《2002年證據(雜項修訂)條例草案》委員會

政府就委員在2003年2月14日會議上有關條例草案第I部的提問所作的回應

在2003年2月14日的會議上，委員就條例草案第I部提出下述事項－

(a) 適用於建議的《刑事訴訟程序條例》第57條的"家庭子女"，其年齡為何應定為不足16歲？為何新條文不適用於16歲以上但不能作證的人士，例如精神上無行為能力的人？

(b) 在南澳大利亞洲 *Trezesinski v Daire* (1986) 21 A Crim R 247案件中，法庭拒絕豁免被控人的配偶提供證據指證被控人的責任。政府應就這宗案件提供多些資料；以及

(c) 由於建議的《刑事訴訟程序條例》第57A條訂明被控人的配偶有權利申請豁免為控方提供證據的責任，建議的《刑事訴訟程序條例》第57(3)條可能變得不必要。

"家庭子女"的年齡及精神上無行為能力的人

2. 根據建議的《刑事訴訟程序條例》第57(3)條，如被控人被控以涉及襲擊、傷害或恐嚇傷害家庭子女或導致家庭子女死亡的罪行而該名子女在關鍵時間不足16歲，或被控以指稱就家庭子女而犯的性罪行，而該名子女在關鍵時間不足16歲，則被控人的丈夫或妻子可予強迫為控方或同案被控人提供證據。

3. 政府在建議《刑事訴訟程序條例》中新增的第57條時，採納了法律改革委員("法改會")會關於"家庭子女"的年齡應定為不足16歲的建議。不足16歲的家庭子女被認為在法庭作證時可能會有困難，尤其是

在必須作證指證近親的情況下。法律改革委員會並沒有在報告書中討論為何家庭子女的年齡應定為不足 16 歲。然而，法改會顯然已考慮和採納英國的《1984 年警察及刑事證據法令》有關這方面的條文。該英國法令是以英國刑法修訂委員會有關證據(一般)的第十一號報告書(HMSO, Cmnd 4991)的建議為依據。英國刑法修訂委員會建議強制被控人的配偶，就被控人向同一家庭中的不足 16 歲子女所犯的暴力或性罪行作證指證被控人，該委員會也認為如果有關子女不能作證，這類案件就較難在法庭證實。

4. 在 2003 年 2 月 14 日的會議上，委員向政府提出建議，表示建議的第 57(3)條亦應適用於 16 歲以上但不能作證的人士，例如精神上無行為能力的人。政府同意建議的第 57(3)條應涵蓋精神上無行為能力的人，但認為應只限於條例草案所界定的家庭子女。

5. 建議的第 57(3)條載列的可強迫作證罪行，只限於對被控人的配偶或年齡不足 16 歲的家庭子女施用暴力或對有關家庭中年齡不足 16 歲的家庭子女作性侵犯等罪行。第 57(3)條的提議是依從法改會的建議作出的，該委員會認為強迫被控人的配偶為控方作證的理據，即保護被告人的直系家人免受暴力及性侵犯，是符合維護婚姻制度的原則。政府雖然同意將精神上無行為能力的人也列入建議的第 57(3)條的保障範圍內，但由於上述的理據為法改會所支持，並得到該委員會為實施有關建議而進行的公眾諮詢所收回的大部分意見書的支持，因此認為應該依循這理據行事。政府因此建議新訂的第 57(3)條的可強迫作證罪行的適用範圍，可擴展至包括不論年齡的精神上無行為能力的家庭子女在內，而並非包括所有精神上無行為能力的人。

***Trezesinski v Daire* 案**

6. 在 *Trezesinski v Daire* 21 A Crim R247 (見附件)一案中，被控人被控以管有大麻罪名。控方要求強迫被控人妻子作證，指證只有她、她的丈夫及他們的兩名子女同住在被發現管有大麻的處所；她對處所內藏有大麻或對種植大麻並不知情；及被控人有否向她承認有關大麻的

事情。被控人的妻子透過代表律師向法庭申請豁免為控方作證，理由是這會損害其婚姻關係，控罪性質亦不嚴重，不值得承受有關風險。裁判官裁定，與被控人可能向妻子承認的有關事情應該獲准豁免作證，但控方要求的其他證供則不能豁免。

7. 被控人被判罪名成立後向南澳大利亞洲最高法院提出反對定罪的上訴。他不服裁判官的裁定，包括他的妻子不獲豁免就她與被控人之間的正式關係事宜、佔住有關處所和她對有關處所是否藏有大麻是否知情等提出證供。

8. 最高法院法官 Prior 判定裁判官以不能證實造成的損害為由而拒絕豁免是錯誤的，因為第 21(3)條的法定驗證是要證實有相當程度造成損害的風險，而非實際損害。然而，法院發現強迫作供對婚姻關係或該名妻子均沒有導致嚴重損害的相當程度風險。儘管假設有此風險，但是就罪行的性質及嚴重性，以及該名妻子所提供證據的重要性而言，讓該名妻子承受該風險是有足夠理由支持的。法院裁定儘管裁判官在此案中有錯誤，但是結果是恰當的。

保留建議的第 57(3)條的需要

9. 政府明白委員提出問題，是因為基於建議的第 57A 條，被控人的配偶在所有案件中，都可予強迫為控方或同案被控人作供，而非只就建議的第 57(3)條所列有限範疇的罪行，才可予強迫作供。但是，政府對於進一步擴大被控人的配偶可予強迫為控方或同案被控人作供的範疇有所保留。

反對訂立配偶可予強迫為控方或同案被控人作證的一般規則的論點

10. 法改會曾考慮被控人的配偶是否在一般情況下亦可予強迫為控方作證以指控被控人。不過，法改會並沒有建議訂立有關配偶可予強迫為控方作證的一般規則，理由如下－

"使配偶可受強制針對丈夫或妻子作證這樣一個戲劇性的改革確有嚴重的缺點。認為配偶在強制的情況下作證就不用擔心受到暴戾的被告配偶責備，那是相當幼稚的。比方說，丈夫因妻子的作證而鋃鐺入獄；丈夫既然目睹妻子在庭上指證自己，那麼，他所感受的不滿和怨恨，與其說是針對強制她出庭作證的制度而發，便不如說是針對她本人而發來得更有可能了。畢竟，這個制度並沒有強迫她以那樣的方式說那樣的話，至少丈夫很可能有這種看法。無論如何，凡是基於猜測妻子會或不會擔心些甚麼，或者丈夫會或不會做些甚麼的論點，都不免流於臆測，並不足以作為這種侵犯個人權利的制度的論據。"(法改會報告書第 14.5 段)

11. 政府同意法改會的論點，認為應否訂立有關配偶可予強迫作證的一般規則涉及平衡各方面利益的問題。一方面是社會在維護婚姻制度和確認婚姻關係的私隱權方面的利益，另一方面是社會把罪犯繩之於法的利益。政府認為如要切合社會人士的利益和香港現時的社會結構，最佳的方法是不要訂立規則，使配偶可予強迫作供指控對方。

建議制訂第 57(3)條的理由

12. 法改會建議，在某些特殊情況下，有需要使被控人的配偶可予強迫為控方或同案被控人作證。法改會認為，如被控人的家庭因被控人對其配偶或子女行使暴力或性侵犯其子女而受到威脅，被控人的配偶可予強迫針對被告人作證。因此，法改會建議在以下情況配偶可予強迫作證－

(a) 控罪涉及毆打、傷害或恐嚇傷害被控人的配偶或未滿 16 歲的子女；

(b) 控罪屬於性罪行，而受害人是被控人家庭未滿 16 歲的子女；或

(c) 控罪指被告試圖或串謀作出，或協助、教唆、慫使或促使他人作出這種罪行。

建議制訂第 57A 條的原因

13. 但是，對於在特殊情況下強迫配偶作證指證被控人，仍有意見表示憂慮。例如在特殊情況下強迫妻子作證指證其丈夫方面，有人關注到該名妻子除害怕自身和子女的安全或擔心將來的財政保障外，可能事實上不希望她的丈夫被檢控。無論該名妻子曾受丈夫怎樣差的對待，她的丈夫在別的時候可能是個好丈夫，而她可能因此不準備採取可能引致婚姻破裂和令子女失去父親的行動。當即時的危機過去，該名妻子最關心的，可能是嘗試維繫婚姻和完整的家庭，而不是確保她的丈夫因他的行為受到懲罰。在這樣的情況下，反對可予強迫作證的人士會爭辯，維繫完整家庭也屬公眾利益，而這項利益超逾檢控罪行的公眾利益。

14. 為消除這方面的疑慮，政府建議被控人的配偶應有權利向法庭申請豁免作證以指證被控人。法庭在考慮作證對損害該配偶和婚姻關係的風險，以及維護司法公正的更廣闊利益等因素後，可酌情決定是否豁免該配偶作證。

律政司
2003 年 3 月

#64255

to be very much less, however, when he makes an unsworn statement from the dock than when he gives his account in a fashion giving rise to the sanction of perjury and allowing by cross-examination an investigation of its real value. It is also to be recalled that the High Court pointed out in *Simic* (1986) 144 CLR 319 at 411,

> "... it is obvious that whether evidence of good character will be of any avail to an accused person depends on the strength of the evidence supporting the charge".

These propositions are evident enough when one remembers that the essential purpose of evidence of good character is not to change facts (as the learned judge remarked in his charge), but to suggest "a different complexion on the facts from that which they might bear without such evidence": (*Bassett*) I do not say that a specific direction to the jury on the bearing that evidence of the accused's previous good character might have on his credit could never be appropriate when he makes an unsworn statement. If the giving of the direction is properly done, however, it might in such a case react unfavourably to the accused rather than beneficially to him. I think that is very likely to have been the case here if the judge had acceded to counsel's submission to redirect. What would the gist of the redirection have been? It could not sensibly have involved merely a suggestion to the jury that they use the evidence of good character in assessing the credibility of the accused's unsworn statement. Why should that particular statement be singled out as being inherently more reliable, on account of the accused's previous good character, than the other statements he had made to the police about the circumstances of the deceased man's death and which were at variance with the unsworn statement? At least two statements made by the accused in his interview with the police on 17 July 1983 were startlingly and vitally opposed to what he said in court. These were, first, that the deceased had said "nothing at all" to the accused after stabbing him and, secondly, that when asked "Why did you go to your bedroom?", the accused replied, "Because I wanted to scare him you know, to get my shotgun and break his legs, that is all." A balanced redirection of the kind sought by counsel for the applicant as to the use the jury might make of evidence of character going to credit could, in my opinion, scarcely have omitted a reference to the other statements; otherwise the judge would in effect have been inviting the jury to be unwarrantably selective in the application of evidence that was said to go to the applicant's credibility. The effect which these two statements, if accepted, could have had on the matter of the accused's particular intent and on the matter of provocation is obvious. In summary, I consider that the applicant really lost nothing from the judge's refusal to redirect on the question. He was, with respect, wise to take the course he did. I am of opinion, accordingly, that this ground is not sustained.

[His Honour agreed with his brother judges that grounds 2, 4, 5 and 6 had not been made out by the applicant.]

Appeal dismissed

Solicitors for the applicant: *Galbally and O'Bryan.*

CRW

[SUPREME COURT, SOUTH AUSTRALIA]

TRZESINSKI v DAIRE

Prior J

23 January, 14 February 1986

Evidence — Compellability — Spouses — Risk of harm to marital relationship and/or spouse — Importance of evidence and gravity of offence — Whether spouse should be compelled to give evidence — Evidence Act 1929 (SA), s 21.

The accused was charged with possession of cannabis. The prosecution sought to compel his wife to give evidence that only she, her husband, and their two children had lived in the premises where the cannabis was found, that she was not aware that cannabis was on, or being grown on the premises, and whether or not the accused had made admissions to her about the cannabis. The magistrate adjourned the hearing to enable the wife to be separately represented. Counsel for the wife submitted that she should be given an exemption from giving evidence because that course would prejudice their marital relationship and that the charge was not sufficiently serious to warrant the taking of that risk. The magistrate ruled that there should be an exemption in relation to admissions which may have been made, but not in relation to the other evidence sought. On appeal,

Held: (1) The statutory inquiry as to exemption lies solely with the presiding judicial officer, and is not one for any counsel, be that counsel for a party to the proceedings or otherwise. It followed that the magistrate was in error in permitting representation for the spouse in question or the participation of any counsel at all.

Morgan (unreported, 22 October 1984), applied.

(2) Despite the fact that counsel has no legitimate interest in the issue, a defendant is entitled to challenge the ruling on appeal.

(3) The magistrate was in error in refusing the exemption on the basis that no harm was proven because the statutory test is risk of harm. Further, the magistrate made errors in his interpretation of the statute. Nevertheless, it is now the law that spouses of parties are both competent and compellable in criminal and civil cases subject only to the statutory exemption. In this case: (a) there was neither substantial risk of serious harm to the marital relationship nor to the wife, and (b) even assuming that there was, exposure to such a risk was justified by the nature and gravity of the offence and the importance of her evidence. Therefore, while the magistrate made errors in this matter, the result reached was proper.

Observations on the content and practice of an application for exemption.

APPEAL AGAINST CONVICTION

M J Sykes, for the appellant.

M A Stevens, for the respondent.

Cur adv vult

14 February 1986

PRIOR J. The appellant's wife was called as a witness for the prosecution in a matter heard by a magistrate, sitting as a court of summary jurisdiction at Adelaide. The husband was charged with knowingly having in his possession cannabis, in breach of s 31 of the *Controlled Substances Act* 1984 (SA). The

evidence actually given by the wife was that only she and her husband [and their two children] had been living for some eight and a half years at the premises where the cannabis was found on 24 June 1985, and that she was not aware of any Indian hemp being grown on the premises, or any Indian hemp being located in the rear shed.

Before the witness was sworn, the prosecutor informed the magistrate that besides calling her to say that no persons other than her husband, herself and two small children, resided at the place where the Indian hemp was found, he might also ask questions about any admissions the defendant may have made to his wife relevant to the charge.

Section 21 of the *Evidence Act* 1929 (SA) provides:

"(1) A close relative of a person charged with an offence shall be competent and compellable to give evidence for the defence and shall, subject to this section, be competent and compellable to give evidence for the prosecution.

(2) Where a person is charged with an offence and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge (including proceedings for the grant, variation or revocation of bail, or an appeal at which fresh evidence is to be taken) the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused in those proceedings.

(3) Where it appears to a court to which an application is made under subsection (2)—

(a) that, if the prospective witness were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of—

(i) serious harm to the relationship between the prospective witness and the accused;

or

(ii) serious harm of a material, emotional or psychological nature to the prospective witness;

and

(b) that, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk, the court may exempt the prospective witness, wholly or in part, from the obligation to give evidence against the accused in the proceedings before the court.

(4) Where a court is constituted of a judge and jury—

(a) an application for an exemption under this section shall be heard and determined by the judge in the absence of the jury;

and

(b) the fact that a prospective witness has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question put to a witness in the presence of the jury or of any comment to the jury by counsel or the presiding judge.

(5) The judge presiding at proceedings in which a close relative of an accused person is called as a witness against the accused shall satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section.

(6) This section does not operate to make a person who has himself been charged with an offence compellable to give evidence in proceedings related to that charge.

(7) In this section—

'close relative' of an accused person means a spouse, parent or child:

'spouse' includes a putative spouse within the meaning of the *Family Relationships Act*, 1975."

Section 21 previously provided for some exceptions to the common law rule that a spouse was not a competent witness for the prosecution against his or her spouse. The 1983 version asserts a new general rule of competency and compellability for spouses with exceptions for them and others within the definition of "close relative" in subs (7). By subs (5), the presiding judicial officer is required to satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section. The magistrate speaks of the wife's rights being explained to her. I assume that this was done by him. I agree with the view expressed by Cox J in *Morgan* (unreported, 22 October 1984) that this is not something to be left to counsel. It is a responsibility staying with the presiding judicial officer. It is not one for any counsel, whether that counsel be counsel for one of the parties to the proceedings or otherwise.

The magistrate was aware of earlier remarks and rulings given by Cox J in *Romano* (1984) 36 SASR 283; 14 A Crim R 168. Most of those views were subject to an "unqualified recantation" in *Morgan*. His Honour then said:

"In my opinion, when it appears that a prospective witness is a close relative within the meaning of s 21 of the *Evidence Act*, the prospective witness ought to be brought into court and his right to apply for an exemption under s 21 explained to him by the judge. The witness should then be asked whether any such application is to be made and, if it is, the judge may, and very likely will, ask him questions with a view to discharging his responsibility under subs (3) and making an appropriate decision.

There are two things I would say, particularly, about the procedure as I understand it under this new section. First, I see no reason why the examination of the prospective witness should be made on oath. Secondly, and more importantly, I do not think, on reflection, that it is appropriate to submit the prospective witness to questioning by counsel for the Crown or counsel for the defence. I say that because I do not consider that they have a legitimate interest in the issue that arises under s 21. I do not mean by that, of course, that they may not be very interested, in the ordinary sense of the word, in the result of any exemption application under s 21. Indeed, one could imagine a case in which the success or failure of the prosecution might depend entirely upon whether or not an application for exemption is granted. However, that does not give the parties an interest in the technical sense which is relevant to what I am now saying.

I think the position is in this respect analogous to a privilege claim by a witness who does not want to answer a question on the ground that his answer might incriminate him. The situation also has some similarity

to the discharge by the judge of his responsibilities with respect to a child witness under s 9 and s 12 of the *Evidence Act*.

I conclude then, contrary to the unconsidered view that I took in *Romano*, that the procedure to be followed under s 21 of the *Evidence Act* is one for the judge alone. When he has heard what the witness has to say, he will consider the issues that are thrown up, particularly by subs (3) of s 21, and grant or refuse the prospective witness's application as he thinks proper.

Mention has also been made this morning of the question whether the right of a person who falls within the scope of the section should be explained to him by the judge personally. Mr Brebner, for the Crown, told me on Friday that the position had been explained to this particular prospective witness, but he drew my attention this morning to the procedure followed by two other members of the Court on this matter in earlier trials. In one case the judge accepted the assurance of counsel and did not, apparently, undertake any independent inquiry of the prospective witness for himself. In that second case, a different trial judge took the view that he should himself, at least in that case, explain to the witness his rights under s 21. My own experience in *Romano* leads me to think that the better course is for the judge to undertake this responsibility. . . . I had little doubt in that case, from my knowledge of counsel concerned, that an explanation of the witness's rights had in each case been given to him, but, of course, that does not necessarily mean that the witness understood properly what his rights under the section were. In any event, it is plainly better to avoid raising an issue, at the trial or later, on that particular question. I am of the opinion, therefore, that, at least as a general rule, it is better if the trial judge makes the necessary explanation and inquiries under subs (5) of s 21 for himself, and satisfies himself from the prospective witness' own answers that the witness understands the questions that necessarily arise under s 21 where a close relative is called to give evidence against a person charged with an offence."

Consistent with this approach, I think the magistrate should not have adjourned the hearing to enable the wife to be separately represented after the prosecutor outlined what he intended to elicit from her. He should have made explanation and inquiry himself. The question of legal representation for the prospective witness was alluded to by Cox J in *Romano*. There his Honour expressed "a very real doubt as to whether . . . one should provoke such questions as legal representation and the calling of supporting witnesses". He then also doubted "whether s 21 envisages any degree of elaboration or complexity at all". I share those doubts and conclude that there was no real justification for allowing counsel for the wife here. Rather, the general rule of which Cox J speaks in the passages cited from *Morgan* called for the inquiries to stay with the magistrate without any assistance from counsel.

Cox J's reference to counsel for the Crown and counsel for the defence, not having a "legitimate interest in the issue that arises under s 21" gave rise to a preliminary objection before me from counsel for the respondent. It was submitted that the ruling given by the magistrate in this case is not one that

the appellant can now challenge in this appeal. I reject that submission. The defendant is now entitled to challenge what the magistrate did.

The submission put to the magistrate by counsel for the prospective witness was that if the wife was to give evidence against her husband, there would be prejudice to their close relationship. The magistrate's note of counsel's submission is that the wife lived at home with two young children. Her relationship with her husband was based on mutual trust and open communication and that for this reason she was fearful that the relationship would be harmed if she were "forced to give evidence". There was reference to the fact that the wife had not been served with a summons to give evidence until she came to court on the date of the hearing. It was submitted that the charge was not a serious one and that for those reasons the matter was not worth the risk that harm might be caused to the wife's relationship with her husband from giving evidence. The very fact of giving evidence, it was submitted, would of itself be "a substantial risk of serious harm to the relationship", the language in par (a) of subs (3) of s 21.

In his ruling, the magistrate said that the applicant had:

> ". . . not produced material to satisfy me there would be serious harm to the relationship between her and her husband, by giving evidence in respect to the ownership and occupation of the property. I say at this stage, if she gives evidence it will be restricted to that and not any other evidence of what her husband may or may not have said to her involving the matter."

These words do not reflect the language of par (a). The question then for the magistrate was whether, on the material before him, it appeared that, if the wife was to give evidence or any particular kind of evidence, there would be a substantial risk of serious harm to the relationship between the prospective witness and her husband, the accused. In this part of his ruling, the magistrate appears to speak of failure to discharge some onus of proving serious harm as a reality as opposed to simply a substantial risk of such harm. The section says that if it appears to the court that there would be a substantial risk of serious harm to the relationship between the prospective witness and the accused, the court must then consider, according to par (b) of subs (3), whether there is insufficient justification for exposing the prospective witness to that substantial risk of serious harm, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give.

The magistrate could have stated positively that the importance to the proceedings of the evidence that the prosecution *knew* the prospective witness was in a position to give was such that, even if there was a substantial risk of serious harm to the relationship between the husband and the wife, there was sufficient justification for exposing the wife to *that* risk. That would have left for consideration with respect to that evidence, whether there would be any substantial risk of serious harm of a material, emotional or psychological kind to the wife under par (a)(ii), and the nature and gravity of the offence.

However, after saying what is quoted above, the magistrate went on to say:

> "I have had regard to the provisions of subs (3)(b) of s 21 — namely the

seriousness of the offence charged. Having regard to what was said by Cox J in his ruling in the matter of *Romano* I do not think there is material before me which would justify a total exemption for the defendant's wife in giving evidence in the matter. I have power of course to exempt her wholly or in part and I propose to act on this basis. To put it in a positive way I will exempt her from giving evidence in respect to anything which may have been said to her by her husband in respect to his involvement in the matter and clearly evidence of that nature would have a detrimental effect on their relationship in terms of the directives given in subpar (2) of s 21(3).

I therefore exempt her from giving evidence in that respect having regard to all the matters in subs (3), including the fact that the charge is not a really serious one. I would think there would be a substantial risk of serious harm being caused to their relationship if she had to give any evidence of the conversation between herself and the defendant, which would have the effect of implicating the defendant in the matter. I therefore grant the application in a limited sense and rule any evidence she gives be restricted to the formal matter of the relationship between herself and the defendant and the occupation of the premises at 4 Klopper Street, Redwood Park and any information which she gave to the police about knowledge of cannabis on the premises."

In this passage, the magistrate has not specifically referred to one of the two matters that he was required to have regard to within par (b) of subs (3), if it appeared to him that there would be a substantial risk of serious harm of one of the kinds referred to in subpars (i) and (ii) of par (a), although he purports to do so by asserting that he has had "regard to all the matters in subs (3)". Just before that, the magistrate speaks of "directives given in subpar (2) of s 21(3)". There is no such subparagraph in ss (3) of s 21. Within par (a) of subs (3) there is reference to serious harm to a relationship in subpar (i), but in subpar (ii) serious harm of three particular natures relates to the prospective witness, not to the relationship between the accused and that person. I am not sure what the magistrate was referring to. It seems counsel made no particular submissions as to subpar (ii). However, the magistrate was obliged to consider for himself whether there would be a substantial risk of serious harm of any of the kinds particularised within subpar (ii) of par (a) as well as any under subpar (i). If he intended to do that by his reference to "subpar (2) of section 21(3)", error is reflected in the reference to a relationship. I think it is more likely that he intended to refer to "that risk" in par (b) of subs (3), that risk being not of a "detrimental effect on their relationship" but that identified from subpar (i), "a substantial risk of serious harm to" their relationship.

The first point taken on the appeal was that the evidence elicited from the wife is no different from that which the magistrate exempted. It was put that both "would have a detrimental effect on the relationship". I think the submission, when translated to the proper language, "substantial risk of serious harm", overlooks the combined effect of the factor of importance to the proceedings, not particularised by the magistrate, and the power of exemption being total or partial. The submission for exemption was put on an all or nothing basis by the assertion that the very fact of giving evidence involved a substantial risk of serious harm to the relationship. So, if the risk

was accepted, the magistrate could not proceed to exempt evidence of a particular kind, as opposed to any evidence at all. The argument is misconceived and must be rejected. I must say that the ruling actually made by the magistrate was an appropriate one for these proceedings, even if the consideration of the exemption power in the agony of the moment was not as close and adequate as it should have been.

The magistrate spoke of having regard to the fact that the charge was "not a really serious one". I have difficulty with this view of this offence, but under the terms of par (b) the magistrate was required to consider the "nature and gravity of the alleged offence and the importance to the proceedings of the evidence" sought to be adduced to see if there was "insufficient justification for exposing" the wife to any substantial risk of serious harm of one or more of the kinds within par (a) of subs (3). The *nature* of the offence, however grave it was, when considered with the evidence ultimately allowed, justified a refusal of the application for exemption of that evidence whatever might be said about the exemption sought with respect to any conversations between the spouses.

The importance to the proceedings of the evidence not exempted was obvious. Without it the prosecution was destined to fail. The same could not be said of any communications between the spouses. There were no particulars of what, if any, evidence of the kind actually excluded, the prospective witness was "in a position to give". Communications between spouses may generate a proper basis for an exemption being granted under subs (3). They may, or as the magistrate put it here, "clearly" give rise to a substantial risk of serious harm when other admissible evidence in the same case might not. I think the magistrate, despite what he said in the first passage cited, was only prepared to find that there would be a substantial risk of serious harm with respect to communications. As to the other evidence, if there was any risk it was at most "slight" or "transient", (the words used by Cox J in *Romano*).

From time to time it has been suggested that in addition to rendering the spouse of the parties incompetent, the common law prohibited the disclosure of marital communications by any witness, whether they passed between him and his spouse, or were other people's marital communications overheard by him. *Rumping v DPP* [1964] AC 814 rejected this view, asserting that the only relevant common law rule was that of incompetency. It may be that this erroneous suggestion of privilege conditioned or inspired the submission put to the magistrate, or the ruling he made. There can now be no doubt that the spouses of parties are competent and compellable witnesses in both civil and criminal cases, subject only to the qualification enacted in s 21: cf also, *Dee v Dall* [1919] SALR 167; and ss 16 and 18 of the *Evidence Act* — particularly the amendment to II and removal of III and IV from subs (1) of s 18, at the same time as s 21 as now enacted came into force.

As I have already said, communications between spouses may generate a proper basis for an exemption being granted under subs (3). The fact that there was no common law privilege attaching to communications between spouses is not a reason now to deny an exemption under s 21 for such communications, if those communications come within the language used by Parliament to confer a power of exemption. On some occasions, communi-

cations between husband and wife may be known to the prosecution. The situation would then be much different from what it was in this case. The court would then have regard to the importance to the proceedings of that particular item of evidence, as well as the nature and gravity of the offence alleged in considering whether an exception should be made, assuming the demands of par (a) were met in some way. Of course, questions of privilege against self-incrimination might also arise in some cases, too. Here, however, no proper inquiry was made as to any proper basis for exemption with respect to communications at all.

I share the magistrate's view that there was not material before him which would justify a total exemption from giving evidence. I doubt that there would have been a substantial risk of serious harm to the relationship between the wife and the accused from requiring the evidence given to be given. Nor do I think there would be a substantial risk of serious harm of a material, emotional or psychological nature to the wife from that either. However, assuming that there was, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence the wife was allowed to give, exposing her to any such risk was justified.

The magistrate was entirely correct in not permitting the prosecutor to go on a fishing expedition, as to admissions of guilt from marital communications. The matter could be properly dealt with here by assuming par (a). Doing that, there was insufficient justification for exposing the wife to such a risk having regard to the matters in par (b). The importance to the proceedings of any such evidence was far from obvious on what was put to the court by the prosecutor.

A further submission was put that by enacting s 21 in its present form, Parliament did not intend to extend the compellability of spouses to cases such as this, but "rather to broaden the class of persons who could claim the exemption and to deal with such claims on a case by case basis". Perhaps this latter submission was justified against observations of the kind made by Lord Atkinson in *Leach* [1912] AC 305 at 311:

> "The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment, not by an ambiguous one such as the section relied upon in this case."

The language of subs (1) of s 21 could not be plainer, even if that in subs (3) could be. The spouse of an accused person is now both competent and compellable to give evidence for the prosecution. Any vagaries in the grounds for exemption in subs (3) cannot support this submission of the appellant.

Subsection (3) of s 21 is not the easiest of provisions to apply. In essence, I think it is plain that if it does appear to a court that there is either a substantial risk of serious harm to the relationship between a prospective witness and the accused, or a substantial risk of serious harm of a material, emotional or psychological nature to the prospective witness, if the prospective witness was to give evidence, or evidence of a particular kind, there is an obligation on the court to consider whether that risk is justified, having regard to the matters particularised in par (b) of subs (3). The positive language within par (a) does not sit happily with the negative terms within

par (b). Nevertheless, I think a court is required to do no more than consider whether any substantial risk of serious harm appearing to it, being one of the kinds particularised in par (a) of subs (3), it should permit that perceived risk to continue or become a reality by not granting, wholly or in part, an exemption in favour of the witness who seeks it, *having* regard to the matters alluded to in par (b).

The words "have or (having) regard to":

> "... have generally been construed ... as requiring the authority concerned to take the stated matters into account and consider them and give due weight to them, but without being bound to comply with them. Ultimately, the authority's discretion remains unfettered: see *Ishak v Thowfeek* [1968] 1 WLR 1718 at 1725; *Rathborne v Abel* (1964) 38 ALJR 293 at 295." (Cox J in *South Australian Planning Commission v Dorrestijn* (1984) 36 SASR 355 at 371.)

In this case, with respect to marital communications, there was very little beyond an assumed privilege to have regard to. However, the assumption made with respect to that does not compel exemption of the evidence ultimately admitted.

Whilst error can be identified in the magistrate's consideration of the application for exemption, my own review of the material before him does nothing to make the evidence admitted the proper subject of an exemption. The appeal must therefore be dismissed.

Appeal dismissed

Solicitors for the appellant: *Sykes Bidstrup.*

MRG