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Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001
Legislative Council
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Sir/ Madam,

Part V (Marital Rape) of Statute Law (Miscellaneous Provisions) Bill 2001

I refer to the Administration's recent Information Paper on the captioned. I have the following comments to make (in my personal capacity):

1. As stated in my previous letters (dated 24 March 2002 and 23 April 2002, respectively) to the Bills Committee, I am of the view that the marital exemption should be retained for offences other than ss.118, 119, 120 and 121, pending a full-scale review. I am, therefore, particularly concerned about the effect of the proposed Committee Stage Amendment (CSA) would have on ss.123, 124 and 125.

2. The Administration cites *R v R* [1992] 1 AC 599, 622A-C as the authority for its position that the term 'unlawful' in 'unlawful sexual intercourse' is mere

surplusage "in section 118, or in *any other material non-rape provision except section 127*" (my emphasis). Presumably, this position is one of the reasons why the Administration would now prefer a more wide-ranging approach. I, however, doubt if such a position could be sustained by the cited paragraphs in *R v R* (attached). Those paragraphs seem, merely, to say that the marital exemption is retained in the UK equivalent of our s.127. They could, however, with due respect, hardly be interpreted as meaning that 'unlawful' has become mere surplusage "in any other material non-rape offences".

3. It seems to me to be an exercise doomed to failure to search for clear case authority on whether the marital exemption to offences other than rape has altogether been abolished. It - either to limit it to s.118 for which there is a clear case authority, namely *R* v *R*, or extends it to other offences - inevitably, is a policy decision that needs to be made.

4. For ss.119, 120 and 121, as I have made clear in my previous submissions, I am of the view that there is consensus that they should be extended to marital cases. Furthermore, the fact that the Hong Kong court's indication of its inclination to follow *R v R* should an appropriate case arise was made in connection with a non-marital case where the accused was charged with an offence under s.119 in *HKSAR v Chan Wing Hung* could be offered as a, perhaps remote, authority to support abolishing the exemption in this category of offences (ss.119, 120 and 121).

5. For ss.123, 124 and 125, for reasons I have given in my previous submissions, I am in favour of retaining the exemption, pending a full-scale review. Support for my position regarding s.124 could perhaps be found in the (again perhaps) remote authority of *Alhaji Mohamed v Knott* [1969] 1 QB 1, 16B-E when the court commented on the possibility of a charge under the UK equivalent of our s.124 against a husband who was validly married under Nigerian law to a girl aged 13:

> There is one other point which has given me some trouble, and that is the suggestion that every time this husband in England has intercourse with his wife, he is committing a criminal offence [under s.6(1) of the Sexual Offences Act 1956]… It is a point which was apparently not before the justices [in the lower court]; they certainly do not base their decision on any such consideration. *Nor, for my part, do I think that the police could ever properly prosecute in a case such as that if the marriage is a marriage recognized by this country*. (my emphasis)

And, it should be noted that this observation was made by the court despite a marital defence, similar to our s.124(2), in s.6(2) of their Sexual Offences Act 1956.

6. There seems to be some contradiction in the Administration's discussion of the effect of the proposed CSA on ss.123 and 124 (p.4, Information Paper). In the first paragraph of that section, the Administration states, correctly, that "consent is not a defence of these offences". But in the following paragraph, it maintains: "Nevertheless, under the [proposed CSA], the principle under Regina v R would continue to apply unambiguously to protect the girls specified in these sections should they be married and should they be victims of non-consensual sexual intercourse perpetrated on them by their husbands. This qualification is particularly important in respect of the marital defence provided under section 124(2)." It seems unclear what the "qualification" here refers to. If it is "non-consensual", it seems to contradict the Administration's own - correct - observation that consent is not an issue for these two sections. The false impression that consent may, in fact, be a defence or qualification obscures the, perhaps, harshness of the effect of the proposed CSA of rendering a husband guilty of sexual intercourse with his lawfully (under foreign law) wedded wife - irrespective of consent of the wife, unless s.124(2) could be raised - 'every time this husband in Hong Kong has intercourse with his wife', to paraphrase Lord Parker C.J.

Yours faithfully,

Sin Wai Man

cc. Mr Michael Scott, DoJ (21809928)
Ms Bernice Wong, LegCo Secretariat (28775029)

intercourse with an estranged wife against her will could properly be charged as indecent assaults. The cases are *Reg. v. Caswell* [1984] Crim.L.R. 111, *Reg. v. Kowalski* (1987) 86 Cr.App.R. 339, and *Reg. v. H.* (unreported), 5 October 1990, Auld J. The effect of these decisions appears to be that in general acts which would ordinarily be indecent but which are preliminary to an act of normal sexual intercourse are deemed to be covered by the wife's implied consent to the latter, but that certain acts, such as fellatio, are not to be so deemed. Those cases illustrate the contortions to which judges have found it necessary to resort in face of the fiction of implied consent to sexual intercourse.

The foregoing represent all the decisions in the field prior to the ruling by Owen J. in the present case. In all of them lip service, at least, was paid to Hale's proposition. Since then there have been three further decisions by single judges. The first of them is *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755. There were nine counts in an indictment against a husband and a co-defendant charging various offences of a sexual nature against an estranged wife. One of these was of rape as a principal. Simon Brown J. followed the decision in *S. v. H.M. Advocate*, 1989 S.L.T. 469 and held that the whole concept of a marital exemption in rape was misconceived. He said, at p. 758:

> "Were it not for the deeply unsatisfactory consequences of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late 20th century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give. Count seven accordingly remains and will be left to the jury without any specific direction founded on the concept of marital exemption."

A different view was taken in the other two cases, by reason principally of the terms in which rape is defined in section 1(1) of the Sexual Offences (Amendment) Act 1976, viz.:

> "For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—(*a*) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (*b*) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; . . ."

In *Reg. v. J. (Rape: Marital Exemption)* [1991] 1 All E.R. 759 a husband was charged with having raped his wife, from whom he was living apart at the time. Rougier J. ruled that the charge was bad, holding that the effect of section 1(1)(*a*) of the Act of 1976 was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He took the view that the word "unlawful" in the subsection meant "illicit," i.e. outside marriage, that being the meaning which in *Reg. v. Chapman* [1959] 1 Q.B. 100 it had been held to bear in section

19 of the Sexual Offences Act 1956. Then in *Reg. v. S.* (unreported), 15 January 1991, Swinton-Thomas J. followed Rougier J. in holding that section 1(1) of the Act of 1976 preserved the marital exemption subject to the established common law exceptions. Differing, however, from Rougier J., he took the view that it remained open to judges to define further exceptions. In the case before him the wife had obtained a family protection order in similar terms to that in *Reg. v. Sharples* [1990] Crim.L.R. 198. Differing from Judge Fawcus in that case, Swinton-Thomas J. held that the existence of the family protection order created an exception to the marital exemption. It is noteworthy that both Rougier J. and Swinton-Thomas J. expressed themselves as being regretful that section 1(1) of the Act of 1976 precluded them from taking the same line as Simon Brown J. in *Reg. v. C. (Rape: Marital Exemption)* [1991] 1 All E.R. 755.

The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the Act of 1976 presents an insuperable obstacle to that sensible course. The argument is that "unlawful" in the subsection means outside the bond of marriage. That is not the most natural meaning of the word, which normally describes something which is contrary to some law or enactment or is done without lawful justification or excuse. Certainly in modern times sexual intercourse outside marriage would not ordinarily be described as unlawful. If the subsection proceeds on the basis that a woman on marriage gives a general consent to sexual intercourse, there can never be any question of intercourse with her by her husband being without her consent. There would thus be no point in enacting that only intercourse without consent outside marriage is to constitute rape.

Reg. v. Chapman [1959] 1 Q.B. 100 is founded on in support of the favoured construction. That was a case under section 19 of the Sexual Offences Act 1956, which provides:

> "(1) It is an offence, subject to the exception mentioned in this section, for a person to take an unmarried girl under the age of 18 out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man. (2) A person is not guilty of an offence under this section because he takes such a girl out of the possession of her parent or guardian as mentioned above, if he believes her to be of the age of 18 or over and has reasonable cause for the belief."

It was argued for the defendant that "unlawful" in that section connoted either intercourse contrary to some positive enactment or intercourse in a brothel or something of that kind. Donovan J., giving the judgment of the Court of Criminal Appeal, rejected both interpretations and continued, at p. 105:

> "If the two interpretations suggested for the appellant are rejected, as we think they must be, then the word 'unlawful' in section 19 is either

surplusage or means 'illicit.' We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view, the word simply means 'illicit,' i.e., outside the bond of marriage. In other words, we take the same view as the trial judge. We think this interpretation accords with the common sense of the matter, and with what we think was the obvious intention of Parliament. It is also reinforced by the alternatives specifically mentioned in sections 17 and 18 of the Act, that is, 'with the intent that she shall marry, or have unlawful intercourse . . .'"

In that case there was a context to the word "unlawful" which by cogent reasoning led the court to the conclusion that it meant outside the bond of marriage. However, even though it is appropriate to read the Act of 1976 alongside that of 1956, so that the provisions of the latter Act form part of the context of the former, there is another important context to section 1(1) of the Act of 1976, namely the existence of the exceptions to the marital exemption contained in the decided cases. Sexual intercourse in any of the cases covered by the exceptions still takes place within the bond of marriage. So if "unlawful" in the subsection means "outside the bond of marriage" it follows that sexual intercourse in a case which falls within the exceptions is not covered by the definition of rape, notwithstanding that it is not consented to by the wife. That involves that the exceptions have been impliedly abolished. If the intention of Parliament was to abolish the exceptions it would have been expected to do so expressly, and it is in fact inconceivable that Parliament should have had such an intention. In order that the exceptions might be preserved, it would be necessary to construe "unlawfully" as meaning "outside marriage or within marriage in a situation covered by one of the exceptions to the marital exemption." Some slight support for that construction is perhaps to be gathered from the presence of the words "who at the time of the intercourse does not consent to it," considering that a woman in a case covered by one of the exceptions is treated as having withdrawn the general consent to intercourse given on marriage but may nevertheless have given her consent to it on the particular occasion. However, the gloss which the suggested construction would place on the word "unlawfully" would give it a meaning unique to this particular subsection, and if the mind of the draftsman had been directed to the existence of the exceptions he would surely have dealt with them specifically and not in such an oblique fashion. In *Reg. v. Chapman* Donovan L.J. accepted, at p. 102, that the word "unlawfully" in relation to carnal knowledge had in many early statutes not been used with any degree of precision, and he referred to a number of enactments making it a felony unlawfully and carnally to know any woman-child under the age of 10. He said, at p. 103 "one would think that all intercourse with a child under 10 would be unlawful; and on that footing the word would be mere surplusage." The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the

subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment, as it clearly fell to be in those referred to by Donovan L.J. That was the view taken of it by this House in *McMonagle v. Westminster City Council* [1990] 2 A.C. 716 in relation to paragraph 3A of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1983.

I am therefore of the opinion that section 1(1) of the Act of 1976 presents no obstacle to this House declaring that in modern times the supposed marital exemption in rape forms no part of the law of England. The Court of Appeal (Criminal Division) took a similar view. Towards the end of the judgment of that court Lord Lane C.J. said, ante, p. 611:

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

I respectfully agree.

My Lords, for these reasons I would dismiss this appeal, and answer the certified question in the affirmative.

LORD BRANDON OF OAKBROOK. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I would answer the certified question in the affirmative and dismiss the appeal.

LORD GRIFFITHS. My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

LORD ACKNER. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Keith of Kinkel, I, too, would answer the certified question in the affirmative and dismiss the appeal.

LORD LOWRY. My Lords, for the reasons given by my noble and learned friend, Lord Keith of Kinkel, I would dismiss this appeal and answer the certified question in the affirmative.

Appeal dismissed.

Solicitors: Kingsford Stacey for Hawley & Rodgers, Leicester; Crown Prosecution Service.

J. A. G.