 M.L.J. 36.
2 *Vide* S 236/1976.
3 Ord. 13 of 1936. Now Evidence Act, Singapore Statutes, Revised Edition, 1970, Cap. 5.
4 (1946) 12 M.L.J. p. 36.
5 *R.* v. *Lapworth* [1931] 1 K.B. 117.

were made into this rule from time to time. The House of Lords in the case of *Leach* v. *R.*[6] held that section 4 of the Criminal Evidence Act 1898, which provided that a spouse may be called as a witness in charges of specific offences, merely allowed a spouse to give evidence if he or she so desired, and that it does not compel him or her to do so. Their Lordships thus gave cognizance to the separability of the two concepts. In short, the law of evidence in England today embraces a distinction between the competence of a witness to testify and his compellability.

The Evidence Act in Singapore, by section 120 subsections (1) and (2), provides that in all civil and criminal proceedings spouses of the parties or of the accused person(s) shall be competent witnesses for and against each other. The effect of this provision is that the existence of a marital relationship in itself is no bar to the competency. of a person to testify for or against another. A spouse like any other individual is to be put to the test of competency outlined in section 118. Under this section, all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to the questions from whatever cause. The interesting point to be noted is that neither of these sections mention compellability. It is submitted that under the Act, the term "competency" embodies compellability unless otherwise stated. And that McElwaine CJ. was correct in postulating that under the Ordinance and now under the Act, there is no special class of witness who can be said to be "compellable" and that a witness who is competent is also compellable unless otherwise provided. An example of such an exception is the recent amendment of section 120 subsection (3). The new sub-section provides that in any criminal proceedings the accused person shall be a competent witness but that he shall not be compellable. This clearly reinforces the above submission since there is no express mention of non-compellability with regard to spouses in sub-sections (1) and (2).

The Evidence Act further makes provision for claims of "privilege". Section 122 of the Act is one instance. It bestows a privilege upon spouses against the disclosure of any communication made from one to the other during the subsistence of a valid marriage between them. It is submitted that here the Act distinguishes between the concepts and for reasons to be enumerated later. Section 122 provides that no spouse may be compelled to disclose such marital communications, but that such a spouse may be permitted to make such disclosure if the communicator consents except in suits between the spouses or in proceedings where a spouse is prosecuted for a crime committed against the other in which case the consent is no longer necessary. It is submitted that the prohibition against compelling a spouse to make such disclosure is absolute, and that it is only the prohibition against allowing voluntary disclosure which is made subject to the exceptions. In other words, a spouse under the Act may never be compelled to give evidence regarding marital communications. Moreover he or she is also incompetent to give such evidence unless the communicator consents, but he or she would be competent in suits between them both and in criminal proceedings where one of them is charged with an offence against the other.

6 [1912] A.C. 305.

McElwaine C.J. had construed this section (or rather, its predecessor section 123 of the Ordinance) otherwise.[7] He said that the prohibition against compellability under section 122 is likewise subject to the exceptions. It is submitted he was in error. In coming to his interpretation, McElwaine C.J. referred to counsel's argument regarding the common law though he later thought it not necessary towards his decision. It is submitted that in construing section 122, reference should not and indeed could not have been made to the common law because the common law knew no such privilege. At common law, as already mentioned, a spouse was generally incompetent to testify for or against the other. There was thus no necessity for a rule bestowing privilege against disclosure of marital communications. The decision of the House of Lords in *Rumping* v. *Director of Public Prosecution*[8] confirms this. The framers of the Indian Evidence Act could not then be said to have had the common law notion of the inseparability of competence and compellability in mind in enacting section 122 or its equivalent. On the contrary, the English rule they could have had in mind was section 3 of the Evidence Amendment Act 1853, or Lord Brougham's Act, which absolutely prohibited compelling disclosure of marital communications by a spouse.

Since section 122 was not directly based upon any English rule, it is submitted it ought to be read literally, as its framers intended it to be read. So read, the prohibition against compelling disclosure is marked off as a separate limb of section 122 by the semi-colon, such that the exceptions relate only to the next limb. This interpretation may also accord with policy considerations. While it may be acceptable to public opinion that a spouse be compelled to answer any questions put to him regarding the other, it may well be quite unacceptable that marital communications made in the trust and belief that they will be treated with confidence be forced into the open from an unwilling witness. But, if the spouse volunteered such testimony in suits against the other or in criminal charges for offences committed against him personally, such disclosure would again be acceptable. This may well form the rationale behind the enactment of section 122.

The passing of the Evidence (Amendment) Act 1976 has added further complications to the interpretation of section 122, and may even be interpreted to have done away with that privilege insofar as criminal proceedings are concerned. Section 7 of the amending Act purports to add new subsections (4), (5), (6) and (7) to section 132 of the Act. Section 132 subsection (1) provides that no witness shall be excused from answering any questions relevant to the matter in issue on the ground that the answer tends to incriminate him or to expose him to some penalty or forfeiture or that he owes a debt to any party. This means in effect that in Singapore there is no privilege against self-incrimination. The amending Act purports to extend this to the accused person who has elected to give evidence on oath[9] and his spouse. In the new subsection (4), an accused person who elects

7 *Vide* note 3.

8 [1964] A.C. 814.

9 Under the new section 120 subsection (3), an accused cannot be compelled to give evidence but may elect to do so. If he so elects, he will be unable to refuse to answer any questions on the ground that it incriminates him or his spouse.

to give evidence is not entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission of the offence by him, nor on the ground that it would expose him to proceedings for another offence or for the recovery of a penalty, nor can he refuse on the ground that it would expose his spouse to proceedings for an offence or for the recovery of a penalty. His spouse, under the new subsection (5) is also not entitled to refuse on the ground that it would tend to prove the commission of the offence by the accused, nor on the ground that it would tend to expose her to proceedings for an offence or for the recovery of some penalty.

It may be observed that the new subsection (5) sub-paragraph (b) is redundant as this is amply covered by the provision regarding all witnesses in subsection (1). On the other hand, while one would expect the extension intended by the amending Act to include the situation where the answer given by the spouse would tend to expose the accused person to some offence other than that charged, it does not do so. The omission is inexplicable. The effect of it, relying upon the well-established principle of statutory interpretation of *expressio unius est exclusio alterius* would be that a spouse *is* entitled to refuse to answer any question or produce any document or thing where it would tend to expose the accused to some other offence than that charged or to some other penalty or forfeiture. It is submitted that there is no basis for such an omission, and the best explanation seems to be that this was an oversight.

The impact of these new subsections upon section 122 and *vice versa* is not immediately clear. The interesting question is: what happens when the sections are juxtaposed? What if in a criminal proceeding where the accused is charged with an offence against X, the evidence sought to be produced is a letter from the accused to his wife confessing his guilt? By section 122 such a marital communication cannot be permitted to be disclosed,[10] but it appears that by section 132 subsections (4) and (5), the accused or his spouse is compelled to disclose it![11] How this apparent inconsistency between the sections will be resolved is a question left to be decided by the courts. Two possibilities may be suggested.

It may be said that since section 132 subsections (4) and (5) are the later enactments, they are an indication of the legislature's intent to modify section 122 insofar as criminal proceedings are concerned. If this be adopted, it means that in any criminal proceedings there is no longer any privilege against the disclosure of marital communications. Indeed, their disclosure may be compelled whenever relevant. The only protection will be that afforded by subsection (6) that such disclosure shall not form the basis of new proceedings against the accused or his spouse. However, such an approach would seem to make nonsense of the second exception to section 122 which the legislature had not seen fit to delete in the amending Act.

The other possible solution is that since section 122 had been left intact and since it is specific as against the general provision in

---

10 Since this is not a case where the exception of a proceeding where one spouse is charged with a crime against the other, applies.

11 *Vide* section 132(6).

section 132 the latter ought to be read subject to it. This means that section 132 subsections (4) and (5) applies only in those criminal proceedings where either the evidence sought is not a marital communication; or that if it be a marital communication, then only in the special circumstance where a spouse is prosecuted for a crime against the other. This interpretation would limit the operation of the new subsections immensely. This is rendered all the more so by the fact that the term "marital communication" has not been exhaustively defined and is apparently very wide in scope. Further the situation where one spouse is prosecuted for a crime committed against the other must surely be rare even given that one can be certain when it is that a crime can be said to have been committed by one spouse "against" the other. It may be that such limitation was not intended by Parliament. Still another problem in adopting this approach is that with regard to the situation where the evidence sought is a marital communication, then section 122 as already discussed only permits its disclosure whereas section 132 subsection clearly compells disclosure.

It may be said that the amending Act, far from clarifying the position regarding spouses as witnesses, has in fact added to the problems of interpretation already existing. Only judicial interpretation of the relevant sections and their interplay will provide a clearer picture.

WANG WAI KUM *

* LL.B.(Mal.), Lecturer in Law, University of Singapore.